Date and Time: Monday, October 23, 2023 1:33:00 PM CST

Job Number: 208663858

Documents (100)

1. [Prakash v. Altadis U.S.A., Inc., 2012 U.S. Dist. LEXIS 46337]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

2. [Ochoa v. United States Bank N.A., 2012 U.S. Dist. LEXIS 201308]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

3. [In re Processed Egg Prods. Antitrust Litig., 2012 U.S. Dist. LEXIS 48321]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

4. [Kolon Indus. v. E.I. du Pont de Nemours & Co., 2012 U.S. Dist. LEXIS 48722]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

5. [Behrend v. Comcast Corp., 2012 U.S. Dist. LEXIS 51889]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

6. *WM Aviation, LLC v. Cessna Aircraft Co., 2012 U.S. Dist. LEXIS 207955*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

7. *Bocobo v. Radiology Consultants of S. Jersey, P.A., 477 Fed. Appx. 890*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

8. *In re High-Tech Emple. Antitrust Litig., 856 F. Supp. 2d 1103*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

9. *Nass-Romero v. Visa U.S.A. Inc., 2012-NMCA-058*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

10. *Hoilien v. OneWest Bank, FSB, 2012 U.S. Dist. LEXIS 55870*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

11. In re Optical Disk Drive Antitrust Litig., 2012 U.S. Dist. LEXIS 55300

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

12. PNY Techs., Inc. v. SanDisk Corp., 2012 U.S. Dist. LEXIS 55965

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

13. In re Processed Egg Prods. Antitrust Litig., 2012 U.S. Dist. LEXIS 57846

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

14. FTC v. Watson Pharms., Inc., 677 F.3d 1298

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

15. County of San Mateo v. CSL Ltd. (In re Plasma-Derivative Protein Therapies Antitrust Litig.), 2012 U.S. Dist. LEXIS 61114

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

Apr 23, 2009 to Dec 31, 2022

16. [CamSoft Data Sys. v. Southern Elecs. Supply, Inc., 2012 U.S. Dist. LEXIS 59889]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

17. [N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, 220 N.C. App. 212]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

18. [Hope for Families & Cmty. Serv. v. Warren, 2012 U.S. Dist. LEXIS 208226]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

19. [Mississippi ex rel. Hood v. AU Optronics Corp., 876 F. Supp. 2d 758]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

20. [Astrotel, Inc. v. Verizon Fla., LLC, 2012 U.S. Dist. LEXIS 63172]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

21. [Liu v. Amerco, 677 F.3d 489]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

22. [O'Brien v. Leegin Creative Leather Prods., 294 Kan. 318]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

23. [Mercer v. Am. Brokers Conduit, 2012 U.S. Dist. LEXIS 199675]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

24. [Motorola Mobility v. Ct Miami, 2012 U.S. Dist. LEXIS 202815]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

25. [In re Wellbutrin XL Antitrust Litig., 2012 U.S. Dist. LEXIS 66312]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

26. [Cheng v. AIM Sports, Inc., 2012 U.S. Dist. LEXIS 197199]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

27. *Favaloro v. Webster Groves, 2012 U.S. Dist. LEXIS 69784*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

28. *Oliver v. 3D-3C, LLC, 2012 U.S. Dist. LEXIS 70615*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

29. *Weco Supply Co. v. Sherwin-Williams Co., 2012 U.S. Dist. LEXIS 73255*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

30. *Nat'l Supermarkets Ass'n v. Am. Express Travel Servs. Co. (In re Am. Express Merchants' Litig.), 681 F.3d 139*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

31. *Cathode Ray Tube (CRT) Antitrust Litig. Crago, Inc. v. Chunghwa Picture Tubes, Ltd., 2012 U.S. Dist. LEXIS 189446*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

32. *Krause Marine Towing Corp. v. Ass'n of Md. Pilots, 205 Md. App. 194*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

33. *Daniel v. Wells Fargo Bank, N.A., 2012 U.S. Dist. LEXIS 77200*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

34. *Card Tech Int'l, LLLP v. Provenzano, 2012 U.S. Dist. LEXIS 81481*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

35. *Hughes v. Abell, 867 F. Supp. 2d 76*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

36. *High Tek USA, Inc. v. Heat & Control, Inc., 2012 U.S. Dist. LEXIS 80772*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

37. *Robert F. Booth Trust v. Crowley, 687 F.3d 314*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

38. *In re N.J. Title Ins. Litig., 683 F.3d 451*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

39. *McCray v. Fid. Nat'l Title Ins. Co., 682 F.3d 229*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

40. *Agnew v. NCAA, 683 F.3d 328*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

41. *Amos v. Aspen Alps 123, LLC, 2012 CO 46*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by

Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

42. *In re Flonase Antitrust Litig., 284 F.R.D. 207*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

43. *Bel Canto Design, Ltd. v. MSS HiFi, Inc., 2012 U.S. Dist. LEXIS 86628*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

44. *Wilson v. Hynek, 2012 Cal. App. Unpub. LEXIS 4580*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

45. *In re Rail Freight Fuel Surcharge Antitrust Litig., 287 F.R.D. 1*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

46. *Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC, 2012 U.S. Dist. LEXIS 88053*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

47. [In re Elec. Books Antitrust Litig., 2012 U.S. Dist. LEXIS 90190]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

48. [Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

49. [Sparig v. Danenberg, 2012 U.S. Dist. LEXIS 90843]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

50. [W. & S. Life Ins. Co. v. Countrywide Fin. Corp. (In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.), 2012 U.S. Dist. LEXIS 184429]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

51. [de Botton v. Kaplin, 2012 Phila. Ct. Com. Pl. LEXIS 189]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

52. [Organ Recovery Sys. v. Preservation Solutions, Inc., 2012 U.S. Dist. LEXIS 92430]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

53. GSI Tech., Inc. v. Cypress Semiconductor Corp., 2012 U.S. Dist. LEXIS 93888

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

54. Nexstar Broad., Inc. v. Granite Broad. Corp., 2012 U.S. Dist. LEXIS 95024

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

55. Catena v. Capitol Records, Inc., 2012 U.S. Dist. LEXIS 199411

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

56. Polypore Int'l, Inc. v. FTC, 686 F.3d 1208

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

57. Crayton v. Concord EFS, Inc. (In re ATM Fee Antitrust Litig.), 686 F.3d 741

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

58. In re K-Dur Antitrust Litig., 686 F.3d 197

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

59. In re Processed Egg Prods. Antitrust Litig., 284 F.R.D. 249

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

60. In re Processed Egg Prods. Antitrust Litig., 284 F.R.D. 278

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

61. Novell, Inc. v. Microsoft Corp., 2012 U.S. Dist. LEXIS 98710

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

62. Animal Sci. Prods. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.), 2012 U.S. Dist. LEXIS 100075

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

63. *Katz v. Fid. Nat'l Title Ins. Co., 685 F.3d 588*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

64. *High Tek USA, Inc. v. Heat & Control, Inc., 2012 U.S. Dist. LEXIS 100538*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

65. *Hyland v. HomeServices of Am., Inc., 2012 U.S. Dist. LEXIS 197949*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

66. *Racek v. Rady Children's Hosp. of San Diego, 2012 Cal. App. Unpub. LEXIS 5368*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

67. *Nfinanse, Inc. v. Interactive Communs. Int'l, 2012 U.S. Dist. LEXIS 203106*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

68. [Ruiz v. Suntrust Mortg., Inc., 2012 U.S. Dist. LEXIS 103239]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

69. [In re Haynes & Boone, 376 S.W.3d 839]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

70. [Cornucopia Prods., LLC v. Dyson, Inc., 881 F. Supp. 2d 1086]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

71. [In re Fresh & Process Potatoes Antitrust Litig., 2012 U.S. Dist. LEXIS 106666]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

72. [Mueller v. Wellmark, Inc., 818 N.W.2d 244]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

73. [Superior Offshore Int'l, Inc. v. Bristow Group, 490 Fed. Appx. 492]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

74. [BanxCorp v. Bankrate Inc., 2012 U.S. Dist. LEXIS 106533]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

75. [Am. Eagle Waste Indus. LLC v. St. Louis County, 379 S.W.3d 813]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

76. [Qsgi, Inc. v. IBM Global Fin., 2012 U.S. Dist. LEXIS 202583]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

77. [Suwannee Am. Cement LLC v. Zurich Ins. Co., 885 F. Supp. 2d 611]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

78. [Franklin County Sheriff's Office v. St. Albans City Police Dep't, 2012 VT 62]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

79. [Hinds County v. Wachovia Bank N.A., 885 F. Supp. 2d 617]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

80. [In re Publ'n Paper Antitrust Litig., 690 F.3d 51]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

81. [Am. Airlines, Inc. v. Travelport Ltd., 2012 U.S. Dist. LEXIS 126934]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

82. [Carlin v. DairyAmerica, Inc., 688 F.3d 1117]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

83. [Gumwood HP Shopping Partners, L.P. v. Simon Prop. Group, 2012 U.S. Dist. LEXIS 188553]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

84. *In re TFT-LCD (Flat Panel) Antitrust Litig., 2012 U.S. Dist. LEXIS 112499*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

85. *Apple, Inc. v. Motorola Mobility, Inc., 886 F. Supp. 2d 1061*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

86. *Midwest Auto Auction, Inc. v. McNeal, 2012 U.S. Dist. LEXIS 114170*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

87. *Drug Mart Pharm. Corp. v. Am. Home Prods. Corp., 2012 U.S. Dist. LEXIS 115882*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

88. *Clean Conversion Techs., Inc. v. CleanTech Biofuels, Inc., 2012 U.S. Dist. LEXIS 117279*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by

Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

89. [Fromer v. Comcast Corp., 886 F. Supp. 2d 106]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

90. [TriPharma, LLC v. First Fruits Bus. Ministry, 2012 U.S. Dist. LEXIS 196024]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

91. [TruePosition, Inc. v. LM Ericsson Tel. Co., 2012 U.S. Dist. LEXIS 117744]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

92. [Clayworth v. Pfizer, Inc., 2012 Cal. App. Unpub. LEXIS 6173]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

93. [In re Blood Reagents Antitrust Litig., 283 F.R.D. 222]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

94. *Prof. JosÉ M. Font De SantiÁgo v. Burset, 2012 U.S. Dist. LEXIS 204000*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

95. *In re Titanium Dioxide Antitrust Litig., 284 F.R.D. 328*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

96. *Static Control Components, Inc. v. Lexmark Int'l, Inc., 697 F.3d 387*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

97. *Corr Wireless Communs., L.L.C. v. AT&T, Inc., 893 F. Supp. 2d 789*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

98. *Davis v. HSBC Bank, 691 F.3d 1152*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

99. *Williamson v. Apple, Inc., 2012 U.S. Dist. LEXIS 125368*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

100. *Am. Airlines, Inc. v. Sabre, Inc., 694 F.3d 539*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

LexisNexis

Prakash v. Altadis U.S.A., Inc.

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

March 30, 2012, Decided; March 30, 2012, Filed

CASE NO. 5:10CV0033

Reporter
2012 U.S. Dist. LEXIS 46337 *; 2012-1 Trade Cas. (CCH) P77,875

ROHIT PRAKASH, Plaintiff, v. ALTADIS U.S.A. INC., et al., Defendants.

Prior History: *Prakash v. Altadis U.S.A., Inc., 2010 U.S. Dist. LEXIS 70894 (N.D. Ohio, July 2, 2010)*

Core Terms

personal jurisdiction, amended complaint, Cigar, Holdings, allegations, Tobacco, trademark, contacts, reasons, Counts, cancellation, registration, long-arm, anti trust law, service of process, resident, Lanham Act, individual defendant, federal statute, venue, lack of personal jurisdiction, Clayton Act, fail to state a claim, Defendants', forum state, nationwide, motion to dismiss, antitrust claim, antitrust, letters

Counsel: **[*1]** Rohit Prakash, Plaintiff, Pro se, Copley, OH.

For Altadis U.S.A., Inc., Altadis Holdings U.S.A., Inc., Cuban Cigar Brands NV, Max Rohr Inc., Imperial Tobacco Group PLC, 800-JR Cigar Inc., Lewis I. Rothman, Grimes & Battersby LLP, Charles W. Grimes, Ronald O. Perelman, McAndrews & Forbes Holdings Inc., Gary R. Ellis, Theo W. Folz, James L. Colucci, George Gershel, Commonwealth Brands Inc., Tabacalera Brands Inc., Defendants: Aubrie A. Wancata, Deborah A. Coleman, Jon P. Anthony, Oliver J. Dunford, Hahn, Loeser & Parks - Cleveland, Cleveland, OH.

For John Does 1-10, Defendant: Deborah A. Coleman, Oliver J. Dunford, Hahn, Loeser & Parks - Cleveland, Cleveland, OH.

Judges: Benita Y. Pearson, United States District Judge.

Opinion by: Benita Y. Pearson

Opinion

MEMORANDUM OF OPINION AND ORDER

[Resolving ECF Nos. 26, 27, 28, 29, 30, 31, 32, 33, and 53]

INTRODUCTION

Pending before the Court are motions to dismiss filed by Defendants alleged to have violated various federal and State laws in an effort to take advantage of *Pro se* Plaintiff by means of, behavior that is best described as anti-competitive or other illegal acts. Defendants contend that the Court does not have subject matter jurisdiction over this action and also lacks **[*2]** personal jurisdiction over fourteen of the fifteen Defendants. In addition, Defendants maintain that several of Plaintiff's causes of action fail to state a claim upon which relief can be granted.

Pro se Plaintiff Rohit Prakash applied to register the mark TREAT for "filter-tipped cigarettes" in International Class 34 in the U.S. Patent and Trademark Office ("PTO"). On January 20, 2006, Defendant Charles W. Grimes sent a cease-and-desist letter (ECF No. 26-3 at 5-6) to Dr. Prakash. *See* Amended Complaint (ECF No. 3) at ¶ 38; Declaration of Charles W. Grimes (ECF No. 26-3 at 3). The letter notified Dr. Prakash of the DUTCH TREATS trademark registered on April 21, 1970 in International Class 34 and stated that the mark was owned by Defendant Max Rohr, Inc. and used by Defendant Altadis U.S.A. Inc. in the sale of cigars for over 30 years. ECF No. 26-3 at 5. The letter demanded that **"you immediately phase out the use of** 'TREAT' **as a designation on or in connection with your cigarettes and expressly abandon your trademark application."** ECF No. 26-3 at 6 (emphasis in original). Litigation was threatened if Dr. Prakash did not comply. *Id*. On March 9, 2006, Defendant Charles W. Grimes sent a **[*3]** letter (ECF No. 26-3 at 9) in reply to Dr. Prakash's letter, dated February 17, 2006 (ECF No. 26-3 at 7-8). In response to the cease-and-desist letters, Somya Inc.[1] stopped making and selling herbal cigarettes with the TREAT trademark and, apparently, discontinued making and selling its herbal smokes altogether. *See* Amended Complaint (ECF No. 3) at ¶¶ 41 and 246a.

On February 14, 2006, Defendant Max Rohr, Inc., by and through Defendant Charles W. Grimes, filed in Number 91169175 in the PTO a formal opposition to registration of the mark TREAT for the sale of cigarettes because of the potential for confusion with, or dilution of, the DUTCH TREATS trademark. On March 21, 2006, Dr. Prakash counterclaimed for cancellation of the DUTCH TREATS trademark. On February 16, 2010, as proceedings before the Trademark Trial and Appeal Board neared the trial stage, the matter was suspended at Plaintiff's request pending final determination of the above-entitled action. Trademark Rule 2.117(a).[2]

On **[*4]** January 7, 2010, *Pro se* Plaintiff Rohit Prakash filed a Complaint (ECF No. 1). Eight days later, Plaintiff filed a 76-page, 11-count Amended Complaint (ECF No. 3) containing 325 allegations against the following Defendants: Altadis U.S.A. Inc., Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., Max Rohr, Inc., Imperial Tobacco Group PLC. Gary R. Ellis, Lewis I. Rothman, Grimes & Battersby, LLP, Charles W. Grimes, Ronald O. Perelman, MacAndrews & Forbes Holdings Inc., Theo W. Folz, 800-JR Cigar, Inc., James L. Colucci, George Gershel, and John Does 1-10. Plaintiff filed the Amended Complaint (ECF No. 3) purportedly for himself and as the purported assignee of non-party Somya Inc. ECF No. 3 at ¶ 19. The Amended Complaint (ECF No. 3) sets forth the following 11 federal and state claims for relief:

> First - Violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") - Violation of *18 U.S.C. § 1962(a)*, *(b)*, *(c)*, and *(d)*;
>
> Second - Antitrust Violations - Sherman Act (*15 U.S.C. § 1*);
>
> Third - Antitrust Violations - Sherman Act (*15 U.S.C. § 2*);
>
> Fourth - Antitrust Violations - Clayton Act (*15 U.S.C. SS 12-27*);
>
> Fifth - *15 U.S.C. § 1125(a)*(Section 43(a) of the Lanham Act) - False **[*5]** Representation and Source of Origin;
>
> Sixth - *15 U.S.C. $1125(a)*(Section 43(a) of the Lanham Act) - Deceptive Advertising;
>
> Seventh - Cancellation of Registrations *15 U.S.C. $1120* (Section 38 of the Lanham Act);

---

[1] Dr. Prakash's wholly owned corporation that sold herbal non-tobacco cigarettes. ECF No. 3 at ¶¶ 18 and 33.

[2] *See* *http://ttabvue.uspto.gov/ttabvue/v?qt=adv&procstatus=All&pno=91169175&propno=&qs=&propnameop=&propname=&pop=&pn=&pop2=&pn2=&cop=&cn=*

Eighth - Unfair Competition Under State Law;

Ninth - Violation of *Ohio Rev. Code $4165.02*, the Uniform Deceptive Trade Practices Act as adopted in Ohio; Tenth - Interference With Prospective Economic Advantage; and

Eleventh - Derivative Liability Under RICO, Antitrust, Lanham Act, and Aiding and Abetting Under *18 U.S.C. § 2*.[3]

Plaintiff's intent-to-use application for registration of the mark TREAT was allegedly filed on December 15, 2004. ECF No. 3 at ¶ 32. Plaintiff alleges that Somya Inc. is a company that manufactures and sells "herbal, non-tobacco smokes, designed to be alternative smokes and intended to help smokers treat their habit of smoking tobacco." *Id.* at ¶ 33. Somya Inc. allegedly used the mark TREAT exclusively to sell herbal nontobacco smokes, beginning in January 2006. *Id.* at ¶¶ 33 and 42. It is alleged that Plaintiff and Defendants are competitors in the sale of smoking products. *Id.* at ¶ 44.

Plaintiff's central complaint is that Defendants Max Rohr, Inc. and Altadis U.S.A. Inc. objected to the use of the mark TREAT for the sale of cigarettes, and Defendant Max Rohr, Inc, formally objected to the registration of that mark. *See, e.g.*, ECF No. 3 at ¶ 205. Plaintiff also complains about the procurement, use of, and enforcement of the mark DUTCH TREATS, owned by Defendant Max Rohr, Inc., alleging, *inter alia*, that the use of this mark is a fraudulent attempt "to capitalize on the prestige and desirability of authentic Dutch cigars." *See Id.* at ¶¶ 196, 252-253, 261-265, 270-275, and 303. He makes a similar complaint about two other marks for cigars that incorporate the term "Dutch", DUTCH MASTERS and DUTCHIES. *Id*.

Plaintiff alleges that, in connection with seeking to register or record the assignment of the registration for certain trademarks, Defendant Grimes & Battersby, LLP or Defendant Charles W. Grimes committed mail fraud by knowingly and willfully concealing from the PTO certain material facts. *Id.* at ¶¶ 141-199. He characterizes the cease-and-desist letters that Defendant Charles W. Grimes sent as extortion. *See id.* at ¶¶ **[*7]** 205-206. Plaintiff admits, however, that throughout, Individual Defendants[4] "engaged in the alleged unlawful conduct in [a] representative capacit[y]." *Id.* at ¶ 312.

In January 2011, the above-entitled action and the within motions were reassigned from Judge Sara Lioi to the undersigned pursuant to General Order 2011-4.

I.

This action is before the Court upon the Joint Motion of All Defendants to Dismiss Counts 1-6 and 8-11 of the Amended Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim, and to Dismiss Count 7 for Lack of Subject Matter Jurisdiction (ECF No. 26), filed on April 7, 2010. The Court has reviewed the memorandum in support (ECF No. 26-1), memoranda in opposition (ECF Nos. 58 and 61),[5] and reply memoranda (ECF Nos. 63 and 65).

---

[3] Plaintiff's "First Amended Pleading" (ECF No. 37) was stricken from the record. **[*6]** *See* Memorandum Opinion and Order (ECF No. 52).

[4] Individual Defendants are Gary R. Ellis, Lewis I. Rothman, Charles W. Grimes, Ronald O. Perelman, Theo W. Folz, James L. Colucci, and George Gershel.

[5] Plaintiff, in both briefs, has, for the most part, presented the Court with a laundry list of cases in a summary fashion and without setting forth any developed analysis or meritorious explanation as to why the Joint Motion of All Defendants should be denied. He also restates **[*8]** a series of allegations from the Amended Complaint (ECF No. 3) in single-spaced blocks of text. *See* ECF No. 61 at 21-27. Additionally, Plaintiff makes statements that are not on point. For example, Plaintiff writes: "Opposing counsels' arguments that all elements of prima facie case against defendants are lacking is thus not supported by law." ECF No. 61 at 17. No such argument regarding the *McDonnell Douglas* elements of a *prima facie* case of discrimination is made in ECF No. 26.

All Defendants move the Court, pursuant to *Fed. R. Civ. P. 12(b)(1)* and *12(b)(6)*, to dismiss Counts 1-6 and 8-11 of the Amended Complaint (ECF No. 3) because Plaintiff has no standing to complain of, or recover for, alleged competitive injury to Somya Inc., and because none of these claims for relief state a claim upon which relief can be **[*9]** granted.

Furthermore, all Defendants move the Court, pursuant to *Fed. R. Civ. P. 12(b)(1)* and *12(b)(6)*, to dismiss those portions of the seventh claim for relief of the Amended Complaint (ECF No. 3) that relate to trademarks other than DUTCH TREATS, as shown on ECF No. 26-2 because Plaintiff has no standing to complain of the registration of those marks, and to dismiss all but Defendant Max Rohr, Inc, from Count 7.

Finally, Defendants move the Court, pursuant to *Fed. R. Civ. P. 12(b)(1)*, to dismiss the balance of the seventh claim for relief of the Amended Complaint (ECF No. 3), namely, the portion that seeks cancellation of the registration of Defendant Max Rohr, Inc.'s mark DUTCH TREATS, for lack of subject matter jurisdiction.

For the reasons set forth in Section X below, Defendants' motion is granted.

II.

This action is also before the Court upon Defendants Ronald 0. Perelman and MacAndrews & Forbes Holdings Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction and Venue, and for Failure to State a Claim (ECF No. 27), filed on April 7, 2010. The Court has reviewed the memoranda in support (ECF Nos. 27-1 and 26-1), memoranda in opposition (ECF Nos. 59, 60, and 61), and reply memoranda **[*10]** (ECF Nos. 63 and 64).

Defendants Ronald Perelman and MacAndrews & Forbes Holdings Inc. move the Court, pursuant to *Fed. R. Civ. P. 12(b)(2)* and *12(b)(3)*, for an order dismissing them for lack of personal jurisdiction and improper venue because they have no connection to Ohio or to the matter of which Plaintiff complains and exercising jurisdiction over them would offend Constitutional notions of fair play and substantial justice.

Furthermore, Defendants Ronald Perelman and MacAndrews & Forbes Holdings Inc. move the Court, pursuant to *Fed. R. Civ. P. 12(b)(6)*, to dismiss the Amended Complaint (ECF No. 3) because it fails to state a claim against them upon which relief can be granted and any such claim is time-barred.

For the reasons set forth in Section XI below, Defendants' Motion is granted.

III.

In addition, this action is before the Court upon Defendant Imperial Tobacco Group PLC's Motion to Dismiss for Lack of Personal Jurisdiction (ECF No. 28), filed on April 7, 2010. The Court has reviewed the memoranda in support (ECF Nos. 28-1 and 26-1), memorandum in opposition (ECF No. 59). and reply memorandum (ECF No. 64).

Defendant Imperial Tobacco Group PLC moves the Court, pursuant to *Fed. R. Civ. P. 12(b)(2)*, **[*11]** for an order dismissing it for lack of personal jurisdiction because it has no connection to Ohio nor does it conduct any business in the United States and exercising jurisdiction over it would offend Constitutional notions of fair play and substantial justice.

For the reasons set forth in Section XII below, Defendant's Motion is granted.

Finally, Plaintiff seeks to rely on the First Amended Pleading (ECF Nos. 53-1 and 2). *See* ECF No. 58 at 11. However, the Court has not yet ruled on his Motion for Leave to File an Amended Pleading in Lieu of Brief in Response to Defendants' Motions Under *Rule 12(b)* (ECF No. 53). Accordingly, the First Amended Pleading (ECF Nos. 52-1 and 2) is not properly before the Court.

IV.

Next, this action is before the Court upon Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci's Motion to Dismiss for Lack of Personal Jurisdiction and Venue, and for Failure to State a Claim (ECF No. 29), filed on April 7, 2010. The Court has reviewed the memoranda in support (ECF Nos. 29-1 and 26-1), memoranda in opposition (ECF Nos. 59, 60, and 61), and reply memoranda (ECF Nos. 63 and 64).

Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci move the Court, pursuant to *Fed. R. Civ. P. 12(b)(2)* and *12(b)(3)*, for an order dismissing them for lack of personal jurisdiction and improper venue because they have no connection to Ohio and exercising jurisdiction over them would offend Constitutional notions of fair play and substantial justice.[6]

Furthermore, Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci move the Court, pursuant to *Fed. R. Civ. P. 12(b)(6)*, to dismiss the Amended Complaint (ECF No. 3) because it fails to state a claim against them upon which relief can be granted.

For the reasons set forth in Section XIII below, Defendants' Motion is granted.

V.

This action is also before the Court upon Defendant George Gershel's Motion to Dismiss for Lack of Personal Jurisdiction and Venue, and for Failure to State a Claim (ECF No. 30), filed on April 7, 2010. The Court has reviewed the memoranda in support (ECF Nos. 30-1 and 26-1), memoranda in opposition (ECF Nos. 59, 60, and 61), and reply memoranda (ECF Nos. 63 and 64).

Defendant George Gershel moves the Court, pursuant to *Fed. R. Civ. P. 12(b)(2)* and *12(b)(3)*, for an order dismissing **[*13]** him for lack of personal jurisdiction and improper venue because his *de minimis* contacts with Ohio are insufficient to establish jurisdiction or venue and exercising jurisdiction over them would offend Constitutional notions of fair play and substantial justice.

Furthermore, Defendant George Gershel moves the Court, pursuant to *Fed. R. Civ. P. 12(b)(6)*, to dismiss the Amended Complaint (ECF No. 3) because it fails to state a claim against him upon which relief can be granted.

For the reasons set forth in Section XIV below, Defendant's Motion is granted.

VI.

In addition, this action is before the Court upon Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction and Improper Venue (ECF No. 31), filed on April 7, 2010. The Court has reviewed the memoranda in support (ECF Nos. 31-1 and 26-1), memoranda in opposition (ECF Nos. 59 and 60), and reply memorandum (ECF No. 64).

Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc. move the Court, pursuant to *Fed. R. Civ. P. 12(b)(2)* and *12(b)(3)*, for an order dismissing them for lack of personal jurisdiction and improper venue **[*14]** because they have no connection to Ohio and exercising jurisdiction over them would offend Constitutional notions of fair play and substantial justice.

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[6] Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, **[*12]** and James L. Colucci assert that they "must be dismissed from this case with prejudice for lack of personal jurisdiction." ECF No. 29-1 at 12. A similar assertion is made in Defendant George Gershel's motion. *See* ECF No. 30-1 at 14. A dismissal for lack of personal jurisdiction, however, is without prejudice. *Intera Corp. v. Henderson, 428 F.3d 605. 620 (6th Cir. 2005)*.

For the reasons set forth in Section XV below, Defendants' Motion is granted.

VII.

Next, this action is before the Court upon Defendants Grimes & Battersby, LLP and Charles W. Grimes' Motion to Dismiss for Lack of Personal Jurisdiction, Improper Venue, and Failure to State a Claim (ECF No. 32), filed on April 7, 2010. The Court has reviewed the memoranda in support (ECF Nos. 32-1, 26-1, and 29-1), memoranda in opposition (ECF Nos. 59, 60, and 61), and reply memoranda (ECF Nos. 63 and 64).

Defendants Grimes & Battersby, LLP and Charles W. Grimes move the Court, pursuant to *Fed. R. Civ. P. 12(b)(2)* and *12(b)(3)*, for an order dismissing them for lack of personal jurisdiction and improper venue because they have no connection to Ohio, except their efforts to enforce a client's trademark rights, and exercising jurisdiction over them would offend Constitutional notions of fair play and substantial justice.

Furthermore, Defendants Grimes & Battersby, LLP and Charles W. Grimes move the Court, pursuant to *Fed. R. Civ. P. 12(b)(6)*. to dismiss the **[*15]** Amended Complaint (ECF No. 3) because it fails to state a claim against them upon which relief can be granted.

For the reasons set forth in Section XVI below, Defendants' Motion is granted.

VIII.

This action is also before the Court upon Defendant Max Rohr, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction and Improper Venue (ECF No. 33), filed on April 7, 2010. The Court has reviewed the memoranda in support (ECF No. 33-1 and 26-1). memoranda in opposition (ECF Nos. 59 and 60), and reply memorandum (ECF No. 64).

Defendant Max Rohr, Inc. moves the Court, pursuant to *Fed. R. Civ. P. 12(b)(2)* and *12(b)(3)*, for an order dismissing it for lack of personal jurisdiction and improper venue because it has no connection to Ohio and exercising jurisdiction over it would offend Constitutional notions of fair play and substantial justice.

For the reasons set forth in Section XVII below, Defendant's Motion is granted.

IX.

Finally, this action is before the Court upon Plaintiff's Motion for Leave to File an Amended Pleading in Lieu of Brief in Response to Defendants' Motions Under *Rule 12(b)* (ECF No. 53), filed on July 21, 2010. Plaintiff has attached a copy of the 136-page proposed amended pleading **[*16]** to the motion. *See* The First Amended Pleading (ECF Nos. 53-1 and 2).

On November 2, 2010, the Court entered an Order (ECF No. 57) that advised Plaintiff that the Court intended to rule on his motion to further amend his Amended Complaint (ECF No. 53) at the same time it rules on Defendants' various pending Motions to Dismiss (ECF Nos. 26-33). Plaintiff was, therefore, granted leave to file a response(s) to the pending dispositive motions.

The Court has now reviewed the memorandum in support, memorandum in opposition (ECF No. 54). and reply memorandum (ECF No. 55) regarding Plaintiff's Motion for Leave to File an Amended Pleading. For the reasons set forth in Section XVIII below, Plaintiff's Motion is denied.

X.

The Court can consider the Declarations of Charles W. Grimes (ECF No. 26-3). Russell D. Dize (ECF No. 26-4). and Rohit Prakash (ECF No. 58-1) in deciding the issues presented by the *Fed. R. Civ. P. 12(b)(1)* prong of the Joint Motion of All Defendants to Dismiss Counts 1-6 and 8-11 of the Amended Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim, and to Dismiss Count 7 for Lack of Subject Matter Jurisdiction (ECF No. 26). *See* *Land v. Dollar, 330 U.S. 731, 735 n. 4, 67 S. Ct. 1009, 91 L. Ed. 1209 (1947)* **[*17]** (when question of court's jurisdiction is raised, the court may consider evidence, by affidavits or otherwise, which bear upon the facts of jurisdiction); *Rogers v. Stratton Industries, Inc., 798 F.2d 913, 917-18 (6th Cir. 1986)* (quoting *Gordon v. National Youth Work Alliance, 675 F. 2d 356, 362-63, 218 U.S. App. D.C. 337 (D.C. Cir. 1982)* (Robinson, C.J., concurring).

A. As a Pro se Plaintiff, Dr. Prakash Cannot Represent His Corporation in This Court

A non-attorney may not file anything on behalf of a corporation in an action pending in this Court. *See* *Local Rule 83.5*; *In re O'Connor, No. 08-16434, 2009 Bankr. LEXIS 1376, 2009 WL 1616105, at *3-4 (Bankr. N.D. Ohio Feb. 27, 2009)*. A corporation cannot appear in court through an officer of the corporation or an appointed agent not admitted to the practice of law. *Union Savings Assn, v. Home Owners Aid. Inc., 23 Ohio St. 2d 60, 262 N.E.2d 558 (1970)*. *Ohio Rev. Code § 4705.01* prohibits anyone from practicing law or commencing or defending an action "in which the person is not a party concerned ... unless the person has been admitted to the bar by order of the supreme court . . . ."

Somya Inc. is an Ohio corporation for profit[7] and Plaintiff is its sole shareholder and owner. Declaration of Rohit Prakash **[*18]** (ECF No. 58-1) at ¶ 4. Plaintiff is hereby advised that *28 U.S.C. § 1654*, which provides that "parties may plead and conduct their own cases personally or by counsel...," has been uniformly construed to mean that a corporation cannot appear otherwise than through an attorney. *United States v. 9.19 Acres of Land, 416 F.2d 1244. 1245 (6th Cir. 1969)*. The rule of this circuit is that a corporation cannot appear in federal court except through an attorney. *Doherty v. American Motors Corp., 728 F.2d 334. 340 (6th Cir. 1984)*.

Therefore, Counts 1-6 and 8-11, and all claims sounding in unfair competition that belong to Somya Inc., are dismissed because Plaintiff cannot maintain them *pro se* or as the alleged assignee of his corporation for profit.[8] The federal courts have, in cases governed by federal law, disapproved any circumvention of the rule by the procedural device of an assignment of the corporation's claims to the lay individual. *See* *U.S. S.E.C. v. Merklinger, No. 08-CV-13184-DT, 2010 U.S. Dist. LEXIS 52046, 2010 WL 2232224, at *2 (E.D. Mich. May 27, 2010)* (citing *Mercu-Ray Indus., Inc. v. Bristol-Myers Co., 392 F.Supp. 16, 20 (S.D.N.Y.)* **[*19]** (to allow a purported assignee of a corporation's claims to appear *pro se* "would be allowing him to flout a well-established and purposeful public policy by means of a procedural device" where he "chose to accept the advantages of incorporation and must now bear the burdens of that incorporation."), *aff'd*, *508 F.2d 837 (2d Cir. 1974)*).

B. Plaintiff Has Failed to State a Claim Under the RICO Statute Upon Which Relief Can be Granted

Most of the pages and paragraphs of the Amended Complaint (ECF No. 3) are devoted to Count 1, a series of wide-ranging allegations that "defendants" engaged in RICO predicate acts and a RICO conspiracy through the procurement, use and enforcement of 56 trademarks, including 47 alleged to have been obtained in violation of laws prohibiting trade with Cuba, such as H. UPMANN, MONTE CRISTO, and POR LARRANAGA. *See* ECF No. 3 at ¶¶ 45-213.

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[7] *http://www2.sos.state.oh.us/pls/bsqry/f?p=100:7:673032241987595::NO:7:P7_CHARTE_R_NUM:1510866*

[8] According to Plaintiff, "Somya Inc. had effectively assigned all its legal rights and interests in the subject matter of this civil action to Rohit Prakash in March 2006." ECF No. 58-1 at ¶ 6. But, he provides no proof of the assignment.

Defendants ask the Court to dismiss Count 1 pursuant to *Fed. R. Civ. P. 12(b)(6)* because Plaintiff **[*20]** cannot state a cognizable RICO claim under any theory.

To state a RICO claim that a defendant violated *18 U.S.C. S 1962*, a plaintiff must plead "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." *Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983)*. As the fifth element suggests, the four subsections of *18 U.S.C. § 1962* require different allegations with respect to the conduct allegedly at issue; *i.e.*, that the defendant "invest" in an enterprise (*§ 1962(a)*); "acquire or maintain" an interest in an enterprise (*§ 1962(b)*); "conduct or participate ... in the conduct" of an enterprise (*§ 1962(d)*); or "conspire" to violate *subsection (a)*, *(b)*, or *(c)* (*§ 1962(d)*). Plaintiff seeks recovery under all four subsections.

Defendants argue that Count 1 fails to state a claim under the RICO statute for several reasons, including a failure adequately to allege a "pattern of racketeering activity," or injury to business and property by reason **[*21]** of a violation of the statute. In response to Defendants' argument, Plaintiff merely states, in conclusory fashion, "RICO Claims - Sufficient Facts Pleaded To State The Claims To Relief Plausible" under the four subsections of *18 U.S.C. S 1962*. He then restates a series of allegations from the Amended Complaint (ECF No. 3) in single-spaced blocks of text without providing pin cites to a specific paragraph or page in the affirmative pleading. *See* ECF No. 61 at 21-24.

C. Plaintiff Lacks Standing Under the RICO Statute

Additionally, Plaintiff lacks standing to bring a RICO claim for wrongs that injured his business, Somya Inc. The alleged "particularized" harm, if any, would be Somya Inc.'s, while any loss of money to Plaintiff as the sole shareholder of Somya Inc. is indirect and does not qualify for Article III standing. *See Frank v. D'Ambrosi., 4 F.3d 1378. 1385 (6th Cir. 1993)* (finding no standing for RICO claims brought by shareholder-employee where the company suffered the alleged injuries). Therefore, Counts 1 and 11 (for "derivative liability") are dismissed.

Finally, Plaintiff asserts, without citing any authority, that Defendants' trademarks may be enjoined from use as part of **[*22]** the "dissolution or reorganization of the enterprise." *See* ECF No. 58 at 27. Dr. Prakash alleged this as part of his "recovery" pursuant to *18 U.S.C. § 1964(a)*. *See* ECF No. 3 at ¶ 328. The Court finds Plaintiff's assertion is moot because Plaintiff does not have standing to assert RICO claims.

D. Counts 2, 3 and 11 Are Dismissed Because Members of a Corporate Family Cannot be Held Liable For Conspiracy Under the Antitrust Laws

Counts 2 and 3 allege a conspiracy "in restraint of trade" among related actors with a unitary purpose, ECF No. 3 at ¶ 222, which cannot be the foundation of an actionable antitrust claim. The seminal case on this topic is *Copperweld v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, which held that the coordinated acts of a parent, such as Defendant Imperial Tobacco Group PLC, and its wholly owned subsidiaries cannot, in the legal sense contemplated by the Sherman Act, constitute a combination or conspiracy. *Id. at 771*. Joinder of the individual defendants does not rescue Plaintiff's fatally defective antitrust claims. *Id. at 769* ("officers or employees of the same firm do not provide the plurality of actors imperative for a *§ 1* conspiracy"). Neither does adding **[*23]** agents of a company who act within the scope of their agency, like Defendants Grimes & Battersby, LLP and Charles W. Grimes, help Plaintiff state an antitrust conspiracy claim on which relief can be granted. *Nelson Radio & Supply Co. v. Motorola Inc., 200 F.2d 911, 914 (5th Cir. 1952)* (explaining that "[i]t is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation").

E. Counts 2-4 and 11 Lack the Specificity Required to State Plausible Antitrust Offenses Under Clearly Established Supreme Court Precedent

Count 2 falls under *§ 1* of the Sherman Act, which prohibits conspiracies "in restraint of trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 1*. Count 3 alleges that "Defendants attempted to monopolize and conspired to monopolize with a specific intent of achieving a monopoly in the trade or commerce in the relevant market for cigars and alternate smokes among the several States in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*." ECF No. 3 **[*24]** at ¶ 224. In Count 4, Plaintiff alleges "exclusionary, predatory and anticompetitive acts and strategies" in violation of *15 U.S.C. §§ 12-27*. ECF No. 3 at ¶ 239. Finally, Count 11 asserts that Individual Defendants have "derivative liability" for the corporate defendants' violation of the antitrust laws. ECF No. 3 at 71-72.

Plaintiff's Amended Complaint (ECF No. 3) attempts to establish a Sherman Act violation by alleging an express agreement to restrain trade, and therefore must "'plausibly suggest[ ],' rather than be 'merely consistent with,' an agreement to restrain trade in violation of the Sherman Act." *Watson Carpet & Floor Covering. Inc. v. Mohawk Industries. Inc., 648 F.3d 452, 457 (6th Cir. 2010)* (quoting *In re Travel Agent Com'n Antitrust Litis., 583 F.3d 896. 908 (6th Cir. 2009)*). To survive a motion to dismiss, these allegations must be specific enough to establish the relevant "who, what, where, when, how or why." *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 437 (6th Cir. 2008)* (internal quotation marks omitted). Furthermore, they must "specify how [each] defendant [was] involved in the alleged conspiracy." *In re Travel Agent Com'n Antitrust Litig., 583 F.3d at 905*.

Plaintiff's **[*25]** allegations in the case at bar fall well short of this pleading threshold. He does not allege a single fact concerning the existence of an actual agreement, when such a purported agreement was entered into, or which of the defendants specifically entered into such an agreement. Even the allegations of the purpose and scope of the supposed conspiracies, *see* ECF No. 3 at ¶¶ 218, 232, and 242, are vague. The Court concludes that Counts 2-4, and 11 will be dismissed because they lack the specificity required to support a claim that the antitrust laws were violated. *See* *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 565 n.10, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (explaining that the plaintiff's failure to allege a "specific time, place, or person involved in the alleged conspiracies" left "no clue as to which of the [defendants] (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place").

F. Plaintiff Lacks Standing to Bring the Antitrust Claims in Counts 2-4 and 11

Additionally, Plaintiff, as the sole shareholder of Somya Inc., lacks standing to bring the antitrust claims in Counts 2-4 and 11. Nor has Plaintiff asserted any consumer injury. Plaintiff asserts that he "has **[*26]** sufficiently alleged this antitrust injury" at 246 of the Amended Complaint (ECF No. 3). ECF No. 58 at 23. But, this allegation does not state how consumers have been injured.

Finally, Plaintiff's reliance on the antitrust laws to assert that the Court can order cancellation of all Defendants' trademarks or enjoin Defendants from their use is unwarranted. The Court also finds Plaintiff's assertion is moot because he does not have standing to bring the antitrust claims.

G. Counts 5 and 6 Are Dismissed as to All Defendants for Failure to State a Claim

The status of Somya Inc. has changed during the pendency of the case at bar. It was alleged in the Amended Complaint (ECF No. 3) that Somya Inc. "used the mark TREAT *exclusively* in production and selling of herbal, non-tobacco smokes" *Id*. at ¶ 33 (emphasis added). Plaintiff now alleges in ECF No. 58 at 19 and ECF No. 58-1 at ¶ 5 that Somya Inc. is the "non-exclusive licensee" of the TREAT trademark. According to Defendants, "this alleged change from exclusive licensee to non-exclusive licensee is an attempt to try to circumvent the right that Somya Inc.

would have as the exclusive licensee to sue under [the] Lanham Act §43(a) for the alleged **[*27]** unfair competition claims, Counts 5 and 6 of the Complaint." ECF No. 65 at 15. *See* *Frisch's Restaurants. Inc. v. Elby's Big Boy of Steubenville, Inc., 670 F.2d 642, 649 (6th Cir. 1982)* (holding that the plaintiff, an exclusive licensee of the mark, had standing to bring a claim under § 43(a)). Whether Somya Inc. is an exclusive or non-exclusive licensee, the Court finds that Plaintiff still lacks standing under Section 43(a) of the Lanham Act, *15 U.S.C. § 1125(a)* because Counts 5 and 6 do not allege how Plaintiff, an individual who is not a competitor of Defendants, himself would be commercially injured.[9]

Counts 5 and 6 of the Amended Complaint (ECF No. 3) are captioned "False Representation and Source of Origin" and "Deceptive Advertising" under Section 43(a). They allege that Defendants have made statements falsely associating their cigars with authentic Dutch or Cuban cigars in an effort to divert customers.

A party must plead and prove the following to recover on a claim for false advertising **[*28]** under Section 43(a) the Lanham Act, *15 U.S.C. S 1125(a)*:

> (1) the defendant has made false or misleading statements of fact concerning his product or another's; (2) the statement actually or tends to deceive a substantial portion of the intended audience; (3) the statement is material in that it will likely influence the deceived consumer's purchasing decisions; (4) the advertisements were introduced into interstate commerce; and (5) there is some causal link between the challenged statements and harm to the plaintiff.

Herman Miller. Inc. v. Palazzetti Imports and Exports. Inc., 270 F.3d 298. 323 (6th Cir. 2001) (citation omitted). Defendants argue that Somya Inc., which is not alleged to be selling a product of authentic Dutch or Cuban origin, has no standing to make the Lanham Act claims set forth in Counts 5 and 6. Plaintiff never actually addresses the substance of Defendants' argument at ECF No. 26-1 at 50-53 in any respect. The Court concludes that Counts 5 and 6 fail to state a claim upon which relief can be granted because the Amended Complaint (ECF No. 3) (1) does not allege facts to support a causal link between the challenged statements and harm to Somya Inc. and (2) does not **[*29]** identify specific false statements or instances in which individual consumers have been misled in their product purchases.

H. To the Extent That Counts 1-4 and 8-11 are Based on the Cease-and-Desist Letters or the Opposition Proceedings before the Trademark Trial and Appeal Board of the PTO, No Liability Attaches Because They Concern Privileged Conduct

Actions taken to protect trademark rights are privileged, and the defendants who take those actions cannot be held liable for them. *Weber v. National Football League, 112 F.Supp. 2d 667. 672-73 (N.D. Ohio 2000)* (legal efforts taken to protect trademark rights do not violate antitrust laws).

Litigation privilege, and its antitrust counterpart, the *Noerr-Pennington* doctrine, immunize Defendants from federal or state liability based on their trademark enforcement efforts. *Noerr-Pennington* immunity[10] requires dismissal of the claims for violation of the Sherman Act and Clayton Act set forth in Counts 2, 3, and 4, to the extent that they are based upon the cease-and-desist letters or the Opposition Proceedings. Furthermore, the Court concludes that the conclusory allegations at ¶¶ 219, 236, and 244 of the Amended Complaint (ECF No. 3) with respect **[*30]** to the "sham litigation" exception to *Noerr-Pennington* immunity are insufficient to survive the *Rule 12(b)(6)* motion. *Mezibov v. Allen, 411 F.3d 712, 716 (6th Cir. 2005)*.

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[9] Nor does Plaintiff have standing for his state law claims (Counts 8, 9, and 10) and Count 11 to the extent that the "derivative liability" against Individual Defendants is based on the Lanham Act.

[10] *Noerr-Pennington* immunity principles are derived from the holdings of the United States Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight. Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*, and *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*.

Similarly, the state law claims in Counts 8-10 are barred by the litigation privilege. Trademark policing activities also cannot form the basis for any of Plaintiffs state law claims. The doctrine of absolute privilege in a judicial proceeding asserts that a statement made during litigation related activities is not actionable where the statement bears "some reasonable relation" to the matters at hand. *Surace v. Wuliger, 25 Ohio St.3d 229. 233, 25 Ohio B. 288, 495 N.E.2d 939 (1986)* (holding that statements in a written pleading are absolutely privileged). The doctrine of absolute privilege extends to communications that occur at "every step in the proceeding, from beginning to end." *M.J. DiCorpo, Inc. v. Sweeney, 69 Ohio St.3d 497. 506, 1994 Ohio 316, 634 N.E.2d 203 (1994)* (citation omitted). Whether this privilege applies in **[*31]** a given case is a question of law for the Court. *Surace, 25 Ohio St.3d at 233*; *Theiss v. Scherer, 396 F.2d. 646. 650 (6th Cir. 1968)*.

The Court holds that the absolute privilege extends to Defendants' statements made in the cease-and-desist letters and during the Opposition Proceedings. *See* *Baldwin v. adidas America. Inc., No. 2:02-cv-00265-JLG-TPK, 2002 U.S. Dist. LEXIS 19626, 2002 WL 2012562, at *3 (S.D. Ohio July 29, 2002)* (applying litigation privilege to statements made in petition for cancellation of trademark before Trademark Trial and Appeal Board).

Nothing in ECF No. 61 at 25-26 changes the Court's conclusion in this regard.

I. Counts 8, 9, and 10 Are Dismissed Because They Suffer From the Same Pleading Deficiencies as Counts 2-6

Counts 8, 9, and 10, which conclusorily allege violations of state unfair competition laws, *see* ECF No. 3 at 305. 308. and 310, suffer from the same pleading deficiencies as the antitrust claims in Counts 2-4 and the Lanham Act claims in Counts 5-6.

A cause of action fails to state a claim upon which relief may be granted when it lacks "plausibility in th[e] complaint." *Twombly, 550 U.S. at 564*. A pleading must contain a "short and plain statement of the claim showing that the pleader **[*32]** is entitled to relief." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Fed. R. Civ. P. 8(a)(2)*). Plaintiff is not required to include detailed factual allegations, but must provide more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id*. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555*. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id. at 557*. It must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id at 570*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S.Ct. at 1949*. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Twombly, 550 U.S. at 556*. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between **[*33]** possibility and plausibility of 'entitlement to relief.'" *Id. at 557* (brackets omitted).

Despite Plaintiff's arguments to the contrary, *see* ECF No. 61 at 26-27, Counts 8, 9, and 10 of the Amended Complaint (ECF No. 3) do not contain allegations reasonably suggesting Plaintiff might have valid claims for unfair competition under state law, violation of *Ohio Rev. Code § 4165.02*, or interference with prospective economic advantage.

In addition, to the extent that Counts 8 and 9 are intended to characterize, as violations of state law, the facts alleged in Counts 5 and 6 as Lanham Act violations, they are subject to dismissal for the same reasons that Counts 5 and 6 fail. Ohio courts recognize that the evaluation of a claim for violation of Ohio's unfair competition laws (Count 8) or of *Ohio Rev. Code § 4165.02*, the Uniform Deceptive Trade Practices Act as adopted in Ohio (Count 9), involves "essentially the same analysis as that applied in assessing unfair competition under the federal statutes." *Cesare v. Work, 36 Ohio App.3d 26, 28, 520 N.E.2d 586 (Ohio Ct. App. 1987)*, citing *Jewel Companies, Inc. v. Westhall Co., 413 F. Supp. 994, 999 (N.D. Ohio 1976)*. *aff'd* *575 F.2d 1176 (1978)*.

J. Count 11

Count 11, **[*34]** which alleges that Individual Defendants have "derivative liability" for violations of RICO, the Sherman Act, and the Lanham Act by their employers, alleges:

1. that Individual Defendants "engaged in the alleged [unspecified] unlawful conduct in [a] representative capacit[y]." ECF No. 3 at ¶ 312.

2. that unspecified but "aforedescribed unlawful activities by corporate defendants arose within the course and scope of the employ and/or agency of the aforementioned individual defendants." ECF No. 3 at ¶ 313.

3. that "[a]ll defendants violated *18 U.S.C. § 2* by seeking to aid and abet and aiding and abetting a scheme to violate *18 U.S.C. §§ 1962(a)*, *(b)*, *(c)* and *(d)* [RICO]; *15 U.S.C. §§ 1*, *2*, *12-27* [antitrust laws]; and *15 U.S.C. § 1125(a)* [Lanham Act]." ECF No. 3 at ¶ 314.

4. that "[a]ll defendants aided and abetted each other," "attempt[ed] to derive substantial income and proceeds through the above-described patterns of racketeering activities" and other alleged violations of law, and intended to invest in and or participate in conducting the affairs of a RICO enterprise. ECF No. 3 at ¶ 315.

Count 11 fails because the underlying claims fail for the reasons set forth above and because there **[*35]** are no allegations that any of Individual Defendants personally participated in the alleged wrongs.

K. Count 7 is Dismissed Because Plaintiff Has No Standing to Seek Cancellation of Any Mark Except Dutch Treats, and This Court Lacks Subject Matter Jurisdiction of That Freestanding Claim

After taking into account Plaintiff's lack of standing to assert Counts 1-6 and 8-11 of the Amended Complaint (ECF No. 3). and the failure of any of these counts to state a claim upon which relief can be granted, only Count 7 remains. Yet, Count 7 too, must be dismissed because this Court lacks subject matter jurisdiction of the claims it asserts. Count 7 seeks the cancellation of the U.S. registration of 56 marks belonging to Defendants Cuban Cigar Brands, N.V. or Max Rohr, Inc. pursuant to Section 38 of the Lanham Act, *15 U.S.C. § 1120*.[11] Those portions of Count 7 concerning marks other than DUTCH TREATS are dismissed because Plaintiff has not pled a "case or controversy" under Article III of the United States Constitution between himself and Defendants Cuban Cigar Brands, N.V. or Max Rohr, Inc. concerning those marks.

Standing has three constitutional elements. A plaintiff seeking to invoke a federal court's jurisdiction must show:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000); accord *Bennett v. Spear, 520 U.S. 154, 167, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)*; *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. All three elements are an "irreducible constitutional minimum," and failure to show any one results in a failure to show standing. *Defenders of Wildlife, 504 U.S. at 560*.

It is apparent that Plaintiff has no personal interest in the outcome of the requested cancellations of the marks other than DUTCH TREATS, or a reasonable basis for the belief that he has been or will be damaged by registration of the marks. Plaintiff has not alleged such an "injury in fact" in the Amended **[*37]** Complaint (ECF No. 3). *Bennett,*

[11] 47 allegedly "Cuban" marks; three other "Cuban" marks-ROYAL CUBAN, ROYAL HAVANA **[*36]** and HAVANA SWEETS; four DUTCH MASTERS marks; DUTCHIES; and, DUTCH TREATS.

520 U.S. at 167, citing Defenders of Wildlife, 504 U.S. at 560-61. Moreover, the mark that he seeks to register is TREAT. The word formative "TREAT" does not even appear in 55 of the 56 registrations Plaintiff seeks to cancel. Once these aspects of Count 7 are dismissed, the only claim remaining before the Court is Plaintiff's claim against Defendant Max Rohr, Inc, for the cancellation of the registration of DUTCH TREATS. Even if this claim were not already pending before the PTO, this Court lacks subject matter jurisdiction of a case consisting solely of a claim for cancellation of a mark.

Next, the Court finds Plaintiff does not have standing to petition to cancel 55 of the 56 trademarks under the Lanham Act. Under the Lanham Act, a party "who believes that he is or will be damaged ... by the registration of a mark on the principal register" may petition to cancel the registration under 15 U.S.C. § 1064. For a court to grant cancellation of the registration, the petitioning party must demonstrate that he has standing and that valid grounds for cancellation exist. Cunningham v. Laser Golf Corp., 222 F.3d 943, 945 (Fed. Cir. 2000) ("Standing ... requires **[*38]** only that the party seeking cancellation believe that it is likely to be damaged by the registration."). A party seeking cancellation must satisfy two judicially-created requirements: the petitioner must show (1) a "real interest" in the proceedings and (2) a "reasonable" basis for the belief that the challenged mark has caused or will cause damage. Ritchie v. Simpson, 170 F.3d 1092, 1095 (Fed. Cir. 1999). To show a real interest, the petitioner must "have a direct and personal stake in the outcome" of the cancellation. *Id*. Standing will not be granted to "'mere intermeddlers' who do not raise a real controversy...." *Id*. With regard to the 55 trademarks other than DUTCH TREATS (owned exclusively by Defendant Max Rohr, Inc.), it is clear that Plaintiff has not alleged a "personal stake" or a real commercial interest in their cancellation or any explanation of how these registrations damage him. *Id*.

After this Court has dismissed Counts 1-6 and 8-11 for lack of standing and failure to state a claim, and has dismissed those portions of Count 7 that relate to marks in which Plaintiff has no personal stake or real commercial interest, the only claim would be against Defendant Max Rohr, Inc. **[*39]** and the DUTCH TREATS trademark for cancellation of the registration under the Lanham Act. In this event, this count cannot be the sole basis for federal jurisdiction. *See* Toytrackerz LLC v. Koehler, No. 08-2297-GLR, 2011 U.S. Dist. LEXIS 31316, 2011 WL 3702970, at *4 (D. Kan. March 25, 2011) ("A court is empowered by 15 U.S.C. § 1119 to order the cancellation of a trademark registration when there is some independent basis for federal jurisdiction apart from the cancellation claim."). As stated in Universal Sewing Mach. Co. v. Standard Sewing Equip. Corp., 185 F.Supp. 257, 260 (S.D.N.Y. 1960):

> [The Court does not agree] that an original suit may be instituted by one in the position of the present plaintiff, in the district court for cancellation of another's federal registration where no other basis for jurisdiction is present.... *In our view § 37 assumes a properly instituted and otherwise jurisdictionally supportable action involving a registered mark. That not being the case here, we are without jurisdiction of the subject matter and upon that ground we must dismiss the complaint*. (Emphasis added.)

See also J. Thomas McCarthy, 5 *McCarthy on Trademarks and Unfair Competition* § 30:110 (4th ed.). Therefore, if the **[*40]** only claim remaining in the case at bar following resolution of the within Joint Motion to Dismiss against Plaintiff is one for cancellation of the federal trademark registration of DUTCH TREATS, that claim must be dismissed.[12]

Finally, absent an independent basis for federal jurisdiction, Plaintiff must first exhaust his administrative remedies before resorting to the courts. The dismissal of Plaintiff's claim for cancellation of the registration of DUTCH TREATS leaves Plaintiff to litigate that claim where he first filed it, before the Trademark Trial and Appeal Board in the PTO. Universal Sewing Mack Co., 185 F.Supp. at 259-60; *see also* Merrick v. Sharp & Dohme, Inc., 185 F.2d 713, 717 (7th Cir. 1950) (noting that "[t]he courts of the United States have no jurisdiction over registration proceedings except that appellate jurisdiction given them by the Trade-Mark Act").

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[12] Plaintiff's only argument in opposition is merely to recite the language of 15 U.S.C. S 1119. *See* ECF No. 58 at 28.

To the extent that Plaintiff's claim for cancellation of the U.S. registration of the marks in Count 7 is akin to a claim for declaratory judgment, it is recognized that a declaratory judgment claim too **[*41]** should not be used to preempt agency action. As the Supreme Court stated:

> [T]he declaratory judgment procedure will not be used to pre-empt and prejudge issues that are committed for initial decision to an administrative body or special tribunal.... Responsibility for effective functioning of the administrative process cannot be thus transferred from the bodies in which Congress has placed it to the courts.

Public Service Comm'n v. Wycoff Co., 344 U.S. 237, 246-47, 73 S. Ct. 236, 97 L. Ed. 291 (1952). *See also* J. Thomas McCarthy, 6 *McCarthy on Trademarks and Unfair Competition* § 32:53 (4th ed.) ("an applicant whose mark is opposed before the Trademark Board, or a registrant whose mark is attacked for cancellation before the Trademark Board, cannot short-circuit the administrative process by filing suit for declaratory judgment in the federal courts."). The parties may now resume their trademark Opposition Proceeding before the Trademark Trial and Appeal Board of the PTO.

XI.

Plaintiff bears the burden of setting forth a *prima facie* showing of personal jurisdiction over a defendant. *Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991)*; *Hitachi Medical Systems America, Inc. v. Branch, No. 5:09CV1575, 2010 U.S. Dist. LEXIS 19405, 2010 WL 816344, at *2 (N.D. Ohio March 4, 2010)*. **[*42]** A plaintiff, seeking to hail a foreign defendant into a distant forum, bears an initial burden of pleading jurisdiction. "He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing." *McNutt v. General Motors, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936)*.

The Court may consider all documents attached to the Amended Complaint (ECF No. 3). or referred to and relied upon by it, without converting a motion to dismiss to one for summary judgment. *Mengel Co. v. Nashville Paper Prods. & Specialty Workers Union, 221 F.2d 644, 647 (6th Cir. 1955)*.

More than 13 years ago, Defendant MacAndrews & Forbes Holdings Inc. had an interest in Consolidated Cigar Corporation. Plaintiff alleges that Defendant Ronald O. Perelman owns Defendant MacAndrews & Forbes Holdings Inc. and that MacAndrews & Forbes owned Consolidated Cigar Corporation during two different time periods, the last ending in January 1999. ECF No. 3 at ¶¶ 26 and 27. Consolidated Cigar Corporation was allegedly the parent of Defendants Max Rohr, Inc. and Cuban Cigar Brands, N.V. *Id*. at ¶ 65. In January 1999, however, Defendant MacAndrews & Forbes Holdings **[*43]** Inc. sold Consolidated Cigar Corporation to Société Nationale D'Exploitation Industrielle des Tabacs et Allumettes ("SEITA"). *Id*. at ¶ 26; Declaration of Steven Fasman (ECF No. 27-3) at ¶ 4. Consolidated Cigar Corporation was allegedly the predecessor of Defendant Altadis U.S.A. Inc. ECF No. 3 at ¶ 26. The Amended Complaint (ECF No. 3) alleges that Defendant MacAndrews & Forbes Holdings Inc. is the "successor" in interest to Consolidated Cigar Corporation and, therefore, is subject to "RICO successorship liability." *Id*. at ¶ 66.

Neither Defendant Ronald O. Perelman nor Defendant MacAndrews & Forbes Holdings Inc. has any Ohio contacts on which personal jurisdiction can be based. Defendant Ronald 0. Perelman, who is the Chairman and Chief Executive Officer of Defendant MacAndrews & Forbes Holdings Inc., is a New York resident. Declaration of Ronald O. Perelman (ECF No. 27-2) at ¶¶ 1-2. Defendant MacAndrews & Forbes Holdings Inc. is a holding company, incorporated in Delaware, with its offices in New York. ECF No. 27-3 at ¶¶ 2-3. Defendants Ronald 0. Perelman and MacAndrews & Forbes Holdings Inc. do not have, and have never had, any offices or places of business in the state of Ohio, nor **[*44]** have they ever stationed any employees, sales representatives, or agents in the state of Ohio. ECF No. 27-2 at ¶¶ 5, 9, and 11-12; ECF No. 27-3 at ¶¶ 9-12. Furthermore, neither has entered into a contract in the state of Ohio, sold goods or services in the state of Ohio, or derived substantial revenue from goods consumed in the state of Ohio. ECF No. 27-2 at ¶¶ 6-8 and 14-15; ECF No. 27-3 at ¶¶ 5-8 and 12. As a holding company, Defendant MacAndrews & Forbes does not derive operational revenues as a result of any contacts in Ohio. ECF No. 27-3 at ¶ 12.

Since 1999, neither Defendant Ronald O. Perelman nor Defendant MacAndrews & Forbes Holdings Inc. has had any interest in any business that sells tobacco products, or any connection to Defendant Imperial Tobacco Group PLC, or any of its subsidiaries, their employees or the agents sued in this case. *See* ECF No. 27-2 at ¶ 4; ECF No. 27-3 at ¶ 4.

A. This Court Lacks Personal Jurisdiction Over Defendants Ronald O. Perelman and MacAndrews & Forbes Holdings Inc.

Defendants Ronald O. Perelman and MacAndrews & Forbes Holdings Inc. argue that Plaintiff has failed to meet his *prima facie* burden of showing personal jurisdiction because there are no **[*45]** allegations in the Amended Complaint (ECF No. 3) that support personal jurisdiction over them. Assuming *arguendo* that the Amended Complaint (ECF No. 3) does include such allegations, a federal court may exercise personal jurisdiction over defendants outside the forum state only pursuant to an applicable federal statute that provides for service of process outside this state or Ohio's long-arm statute, *Ohio Rev. Code Ann. S 2307.382*. *Robert J. Kwait & Assocs. v. Health-Mark Diagnostics, L.L.C., No. 1:97-CV-512, 1998 U.S. Dist. LEXIS 22880, at *4-5 (N.D. Ohio Feb. 23, 1998)*. Nationwide service of process may be effected in a civil RICO action pursuant to *18 U.S.C. § 1965(b)* and *(d)*. Worldwide service of process may be effected in an antitrust case pursuant to the Clayton Act.[13] According to Defendants Ronald O. Perelman and MacAndrews & Forbes Holdings Inc., neither has any contacts with Ohio sufficient to support personal jurisdiction under any federal statute that Plaintiff invokes or under the Ohio long-arm statute. Finally, even if these statutory tests could be met, the *Fourteenth Amendment* must still be satisfied, and in the case at bar, Defendants Ronald O. Perelman and MacAndrews **[*46]** & Forbes Holdings Inc. contend that neither has the minimum contacts with Ohio that would allow a suit to be brought here.

1. The RICO Statute Cannot be Used to Establish Personal Jurisdiction Over Defendants Ronald O. Perelman and MacAndrews & Forbes Holdings Inc. Because Plaintiffs RICO Allegations Fail to State a Justiciable Claim

Whether a plaintiff can rely on the nationwide service provisions of a federal statute "[d]epends upon whether [he] has adequately stated a claim" for a violation of that statute. *United Liberty Life Ins. Co. v. Ryan, 985 F.2d 1320, 1330 (6th Cir. 1993)*; *accord* *Med. Mut. of Ohio v. deSoto, 245 F.3d 561, 566-68 (6th Cir. 2001)* (concluding that the federal statute providing for nationwide service of process requires a determination only that a party has contacts with the United States, not a particular state, for personal jurisdiction). **[*47]** As detailed in Section X, Part B, Plaintiff has failed to state a RICO claim on which relief can be granted. For that reason, he cannot utilize RICO's nationwide service provision to secure personal jurisdiction over Defendants Ronald O. Perelman and MacAndrews & Forbes Holdings Inc. *See, e.g.*, *Williams v. D. Richey Management Corp., No. 87 C 6398, 1988 U.S. Dist. LEXIS 988, 1988 WL 8983, at *2 (N.D.Ill. Jan. 28, 1988)* (declining to assert personal jurisdiction pursuant to nationwide-service provision of RICO where "plaintiff's RICO allegations fail[ed] to state a claim upon which relief may be granted").

2. Plaintiff Cannot Establish Personal Jurisdiction Over Defendants Ronald O. Perelman and MacAndrews & Forbes Holdings Inc. Under the Antitrust Laws

As discussed in Section X, Parts D and E, Plaintiff has failed to state an antitrust claim on which relief can be granted. Furthermore, none of the provisions of the Clayton Act that Plaintiff invokes-*15 U.S.C. § 5*, *15 U.S.C. § 15*, *15 U.S.C. § 22*, and *15 U.S.C. § 24*-establish personal jurisdiction over either Defendant Ronald 0. Perelman or

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[13] The Clayton Act contains a provision that authorizes service of process on a corporate defendant in any judicial district in which the defendant may be found, *15 U.S.C.A. § 22*, but that section contains no provision authorizing service on individual defendants. *Brink's Mat Ltd. v. Diamond, 906 F.2d 1519. 1522 (11th Cir. 1990)*.

Defendant MacAndrews & Forbes Holdings Inc. *15 U.S.C. § 5* applies only to claims brought by the United States. *Georgia v. Pennsylvania Railroad, 324 U.S. 439. 466-467, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)*. **[*48]** Because Plaintiff did not and cannot allege that Defendant Ronald O. Perelman or Defendant MacAndrews & Forbes Holdings Inc. have the connection to Ohio required for proper venue under *15 U.S.C. § 15*, they cannot be compelled to litigate in the Northern District of Ohio and must be dismissed for improper venue. *See Braun v. Berenson, 432 F.2d 538, 544 (5th Cir. 1970)*; *Redmond v. Atl. Coast Football League, 359 F. Supp. 666, 671 (S.D. Ind. 1973)*, *aff'd* 478 F.2d 1405 (7th Cir. 1973). *See also Pocahontas Supreme Coal Co., Inc., v. National Mines Corp., 90 F.R.D. 67, 69-70 (S.D.N.Y. 1981)* (holding that the individual defendant did not reside in New York because he was a Kentucky resident). Notwithstanding the provisions of *15 U.S.C. § 22*,[14] Defendant MacAndrews & Forbes Holdings Inc. cannot be sued in Ohio because it cannot be found in Ohio. There is no allegation in the Amended Complaint (ECF No. 3) that Defendant MacAndrews & Forbes Holdings Inc. did anything in Ohio, and Defendant MacAndrews & Forbes Holdings Inc.'s assertion that it cannot be found in Ohio is not refuted. Therefore, the venue provision is not satisfied. Finally, *15 U.S.C. § 24* cannot provide personal jurisdiction because **[*49]** Defendant Ronald O. Perelman does not have minimum contacts with Ohio. Sullivan v. Tagliabue, *785 F. Supp. 1076, 1082 (D.R.I. 1992)*. Neither the theory of general jurisdiction, *Schultz v. Szott, No. 3:08CV2718, 2009 U.S. Dist. LEXIS 66627, 2009 WL 2392912, at *8 (N.D. Ohio July 31, 2009)*, or specific jurisdiction, *Reynolds v. Int'l Amateur Athletic Fed'n, 23 F.3d 1110, 1116 (6th Cir. 1994)*, supports a claim for personal jurisdiction over him. *See* Section XTV, Part B(3) and (4), *infra*.

3. Plaintiff Cannot Satisfy the Ohio Long-Arm Statute for His Lanham Act and State Law Claims

Unlike RICO **[*50]** and the antitrust laws, the Lanham Act does not have a provision that permits service of process outside the forum state. To establish personal jurisdiction of an out-of-state defendant for a Lanham Act claim, a plaintiff must rely on the long-arm statute of the forum state. *See generally 15 U.S.C. §§ 1051-1141*. "When considering whether to exercise jurisdiction over a non-resident defendant in a diversity case, or in a case where federal subject matter jurisdiction exists but the federal statute does not provide for service of process, a federal court must apply the law of the forum state in which it sits." *Robert J. Kwait & Assocs., 1998 U.S. Dist. LEXIS 22880, at *4-5*.

A federal district court may exercise personal jurisdiction only if the requirements of both the state long-arm statute and constitutional due process are met. *See Calphalon Corp. v. Rowlette, 228 F.3d 718, 721 (6th Cir. 2000)*; *Reynolds, 23 F.3d at 1115*. *See also Goldstein v. Christiansen, 70 Ohio St.3d 232, 235, 1994 Ohio 229, 638 N.E.2d 541 (1994)* ("When determining whether a state court has personal jurisdiction over a nonresident defendant, the court is obligated to (1) determine whether the state's 'long-arm' statute and the applicable Civil **[*51]** Rule confer personal jurisdiction, and if so, (2) whether granting jurisdiction under the statute and rule would deprive the defendant of the right to due process of law pursuant to the *Fourteenth Amendment to the United States Constitution*."). Neither is true in the case at bar. The provisions of the Ohio long-arm statute that Plaintiff invokes-*Ohio Rev. Code S 2307.382(A)(3)* and *(7)*[15]-do not support the assertion of personal jurisdiction over Defendant

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[14] *15 U.S.C. § 22* provides:

> Any suit, action, or proceeding *under the antitrust laws* against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found (emphasis added).

Although this statute provides for nationwide service of process, "proper venue is still required in order to confer personal jurisdiction." *Hyland v. Homeservices of America, Inc., No. 3:05 CV 612 R, 2007 U.S. Dist. LEXIS 47502, 2007 WL 1959158, at *3 (W.D.Ky. June 28, 2007)*.

[15] Ohio courts are deemed to have personal jurisdiction over a person "as to a cause of action arising from the person's ... [c]ausing tortious injury by an act or omission in" Ohio or from the person's "[c]ausing tortious injury to any person by a criminal act, any element of which takes place in [Ohio], which he commits or in the commission of which he is guilty of complicity."

Ronald O. Perelman, a New York resident, or Defendant MacAndrews & Forbes Holdings Inc., a Delaware corporation. These claims must be dismissed because Plaintiff cannot meet his burden to establish such jurisdiction. *Nationwide Mut'l Ins. Co. v. Tryg Int'l Ins. Co., Ltd., 91 F.3d 790. 793 (6th Cir. 1996)*. Moreover, the "absent co-conspirator" doctrine alleged at ¶ 13 of the Amended Complaint (ECF No. 3) is not recognized as a means for establishing personal jurisdiction in this district. *See* *Hollar v. Philip Morris. Inc., 43 F. Supp.2d 794. 802 n.7 (N.D. Ohio 1998)* ("Since personal jurisdiction must be based on the actions and contacts of the specific defendant at issue, the Court declines to apply the so called 'conspiracy theory **[*52]** of jurisdiction' in which the contacts of a defendant's co-conspirators with the forum state are attributed to the defendant in order to supply the minimum contacts necessary for personal jurisdiction.") (citation omitted).

4. Plaintiff Cannot Satisfy the Fourteenth Amendment Due Process Requirements

Fourteenth Amendment due process requirements are met when *in personam* jurisdiction is asserted over a nonresident defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)* **[*53]** (quoting *Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)*. Because neither Defendant Ronald 0. Perelman nor Defendant MacAndrews & Forbes Holdings Inc. have-or are alleged to have-such contacts, whether related to Plaintiff's claims or otherwise, they lack the minimum contacts that would permit this Court constitutionally to exercise personal jurisdiction over either of them.

5. The Alleged Inapplicability of the "Fiduciary Shield Doctrine" Does Not Confer Personal Jurisdiction Over Defendants

Defendant Ronald O. Perelman is mentioned by name only once in ECF No. 59 and not at all in ECF Nos. 60 and 61, Plaintiff's memoranda in opposition. Furthermore, Defendant MacAndrews & Forbes Holdings Inc. is not mentioned by name at all in ECF Nos. 59, 60, and 61.

Plaintiff argues that the "Fiduciary Shield Doctrine" is inapplicable in this Circuit and therefore, this Court has personal jurisdiction over all of Individual Defendants (including Defendant Ronald O. Perelman) and Defendant Grimes & Battersby, LLP. *See* ECF No. 59 at 21-24. Plaintiff appears to argue that the "individual defendants (i.e., Folz, Gershel, Colucci, Ellis, Perelman, Grimes and Rothman,) and GB (Grimes & Battersby LLC)" cannot **[*54]** use the corporate form of the other defendants to shield them from liability. In other words, Individual Defendants are not shielded from liability simply because their acts were undertaken in an official rather than a personal capacity.

However, the Sixth Circuit has specifically recognized that "jurisdiction over the individual officers of a corporation cannot be predicated *merely* upon jurisdiction over the corporation." *Weller v. Cromwell Oil Co., 504 F.2d 927, 929 (6th Cir. 1974)* (emphasis added). In *Balance Dynamics Corp. v. Schmitt Indus. Inc*., the Sixth Circuit clarified the fiduciary shield doctrine by expressing agreement with courts that exercised personal jurisdiction over corporate officers where the officers were personal, active participants in allegedly tortious or violative conduct. *204 F.3d 683, 697-98 (6th Cir. 2000)* (citing *Chattanooga Corp. v. Klingler, 704 F.2d 903, 906-907 (6th Cir. 1983)*; *Serras v. First Tennessee Bank N.A., 875 F.2d 1212, 1217 (6th Cir. 1989)*). In other words, just because there may be personal jurisdiction over a corporation does not necessarily mean that there is personal jurisdiction over its officers and employees.

In the case at bar, Plaintiff **[*55]** has not sufficiently pled how Individual Defendants or Defendant Grimes & Battersby, LLP were primary participants in any alleged wrongdoing. Plaintiff states that "[t]heir intentional

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Plaintiff merely recites the language from *§ 2307.382(A)(7)* in ¶ 15 of the Amended Complaint (ECF No. 3). rather than allege specific facts concerning any alleged criminal act or element thereof that took place in Ohio.

participation in violations is alleged in AC ¶¶ 311-314." ECF No. 59 at 22. The Court agrees with Defendants that those allegations comprise nothing more than conclusory statements that "Defendants" (collectively) violated certain federal statutes, without explaining specifically what acts an individual defendant committed. *See* ECF No. 64 at 13-14. Therefore, this is not a case wherein Individual Defendants seek to be shielded from liability by the corporate form with regard to acts they committed in their official capacities. Instead, there is no credible allegation that Individual Defendants and Defendant Grimes & Battersby, LLP committed any wrongful acts in the first place. There is simply no believable allegation that Defendant Ronald O. Perelman or any of the other Individual Defendants engaged in any wrongdoing whatsoever.

B. The Amended Complaint (ECF No. 3) Fails to State a Claim Against Defendants Ronald O. Perelman and MacAndrews & Forbes Holdings Inc. Upon Which Relief Can be Granted

As stated **[*56]** in Section X, Part I, a cause of action fails to state a claim upon which relief may be granted when it lacks "plausibility in th[e] complaint." *Twombly, 550 U.S. at 564*. A pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Iqbal, *129 S.Ct. at 1949* (quoting *Fed. R. Civ. P. 8(a)(2)*). The factual allegations in the pleading must be sufficient to raise the right to relief above the speculative level on the assumption that all the allegations in the complaint are true. *Twombly, 550 U.S. at 555*. Plaintiff is not required to include detailed factual allegations, but must provide more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal, 129 S.Ct. at 1949*. A pleading that offers legal conclusions or a simple recitation of the elements of a cause of action will not meet this pleading standard. *Id*. In reviewing a complaint, the Court must construe the pleading in the light most favorable to the plaintiff. *Bibbo v. Dean Witter Reynolds, Inc., 151 F.3d 559, 561 (6th Cir. 1998)*.

1. Plaintiff's Claims Against Defendants Ronald O. Perelman and MacAndrews & Forbes Holdings Inc. Fail Because He Has Alleged No Relevant [*57] Conduct or Breach of Duty on the Part of Either Defendant

In Plaintiff's Amended Complaint (ECF No. 31. there are no allegations of conduct by Defendants Ronald O. Perelman or MacAndrews & Forbes Holdings Inc. that violated any legal duty to Plaintiff or that injured him. The only four allegations about Defendants Ronald O. Perelman or MacAndrews & Forbes Holdings Inc. allege Perelman's ownership of MacAndrews & Forbes, its sale of Consolidated Cigar Corporation to SEITA in January 1999, and implausibly, that Defendant MacAndrews & Forbes Holdings Inc. is the "successor" in interest to Consolidated Cigar. ECF No. 3 at ¶¶ 26, 27, and 66.

2. Plaintiffs Claims Against Defendants Ronald O. Perelman and MacAndrews & Forbes Holdings Inc. Are Time-Barred

Plaintiff's claims against Defendants Ronald 0. Perelman and MacAndrews & Forbes Holdings Inc. are dismissed because any applicable statutes of limitations have run. Plaintiff's claims under RICO, the Sherman Act, and the Clayton Act are subject to four-year statutes of limitations. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 156, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987)*; *15 U.S.C. § 15b*. His claims based on unfair competition and interference with **[*58]** prospective economic advantage are barred by four-year statutes of limitations, as well. *See Ohio Rev. Code § 1331.12(B)*; *Cramer v. Fairfield Med. Ctr., 182 Ohio App.3d 653, 668, 2009 Ohio 3338, 914 N.E.2d 447 (Ohio Ct. App. 2009)* ("The statute of limitations for a claim of tortious interference with contract is four years pursuant to *R.C. 2305.09(D)*."). Finally, for the Lanham Act and Deceptive Trade Practices Act claims, because there are no specific statutes of limitations, courts apply the equitable doctrine of laches. *See Veracity Group, Inc. v. Cooper-Atkins Corp., Inc., No. 1:11-cv-526, 2012 U.S. Dist. LEXIS 7997, 2012 WL 203415, at *2 (S.D. Ohio Jan. 24, 2012)* ("The starting point of the laches analysis is the analogous statute of limitations of the forum state-which is a claim of false advertising in Ohio. Therefore, a two-year limitations period (*Ohio Rev. Code § 2305.10*) applies."); *Santana Prods., Inc. v. Bobrick Washroom Equip., Inc., 401 F.3d 123. 140 (3rd Cir. 2005)* (dismissing Lanham Act claim based on laches). Plaintiff has alleged no conduct on the part of

Defendants Ronald O. Perelman or MacAndrews & Forbes Holdings Inc. since 1999. ECF No. 3 at ¶ 26. Because the last conduct on the part of Defendants Ronald O. Perelman and **[*59]** MacAndrews & Forbes Holdings Inc. was more than 13 years ago, Plaintiff's claims against them are time-barred by the applicable statutes of limitations and by the doctrine of laches.

XII.

Defendant Imperial Tobacco Group PLC is a corporation organized and existing under the laws of the United Kingdom with offices in the United Kingdom. Declaration of Robert Dyrbus (ECF No. 28-2) at ¶ 2. Defendant Imperial Tobacco Group PLC directly or indirectly owns subsidiaries that have U.S. connections or operations, but Defendant Imperial Tobacco Group PLC has, at all times, maintained a separate corporate existence and identity and has operated solely outside the United States. *Id*. at ¶¶ 3-6. Its shares are traded in the United States in the form of American Depositary Shares. *See* ECF No. 59 at 17 and ECF No. 64 at 12-13. None of Defendant Imperial Tobacco Group PLC's subsidiaries, including Commonwealth Brands, is authorized to act as Defendant Imperial Tobacco Group PLC's agent or to accept service[16] for Defendant Imperial Tobacco Group PLC. *Id*. at ¶¶ 4 and 9. Defendant Imperial Tobacco Group PLC has no office or place of business in Ohio or elsewhere in the United States. *Id*. at ¶ 8. Defendant **[*60]** Imperial Tobacco Group PLC has no employees that reside in Ohio or the United States, and has no mailing address, or phone listing, and owns no property in Ohio or the United States. *Id*. Defendant Imperial Tobacco Group PLC has never solicited business and has never sold or contracted to sell any goods or services in the state of Ohio. *Id*.

A. Plaintiff Has Failed to Meet His Burden to Establish a Prima Facie Case in Support of Personal Jurisdiction

Plaintiff makes only a single allegation of fact in the Amended Complaint (ECF No. 3) to support a claim that the Court has personal jurisdiction over Defendant Imperial Tobacco Group PLC, namely, that "[t]his court has personal jurisdiction over the alien defendant Imperial Tobacco Group PLC on the basis of: . . . [the actions of] its agent subsidiaries in the United States." ECF No.3 at ¶ l6(d). In ¶ 30 of the Amended **[*61]** Complaint (ECF No. 3), Plaintiff purports to describe Defendant Imperial Tobacco Group PLC's interest in a number of U.S.-based subsidiaries, including Defendants Altadis U.S.A. Inc., Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., Max Rohr, Inc., and 800-JR Cigar, Inc. *See also* ECF No. 3 at ¶ 77 ("Imperial Tobacco Group PLC has sufficient contacts with the United States. It has several agent subsidiaries in the U.S. that are in the same business as parent.").

Plaintiff would have the Court exercise jurisdiction over Defendant Imperial Tobacco Group PLC because of the activity of its agent U.S.-based subsidiaries. A company does not, however, purposefully avail itself of the privilege of conducting activities within a state merely by owning all or some of a corporation subject to jurisdiction. *See* *Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 n. 13, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)* (jurisdiction over a corporation does not necessarily result in jurisdiction over holding company that owns it). Ownership of shares in a corporation located in a particular forum is not purposeful availment of that forum. *Shaffer v. Heitner, 433 U.S. 186, 216, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)*. Stock ownership in or affiliation with a corporation, **[*62]** without more, is not a sufficient minimum contact. *Dean v. Motel 6 Operating L.P., 134 F.3d 1269, 1273-74 (6th Cir. 1998)*. The Court finds that there is no personal jurisdiction over Defendant Imperial Tobacco Group PLC because there is no purposeful availment by Imperial. *Id. at 1275*.

Assuming *arguendo* that the Amended Complaint (ECF No. 3) does include sufficient allegations of jurisdictional "facts," as stated above, a federal court may exercise personal jurisdiction over a defendant outside the forum state

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[16] Plaintiff served a summons on Commonwealth Brands, naming it as the agent of Defendant Imperial Tobacco Group PLC for accepting service of process. ECF No. 4 at 7-8 and 26. According to Defendant Imperial Tobacco Group PLC, any assertion that Commonwealth Brands is Imperial's agent is incorrect. *See* ECF No. 28-1 at 11 n. 4.

only pursuant to an applicable federal statute that provides for service of process outside this state or Ohio's long-arm statute, *Ohio Rev. Code Ann. § 2307.382*, and only if the exercise of such jurisdiction satisfied the *Due Process Clause of the Constitution of the United States*. *Robert J. Kwait & Assocs., 1998 U.S. Dist. LEXIS 22880, at *4-5*. (stating that courts look to a state's long-arm statute for non-resident defendants if there is no federal statute that provides for service of process).

B. Plaintiff Cannot Establish Personal Jurisdiction Pursuant to the Special Service Provision of RICO (18 U.S.C. § 196S(b))

The RICO statute authorizes nationwide service of process, *18 U.S.C. § 1965(b)* **[*63]** Whether a plaintiff can rely on the nationwide service provisions of a federal statute "[d]epends upon whether [he] has adequately stated a claim" for a violation of that statute. *United Liberty Life Ins. Co., 985 F.2d at 1330*. As detailed in Section X, Part B, Plaintiff has failed to state a RICO claim on which relief can be granted. For that reason, he cannot utilize RICO's nationwide service provision to secure personal jurisdiction over Defendant Imperial Tobacco Group PLC. *See, e.g.*, *Williams, 1988 U.S. Dist. LEXIS 988, 1988 WL 8983, at *2* (declining to assert personal jurisdiction pursuant to nationwide-service provision of RICO where "plaintiff's RICO allegations fail[ed] to state a claim upon which relief may be granted").

RICO does not authorize international service of process. So, even if Plaintiff could state a RICO claim, RICO's nationwide service of process provision would not support the exercise of personal jurisdiction over Defendant Imperial Tobacco Group PLC, a company that is a resident of and is incorporated in the United Kingdom and which was served in the United Kingdom. Thus, Plaintiff must rely on Ohio's long-arm statute and constitutional due process to establish that the Court has personal **[*64]** jurisdiction over Defendant Imperial Tobacco Group PLC. *See* *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc., 23 F. Supp.2d 796, 806 (N.D. Ohio 1998)* (British Defendant B.A.T. Industries dismissed for lack of personal jurisdiction from case alleging RICO and Clayton Act violations.).

C. Plaintiff Cannot Establish Personal Jurisdiction Over Defendant Imperial Tobacco Group PLC Under the Antitrust Laws

Plaintiff cannot use the service provision in *15 U.S.C. § 22* to secure personal jurisdiction over Defendant Imperial Tobacco Group PLC. Because *Section 22*, applies only to a "suit, action, or proceeding under the antitrust laws," Plaintiff's failure to state a claim under the antitrust laws precludes him from using the worldwide provision of *15 U.S.C. § 22* as a means to secure personal jurisdiction over Defendant Imperial Tobacco Group PLC. *See* *A-DEC, Inc. v. Professional Equipment Mfg. Co., No. 83-1118, 1983 U.S. Dist. LEXIS 11560, 1983 WL 1944, at *2 (D. Or. 1983)* ("[T]he expansive venue and service of process provisions of [*15 U.S.C. § 22*] shall only apply to allow for expanded personal jurisdiction as against corporations that allegedly have violated the antitrust laws."). As discussed in Section **[*65]** X, Parts D and E, Plaintiff has failed to state an antitrust claim on which relief can be granted. Furthermore, none of the provisions of the Clayton Act that Plaintiff invokes against Defendant Imperial Tobacco Group PLC-*15 U.S.C. § 5*, *15 U.S.C. § 15*, or *15 U.S.C. § 22*-establish personal jurisdiction over Imperial.

Section 5, 15 U.S.C. applies only to claims brought by the United States. *Pennsylvania Railroad, 324 U.S. at 466-67*. *15 U.S.C. § 15(a)*, which authorizes a private cause of action for "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws [establishes venue for such a claim in] the United States in the district in which the defendant *resides* or *is found* or *has an agent*. . . ." (emphasis added). Defendant Imperial Tobacco Group PLC does not reside, cannot be found,[17] and does not have an agent anywhere in the United States. This is conclusively established by the fact that Plaintiff was required to serve Defendant Imperial Tobacco Group PLC in the United Kingdom under *Fed. R. Civ. P. 4(h)*. *See* Alias Summons(ECF No. 23).

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[17] Plaintiff agrees that Defendant Imperial Tobacco Group PLC cannot be found in this district. *See* **[*66]** ECF No. 59 at 15.

Section 22, 15 U.S.C, also cannot be relied upon by Plaintiff to establish personal jurisdiction over Defendant Imperial Tobacco Group PLC because Imperial lacks the minimum contacts with the state of Ohio or the United States as a whole upon which such jurisdiction could be based. *See* Plaskolite, Inc. v. Zheijiang Taizhou Eagle Mach. Co., Ltd., No. 08cv487, 2008 U.S. Dist. LEXIS 99395 (S.D. Ohio Dec. 9, 2008) (noting circuit split regarding the interaction of the Clayton Act's special venue provision and the general venue statute, 28 U.S.C. § 1391, when a plaintiff relies on 15 U.S.C. § 22 to establish personal jurisdiction). Defendant Imperial Tobacco Group PLC conducts no business, owns no property, and maintains no office in the United States. ECF No. 28-2 at ¶ 8. Although U.S. employees of Defendant Imperial Tobacco Group PLC's subsidiaries may qualify to purchase shares of Imperial's stock through its "Sharesave" plan,[18] this alone is insufficient to establish personal jurisdiction over Imperial. *See* Ames v. Whitman's Chocolates. Div. of Pet. Inc., No. 91-3271, 1991 U.S. Dist. LEXIS 18389, 1991 WL 281798 (E.D. Pa. Dec. 30, 1991) (dismissing foreign parent corporation pursuant to Fed. R. Civ. P. 12(b)(2) **[*67]** even though it granted stock options to Plaintiff). Finally, Plaintiff's bare conclusory allegations in the Amended Complaint (ECF No. 3) that Defendant Imperial Tobacco Group PLC conducts business within the United States are insufficient as well. *See* Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1239 (6th Cir. 1981).

D. None of the Remaining Claimed Federal Bases for Jurisdiction Over Defendant Imperial Tobacco Group PLC Apply

In ¶ 16(f)-(j) of the Amended Complaint (ECF No. 3), Plaintiff makes an obscure reference to the "effects doctrine," to extraterritorial application of the RICO statute, a section of the Code of Federal Regulations, and two sections of the United States Code, and claims that these references establish personal jurisdiction over Defendant Imperial Tobacco Group PLC. In ¶ 16(a)-(b) of the Amended Complaint (ECF No. 3), Plaintiff cites Fed. R. Civ. P. 4(k)(1)(C) as a basis to establish personal jurisdiction over Defendant Imperial Tobacco Group PLC under 18 U.S.C. § 1965(d) and 15 U.S.C. § 22.

First, the Amended Complaint (ECF No. 3) asserts that personal jurisdiction over Defendant Imperial Tobacco Group PLC exists pursuant to the "'[e]ffects **[*68]** doctrine,' since the foreign defendant's acts have a foreseeable impact within the United States." ECF No. 3 at ¶ 16 (f). The Sixth Circuit recently stated:

> Since Judge Learned Hand's leading opinion in United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 443 (2d Cir. 1945), which proposed the need for practical limitations on the Sherman Act that would avoid global overreaching, it has been generally established that the so-called "effects test" limits the Sherman Act "to those acts (1) that 'significantly' or 'directly' affect United States commerce, or (2) that are intended to have an effect, or (3) that are both intended to have and do have such an effect." IB Phillip Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 272d, at 279-80 (3d ed.2006) (citing Alcoa, 148 F.2d at 443-44). These standards have since been widely incorporated into U.S. jurisprudence. Indeed, "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993). The Supreme Court, however, has not delineated **[*69]** the precise bounds of the effects test, and lower courts are not in agreement as to its exact scope. *Cf. generally* Dee-K Enters., Inc. v. Heveafil Sdn. Bhd., 299 F.3d 281, 286 (4th Cir. 2002) (addressing the scope of the effects test and discussing the complexities inherent in applying the test in cases such as this one, which involve a "mixture of foreign and domestic elements"). . . .

Carrier Corp. v. Outokumpu Ovh, Nos. 07-6052, 07-6114, __ F.3d __, 673 F.3d 430, 2012 U.S. App. LEXIS 4283, 2012 WL 678151, at *4 (6th Cir. March 2, 2012) (complaint satisfied threshold jurisdictional requirement under Sherman Act). The Amended Complaint (ECF No. 3) is utterly devoid of any specific allegations supporting the conclusory claim that Defendant Imperial Tobacco Group PLC's actions abroad had a substantial effect in the United States. The Amended Complaint (ECF No. 3) alleges no such overt acts abroad and no identified effects in

[18] *See* ECF No. 28-2 at ¶ 7.

Ohio or even in the United States as a whole. Moreover, Plaintiff has not alleged an action by Defendant Imperial Tobacco Group PLC that was purposefully directed at Ohio with an intention to cause Plaintiff foreseeable harm here. *See* Reynolds, 23 F.3d at 1120 (no personal jurisdiction over international **[*70]** athletic foundation for publication of allegedly defamatory press release in England despite allegations of harm felt in Ohio).

Second, as noted in Section XII, Part B, Plaintiff has failed to state a valid RICO cause of action against Defendant Imperial Tobacco Group PLC and thus any reference to RICO as a basis for jurisdiction also fails as a matter of law.

Third, the section of the Code of Federal Regulations that Plaintiff cites at ¶ 16(h), *i.e.*, 31 C.F.R. § 515.310(d), does not exist. The non-existent regulation that Plaintiff cites cannot possibly establish personal jurisdiction over Defendant Imperial Tobacco Group PLC.

Fourth, Plaintiff lacks standing to assert a claim under the Helms-Burton Act, specifically 22 U.S.C. § 6082, because he never alleges that he is a United States national whose property was confiscated by the Cuban government. Thus, 22 U.S.C. § 6082 does not apply to Plaintiff's claims and it does not establish personal jurisdiction over Defendant Imperial Tobacco Group PLC.

Fifth, Plaintiff's reference to 18 U.S.C. § 1957(d)(2)[19] at ¶ 160) of the Amended Complaint (ECF No. 3) does not establish personal jurisdiction over Defendant Imperial Tobacco Group PLC. 18 U.S.C. § 1957 **[*71]** prohibits individuals and entities from "engag[ing] in a monetary transaction in criminally derived property." *See* 18 U.S.C. § 1957(a). 18 U.S.C. § 1957 does not apply to Defendant Imperial Tobacco Group PLC because Imperial is not a United States person. Furthermore, enforcement of 18 U.S.C. § 1957 is left to the Department of Justice, Department of the Treasury, Department of Homeland Security, and the United States Postal Service, depending on the circumstances of the infraction. *See* 18 U.S.C. § 1957(e).

Sixth, the reference to Fed. R. Civ. P. 4(k)(1)(C) in ¶ 16(a)-(b) of the Amended Complaint (ECF No. 3) does not establish an independent basis for personal jurisdiction. Fed. R. Civ. P. 4, entitled "Summons," deals with the service of a summons on another party. Subsection (k) sets forth the territorial limits of effective **[*72]** service and subsection (k)(1)(C) specifically states that personal jurisdiction is established "when authorized by a federal statute." There is no personal jurisdiction over Defendant Imperial Tobacco Group PLC pursuant to Fed. R. Civ. P. 4(k)(1)(C) because, as shown above, none of the federal statutes cited by Plaintiff establish personal jurisdiction.

Seventh, Plaintiff argues that Fed. R. Civ. P. 4(k)(2)[20] provides personal jurisdiction over Defendant Imperial Tobacco Group PLC. *See* ECF No. 59 at 18-19. In order to prove that jurisdiction is proper under Fed. R. Civ. P. 4(k)(2), (1) the plaintiff's claims must be based on federal law; (2) no state court could exercise jurisdiction over the defendants; (3) the exercise of jurisdiction must be consistent with the laws of the United States; and (4) the exercise of jurisdiction must be consistent with the Constitution." See, Inc. v. Imago Eyewear Pty. Ltd., 167

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[19] 18 U.S.C. § 1957(d)(2) provides:

> The circumstances referred to in subsection (a) are--
>
> * * *
>
> that the offense under this section takes place outside the United States and such special jurisdiction, but *the defendant is a United States person* (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section) (emphasis added).

[20] Fed. R. Civ. P. 4(k)(2) provides:

> For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:
>
> (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and
>
> (B) exercising jurisdiction is consistent with the United States Constitution and laws.

Fed.Appx. 518, 521-24 (6th Cir. 2006) (holding that defendant's overall contacts with the United States did not provide sufficient contacts with the United States to satisfy due process). As detailed above, Defendant Imperial Tobacco Group PLC's contacts with the United States **[*73]** are minor. *See* ECF No. 28-2. The Court finds that Defendant Imperial Tobacco Group PLC does not have sufficient contacts with the United States to be hauled into Court here.

Finally, Plaintiff contends, without providing any legal authority, that the "Corporate Disregard Doctrine" provides an additional basis for personal jurisdiction over Defendant Imperial Tobacco Group PLC. *See* ECF No. 59 at 24. The Court disregards this argument, however, because Plaintiff has not cited any case applying the "Corporate Disregard Doctrine" to establish personal jurisdiction over a defendant.

E. Plaintiff Cannot Satisfy the Ohio Long-Arm Statute for His RICO, Lanham Act, and State Law Claims

Plaintiff must turn to the laws of Ohio because he cannot establish personal jurisdiction over Defendant Imperial Tobacco Group PLC under a federal statute **[*74]** that provides for international service of process. To establish personal jurisdiction of an out-of-state defendant for a Lanham Act claim, a plaintiff must rely on the long-arm statute of the forum state. *See generally* *15 U.S.C. §§ 1051-1141*. "When considering whether to exercise jurisdiction over a non-resident defendant in a diversity case, or in a case where federal subject matter jurisdiction exists but the federal statute does not provide for service of process, a federal court must apply the law of the forum state in which it sits." *Robert J Kwait & Assocs., 1998 U.S. Dist. LEXIS 22880, at *4-5*.

A federal district court may exercise personal jurisdiction only if the requirements of both the state long-arm statute and constitutional due process are met. *See* *Calphalon Corp., 228 F.3d at 721*; *Reynolds, 23 F.3d at 1115*. *See also* *Goldstein, 70 Ohio St.3d at 235* ("When determining whether a state court has personal jurisdiction over a nonresident defendant, the court is obligated to (1) determine whether the state's 'long-arm' statute and the applicable Civil Rule confer personal jurisdiction, and if so, (2) whether granting jurisdiction under the statute and rule would deprive the **[*75]** defendant of the right to due process of law pursuant to the *Fourteenth Amendment to the United States Constitution*."). Neither is true here. The provisions of the Ohio long-arm statute that Plaintiff calls upon-*Ohio Rev. Code § 2307.382(A)(3)* and *(7)*[21] -do not support the assertion of personal jurisdiction over Defendant Imperial Tobacco Group PLC, a citizen of the United Kingdom. The Amended Complaint (ECF No. 3) does not allege that Defendant Imperial Tobacco Group PLC was ever present in Ohio or committed any act in Ohio that harmed Plaintiff. *Hildebrand v. Steck Mfg. Co. Inc.*, *279 F.3d 1351, 1355 (Fed. Cir. 2002)* (to satisfy *§ 2307.382(A)(3)*, both the tortious act and the injury must occur in Ohio and the presence of the alleged tortfeasor is required). Also, Plaintiff merely recites the language from *§ 2307.382(A)(7)* at ¶ 16(d) of the Amended Complaint (ECF No. 3). *Hoover v. Society Bank of Eastern Ohio N.A., No. 5:90CV1245, 1991 U.S. Dist. LEXIS 19073, at *34-35 and 41 (N.D. Ohio April 12, 1991)* (finding that plaintiff failed to establish personal jurisdiction under *§ 2307.382(A)(7)* because the amended complaint merely recited the statute and failed to offer any creditable evidence **[*76]** regarding what criminal act allegedly occurred). The RICO, Lanham Act, and state law claims are dismissed because Plaintiff cannot meet his burden to establish such jurisdiction. *Nationwide Mut'l Ins. Co., 91 F.3d at 793*.

Moreover, the "absent co-conspirator" doctrine alleged at ¶ 16(e) of the Amended Complaint (ECF No. 3) is not recognized as a means for establishing personal jurisdiction in this district. *See* *Hollar, 43 F.Supp.2d at 802 n.7* ("Since personal jurisdiction must be based on the actions and contacts of the specific defendant at issue, the Court declines to apply the so called 'conspiracy theory of jurisdiction' in which the contacts of a defendant's co-conspirators with the forum state are attributed to the defendant in order to supply the minimum contacts necessary for personal jurisdiction.") **[*77]** (citation omitted).

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[21] Ohio courts are deemed to have personal jurisdiction over a person "as to a cause of action arising from the person's . . . [c]ausing tortious injury by an act or omission in" Ohio or from the person's "[c]ausing tortious injury to any person by a criminal act, any element of which takes place in [Ohio], which he commits or in the commission of which he is guilty of complicity."

Lastly, *Fourteenth Amendment* due process requirements are met when *in personam* jurisdiction is asserted over a nonresident defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)* (quoting *Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940))*. Because Defendant Imperial Tobacco Group PLC does not have-and is not alleged to have-such contacts, whether related to Plaintiff's claims or otherwise, neither the theory of general jurisdiction or specific jurisdiction supports a claim for personal jurisdiction over Defendant Imperial Tobacco Group PLC. *See Chrysler Corp., 643 F.2d at 1239-40* (dismissing a foreign corporation because the plaintiff had presented no evidence demonstrating the foreign corporation's contacts with the forum or the United States, and because the "[m]aintenance of this action against it would offend traditional notions of fair play and substantial justice") (internal quotations and citation omitted).

XIII.

Plaintiff has joined as defendants several current and former employees of the **[*78]** corporate defendants, including Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci. ECF No. 3 at ¶¶ 23-25 and 29. These defendants are not Ohio residents, and they do not have any contacts with the state of Ohio upon which personal jurisdiction may be based. Defendant Theo W. Folz, who is the former President and Chief Executive Officer of Defendant Altadis U.S.A. Inc., is a Florida resident. Declaration of Theo W. Folz (ECF No. 29-2) at ¶¶ 2-3. Defendant Gary R. Ellis, the current President and Chief Executive Officer of Defendant Altadis U.S.A. Inc., is a resident of Florida. Declaration of Gary R. Ellis (ECF No. 29-3) at ¶¶ 2-3. Defendant James L. Colucci is also a Florida resident and an Executive Vice President of Defendant Altadis U.S.A. Inc. Declaration of James L. Colucci (ECF No. 29-4) at ¶¶ 2-3. Defendant Lewis I. Rothman, the Chairman, President, and Chief Executive Officer of Defendant 800-JR Cigar, Inc., is a New Jersey resident. Declaration of Lewis I. Rothman (ECF No. 29-5) at ¶¶ 2-3. Neither Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, nor James L. Colucci has ever resided in Ohio, has had any offices in Ohio, or has had any **[*79]** employees or agents in Ohio. ECF No. 29-2 at ¶¶ 6-12; ECF No. 29-3 at ¶¶ 8-9 and 11; ECF No. 29-4 at ¶¶ 8-9 and 11; and ECF No. 29-5 at ¶¶ 7-8 and 10. Nor have they ever transacted any business in Ohio. ECF No. 29-2 at ¶ 15; ECF No. 29-3 at ¶ 14; ECF No. 29-4 at ¶ 14; and ECF No. 29-5 at ¶ 13.

A. The Amended Complaint (ECF No. 3) Fails to State a Claim Against Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci Upon Which Relief Can be Granted

In *Iqbal*, the United States Supreme Court stated: "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *129 S.Ct. at 1949*. To survive a motion to dismiss for failure to state a claim, a "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Scheid v. Fanny Farmer Candy Shops. Inc., 859 F.2d 434, 436 (6th Cir. 1988)* (internal quotation marks and citations omitted). A plaintiff cannot survive a *Rule 12(b)(6)* motion based solely on wholly conclusory allegations hoping that he "might later establish some 'set of [undisclosed] facts' to support recovery." *Twombly, 550 U.S. at 561*. **[*80]** (internal quotation marks omitted).

The Amended Complaint (ECF No. 3) does not state any factual allegations of any conduct by Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci. Beyond the allegations that introduce Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci (ECF No. 3 at ¶¶ 23-25 and 29) referenced above, the only allegations that even mention these defendants appear in Count 11 of the Amended Complaint (ECF No. 3) at ¶¶ 312-315. These allegations, which contain only generalities as to all seven Individual Defendants, provide as follows:

¶ 312 alleges, in essence, that whatever Individual Defendants did, they did in the course of their employment;

¶ 313 alleges that whatever the corporate defendants did occurred while Individual Defendants were employed by their respective corporate defendant employers;

¶ 314 alleges that Individual Defendants were aiders and abettors to an unspecified principal with respect to violations of certain federal law that are not described; and

¶ 315 contains a more verbose but equally general allegation of aiding and abetting.

Also see Section XI, Part J. Notably, there is no mention of Defendants **[*81]** Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci in the RICO allegations. *See* ECF No. 3 at ¶¶ 45-213.

Conspicuously absent is any allegation that Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, or James L. Colucci were personally involved in any way in any of the conduct of which Plaintiff complains. The Amended Complaint (ECF No. 3) utterly lacks allegations sufficient to state a claim that any of these defendants personally violated a legal duty to Plaintiff or caused him injury. For this reason, as well as the reasons stated in Section X above, the Amended Complaint (ECF No. 3) is dismissed with prejudice as to Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, or James L. Colucci for failure to state a claim upon which relief can be granted. *See* *Twombly, 550 U.S. at 570* (dismissing antitrust claims because the complaint did not "state a claim to relief that is plausible on its face").

B. This Court Lacks Personal Jurisdiction Over Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci

Plaintiff has failed to allege (1) that Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci personally engaged in **[*82]** any conduct affecting him or (2) that any of these defendants have any personal contacts with Ohio-nor do they. As stated at the beginning of Section XI, Plaintiff bears the burden of setting forth a *prima facie* showing of personal jurisdiction over a defendant. *Theunissen, 935 F.2d at 1458*. A plaintiff, seeking to hail a foreign defendant into a distant forum, bears an initial burden of pleading jurisdiction. "He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing." *McNutt, 298 U.S. at 189*. Plaintiff has failed to meet his *prima facie* burden of showing personal jurisdiction because the Amended Complaint (ECF No. 3) does not allege any facts to support a claim that this Court has personal jurisdiction over Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci.

Assuming *arguendo* that the Amended Complaint (ECF No. 3) does include such allegations, a federal court may exercise personal jurisdiction over defendants outside the forum state only pursuant to an applicable federal statute that provides for service of process outside this state or Ohio's long-arm statute. *Robert J. Kwait & Assocs., 1998 U.S. Dist. LEXIS 22880, at *4-5*. **[*83]** Nationwide service of process may be effected in a civil RICO action pursuant to *18 U.S.C. § 1965(b)* and *(d)*. Worldwide service of process may be effected in an antitrust case pursuant to the Clayton Act.[22] According to Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci, none of them reside in Ohio or have any contacts with Ohio sufficient to support personal jurisdiction under any federal statute that Plaintiff invokes or under the Ohio long-arm statute.

1. The RICO Statute Cannot be Used to Establish Personal Jurisdiction Over Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci Because Plaintiffs RICO Allegations Fail to State a Justiciable Claim

For the reasons set forth at Section XI, Part A(1), Plaintiff cannot utilize RICO's nationwide service provision to secure personal jurisdiction over Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci.

2. Plaintiff Cannot Establish Personal Jurisdiction Over Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci Under the Antitrust Laws

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[22] *See* n. 13, *supra*.

For the reasons set forth at Section XI, Part A(2), none of the provisions of the **[*84]** Clayton Act that Plaintiff invokes against Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci-*15 U.S.C. § 5*, *15 U.S.C. § 15*, or *15 U.S.C. § 24*-establish personal jurisdiction over them.

3. Plaintiff Cannot Satisfy the Ohio Long-Arm Statute for His Lanham Act and State Law Claims

For the reasons set forth at Section XI, Part A(3), these claims must be dismissed because Plaintiff cannot meet his burden to establish personal jurisdiction over Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci.

4. The Court Does Not Have Jurisdiction Over Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci Just Because It Has Jurisdiction Over Defendant Altadis U.S.A. Inc.

As previously stated, the Sixth Circuit has specifically recognized that "jurisdiction over the individual officers of a corporation cannot be predicated *merely* upon jurisdiction over the corporation." *Weller, 504 F.2d at 929* (emphasis added). Thus, although Defendant Altadis U.S.A. Inc. currently employs Defendants Gary R. Ellis and James L. Colucci and formerly employed Defendant Theo W. Folz, and Defendant Altadis U.S.A. Inc. does not object to jurisdiction, **[*85]** these circumstances do not support the exercise of jurisdiction over Defendants Gary R. Ellis, Theo W. Folz, or James L. Colucci personally. Rather, a court may exercise jurisdiction over an employee only if the employee was (1) "actively and personally involved in the conduct giving rise to the claim, [and (2)] the exercise of personal jurisdiction [satisfies] traditional notions of fair play and substantial justice." *Balance Dynamics Corp., 204 F.3d at 698*. The Amended Complaint (ECF No. 3) does not satisfy either factor.

The Amended Complaint (ECF No. 3) does not set forth specific facts that Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, or James L. Colucci were personally involved in any way in any of the conduct of which Plaintiff complains or an allegation sufficient to state a claim that any of these defendants personally violated a legal duty to Plaintiff or caused him injury. *See Kemper v. Saline Lectronics, 348 F. Supp.2d 897, 902 (N.D. Ohio 2004)* (holding that the broad allegation that defendants engaged in fraudulent conduct was insufficient to establish personal jurisdiction over a corporate employee when plaintiff presented no specific facts showing the employee's **[*86]** involvement).

For these reasons and those set forth at Section XI, Part A(5), the Court concludes that the fiduciary shield doctrine prevents the Court from exercising personal jurisdiction over Defendants Gary R. Ellis, Lewis I. Rothman, Theo W. Folz, and James L. Colucci.

XIV.

Plaintiff has joined as defendants several current and former employees of the corporate defendants, including retired employee Defendant George Gershel, allegedly an executive vice president of Defendant Altadis U.S.A. Inc. and managing director of Defendant Cuban Cigar Brands N.V. *See* ECF No. 3 at ¶ 25. Defendant George Gershel is not an Ohio resident and does not have sufficient contacts with the state of Ohio upon which personal jurisdiction may be based. Defendant George Gershel was Executive Vice President Tobacco of Defendant Altadis U.S.A. Inc. until December 31, 2008, when he retired. Declaration of George Gershel (ECF No. 30-2) at ¶¶ 3-4. While employed with Defendant Altadis U.S.A. Inc., Defendant George Gershel was a resident of Florida. *Id*. at ¶ 5. After retiring, Defendant George Gershel moved to Switzerland with his wife, who is a citizen of Switzerland, and became a permanent resident. *Id*. at ¶¶ **[*87]** 2 and 4.[23] Defendant George Gershel has never resided or intended to permanently reside in Ohio, nor has he ever had any offices, employees, or agents in Ohio. *Id*. at ¶¶ 7 and 13-14. Defendant George Gershel does, however, maintain an apartment, car, bank account, and phone listing in Ohio

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[23] Plaintiff served a summons on Defendant George Gershel in Florida. *See* Return of Service (ECF No. 10).

that he uses when he travels to Ohio a few times a year to visit two of his children. *Id*. at ¶ 6. Defendant George Gershel has no other contacts with Ohio and does not work in Ohio, sell any goods or services in Ohio, or regularly solicit business in Ohio. *Id*. at ¶¶ 11-12.

A. The Amended Complaint (ECF No. 3) Fails to State a Claim Against Defendant George Gershel Upon Which Relief Can be Granted

Plaintiff does not allege that Defendant George Gershel has any connection to the matters of which Plaintiff complains, except that he worked for one of the corporate defendants. Beyond the allegations that introduce Defendant George Gershel (ECF No. 3 at ¶ 25) referenced above, the only allegations that even mention this defendant appear in Count 11 of the Amended Complaint (ECF No. 3) at ¶¶ 312-315. As **[*88]** mentioned in Section XIII, Part A, these allegations contain only generalities as to all seven Individual Defendants. Notably, there is no mention of Defendant George Gershel in the RICO allegations. *See* ECF No. 3 at ¶¶ 45-213. For these reasons and those set forth at Section XIII, Part A, the Amended Complaint (ECF No. 3) is dismissed with prejudice as to Defendant George Gershel for failure to state a claim upon which relief can be granted.

B. This Court Lacks Personal Jurisdiction Over Defendant George Gershel

Plaintiff has failed to allege (1) that Defendant George Gershel personally engaged in any conduct affecting him or (2) that Defendant George Gershel has any personal contacts with Ohio upon which jurisdiction can be based-nor does he. His limited personal contacts with the state in connection with visiting his children here are insufficient to support jurisdiction. Because Defendant George Gershel does not reside in Ohio and has only *de minimis* **[*89]** contacts with the state that are insufficient to support personal jurisdiction under any federal statute that Plaintiff invokes or the Ohio long-arm statute, the Court dismisses Defendant George Gershel for lack of personal jurisdiction.

1. The RICO Statute Cannot be Used to Establish Personal Jurisdiction Over Defendant George Gershel Because Plaintiffs RICO Allegations Fail to State a Justiciable Claim

For the reasons set forth at Section XI, Part A(1), Plaintiff cannot utilize RICO's nationwide service provision to secure personal jurisdiction over Defendant George Gershel.

2. Plaintiff Cannot Establish Personal Jurisdiction Over Defendant George Gershel Under the Antitrust Laws

For the reasons set forth at Section XI, Part A(2), none of the provisions of the Clayton Act that Plaintiff invokes against Defendant George Gershel-*15 U.S.C. § 5*, *15 U.S.C. S 15*, or *15 U.S.C. § 24*-establish personal jurisdiction over him.

3. The Court Cannot Exercise General Jurisdiction Over Defendant George Gershel Because He Does Not Have Continuous and Systematic Contacts With Ohio

Personal jurisdiction may be based on either general or specific jurisdiction. *Bird v. Parsons, 289 F.3d 865, 873 (6th Cir. 2002)*. **[*90]** General jurisdiction is based on a defendant's actual or virtual presence in the forum. "General jurisdiction is proper only where 'a defendant's contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state.'" *Id*. (quoting *Third Nat'l Bank in Nashville v. WEDGE Group Inc., 882 F.2d 1087, 1089 (6th Cir. 1989)*).

The Amended Complaint (ECF No. 3) is devoid of allegations that Defendant George Gershel has any contact with the state of Ohio. In *Schultz*, the Court recently found that general jurisdiction was not established in a case where the defendants had only isolated contacts with the state of Ohio rather than a regular presence which is necessary to establish that continuous and systematic contacts exist. *2009 U.S. Dist. LEXIS 66627, 2009 WL 2392912, at *9*. Furthermore, merely maintaining a bank account within the forum, having an interest in property in the forum, or traveling to the forum occasionally does not constitute the systematic and continuous contacts required to establish general jurisdiction. *See Access Telecom, Inc. v. MCI Telecommunications Corp., 197 F.3d 694, 717 (5th Cir. 1999)* **[*91]** (stating that renting or owning property in a forum does not confer general jurisdiction when the property is not used to conduct business in the forum); *Sullivan, 785 F. Supp. at 1079-80* (maintaining a bank account within the forum or occasionally traveling to the forum is not a continuous and systematic contact). Defendant George Gershel's limited personal contacts with the state in connection with visiting his children here do not constitute the systematic and continuous contacts required to establish general jurisdiction. *See Access Telecom, Inc., 197 F.3d at 717*; *Sullivan, 785 F. Supp. at 1079-80*.

For these reasons, Defendant George Gershel is not subject to general jurisdiction in Ohio. The Court must therefore determine whether he is subject to specific jurisdiction.

4. The Court Cannot Exercise Specific Jurisdiction Over Defendant George Gershel Because His De Minimis Contacts With Ohio are Unrelated to the Matters of Which Plaintiff Complains

In contrast to general jurisdiction, specific jurisdiction is proper under circumstances "where 'a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum.'" *Bird, 289 F.3d at 874* **[*92]** (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n. 8, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)*). Specific jurisdiction may be based on a single act. *Nationwide Mut'l Ins. Co., 91 F.3d at 794* (citing *McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957)*).

The Sixth Circuit has developed a three-part test to determine whether a defendant's contacts are sufficient so as to establish specific jurisdiction:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable.

Reynolds, 23 F.3d at 1116.

In *CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996)*, the Sixth Circuit stated:

> This court has stated that the question of whether a defendant has purposefully availed itself of the privilege of doing business in the forum state is "the *sine qua non* for *in personam* jurisdiction." *Mohasco Indus., 401 F.2d at 381-82*. The "purposeful availment" **[*93]** requirement is satisfied when the defendant's contacts with the forum state "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State," and when the defendant's conduct and connection with the forum are such that he "should reasonably anticipate being haled into court there." *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-75, 105 S.Ct. 2174, 2183-84, 85 L.Ed.2d 528 (1985)* (quoting *World-Wide Volkswagen, 444 U.S. at 297, 100 S.Ct. at 567*); *Reynolds, 23 F.3d at 1116*. Courts require purposeful availment to insure that "random," "fortuitous," or "attenuated" contacts do not cause a defendant to be haled into a jurisdiction. *Burger King Corp., 471 U.S. at 475, 105 S.Ct. at 2183-84* (citing *Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984))*.

Id., at 1263 (Emphasis in original.) Plaintiff's allegations in the Amended Complaint (ECF No. 3) and the absence of any argument in opposition, *see* ECF No. 59, fall woefully short of establishing purposeful availment. Instead of alleging specific facts concerning Defendant George Gershel's Ohio contacts, Plaintiff alleges merely that "defendants" **[*94]** committed unspecified "tortious activities," and caused an unspecified "tortious injury" through an unspecified "criminal act" in Ohio. ECF No. 3 at ¶¶ 14-15. Plaintiff has not demonstrated that Defendant George Gershel has connections with Ohio that are substantial enough to show "purposeful availment." *Highway Auto Sales v. Auto-Konig of Scottsdale, Inc., 943 F. Supp. 825, 828 (N.D. Ohio 1996)*. Thus, the Court finds that Defendant George Gershel's personal Ohio contacts, related to occasional visits to his children, are clearly insufficient to establish that he has purposelfully availed himself of the privilege of doing business in Ohio. *See* ECF No. 30-2 at ¶¶ 6 and 8-9.

The matters of which Plaintiff complains are unrelated to Defendant George Gershel's *de minimis* Ohio contacts and exercising personal jurisdiction over him would be unreasonable. Plaintiff has not alleged that Defendant George Gershel engaged in any conduct, anywhere, that harmed him. Moreover, Plaintiff has not made any allegations that suggest a connection between his claims and Defendant George Gershel's personal contacts with Ohio. Thus, exercising jurisdiction over Defendant George Gershel in the case at bar **[*95]** would be random and arbitrary, and would offend the notions of fair play and substantial justice. *See, e.g.*, *Conti v. Pneumatic Products Corp., 977 F.2d 978, 983 (6th Cir. 1992)* (holding personal jurisdiction over a foreign defendant based merely on the plaintiff's state of residence would be unfair and would not comport with the notions of fair play and substantial justice).

5. Plaintiff Cannot Satisfy the Ohio Long-Arm Statute for His Lanham Act and State Law Claims

For the reasons set forth at Section XI, Part A(3), these claims must be dismissed because Plaintiff cannot meet his burden to establish personal jurisdiction over Defendant George Gershel.

6. Plaintiff Cannot Satisfy the Fourteenth Amendment Due Process Requirements

For the reasons set forth at Section XTV, Part B(3) and (4), Plaintiff cannot establish that the Court has general or specific jurisdiction over Defendant George Gershel. Therefore, Plaintiff cannot satisfy the *Fourteenth Amendment* Due Process requirements to secure personal jurisdiction over Defendant George Gershel.

7. The Court Does Not Have **Jurisdiction Over Defendant George Gershel Just Because It Has Jurisdiction Over Defendant Altadis U.S.A. Inc**.

For the **[*96]** reasons set forth at Section XIII, Part B(4), the Court concludes that the fiduciary shield doctrine prevents the Court from exercising personal jurisdiction over Defendant George Gershel.

XV.

Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc. are all holding companies. Declaration of Salvatore M. Marino (ECF No. 31-2) at ¶ 5; Declaration of Gary R. Ellis (ECF No. 31-3) at ¶ 5; Declaration of Eric Workman (ECF No. 31-4) at ¶ 6. Defendant 800-JR Cigar, Inc. is incorporated in Delaware. ECF No. 31-2 at ¶ 4. Defendant Altadis Holdings U.S.A. Inc. is a Delaware company, with its principal place of business in Fort Lauderdale, Florida. ECF No. 3 at ¶ 120; ECF No. 31-3 at ¶ 4. And Defendant Cuban Cigar Brands, N.V. is organized under the laws of the Netherlands Antilles, having an office in Fort Lauderdale, Florida. ECF No. 3 at ¶ 22; ECF No. 31-4 at ¶ 4. None of these defendants has, or previously had, any offices or places of business in the state of Ohio, nor has any ever stationed any employees, sales representatives, or agents in the state of Ohio. ECF No. 31-2 at ¶¶ 6-12; ECF No. 31-3 at ¶¶ 6-14; ECF No. 31-4 at ¶¶ 7-13. Furthermore, none has entered **[*97]** into a contract in the state of Ohio, sold goods or services in the state of Ohio, or derived substantial revenue from goods consumed in the state of Ohio. ECF No. 31-2 at ¶¶ 7-8 and 13; ECF No. 31-3 at ¶¶ 7-8 and 13; ECF No. 31-4 at ¶¶ 9 and 14. As holding companies, Defendants Cuban Cigar Brands, N.V., Altadis

Holdings U.S.A. Inc., and 800-JR Cigar, Inc. do not derive operational revenue from any of their activities in Ohio. ECF No. 31-2 at ¶ 13; ECF No. 31-3 at ¶ 13; ECF No. 31-4 at ¶ 14.

A. This Court Lacks Personal Jurisdiction Over Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.SA. Inc., and 800-JR Cigar, Inc.

Plaintiff has failed to allege (1) that Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc. have any Ohio contacts on which personal jurisdiction can be based and (2) with the exception of the conclusory RICO allegations,[24] that they have engaged in any conduct that injured Plaintiff. Notably, there are no allegations about Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc. in Counts 2-11 of the Amended Complaint (ECF No. 3).

As stated at the beginning of Section XI and in Section XIII, Part B, Plaintiff bears the burden of setting forth a *prima facie* showing of personal jurisdiction over a defendant. *Theunissen, 935 F.2d at 1458*. A plaintiff, seeking to hail a foreign defendant into a distant forum, bears an initial burden of pleading jurisdiction. "He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing." *McNutt, 298 U.S. at 189*. Plaintiff has failed to meet his *prima facie* burden of showing personal jurisdiction because the Amended Complaint (ECF No. 3) does not allege any facts to support a claim that this Court has personal jurisdiction over Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc.

Assuming *arguendo* that the Amended Complaint (ECF No. 3) does include such allegations, a federal court may exercise personal jurisdiction over defendants outside the forum **[*99]** state only pursuant to an applicable federal statute that provides for service of process outside this state or Ohio's long-arm statute. *Robert J. Kwait & Assocs., 1998 U.S. Dist. LEXIS 22880, at *4-5*. Nationwide service of process may be effected in a civil RICO action pursuant to *18 U.S.C. § 1965(b)* and *(d)*. Worldwide service of process may be effected in an antitrust case pursuant to the Clayton Act.[25] According to Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc., none of them is an Ohio company or have any contacts with Ohio sufficient to support personal jurisdiction under any federal statute that Plaintiff invokes or under the Ohio long-arm statute. Finally, even if these statutory tests could be met, the *Fourteenth Amendment* must still be satisfied, and here, Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc. do not have the minimum contacts with Ohio that would allow a suit to be brought here.

1. Plaintiff Cannot Establish Personal Jurisdiction Pursuant to the Service Provisions of RICO and the Antitrust Laws

*a. Broad Service Provisions Apply Only When the Plaintiff Has Stated Viable [*100] Causes of Action Under the Relevant Statutes*

Plaintiff cannot establish personal jurisdiction over Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc. based on the special service provisions of RICO (*18 U.S.C. § 1965(b)* and *(d)*) or the antitrust laws (*15 U.S.C. § 22*) because the Amended Complaint (ECF No. 3) does not state valid RICO or antitrust claims against any of them. As previously stated, it is well recognized that a plaintiff cannot rely on the special service provisions of a federal statute unless the plaintiff "has adequately stated a claim" for a violation of that statute. *United Liberty Life Ins. Co., 985 F.2d at 1330* (remanding for ruling on validity of claim under the 1934

[24] The RICO allegations in the Amended Complaint (ECF No. 3) merely **[*98]** assert in non-factual, conclusory fashion that Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc. illegally owned and/or sold certain trademarks and/or illegally derived profits therefrom.

[25] *See* n. 13, *supra*.

Exchange Act); *see also* NGS Am., Inc. v. Jefferson, 218 F.3d 519 (6th Cir. 2000) (affirming dismissal for lack of personal jurisdiction because ERISA's nationwide-service provision did not apply to the plaintiff's case).

b. Plaintiff Cannot Rely on RICO's Nationwide Service of Process Because the Amended Complaint (ECF No. 3) Fails to State a RICO Claim

For the reasons set forth at Section XI, Part A(1), Plaintiff cannot utilize RICO's nationwide service provision **[*101]** to secure personal jurisdiction over Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc.

c. Plaintiff Cannot Establish Jurisdiction Over Defendants Cuban Cigar Brands, N. V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc. Under 15 U.S.C. § 22 Because the Amended Complaint (ECF No. 3) Fails to State an Antitrust Claim Against Them and Ohio is an Improper Venue

While the nationwide-service provision of the antitrust laws may permit certain defendants to be *served* in any district, it does not permit these defendants to be *sued* in any district. Rather, defendants in antitrust suits may be sued only where they are *found. See, e.g.*, *Valley Drive Systems, Inc. v. EMPI, Inc., No. 94 C 50118, 1994 U.S. Dist. LEXIS 13233, 1994 WL 511294, at *3 (N.D. Ill. Sept. 19, 1994)* ("In an antitrust action, a corporate defendant may be sued in any judicial district where it is an inhabitant, where it may be found or where it transacts business."). In the case at bar, Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc. do not have any connection with the Northern District of Ohio. And therefore, because Defendants Cuban Cigar Brands, N.V., Altadis Holdings **[*102]** U.S.A. Inc., and 800-JR Cigar, Inc. cannot be found in Ohio, they cannot be sued in Ohio, notwithstanding the provisions of Section 12 of the Clayton Act, 15 U.S.C. § 22.

Plaintiff cannot rely on Section 12 of the Clayton Act to establish personal jurisdiction over Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc. because he has not stated an antitrust claim against them. Because 15 U.S.C. § 22 applies only to "[a]ny suit, action, or proceeding under the antitrust laws," Plaintiff's failure to state a claim under the antitrust laws precludes him from using the worldwide service of process provision of *Section 22* as a means to secure jurisdiction over Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc. *See* *A-DEC, Inc., 1983 U.S. Dist. LEXIS 11560, 1983 WL 1944, at *2 (D. Or. 1983)* ("[T]he expansive venue and service of process provisions of [15 U.S.C. § 22] shall only apply to allow for expanded personal jurisdiction as against corporations that allegedly have violated the antitrust laws."). As discussed in Section X, Parts D and E, Plaintiff has failed to state an antitrust claim on which relief can be granted.

Assuming *arguendo* that Plaintiff **[*103]** has made a valid antitrust claim against Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc., he still cannot rely on *15 U.S.C. § 22* to establish jurisdiction over these defendants, because under Section 12 of the Clayton Act, "proper venue is still required in order to confer personal jurisdiction." *Hyland v. Homeservices of America., Inc.*, No. 3:05 CV 612 R, 2007 U.S. Dist. LEXIS 47502, 2007 WL 1959158, at *3 (W.D. Ky. June 28, 2007) (venue is proper "only . . . if it could be determined that the objecting defendants were inhabitants of, could be found in, or transacted business within the district"). This Court is not a proper venue in which to sue Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc., since none of these defendants (1) is an inhabitant of; (2) transacts business in; or (3) may be found, in the Northern District of Ohio.

A corporation is an "inhabitant" of the state of its incorporation. *Athletes Foot of Delaware, Inc. v. Ralph Libonati Co., Inc., 445 F. Supp. 35, 42-46 (D. Del. 1977)* (dismissing defendant not incorporated in forum state). Plaintiff has not alleged that Defendants Cuban Cigar Brands, N.V., Altadis Holdings **[*104]** U.S.A. Inc., and 800-JR Cigar, Inc. were incorporated in Ohio, and none were. As alleged in ¶ 20 of the Amended Complaint (ECF No. 3), Defendant Altadis Holdings U.S.A. Inc. is incorporated under the laws of Delaware and its principal place of business is located in Fort Lauderdale, Florida. ECF No. 31-3 at ¶4. Similarly, as alleged in ¶ 22 of the Amended Complaint (ECF No. 3), Defendant Cuban Cigar Brands, N.V. is organized under the laws of Netherlands Antilles, with a place of business in Fort Lauderdale, Florida, where it was served.[26] ECF No. 31-4 at ¶ 4. Although Plaintiff does not allege where Defendant 800-JR Cigar, Inc. is incorporated, *see* ¶ 28 of the Amended Complaint (ECF No. 3), this omission does not work in his favor. As set forth in ¶ 4 of ECF No. 31-2, Defendant 800-JR Cigar, Inc. is a Delaware corporation.

Additionally, the Amended Complaint (ECF No. 3) does not allege that Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc. have done *anything* in Ohio, much less that they have transacted *substantial* business in Ohio. "[B]efore a corporation may be held to be 'transacting business' **[*105]** in a district[,] it must in the ordinary and usual sense 'transact business' therein of any substantial character." *Ohio-Midland Light & Power Co. v. Ohio Brass Co., 221 F. Supp. 405, 408 (S.D. Ohio 1962)* (citations omitted). Furthermore, a corporation must engage in more extensive activities to be "found" within a district than required to be "transacting business" there. *Friends of Animals, Inc. v. American Veterinary Medical Assn., 310 F. Supp. 620, 622 (S.D. N.Y. 1970)* (citations omitted). Indeed, Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc. have not transacted any business in the Northern District of Ohio. *See* ECF No. 31-2 at ¶ 9; ECF No. 31-3 at ¶ 9; ECF No. 31-4 at ¶ 10. Therefore, the Court finds that neither the allegations of the Amended Complaint (ECF No. 3) nor the facts support a conclusion that Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc. "transact business" in or can be "found" in the Northern District of Ohio.

d. Plaintiff Cannot Establish Personal Jurisdiction Over Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc. Under 15 U.S.C. § 5 or 15 U.S.C. § 15 [*106] of the Antitrust Laws

For the reasons set forth at Section XI, Part A(2), none of the other provisions of the Clayton Act that Plaintiff invokes against Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc.-*15 U.S.C. § 5*, or *15 U.S.C. § 15*-establish personal jurisdiction over any of the defendants.

e. Plaintiff Cannot Rely on the Ohio Long-Arm Statute to Establish Personal Jurisdiction Over Defendants Cuban Cigar Brands, N.V., Altadis Holdings U.S.A. Inc., and 800-JR Cigar, Inc.

The Court cannot exercise personal jurisdiction over Defendants 800-JR Cigar, Inc. (a Delaware corporation), Altadis Holdings U.S.A. (a Delaware corporation with its principal place of business in Florida), and Cuban Cigar Brands, N.V. (a Netherlands Antilles corporation with its principal place of business in Florida) unless (1) each is amenable to suit under Ohio's long-arm statute and (2) the due process requirements of the United States Constitution are met. *Reynolds, 23 F.3d at 1115*. For the reasons set forth at Section XII, Part E, Plaintiff can satisfy neither in the case at bar.

XVI.

All of the allegations concerning Defendants Grimes & Battersby, LLP and Charles W. Grimes **[*107]** concern their actions as lawyers on behalf of clients in connection with the registration or enforcement of trademarks. The Amended Complaint (ECF No. 3) does not allege that Defendants Grimes & Battersby, LLP and Charles W. Grimes reside in or have had any contact with the state of Ohio, except that Defendant Charles W. Grimes sent the cease-and-desist letters.

Neither Defendant Grimes & Battersby, LLP nor Defendant Charles W. Grimes has any Ohio contacts on which personal jurisdiction can be based. Defendant Charles W. Grimes, the Managing Partner of the law firm Grimes & Battersby, LLP, is a Connecticut resident. Declaration of Charles W. Grimes (ECF No. 32-2) at ¶¶ 1-2. Defendant

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[26] *See* Return of Service (ECF No. 4) at 5-6, and 23.

Grimes & Battersby, LLP is a limited liability partnership, with offices in Norwalk, Connecticut and New York City, New York. *Id*. at ¶ 6. All of the attorneys affiliated with Defendant Grimes & Battersby, LLP live and work in Connecticut or New York, except when the representation of a client requires travel. *Id*. Neither Defendant Grimes & Battersby, LLP nor Defendant Charles W. Grimes has engaged in any persistent course of conduct in Ohio. *Id*. at ¶ 7. A Grimes & Battersby lawyer took Plaintiff's deposition **[*108]** in connection with the Opposition Proceeding, but otherwise, neither Defendant Charles W. Grimes nor Defendant Grimes & Battersby, LLP has had an employee or agent in Ohio. *Id*. at ¶¶ 11, 14, 16, and 21. Neither Defendant Grimes & Battersby, LLP nor Defendant Charles W. Grimes has regularly solicited business in the state of Ohio, or ever sold any goods or services in Ohio, except possibly in connection with their representation of clients. *Id*. at ¶¶ 8-10. Neither Defendant Grimes & Battersby, LLP nor Defendant Charles W. Grimes has established a mailing address or phone listings in Ohio, neither owns property in Ohio, and neither has an office in Ohio. *Id*. ¶¶ 10-12. Neither Defendant Grimes & Battersby, LLP nor Defendant Charles W. Grimes has ever negotiated or entered into any contracts in Ohio. *Id*. at ¶ 13. Defendant Charles W. Grimes has never transacted any business in Ohio, and to the extent that other Grimes & Battersby attorneys have, they have only done so on behalf of clients, in connection with their representation of those clients. *Id*. at R ¶ 14. Neither Defendant Grimes & Battersby, LLP nor Defendant Charles W. Grimes has had business or personal contact with Plaintiff **[*109]** or Somya Inc. other than receipt of process in this case, the cease-and-desist letters and their involvement in the pending trademark Opposition Proceeding in which they represent Defendant Max Rohr, Inc. *Id*. at ¶ 15.

A. The Amended Complaint (ECF No. 3) Fails to State a Claim Against Defendants Grimes & Battersby, LLP and Charles W. Grimes Upon Which Relief Can be Granted

The allegations (1) that Defendants Grimes & Battersby, LLP and Charles W. Grimes took action, as counsel for their clients, to register, record the assignment of or enforce trademark rights, and (2) of Count 11 of the Complaint, which refer to Attorney Grimes among other Individual Defendants, fail to state a claim against these defendants upon which relief can be granted.

1. Ohio's Litigation Privilege Protects Defendants Grimes & Battersby, LLP and Charles W. Grimes from Claims Based on Work for Their Clients Before the PTO, or to Enforce Registered Marks

For the reasons set forth at Section X, Part H, the work of Defendants Grimes & Battersby, LLP and Charles W. Grimes as counsel for their clients, in connection with the registration and enforcement of trademarks, cannot be the basis for liability to Plaintiff.

2. [*110] Count 11 of the Amended Complaint (ECF No. 3) Fails to State a Claim Against Defendant s Charles W. Grimes Upon Which Relief Can be Granted

For the reasons set forth at Section XIII, Part A, Count 11 fails to state a claim against Defendant Charles W. Grimes.

B. This Court Lacks Personal Jurisdiction Over Defendants Grimes & Battersby, LLP and Charles W. Grimes

Personal jurisdiction cannot be based on the cease-and-desist letters or the Opposition Proceeding. Neither Defendant Grimes & Battersby, LLP nor Defendant Charles W. Grimes is an Ohio resident; and the limited contact with the state of Ohio that Defendants Grimes & Battersby, LLP and Charles W. Grimes had, in the course of seeking to protect a client's trademark rights, cannot legally or fairly serve as the basis for the assertion of personal jurisdiction. This conduct was privileged.

The discussion at the beginning of Section XIII, Part B is incorporated herein by reference.

1. The RICO Statute Cannot be Used to Establish Personal Jurisdiction Over Defendants Grimes & Battersby, LLP and Charles W. Grimes Because Plaintiffs RICO Allegations Fail to State a Justiciable Claim

For the reasons set forth at Section XI, Part A(1), Plaintiff **[*111]** cannot utilize RICO's nationwide service provision to secure personal jurisdiction over Defendants Grimes & Battersby, LLP and Charles W. Grimes.

2. Plaintiff Cannot Establish Personal Jurisdiction Over Defendants Grimes & Battersby, LLP and Charles W. Grimes Under the Antitrust Laws

For the reasons set forth at Section XI, Part A(2), none of the provisions of the Clayton Act that Plaintiff invokes against Defendants Grimes & Battersby, LLP and Charles W. Grimes-*15 U.S.C. § 5*, *15 U.S.C. § 15*, *15 U.S.C. §22* (as to Defendant Grimes & Battersby, LLP only), or *15 U.S.C. $24* (as to Defendant Charles W. Grimes only)-establish personal jurisdiction over them.

Moreover, *15 U.S.C. § 15* does not help Plaintiff to establish personal jurisdiction over Defendants Grimes & Battersby, LLP and Charles W. Grimes in Ohio. It merely establishes proper venue for an antitrust action. *See* *Norman's on the Waterfront v. West Indies Corp*., No. 515/1973 Antitrust, 1974 U.S. Dist. LEXIS 7588, at *3 (D. V.I. July 17, 1974) ("Paragraph 1 of the complaint states that jurisdiction and venue are founded on ... *15 U.S.C. § 15*. **[*112]** It is true that [this] provision[ ] [does not] authorize the exercise of personal jurisdiction."). The cease-and-desist letters and the deposition taken of Plaintiff provide the only possible connection between Defendants Grimes & Battersby, LLP and Charles W. Grimes and the state of Ohio. But those activities are privileged, and they cannot be the basis for personal jurisdiction or venue. *See* Section X, Part H, *supra*; *Database America, Inc. v. Bellsouth Advertising & Pub. Corp.. 825 F. Supp. 1216, 1226 (P. N.J. 1993)* (construing venue under *28 U.S.C. § 1391*, and holding "[b]ecause cease-and-desist letters are logically sent to an alleged infringer in its home forum, a rule which automatically provides for venue in the district of receipt of such letter has the effect of establishing venue in the plaintiff's home forum, without regard to the inconvenience to the defendant.... This result is contrary to both the letter and spirit of the venue requirement.").

Plaintiff cannot rely on *15 U.S.C. §22* to establish personal jurisdiction over Defendant Grimes & Battersby, LLP because, as previously stated, *Section 22* applies only to "[a]ny suit, action, or proceeding under the antitrust laws **[*113]** against a *corporation*." *See* n. 13, *supra*. Defendant Grimes & Battersby, LLP is a limited liability partnership, not a corporation. *See* ECF No. 32-2 at ¶ 6.

Finally, Plaintiff cannot rely on *15 U.S.C. § 24* to establish personal jurisdiction over Defendant Charles W. Grimes because it applies only to corporate employees, it is not a jurisdictional statute, and the nature of Grimes's contacts with Ohio do not support the exercise of jurisdiction. First, *15 U.S.C. § 24*, entitled "Liability of directors and agents of corporation" applies only to Individual Defendants who work for corporations, and Defendant Grimes & Battersby, LLP is a limited liability partnership. *See* ECF No. 32-2 at ¶ 6. Second, *15 U.S.C. § 24* is not a jurisdictional statute. *Sullivan, 785 F. Supp. at 1082*. Rather, "before a state can exercise jurisdiction over [an] employee," the Court must look to whether the employee has contacts with the forum sufficient to support the exercise of general jurisdiction or specific jurisdiction." *Id*. Third, for the reasons set forth at Section XIV, Part B(3) and (4), Plaintiff cannot establish that the Court has general or specific jurisdiction over Charles W. Grimes.

3. Plaintiff Cannot [*114] Establish Personal Jurisdiction Based on Due Process and the Ohio Long-Arm Statute

The discussion at Section XI, Part A(3) and Section XII, Part E is incorporated herein by reference.

The Court cannot exercise personal jurisdiction over Defendants Grimes & Battersby, LLP (a Connecticut limited liability partnership) or Defendant Charles W. Grimes (a Connecticut resident) unless (1) each is amenable to suit under Ohio's long-arm statute and (2) the due process requirements of the United States Constitution are met.

Reynolds, 23 F.3d at 1115. For the reasons set forth at Section XII, Part E, Plaintiff can satisfy neither in the case at bar.

The Amended Complaint (ECF No. 3) does not allege that either Defendant Grimes & Battersby, LLP or Defendant Charles W. Grimes were ever present in Ohio. Although Defendant Charles W. Grimes sent cease-and-desist letters to Plaintiff in Ohio, "letters sent into the forum do not constitute . . . presence in Ohio." *Hildebrand, 279 F.3d at 1355*. Personal jurisdiction also does not exist because Plaintiff's reliance on the two letters that Defendant Charles W. Grimes sent to Plaintiff from his Connecticut office offends due process. *See* Section XIV, Part **[*115]** B(4). *See also* *Calphalon Corp., 228 F.3d at 721*; *Cadle Co. v. Schlichtmann, 123 Fed. Appx. 675, 681 (6th Cir. 2005)* (rejected the idea that a letter sent from an out-of-state attorney could form the basis of personal jurisdiction in Ohio).

XVII.

Defendant Max Rohr, Inc. has an insufficient connection to Ohio to satisfy the minimum contacts necessary for personal jurisdiction in the case at bar. Privileged efforts to protect trademark rights cannot be the basis for personal jurisdiction.

The Amended Complaint (ECF No. 3) does not allege that Defendant Max Rohr, Inc. resides in or had any contact with Ohio, except that Defendant Grimes & Battersby, LLP sent the cease-and-desist letters to Plaintiff on Max Rohr's behalf. Defendant Max Rohr, Inc. has no Ohio contacts on which personal jurisdiction can be based. Defendant Max Rohr, Inc. is a Delaware corporation with offices located in Wilmington, Delaware.[27] Declaration of Pamela Jasinski (ECF No. 33-2) at ¶ 1. Defendant Max Rohr, Inc. has never solicited business in the state of Ohio, has never contracted to sell any goods or services in the state of Ohio, and has never transacted any business in the state of Ohio. *Id*. at ¶¶ 7-10. Other **[*116]** than in connection with the Opposition Proceeding at the Trademark Trial and Appeal Board of the PTO, Defendant Max Rohr, Inc. has never had any agents or employees in the state of Ohio. *Id*. at ¶¶ 11 and 16. Likewise, Defendant Max Rohr, Inc. has never had any contact with Plaintiff other than the cease-and-desist letters sent by Defendant Grimes & Battersby, LLP, the receipt of service of process in the case at bar, and its involvement as a party in the Opposition Proceeding before the Trademark Trial and Appeal Board. *$d*. at ¶ 16. Except in connection with its privileged efforts to enforce its trademark rights, Defendant Max Rohr, Inc. has had no contact or relation with the state of Ohio whatsoever, and has never had any expectation of being sued here. *Id*. ¶ 19.

Defendant Max Rohr, Inc. has never maintained offices or owned property in the state of Ohio. *Id*. at ¶¶ 12-13. Moreover, Defendant Max Rohr, Inc., being exclusively a trademark holding company, does not operate any business and therefore has no operational revenue of any kind as a result of its activities in Ohio. *Id*. at ¶¶ 6 **[*117]** and 14. Defendant Max Rohr, Inc. has never established a mailing address or phone listing in Ohio. *Id*. at ¶ 15.

The discussion at the beginning of Section XIII, Part B is incorporated herein by reference.

A. Ohio's Litigation Privilege Protects Defendant Max Rohr, Inc. from Claims Based on the Work that Defendants Grimes & Battersby, LLP and Charles W. Grimes Performed on Its Behalf Before the PTO, or to Enforce Registered Marks

For the reasons set forth at Section X, Part H, the work of Defendants Grimes & Battersby, LLP and Charles W. Grimes, as counsel for Defendant Max Rohr, Inc., in connection with the registration and enforcement of trademarks, cannot be the basis for liability to Plaintiff.

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[27] Defendant Max Rohr, Inc. was served in Wilmington, Delaware. *See* Return of Service (ECF No. 21).

B. The RICO Statute Cannot be Used to Establish Personal Jurisdiction Over Defendant Max Rohr, Inc. Because Plaintiffs RICO Allegations Fail to State a Justiciable Claim

For the reasons set forth at Section XI, Part A(1), Plaintiff cannot utilize RICO's nationwide service provision, *18 U.S.C. § 1965(b)* and *(d)*, to secure personal jurisdiction over Defendant Max Rohr, Inc.

C. Plaintiff Cannot Establish Personal Jurisdiction Over Defendant Max Rohr, Inc. Under the Antitrust Laws

1. Plaintiff Cannot [*118] Establish Jurisdiction Over Defendant Max Rohr, Inc. Under 15 U.S.C. § 22 Because the Amended Complaint (ECF No. 3) Fails to State an Antitrust Claim Against It and Ohio is an Improper Venue

For the reasons set forth at Section XV, Part A(1)(c), Plaintiff cannot utilize the worldwide service provision of *Section 12* of the Clayton Act, *15 U.S.C. § 22*, to secure personal jurisdiction over Defendant Max Rohr, Inc.

2. Plaintiff Cannot Establish Personal Jurisdiction Over Defendant Max Rohr, Inc. Under 15 U.S.C. § 5 or 15 U.S.C. § 15

For the reasons set forth at Section XI, Part A(2), neither of the other provisions of the Clayton Act that Plaintiff invokes against Defendant Max Rohr, Inc.-*15 U.S.C. § 5* or *15 U.S.C. § 15*-establish personal jurisdiction over it.

Moreover, just as is the case with Defendants Grimes & Battersby, LLP and Charles W. Grimes, *15 U.S.C. § 15* does not help Plaintiff to establish personal jurisdiction over Defendant Max Rohr, Inc. in Ohio. It merely establishes proper venue for an antitrust action. *See* *Norman's v on the Waterfront, 1974 U.S. Dist. LEXIS 7588, at *3* ("Paragraph 1 of the complaint states that jurisdiction and venue are founded on . . . *15 U.S.C. § 15*. **[*119]** It is true that [this] provision[ ] [does not] authorize the exercise of personal jurisdiction."). Just as venue would be improper under *15 U.S.C. § 22*, it is likewise improper under *15 U.S.C. § 15*. Federal courts analyzing this provision have required a plaintiff to establish that the defendant has a "substantial" level of contact with a given jurisdiction before the defendant will be "found" within that jurisdiction. *See, e.g.*, *Redmond, 359 F. Supp. at 669-71*. Other than its trademark policing activities-activities privileged under Ohio law-the Amended Complaint (ECF No. 3) makes no allegations that Defendant Max Rohr, Inc. has had any contact with the state of Ohio. In fact, Defendant Max Rohr, Inc. does not reside in, cannot be found in, and does not have agents in the Northern District of Ohio. ECF No. 33-2 at ¶¶ 3, 6-15, and 18. Because Plaintiff does not and cannot allege that Defendant Max Rohr, Inc. has the connection to Ohio required for proper venue under *15 U.S.C. § 15*, it must be dismissed for lack of personal jurisdiction. *Redmond, 359 F.Supp. at 671*.

D. Plaintiff Cannot Establish Personal Jurisdiction Based on Due Process and the Ohio Long-Arm Statute

The discussion at **[*120]** Section XVI, Part B(3) is incorporated herein by reference.

XVIII.

On April 26, 2010, Plaintiff filed another Amended Complaint (ECF No. 37) without seeking leave of Court, which although styled as a "First Amended Pleading" is truly a Second Amended Complaint. Defendants moved to strike Plaintiff's "First Amended Pleading" and the Court granted Defendants' motion on July 2, 2010. In the July 2, 2010 Memorandum Opinion and Order (ECF No. 52). the Court also instructed Plaintiff to file responses to Defendants' pending motions to dismiss by July 26, 2010 and noted: "*Failure to timely oppose these motions may result in summary dismissal of this action*" (emphasis added).

On July 21, 2010, Plaintiff filed the within motion, which seeks leave to file a further amended complaint, rather than address the substance of Defendants' various pending Motions to Dismiss (ECF Nos. 26-33). As stated above in Section EX, the Court entered an Order (ECF No. 57) that advised Plaintiff that the Court intended to rule on his motion to further amend his Amended Complaint (ECF No. 53) at the same time it ruled on Defendants' various pending motions. Plaintiff was, therefore, granted leave to file a response(s) **[*121]** to the eight comprehensive and case-dispositive motions to dismiss.

Plaintiff seeks to add two additional new party defendants by virtue of the proposed amendment. He seeks to join as defendants Tabacalera Brands, Inc. and Commonwealth Brands, Inc., two additional companies in Defendant Altadis U.S.A. Inc.'s corporate family. Plaintiff also seeks to add a proposed "Fifth Claim for Relief and to expand his claim under the Lanham Act to increase the number of trademark registrations he seeks to cancel from 56 to approximately 380.

The Court denies Plaintiff's Motion for Leave to File an Amended Pleading (ECF No. 53) for two reasons.[28] First, the procedural and substantive defects in Plaintiff's claims are not curable. *Kottmyer v. Maas, 436 F.3d 684, 692 (6th Cir. 2006)* ("A district court may deny a plaintiff leave to amend his . . . complaint . . . when the proposed amendment would be futile.") For example, Plaintiff has added a proposed "Fifth Claim for Relief to "null and void" Defendants trademarks. *See* ECF No. 53-2 at 25-26. However, there is no private right of action for declaratory relief under the Cuban Assets Control Regulations, *31 C.F.R. § 515.101 et seq*. *See* *Glen v. Club Mediterranee S.A.., 365 F. Supp. 2d 1263, 1272 (S.D. Fla. 2005)* **[*122]** (citing *Schilling v. Rogers, 363 U.S. 666, 80 S. Ct. 1288, 4 L. Ed. 2d 1478 (1960)* and explaining that where the plaintiff has no "remedial right" under a statute the Court lacked jurisdiction to consider the claim). The First Amended Pleading (ECF Nos. 53-1 and 2) would not withstand a motion to dismiss.

Second, the current defendants will be unduly prejudiced by the proposed amendment because Defendants reasonably relied upon the Amended Complaint (ECF No. 3) as the controlling affirmative pleading, to which they expended substantial time, effort, and legal fees in preparing and filing eight responsive motions to dismiss.

Thus, the Court hereby brings an end to this litigation in this court.

XIX.

The Court also dismisses without prejudice Plaintiff's allegations against John Does 1-10 as service of process, and, by extension the **[*123]** institution of a lawsuit, cannot be effected on fictitious persons. *Webster v. Freedom Debt Relief, LLC. No. 1:10CV1587, 2011 U.S. Dist. LEXIS 85848, 2011 WL 3422872, at *2 (N.D. Ohio Aug. 4, 2011)*.

IT IS SO ORDERED.

March 30, 2012

Date

/s/ Benita Y. Pearson

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[28] In their Memorandum in Opposition (ECF No. 54), Defendants argue that "Plaintiff's Motion for Leave to Amend should be denied because Plaintiff has unduly delayed in seeking leave to amend. Defendants submit that Plaintiff seeks leave now in an attempt to delay responding to the pending motions to dismiss." ECF No. 54 at 3. Given the Court's prior ruling, *see* ECF No. 57, this argument is moot.

Benita Y. Pearson

United States District Judge

Ochoa v. United States Bank N.A.

United States District Court for the Southern District of California

April 2, 2012, Decided; April 2, 2012, Filed

CASE NO. 12-CV-0280-H (RBB)

Reporter

2012 U.S. Dist. LEXIS 201308 *; 2012 WL 13176112

CLEMENTE OCHOA, Plaintiff, vs. U.S. BANK N.A., et al., Defendants.

Core Terms

allegations, motion to dismiss, concealment, judicial notice, trustee sale, trust deed, fraudulent, negligent misrepresentation, leave to amend, Notice, unfair, intentional misrepresentation, quiet title, documents, recorded

Counsel: **[*1]** Clemente Ochoa, Plaintiff, Pro se, San Diego, CA USA.

For U.S. Bank N.A., as Trustee for Structured Asset Securities Corporation Trust 2006-WF3, Wells Fargo Bank, N.A., First American Loan Star Trustee Services, Llc, a Texas limited liability company, First American Title Company, a California corporation, Defendants: Kathryn Anne Moorer, LEAD ATTORNEY, Wright Finlay & Zak LLP, Newport Beach, CA USA.

Judges: MARILYN L. HUFF, UNITED STATES DISTRICT JUDGE.

Opinion by: MARILYN L. HUFF

Opinion

ORDER GRANTING MOTION TO DISMISS

On February 9, 2012, Defendants U.S. Bank N.A. and Wells Fargo Bank N.A. filed a motion to dismiss Plaintiff Clemente Ochoa's complaint. (Doc. No. 5.) On February 17, 2012, Plaintiff, proceeding pro se, filed his response in opposition to the motion to dismiss. (Doc. No. 7.) On February 27, 2012, Defendants filed a reply. (Doc. No. 10.) The Court determined this matter appropriate for resolution without oral argument and submitted the matter. (Doc. No. 11.)

Background

On or about June 21, 2006, Mr. Clemente Ochoa obtained a loan from Wells Fargo in the amount of $493,000, which was secured by a deed of trust ("Deed of Trust") against the property at 2948 Clay Avenue #A-C, San Diego, CA 92113. (Doc. **[*2]** No. 5-1 at ¶ 18.) In January 2009, Plaintiff received a loan modification. Plaintiff ultimately defaulted on the modified loan agreement and a Notice of Default was recorded on June 12, 2009, when the amount in arrears had reached $58,747.07. On July 28, 2009, Wells Fargo substituted in as trustee under the Deed of Trust First American Loan Star Trustee Services, LLC. On July 28, 2009, the beneficial interest under the Deed of Trust was assigned to U.S. Bank. A Notice of Trustee's Sale was recorded identifying April 1, 2011 as the date for public auction. The trustee's sale has been postponed due, in part, to Plaintiff's chapter 13 bankruptcy. Plaintiff originally filed suit in the Superior Court of California, County of San Diego, asserting state law claims for (1) unlawful/unfair business practices in violation of *Cal. Bus. & Prof. Code § 17200*; (2) intentional misrepresentation; (3) negligent misrepresentation; (4) fraudulent concealment; (5) quiet title; and (6) declaratory relief. Ochoa v. U.S. Bank, N.A., Superior Court of California, County of San Diego, Case No. 37-2011-00102826-CU-OR-CTL (filed December 21, 2011). On February 2, 2012, Defendants removed the action to this court on diversity grounds. Defendants **[*3]** now seek to dismiss Plaintiff's claims under *Federal Rule of Civil Procedure 12(b)(6)*.

Discussion

I. Motion to Dismiss Pursuant to *Fed. R. Civ. P. 12(b)(6)*

A motion to dismiss a complaint under *Federal Rule of Civil Procedure 12(b)(6)* tests the legal sufficiency of the claims asserted in the complaint. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. *Rule 8(a)(2)* requires that a pleading stating a claim for relief contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The function of this pleading requirement is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 557*). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555* (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004)). "All allegations of material fact are taken as true and construed in the light most favorable **[*4]** to plaintiff. However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996)*; see also *Twombly, 550 U.S. at 555*.

"Generally, a district court may not consider any material beyond the pleadings in ruling on a *Rule 12(b)(6)* motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990)*. The court may, however, consider the contents of documents specifically referred to and incorporated into the complaint. *Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)* overruled on other grounds by *Galbraith v. County of Santa Clara, 307 F.3d 1119, 1127 (9th Cir. 2002)*. A court may also consider judicially noticed facts to show whether a complaint states a cause of action. *Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd., 245 F.2d 67, 70 (9th Cir. 1956)*.

II. Plaintiff's Complaint

A. Unlawful/Unfair Business Practices

California's Unfair Competition Law ("UCL") prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code §17200*. An act is "unlawful" if it violates an underlying state or federal statute or common law. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. An act is "unfair" if it "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id. at 187*. Under the UCL, conduct is deceptive or misleading if it is likely **[*5]** to deceive an ordinary consumer. *Williams v. Gerber Products Co., 552 F.3d 934, 938 (9th Cir. 2008)*. To have standing for a violation of *Section 17200*, a plaintiff must allege that he suffered an injury-in-fact as a result of the unfair or unlawful conduct. *Cal. Bus. & Prof. Code §17204*; see also *Hale v. Sharp Healthcare, 183 Cal. App. 4th 1373, 1384, 108 Cal. Rptr. 3d 669 (2010)*.

Federal Rule of Civil Procedure 9(b)'s heightened pleading standards apply to claims for violation of the UCL that are grounded in fraud. *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)*. Under *Rule 9(b)*, a plaintiff must plead fraud with particularity. *Fed. R. Civ. P. 9(b)*. "*Rule 9(b)*'s particularity requirement applies to state-law causes of action." *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003)*. "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Id. at 1106* (quoting *Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir.1997))*.

Defendant asserts that the complaint only provides conclusory allegations that Defendant violated the UCL. (Doc. No. 5-1 at ¶¶ 39-50.) For example, Plaintiff alleges that Defendants wrongfully foreclosed and sold the property without legal standing to do so. (Id. at ¶ 40.) Plaintiff also alleges that Defendants deceptively posted a notice of trustee's sale without legal standing to do so. (Id. at ¶ 43.) Plaintiff further alleges that Defendants used fraudulent documents to illegitimately foreclose upon and sell the property. (Id. at ¶ 45.)

Defendant challenges the adequacy of these allegations under *Rule 9(b)*. The Court concludes that the allegations in the **[*6]** complaint are insufficient to establish a claim for violation of the UCL under *Rule 9(b)*. Plaintiff's complaint does not provide specific facts to support the who, what, when, where, and how of Defendants' conduct violates the UCL. See *Vess, 317 F.3d at 1103* ("Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged."). For example, Plaintiff does not plead facts relating to how Defendants' actions led to an injury-in-fact. Plaintiff still holds legal title to the property, is still in possession of the property, and no trustee's sale has taken place. Therefore, the complaint lacks facts showing how he sustained an injury based on Defendants' actions. Therefore, the complaint falls short of the pleading standards required under *Rule 9(b)*. Accordingly, the Court grants Defendants' motion to dismiss Plaintiff's UCL claim with thirty (30) days leave to amend.

B. Intentional Misrepresentation

To establish a fraudulent claim for intentional misrepresentation, the plaintiff must establish seven essential elements: (1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false **[*7]** when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff. *Manderville v. PCG & S Group, Inc., 146 Cal. App. 4th 1486, 1498, 55 Cal. Rptr. 3d 59 (2007)*.

Defendants challenge the sufficiency of Plaintiff's conclusory allegations regarding intentional misrepresentation of material facts. For example, Plaintiff alleges that Defendants falsely represented their right to foreclose and sell the property. (Doc. No. 5-1 at ¶¶ 51-52.) Plaintiff also alleges that Defendants made this representation with the intent to induce him into surrendering his property. (Id. at ¶ 55.) Plaintiff further alleges that he reasonably relied on these representations. (Id. at ¶ 56.)

Defendant asserts that the complaint lacks facts to support these allegations. The Court concludes that the complaint does not provide sufficient facts to satisfy the pleading requirements of fraud-based claims under *Rule 9(b)*. See *Vess, 317 F.3d at 1103* ("Averments of fraud must be accompanied by the who, what, **[*8]** when, where, and how of the misconduct charged."). For example, Plaintiff does not plead facts relating to how he has relied on Defendants' representations. Plaintiff still holds legal title to the property, is still in possession of the property, and no trustee's sale has taken place. Therefore, the complaint lacks facts to establish how he relied on Defendants' representations. Plaintiff's allegations that Defendants induced him into surrendering the property cannot stand because he is still in possession of the property. Accordingly, the Court concludes that the complaint does not establish a claim for intentional misrepresentation and grants Defendants' motion to dismiss this claim with thirty (30) days leave to amend.

C. Negligent Misrepresentation

The tort of negligent misrepresentation encompasses '[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true', and '[t]he positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true.' *Small v. Fritz Companies, Inc., 30 Cal. 4th 167, 173-74, 132 Cal. Rptr. 2d 490, 65 P.3d 1255 (2003)*. Negligent misrepresentation does not require scienter or intent to defraud. *McClain v. Octagon Plaza, LLC, 159 Cal. App. 4th 784, 71 Cal. Rptr. 3d 885 (2008)*. "As is true of negligence, **[*9]** responsibility for negligent misrepresentation rests upon the existence of a legal duty, imposed by contract, statute or otherwise, owed by a defendant to the injured person. The determination of whether a duty exists is primarily a question of law." *Eddy v. Sharp, 199 Cal.App.3d 858, 864, 245 Cal. Rptr. 211 (1988)*. "[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." *Das v. Bank of America, 186 Cal. App. 4th 727, 740, 112 Cal. Rptr. 3d 439 (2010)*.

Defendant contends that it does not owe a legal duty of care to Plaintiff because it operated within the scope of its traditional role as a lender of money. The complaint lacks facts to support that Defendants exceeded its traditional role as a lender of money. See *Das, 186 Cal. App. 4th at 740* ("[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.") Therefore, the Court concludes that the complaint fails to plead a duty of care owed to Plaintiff. Accordingly, the Court concludes that the complaint does not establish a claim for negligent misrepresentation, and grants Defendants' motion **[*10]** to dismiss this claim with thirty (30) days leave to amend.

D. Fraudulent Concealment

The elements of fraudulent concealment are: "(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." *Kaldenbach v. Mutual of Omaha Life Ins. Co., 178 Cal. App. 4th 830, 850, 100 Cal. Rptr. 3d 637 (2009)*; accord *Levine v. Blue Shield of California, 189 Cal. App. 4th 1117, 1126-1127, 117 Cal. Rptr. 3d 262 (2010)*.

Defendant argues that the complaint does not provide sufficient facts to satisfy the heightened pleading requirement of fraud-based claims under *Rule 9(b)*. See *Vess, 317 F.3d at 1103* ("Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged."). For example, Plaintiff does not plead facts relating to how Defendants' concealment led to his injury. Plaintiff still holds legal title to the property, is still in possession of the property, and no trustee's sale has taken place. Therefore, the complaint lacks facts indicating **[*11]** how he sustained an injury based on Defendants' actions. Accordingly, the Court concludes that the complaint does not establish a claim for fraudulent concealment, and grants Defendants' motion to dismiss this claim with thirty (30) days leave to amend.

E. Quiet Title

Under California law, a quiet title action must include: (1) a description of the property in question; (2) the basis for plaintiff's title; and (3) the adverse claims to plaintiff's title. *Cal. Code Civ. Proc. § 761.020*. A borrower may not quiet title without first paying the outstanding debt on the property. See *Miller v. Provost, 26 Cal. App. 4th 1703, 1707, 33 Cal. Rptr. 2d 288 (1994)* ("a mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee"); *Karlsen v. Am. Sav. & Loan Ass'n, 15 Cal. App. 3d 112, 92 Cal. Rptr. 851 (1971)*. The first amended complaint does not alleged that Plaintiff paid his outstanding debt obligations under the Deed of Trust. Therefore, the Court concludes that Plaintiff fails to state a claim for quiet title, and grants Defendant's motion to dismiss the claim to quiet title with thirty (30) days leave to amend.

F. Declaratory Relief

The Declaratory Judgment Act provides, in relevant portion, that "[i]n a case of actual controversy within its jurisdiction. . ., any court of the United States. . . may declare the rights and other legal relations **[*12]** of any interested party seeking such declaration." *28 U.S.C. § 2201(a)*. "A 'controversy' in this sense must be one that is appropriate for judicial determination. . . A justiciable controversy is [not one] of a hypothetical or abstract character [or] one that is academic or moot. . . [It is] definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241, 57 S. Ct. 461, 81 L. Ed. 617 (1937)*. Issuing a declaratory judgment in a case without an actual controversy is an advisory opinion, which is prohibited by Article III of the United States Constitution. *Hillblom v. United States, 896 F.2d 426, 430 (9th Cir. 1990)*.

In view of the Court's determinations on Plaintiff's other causes of action, the Court concludes that the claim for declaratory relief constitutes an improper request for an advisory opinion. Accordingly, the Court grants Defendants' motion to dismiss this claim with thirty (30) days leave to amend.

III. Request For Judicial Notice

Federal Rule of Evidence 201 permits judicial notice of adjudicative facts, which are defined as facts "not subject to reasonable dispute." *Fed. R. Evid. 201(b)*. A judicially noticed fact must be one that is not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy **[*13]** cannot reasonably be questioned. Id. A court may take judicial notice of "[r]ecords and reports of administrative bodies." *Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994)*; see also *Interstate Natural Gas Co. v. S. Cal. Gas Co., 209 F.2d 380, 385 (9th Cir. 1953)* ("We may take judicial notice of records and reports of administrative bodies.").

Defendants request this Court to take judicial notice of seven documents: (1) A Deed of Trust (Doc. No. 5-2 at 5-33, "Exhibit 1"); (2) A Loan Modification Agreement (Id. at 34-39, "Exhibit 2"); (3) A Notice of Default and Election to Sell (Id. at 40-43, "Exhibit 3"); (4) A Substitution of Trustee (Id. at 44-46, "Exhibit 4"); (5) An Assignment of Deed of Trust (Id. at 47-48, "Exhibit 5"); (6) A Notice of Trustee's Sale (Id. at 49-50, "Exhibit 6"); and (7) A Voluntary Petition filed in the United States Bankruptcy Court, Southern District of California (Id. at 51-57, "Exhibit 7"). Exhibits 1-6 are documents that have been officially recorded at the San Diego County Recorder's Office. Exhibit 7 is a copy of petition filed with U.S. Bankruptcy Court for the Southern District of California. Therefore, these documents are records of administrative bodies and courts, each of which are readily ascertainable and verifiable. Accordingly, the Court takes judicial notice of Defendants' Exhibits 1-7.

Conclusion

Based on the foregoing, **[*14]** the Court grants Defendants' motion to dismiss Plaintiff's complaint. The Court permits Plaintiff to file an amended complaint, if he can cure the deficiencies noted in this Order, within thirty (30) days of this Order.

IT IS SO ORDERED.

DATED: April 2, 2012

/s/ Marilyn L. Huff

MARILYN L. HUFF, District Judge

UNITED STATES DISTRICT COURT

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In re Processed Egg Prods. Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

April 4, 2012, Decided; April 4, 2012, Filed

MDL No. 2002 08-md-02002

Reporter

2012 U.S. Dist. LEXIS 48321 *; 2012-1 Trade Cas. (CCH) P77,853

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION;THIS DOCUMENT APPLIES TO: ALL INDIRECT PURCHASER PLAINTIFF ACTIONS

Subsequent History: Motion denied by, Motion granted by, in part, Motion denied by, in part, Count dismissed at, Without prejudice *In re Processed Egg Prods. Antitrust Litig., 2012 U.S. Dist. LEXIS 57846 (E.D. Pa., Apr. 24, 2012)*

Prior History: *In re Processed Egg Prods. Antitrust Litig., 2012 U.S. Dist. LEXIS 37265 (E.D. Pa., Mar. 19, 2012)*

Core Terms

egg, claim for damages, fraudulent concealment, concealment, unjust enrichment, allegations, common law, judicial notice, conspiracy, prices, recommendations, affirmative act, Certification, guidelines, Antitrust, logo, statute of limitations, tolling, animal, factual allegations, motion to dismiss, inquiry notice, scientific, material fact, Purchaser, parties, hens, increased price, limitations, misleading

Counsel: **[*1]** For IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION, IN RE:: IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION.

For SANDRA A. JESKIE, Special Master: SANDRA A. JESKIE, LEAD ATTORNEY, DUANE, MORRIS LLP, PHILADELPHIA, PA.

Judges: GENE E.K. PRATTER, United States District Judge.

Opinion by: GENE E.K. PRATTER

Opinion

MEMORANDUM

GENE E.K. PRATTER, J.

I. Introduction

Defendant egg producers and trade groups move for the dismissal of claims for damages outside the statutes of limitations applicable in the various jurisdictions that recognize the Indirect Purchaser Plaintiffs' antitrust, consumer protection, and unjust enrichment claims in the Second Consolidated Amended Class Action Complaint (hereinafter, the "IPSAC").[1] Specifically, the motion seeks partial dismissal of 33 state law claims emanating from 17 different jurisdictions.[2] For the following reasons, the Court grants the motion without prejudice.

II. Background, Factual Allegations, and Legal Standards

The background of this litigation and the core factual allegations contained in the IPSAC are set forth at length in the Court's *March 19, 2012 Opinion and Order, 2012 U.S. Dist. LEXIS 37265, 2012 WL 935669* (Doc. Nos. 631 and 632). That Opinion also discussed the applicable legal standards for reviewing a motion to dismiss in this case, including the relevance of the *Erie* doctrine's precepts to the Court's consideration of the Plaintiffs' state law claims, as well as *Federal Rules of Civil Procedure 8*, *9(b)*, and *12(b)(6)*. Therefore, the Court need not repeat that legal framework in this Memorandum except to incorporate the prior Opinion by reference. *See* *2012 U.S. Dist. LEXIS 37265, [WL] at *1-6*. Insofar that any such previously-discussed matters arise in-depth as a predicate to the Court's rulings here, the Court will include more explicit discussion as appropriate.

III. Legal Discussion

In their briefing, Defendants have summarized the relevant limitations periods governing the 33 state law claims, which range from three to six years. *See* Defs.' Mot. at 2-3 & n.4. The Defendants have calculated their proposed limitations dates based **[*4]** upon the filing dates of the first direct purchaser suit consolidated in these proceedings to have first asserted claims under the various state laws. *See id.* at 2 & n.2; Defs.' Proposed Order at 1-3.

Plaintiffs have not raised any objections to those limitations periods or the calculation of the statutes of limitations dates as to each state claim at issue. Plaintiffs also have not contended as a general matter that those statutes of limitations, as calculated and absent any applicable equitable tolling, would not curtail their claims for damages.

The parties' focal point of dispute, and the kernel of the motion to dismiss, concerns whether Plaintiffs sufficiently alleged facts that demonstrate their entitlement to equitably toll the various state statutes of limitations pursuant to those jurisdictions' respective fraudulent concealment doctrines, or comparable equitable tolling doctrines.[3] The

[1] The Defendants filed their Motion to Dismiss the Indirect Purchaser Plaintiffs' Claims for Damages Barred by the Statutes of Limitations of Various States at Docket No. 331. The Plaintiffs' response is at Docket No. 353, and the Defendants' reply brief is at Docket No. 384. The parties also submitted several supplemental **[*2]** materials to the Court. The transcript of the oral argument on the motion is contained in the record at Docket No. 597.

[2] Certain claims in the IPSAC are not, or are no longer, subject to this motion. Defendants have not moved to dismiss as time-barred the Sherman Act claim, the Wisconsin antitrust and unjust enrichment claims, the California unjust enrichment claim, and all claims brought under the laws of Massachusetts, Nevada, New Mexico, and West Virginia. *See* Defs.' Mot. at 3 n.4. Certain other claims also are not subject to this motion: those state claims which the Court dismissed by granting in part the Defendants' prior Motion—the consumer protection claims arising under the laws of Kansas and New York, the North Dakota unjust enrichment claim, and the Plaintiffs' Utah Antitrust Act claim with respect to alleged damages occurring prior to May 1, 2006—and those claims that Plaintiffs voluntarily withdrew, namely, all claims brought under Maine or Puerto Rico law, and the consumer protection claims brought under the laws of Michigan, South Dakota, and Wisconsin. To the extent that the motion *sub judice* sought to dismiss one of these claims that are no longer a part of the case, **[*3]** the Court does not address that aspect of this motion.

[3] To the **[*5]** extent that the Plaintiffs rely on equitable tolling doctrines other than the fraudulent concealment doctrine for certain jurisdictions (such as jurisdictions that recognize multiple equitable tolling doctrines, or those jurisdictions that embrace the principles of "fraudulent concealment" within the manifolds of another equitable tolling doctrine, such as, by way of example, equitable estoppel, or those that might incorporate the discovery rule into the fraudulent concealment doctrine), the parties appear to posit that the principles and standards that the Motion places at issue, and as discussed in this Memorandum, as to fraudulent concealment are, as a general matter, equally applicable across jurisdictions without consideration for the actual doctrine at issue. *See, e.g.,* Tr. at 16-17; 40-43; 54. In light of the Court's ruling here, which focuses on the actual facts pled in

parties implicitly agree that if Plaintiffs adequately plead facts in support of fraudulent concealment pursuant to the constraints of *Rules 12(b)(6)* and *9(b)*, then the doctrine functions so that Plaintiffs may pursue their state claims for recovery of damages during the tolled period.

The Court previously addressed the specific statute of limitations principles and the federal fraudulent concealment doctrine appurtenant to the Direct Purchaser Plaintiffs' Sherman Act claim in a prior decision. *See* *Nov. 30, 2011 Opinion and Order, 2011 U.S. Dist. LEXIS 139995, 2011 WL 5980001* (Doc. Nos. 593 and 594). The Court references here the explanation in that decision of the operation of certain legal precepts which the parties appear to presume are generally (although not necessarily specifically) applicable to the various jurisdictions' jurisprudence concerning statutes of limitations and the fraudulent concealment doctrine.

The Defendants' motion can be distilled into three separate categories of arguments concerning (1) judicial notice of documents external to the IPSAC, (2) failure to plead affirmative acts of concealment, and (3) whether Kansas law recognizes the fraudulent concealment doctrine. The Court addresses each in turn.

A. Requests for Judicial Notice

Defendants argue that the "Plaintiffs' allegations and judicially noticeable materials establish that, before and throughout the alleged class period, **[*7]** Defendants openly and publicly discussed the mechanisms purportedly used to implement the so-called conspiracy—the UEP Certification program, the UEP recommendations for flock reductions, and egg exports." Defs.' Mot. at 5 (footnote omitted). Defendants urge the Court to take judicial notice of "newspaper and magazine articles not referenced in Plaintiffs' complaints" for the "fact [of] that press coverage . . . without regard to the truth of their contents" so as to determine whether they constitute "storm warnings" that might trigger inquiry notice. *Id.* at 5 n.7 (emphasis omitted) (internal quotation marks omitted). According to Defendants, "[t]hese publications demonstrate that Defendants repeatedly, routinely, and freely discussed the facts underlying Plaintiffs' supposedly 'concealed' conspiracy." *Id.* at 6. Defendants contend that the publications ultimately demonstrate that "Defendants concealed nothing," and that the various fraudulent concealment doctrines of each jurisdiction at issue are not available to Plaintiffs for purposes of tolling the statutes of limitations. *Id.* at 11.

Plaintiffs do not object to the Defendants' request for judicial notice *per se,* but instead claim **[*8]** that the publications "to which the Defendants point in the Motion *are* the fraud." Pls.' Resp. at 2 (emphasis in original). Indeed, Plaintiffs appear to make their own request for judicial notice of a document called the "Assurance of Voluntary Compliance," which Plaintiffs have proffered for the Court's consideration as a means of illustrating the "misleading nature of Defendants' conduct." Pls.' Resp. at 2 (describing the document).

The Court previously considered similar requests for judicial notice in conjunction with a motion to dismiss the Direct Purchaser Plaintiffs' Second Consolidated Amended Class Action Complaint on the basis of a statute of limitations and fraudulent concealment. In that pleading, the Direct Purchasers had alleged "certain facts drawn from excerpted quotes of various publicly disseminated egg industry publications and regional newspapers between 1999 and September 24, 2004," and Defendants urged the Court to take judicial notice of those publications. *Nov. 30, 2011 Opinion and Order, 2011 U.S. Dist. LEXIS 139995, 2011 WL 5980001, at *5*. The Court declined, recognizing that "as a general matter, 'a district court ruling on a motion to dismiss may not consider matters extraneous to the **[*9]** pleadings.'" *2011 U.S. Dist. LEXIS 139995, [WL] at *6* (quoting *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997))*.

The Court also explained that "even if the cited articles were 'sources whose accuracy cannot reasonably be questioned' and concerned matters that are 'capable of accurate and ready determination,' the articles ought not be relied upon at this stage of the litigation to determine whether or not Defendants concealed the conspiracy"

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the IPSAC, the Court need not explore the distinctions between other equitable tolling doctrines and fraudulent concealment generally, or specifically as to any particular jurisdiction. Nonetheless, as this litigation proceeds and insofar that jurisdiction-specific laws on equitable tolling may arise again, **[*6]** the parties will need to be explicit as to what doctrine(s) in a given jurisdiction are at issue.

because such consideration would constitute a merits inquiry, which is appropriate for another, subsequent stage of the litigation. *Id.*

Insofar as the Court could properly consider the publications for the purpose of establishing that their content was publicly available, the Court nonetheless declined to take judicial notice of their contents. *2011 U.S. Dist. LEXIS 139995, [WL] at *7*. The Court observed that the exercise of ascertaining whether the Direct Purchaser Plaintiffs were on inquiry notice requires a fact intensive inquiry as to "whether a plaintiff should have known of her claim and the reasonableness of a plaintiff's investigation." *Id.* The Court concluded that judicial notice of the documents in question would be unproductive because "there are no grounds in the [complaint] **[*10]** from which to conclude that Plaintiffs contemporaneously knew of, or reasonably should have been expected to know of, those documents." *2011 U.S. Dist. LEXIS 139995, [WL] at *8*. The Court held that "because the articles proffered by Defendants would not lead to productive avenues of analysis on this motion, the Court finds it appropriate to limit its consideration to the [complaint] itself." *Id.*

Considering the IPSAC's entire allegations and recognizing that the parties' proffered documents are not a part of or attached to the IPSAC, nor are those documents integral to the Plaintiffs' claims, the Court concludes that its earlier rationale, as just summarized, equally applies to reject both parties' arguments for judicial notice here. To reiterate, taking judicial notice of the documents would constitute an impermissible merits inquiry and/or an unfruitful inquiry notice analysis.[4] Therefore, the Court declines to take judicial notice of the Defendants' proffered publications as well as the Plaintiffs' proffered document, and determines that those materials do not provide appropriate grounds for concluding that the fraudulent concealment doctrines of the various jurisdictions are inapplicable or vice versa.

B. Failure to Plead Affirmative Acts of Concealment

As a generalized legal principle, fraudulent concealment is understood to involve a defendant concealing the wrong at issue which prevents the plaintiff from discovering, with due diligence, her claim sooner. *See generally* 2 C. Corman, *Limitation of Actions* § 9.7.1 (1991); John P. Dawson, *Fraudulent Concealment and Statutes of Limitation,* 31 Mich. L. Rev. 875, 878-81 (1933). All parties agree that the fraudulent concealment or equitable tolling doctrine in each of the jurisdictions at issue here require Plaintiffs to plead facts that demonstrate that Defendants performed affirmative acts of concealment. *See* **[*12]** Defs.' Mot. at 11; Pls.' Resp. at 3-4. However, the parties dispute whether Plaintiffs have failed to sufficiently plead this element as to each of the 17 jurisdictions at issue: Arizona, California, the District of Columbia, Florida, Iowa, Kansas, Michigan, Minnesota, Mississippi, Nebraska, New York, North Carolina, North Dakota, South Dakota, Tennessee, Utah, and Vermont.

Yet, despite agreeing that each jurisdiction requires "an affirmative act of concealment" element, the parties provide limited reference to the law concerning this element in each of the jurisdictions at issue. Still, the parties jointly appear to posit that the laws of each of the 17 jurisdictions can be abstracted into a single encapsulation of "law." However, this "cheaper by the dozen" approach verges on forging a kind of "common law" that is firmly discouraged by the *Erie* doctrine. Furthermore, neither party has presented any grounds—let alone well-documented, appropriate grounds—to treat all 17 jurisdictions' laws identically. Indeed, the parties' own arguments suggest there are jurisdiction-specific variations to this element that conflict with the parties' endorsement of a common "law" applicable **[*13]** to all jurisdictions.[5]

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[4] As will **[*11]** be discussed, *infra,* the parties have not discussed the specific laws of the various jurisdictions at issue with respect to this Motion, and, thus, they present no occasion for the Court to consider whether *vel non* a plaintiff's inquiry notice and reasonable diligence are operative principles of fraudulent concealment in those jurisdictions. Of course, to the extent that those jurisdictions might not embrace such principles, the Defendants' arguments in favor of the judicial notice of the publications would be further diminished.

[5] As an example, Defendants generally describe this element of fraudulent concealment in two distinct ways: 1) an affirmative act "to conceal Plaintiffs' *causes of action,*" Defs.' Mot. at 11 (emphasis added); or 2) an affirmative act that "conceals an *element* of the claim," Defs.' Reply at 2 (emphasis added), *see also id.* at 4-5, 7 (discussing same). Defendants ostensibly take the position

In order to address the Defendants' motion to dismiss, the most conservative—indeed, hard boiled—analysis would require separately asking whether the IPSAC sufficiently pleads the "affirmative act of concealment" element as to **[*15]** each individual jurisdiction's fraudulent concealment claim.[6] However, given that the parties themselves eschewed this task, the Court will not—and need not, under the circumstances here—assume the burden of meaningfully articulating the 17 jurisdictions' laws as to this element.

Instead, the Court observes that, notwithstanding that they are each unique legal jurisdictions and their respective "affirmative acts of concealment" elements may have additional and differing demands, the 17 jurisdictions can be divided into two categories as classified by one of two common *minimum* standards. That is, a given jurisdiction *at minimum* requires one of the following two standards: either that (a) a defendant concealed **[*16]** a material fact about the alleged wrong, *i.e.,* a fact that is material to the underlying claim at issue, to wit, a state antitrust, consumer protection, or unjust enrichment claim, *or* (b) a defendant concealed a fact that would prompt a plaintiff's inquiry notice, *i.e.,* information that might alert an individual to inquire into and discover whether a wrong exists.[7]

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that there is no meaningful difference between these characterizations. However, Defendants cite case authority as to the 17 jurisdictions at issue, which, as cited, suggests that many of the jurisdictions take differing approaches to this element—approaches that do not necessarily conform with the Defendants' singular broad characterization of the element. *See* Defs.' Mot. at 11-12 n.14. The Defendants' cited authorities illustrate that the first element of fraudulent concealment can involve consideration of the defendant's conduct in terms of whether the conduct, *inter alia,* occurred after the wrong transpired, was "calculated to operate" in a certain manner, or was the defendants' ultimate object.

Plaintiffs do not raise any targeted objections to the jurisdiction-specific case **[*14]** law cited by Defendants. Rather, Plaintiffs cite several federal court decisions that generally appear to have addressed matters relating to fraudulent concealment under federal law rather than the jurisdictions at issue in their claims. However, in contrast to the Defendants' position, the tenor of the Plaintiffs' arguments suggest that the 17 jurisdictions require that the alleged affirmative acts of concealment conceal *facts* about the Defendants' purported conduct as a general matter, rather than concealing facts that give rise to a claim or an element of that claim. Indeed, according to Plaintiffs, to establish this element, any facts concealed would merely need to be those that would prompt the Plaintiffs' inquiry notice, as opposed to facts that give rise to a cause of action. *See, e.g.,* Tr. at 40 ("Does lying about what you are doing to try and calm people to relax, is that a pretextual reason[.] [S]hould that create [grounds for] equitable tolling.").

[6] Indeed, when the Court asked the parties about the omission of jurisdiction-by-jurisdiction analyses in their papers, the parties appropriately conceded that a jurisdiction-by-jurisdiction analysis would have been appropriate. Tr. at 16:10-11 (responding "to a certain extent, yes" to the question of whether a state-by-state analysis of the law of concealment is necessary); *id.* at 43:1 (remarking that it "may have been a legal mistake" not to engage in a state-by-state analysis).

[7] *See* *Ulibarri v. Gerstenberger, 178 Ariz. 151, 871 P.2d 698, 709 (Ariz. App. Ct. 1993)* ("The wrongful concealment sufficient to toll a statute of limitations requires a positive act by the defendant taken for the purpose of preventing detection of the cause of action."); **[*17]** *Sanchez v. South Hoover Hosp., 18 Cal. 3d 93, 132 Cal. Rptr. 657, 553 P.2d 1129, 1133-34 (Cal. 1976)* ("It has long been established that the defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations . . . ."); *Bernson v. Browning-Ferris Indus., 7 Cal. 4th 926, 30 Cal. Rptr. 2d 440, 873 P.2d 613, 616 n.3 (Cal. 1994)* ("The rule of fraudulent concealment is applicable whenever the defendant intentionally prevents the plaintiff from instituting suit. . . ."); *Drake v. McNair, 993 A.2d 607, 619 (D.C. 2010)* ("It is well established that affirmative acts employed by a party to fraudulently conceal either the existence of a claim or facts forming the basis of a cause of action toll the running of limitations periods." (quoting *Estate of Chappelle v. Sanders, 442 A.2d 157, 158 (D.C.1982))*); *Berisford v. Jack Eckerd Corp., 667 So.2d 809, 811 (Fla. App. Ct.1995)* ("'[T]he statute of limitations will be tolled when it can be shown that fraud has been perpetrated on the injured party sufficient to place him in ignorance of his right to a cause of action or to prevent him from discovering his injury.'. . . In order to establish fraudulent concealment sufficient to toll the statute, the plaintiff must show 'both successful **[*18]** concealment of the cause of action and fraudulent means to achieve that concealment.'" (quoting *Nardone v. Reynolds, 333 So.2d 25, 37 (Fla. 1976)*, *modified on other grounds,* *Tanner v. Hartog, 618 So.2d 177 (Fla. 1993)))*; *Langner v. Simpson, 533 N.W.2d 511, 522 (Iowa 1995)* ("Under Iowa law, proof of fraudulent concealment requires evidence of affirmative steps independent of and in addition to the original wrongdoing which prevented the plaintiff from discovering the wrongdoing."); *Christy v. Miulli, 692 N.W.2d 694, 702 (Iowa 2005)* ("The foundational elements of equitable estoppel are well established: (1) The defendant has made a false representation or has concealed material facts . . . . With respect to the first element, a party relying on the doctrine of fraudulent concealment must prove the defendant did some affirmative act to conceal the plaintiff's cause of action independent of and subsequent to the liability-producing conduct." (citations omitted)); *Friends Univ. v. W. R.*

Plaintiffs must meet the minimum threshold as to each jurisdiction at issue for purposes of Rule 8. Furthermore, another common standard by which all of the Plaintiffs' fraudulent concealment claims must be assessed is Rule 9(b).[8] Based upon these standards, the Court determines that Plaintiffs have failed to adequately plead the 17

Grace & Co., 227 Kan. 559, 608 P.2d 936, 941 (Kan. 1980) ("To constitute concealment of a cause of action within the general rule tolling the statute of limitations on that ground the concealment must be fraudulent or **[*19]** intentional and, in the absence of a fiduciary or confidential relationship, there must be something of an affirmative nature designed to prevent, and which does prevent, discovery of the cause of action. There must be some actual artifice to prevent knowledge of the fact, some affirmative act of concealment, or some misrepresentation to exclude suspicion and prevent injury." (internal quotation marks and citation omitted)); Bowen v. Westerhaus, 224 Kan. 42, 578 P.2d 1102, 1105 (Kan. 1978) ("A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. It must also show it rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts. . . ." (quoting United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, Inc., 221 Kan. 523, 561 P.2d 792, 795 (Kan. 1977))); Weast v. Duffie, 272 Mich. 534, 262 N.W. 401, 402 (Mich. 1935) ("The fraudulent concealment which will postpone the operation of the statute must be the concealment of the fact that plaintiff has a cause of action."); Draws v. Levin, 332 Mich. 447, 52 N.W.2d 180, 183 (Mich. 1952) **[*20]** ("[T]he fraudulent concealment which will work a postponement of the statute must be a concealment produced by affirmative acts or misrepresentations. A mere silence on the part of the defendant is not enough. The plaintiff must show some arrangement or contrivance on the part of the defendant, of an affirmative character, designed to prevent subsequent discovery."); Hydra-Mac, Inc. v. Onan Corp., 450 N.W.2d 913, 918 (Minn. 1990) (recognizing that fraudulent concealment tolls the statute of limitations "if it is the very existence of the facts which establish the cause of action which are fraudulently concealed" (quotations omitted)); Miss. Code Ann. § 15-1-67 ("If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered."); Andres v. McNeil Co., Inc., 270 Neb. 733, 707 N.W.2d 777, 787 (Neb. 2005) ("[I]n order to successfully assert the doctrine of fraudulent concealment and thus estop the defendant from claiming a statute of limitations **[*21]** defense, the plaintiff must show the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering the [misconduct]." (internal quotations omitted)); Rucker v. Ward, 131 Neb. 25, 267 N.W. 191, 195 (Neb. 1936) (observing that "defendant cannot avail himself of the statutes of limitation as a defense," when defendant "wrongfully conceals a material fact necessary to the accrual of a cause of action against him, and such concealment causes the opposite party to delay the filing of suit," (internal quotations omitted)); Putter v. North Shore University Hosp., 7 N.Y.3d 548, 858 N.E.2d 1140, 1142, 825 N.Y.S.2d 435 (N.Y. 2006) ("[E]quitable estoppel will preclude a defendant from using the statute of limitations as a defense 'where it is the defendant's affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding.' A plaintiff seeking to apply the doctrine of equitable estoppel must 'establish that subsequent and specific actions by defendants somehow kept [him or her] from timely bringing suit.'" (citations omitted)); In re Covington's Will, 252 N.C. 546, 114 S.E.2d 257, 260 (N.C. 1960) **[*22]** ("[T]he essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert . . . ."); Roether v. National Union Fire Ins. Co., 51 N.D. 634, 200 N.W. 818, 819 (N.D. 1924) ("[T]here must be some affirmative act or representation designed to prevent, and which does in fact prevent, discovery of the cause of action, or lulls suspicion as to its existence."); Bruske v. Hille, 1997 SD 108, 567 N.W.2d 872, 879 (S.D. 1997) ("In the absence of some trust or confidential relationship between the parties there must be some affirmative act or conduct on the part of the defendant designed to prevent, and which does prevent, the discovery of the cause of action. Mere silence, in the absence of a duty to speak, is not ordinarily sufficient." (quoting Koenig v. Lambert, 527 N.W.2d 903, 905-06 (S.D.1995)); Benton v. Snyder, 825 S.W.2d 409, 414 (Tenn. 1992) ("Generally, a plaintiff seeking to establish fraudulent concealment must prove that the defendant **[*23]** took affirmative action to conceal the cause of action and that the plaintiff could not have discovered the cause of action despite exercising reasonable diligence."); Berenda v. Langford, 914 P.2d 45, 51 (Utah 1996) ("[W]hen a plaintiff alleges that a defendant took affirmative steps to conceal the plaintiffs cause of action, . . . the plaintiff can avoid the full operation of the discovery rule by making a prima facie showing of fraudulent concealment and then demonstrating that given the defendant's actions, a reasonable plaintiff would not have discovered the claim earlier."); 12 V.S.A. § 555 ("When a person entitled to bring a personal action is prevented from so doing by the fraudulent concealment of the cause of such action by the person against whom it lies, the period prior to the discovery of such cause of action shall be excluded in determining the time limited for the commencement thereof.").

[8] The parties agree that in pleading fraudulent concealment the Plaintiffs must meet the requirements of Rule 9(b). *See also* Byrnes v. DeBolt Transfer, Inc., 741 F.2d 620, 626 (3d Cir. 1984) ("We agree, **[*24]** of course, that fraud, and thus fraudulent

fraudulent concealment claims because the alleged facts do not sufficiently demonstrate that Defendants concealed a material fact or a fact that would prompt a plaintiff's inquiry notice about the alleged wrong for purposes of *Rules 8* and *9(b)*.

Plaintiffs contend that the Defendants' "affirmative acts of concealment" misrepresented the reasons for increased prices of eggs that allegedly occurred as a result of the Defendants' purported conspiracy. Plaintiffs argue that:

> Defendants issued misleading and false statements regarding the legitimacy of their actions and the cause of increased egg prices—in essence the statements concealed the conspiracy to restrict supply. Properly understood, the truly public statements . . . *are* the fraud. Defendants . . . launched a scheme . . . to explain the supply reductions using the pretexts of animal care and market conditions.

Pls.' Resp. at 2 (emphasis in original).

Plaintiffs claim that each of their 17 claims of fraudulent concealment, and more specifically, each of the elements of "affirmative acts of concealment," arise from the same factual allegations in the IPSAC. According to Plaintiffs, the alleged facts that demonstrate the Defendants' misrepresentations include:

> (a) "stamps" on egg cartons, (*E.g.,* ¶¶ **[*25]** 224, 298-300), (b) marketing and comments to the public and distributors attributing the price increases to legitimate actions or market factors (*E.g.,* ¶¶ 172, 182, 184, 185, 187, 238, 296-300, 304-07, 405; *see also* [Defs.'] Motion at 8-11), and (c) the fact that the statements and standards as communicated to the public were misleading and pretextual (*E.g.,* ¶¶ 192, 196, 239, 298-301, 304-07).

Id. at 9.

The Court will discuss the adequacy of these factual allegations for pleading purposes. The Court will assume, *arguendo,* that the reasons for the alleged offending increased egg prices, such as, by way of example, the "coordinated efforts" undertaken by Defendants to advance their conspiracy, constitute either material facts as to the state antitrust, consumer protection, and unjust enrichment claims at issue, or a fact that would prompt a plaintiff's inquiry notice into those claims.[9]

To start, the Court determines that many of the factual allegations that Plaintiffs contend demonstrate the Defendants' misrepresentations **[*26]** or false statements fail to satisfy *Rule 9(b)*'s particularity requirement. For example, the IPSAC's allegations as to the UEP Certification Program's "logo" or "stamp" are insufficiently particular. The IPSAC contains no specific allegations concerning the use of the logo in terms of what kinds of egg cartons were stamped, who stamped them, when the stamp was used, and so forth. As to what "message" the logo communicated, it can be fairly inferred from the IPSAC that the logo was supposed to indicate to its intended audience: "(a) the level of care given to hens under the [UEP Certification Program] standards, (b) the nature of the auditing process used to ensure compliance with the standards, (c) the role of the scientific advisory committee in developing the standards, (d) the comparative benefits of eggs produced by farmers implementing the standards, and (e) the comparative quality of animal care for hens in UEP-certified facilities." IPSAC ¶ 299. However, it is unclear from the IPSAC what the actual substance of the logo's "message" was in terms of type of alleged care, benefits, and so forth, and thus whether such a "message" was actually misleading.

Although Plaintiffs have alleged **[*27]** that the UEP entered into agreements with the Federal Trade Commission ("FTC") and 16 states concerning the logo and the UEP Certification program, those allegations do not do the legwork that the Plaintiffs attempt to assign them. The allegations concerning the FTC simply outline that following an FTC investigation into the "use of the name 'Animal Care Certified' (the original name for the Certification Program) as being potentially misleading," UEP agreed to no longer use the logo on egg cartons. *Id.* ¶ 298. This

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concealment, must be pleaded with particularity." (citing *Fed. R. Civ. P. 9(b)* and *Walters v. Ditzler, 424 Pa. 445, 227 A.2d 833 (1967))*).

[9] In light of the Court's ruling here, the Court need not decide at this time whether such alleged facts are material as to each of the state claims that Plaintiffs assert.

allegation does not inexorably suggest, contrary to the Plaintiffs' insinuation otherwise, that the use of the logo was ever misleading; instead, this allegation stands only for what it states, that at some point the logo was no longer used on egg cartons.

The same is equally true for the IPSAC's allegations concerning the Plaintiffs' reliance on allegations that the UEP entered into an Assurance of Voluntary Compliance ("AVC") with 16 states. Under the AVC, UEP allegedly agreed to "not misrepresent, directly or by implication, the level or type of care given to hens under the standards; the role of any scientific advisory committee in devising the standards ultimately adopted **[*28]** by UEP; or the comparative quality of animal care for hens in UEP certified facilities." *Id.* ¶ 300. This allegation only signifies that UEP agreed not to engage in certain conduct, and thus does not provide any factual insight as to the actual nature of the Defendants' use of the logo or similar conduct prior to entering into the agreement.

Likewise, Plaintiffs have alleged certain other general facts as to the nature of the Defendants' alleged misrepresentations and false statements that are devoid of precise allegations of date, time, or place, fail to identify the speaker or the audience, provide no indication as to the medium through which the statements were conveyed, and have no other measure of precision. These include the IPSAC allegations that:

• ". . . Defendants misleadingly promoted the UEP Certified Program to retailers and consumers nationwide as making for better eggs." *Id.* ¶ 172.

• "Defendants . . . falsely represented to Plaintiffs and members of the Class that the prices they paid for shell eggs were fair and competitive." *Id.* ¶ 304.

• The "Defendants' false representations and public statements attributed price increases to normal market conditions and factors other **[*29]** than their illegal conspiracy." *Id.* ¶ 305.

• Defendants gave "explanations for the pricing behavior of [eggs]" which "in some instances . . . involved proprietary or otherwise non-public information within Defendants' exclusive control." *Id.* ¶ 305. "Such explanations made by the Defendants include assertions that they could not effectively respond to supply reductions as a result of limitations imposed by animal husbandry guidelines that had the effect of reducing cumulative cage space, as well as their attributing price increases to other external factors including supply-side wear-and-tear, the increased price of fuel and feed, and the upward adjustment of other costs of production." *Id.* ¶ 306.

• The "Defendants' illegal price-fixing and supply control conspiracy . . . was undertaken solely for financial gain and not for humane reasons as Defendants repeatedly claimed." *Id.* ¶ 307.[10]

• "Defendants, by the design, intent and nature of their conspiracy failed to reveal material facts regarding the price and supply of shell eggs and egg products . . . ." *Id.* ¶ 405.

There are simply no particularized facts in the IPSAC that serve to substantiate these particular allegations. The IPSAC contains **[*30]** no allegations that any of the Defendants made any specific statements that might appropriately correspond with any of these more general factual allegations.

Rather, there are specific facts in the IPSAC—facts that Plaintiffs also contend demonstrate the Defendants' misrepresentations or false statements—that undercut some of these allegations. For example, Plaintiffs allege that:

> In a December 11, 2003 article [in the *Buffalo News*], a UEP member admitted that the UEP's certification program was increasing egg prices:

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[10] The Court assumes that through this allegation Plaintiffs did not intend to imply that they were contemporaneously aware of the alleged conspiracy at the time it supposedly was occurring. It appears that Plaintiffs meant to allege that the "coordinated efforts" that advanced the conspiracy, to the extent Plaintiffs contemporaneously knew of them, such as the UEP Certification Program guidelines, were "undertaken solely for financial gain and not for humane reasons as Defendants repeatedly claimed."

> Numerous industry experts have pointed to the popularity of lowcarbohydrate, high-protein diets, but Scott Kreher, a partner in Kreher's Farm Fresh Eggs in Clarence, believes **[*31]** the spike is due more to diminished supply than diet-fueled demand.
>
> "Eggs are primarily a non-elastic demand item. People always need eggs," said Kreher, whose egg farm supplies many local grocers. "What's really affecting egg prices are the houses chickens are being placed in."
>
> Specifically, new guidelines adopted by United Egg Producers, a national cooperative of egg producers to which Kreher's belongs, have gradually raised the amount of space it recommends each egg-laying chicken be given inside its housing—from the current industry average of 53 square-inches per bird to 61 square-inches in April of 2005.

Id. ¶ 182 (emphasis omitted). This allegation stands in direct contrast to the Plaintiffs' more general allegation that "Defendants' false representations and public statements attributed price increases to normal market conditions and factors other than their illegal conspiracy." *Id.* ¶ 305. Indeed, Mr. Kreher's alleged comment specifically identifies an alleged "coordinated effort" that purportedly advanced the Defendants' conspiracy, *i.e.,* the UEP Certification program guidelines, as the reason for the alleged increased egg prices.

As to the few specific allegations concerning **[*32]** the Defendants' purported comments that were published in regional newspapers or made during Congressional testimony—allegations that Plaintiffs claim are illustrative of the Defendants' misrepresentations or false statements—those allegations are not sufficient to plausibly suggest that Defendants concealed a material fact or a fact that would prompt a plaintiff's inquiry notice about the alleged wrong for purposes of *Rule 8*.[11] In other words, while these allegations may pass *Rule 9(b)* muster, they fail to adequately plead the "affirmative act of concealment" element as to each jurisdiction. Mr. Kreher's comment illustrates this in that his comment spoke specifically to an alleged reason for the increased egg prices. *See id.* ¶ 183.

Indeed, the other specific Defendant statements published in regional newspapers, which Plaintiffs claim support their fraudulent concealment claims, suggest that increased egg prices were due to the cage space guidelines of the UEP Certification Program. *See id.* ¶ 184 ("In a December 13, 2003 article, Fred Adams, the CEO of Defendant Cal-Maine, acknowledged that high prices were a result of industry efforts to hold down supplies: **[*34]** 'The supplies are adequate, but just barely. . . . The industry also says production is down as new guidelines . . . have reduced the number of hens allowed in a cage.'" (alterations in original)); *id.* ¶ 185 ("Gary Bethel, an officer of several Hillandale Farms entities, was quoted in a December 13, 2003 article discussing increased egg prices, in which he explained how Hillandale Farms had reduced supply . . . ."); *id.* ¶ 187 ("The President of Defendant R.W. Sauder, Paul Sauder, expressed similar sentiments: 'The [UEP] program is one of several causes cited for the recent surge in egg prices, because it's helping to dampen supply short-term . . . .['] A key guideline, which concerns the amount of space per hen in a cage, will result in reducing the number of hens per cage from nine to seven by April 2008. Asked if that's a significant change, Sauder replied, 'Absolutely. That's a 22 percent reduction in capacity. That's huge.'" (alterations in original)). As alleged in the IPSAC, the cage space guidelines were part of the Defendants' "coordinated efforts" to advance the alleged conspiracy to decrease the supply of eggs and

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[11] Insofar that Plaintiffs contend that IPSAC Paragraph 238 falls into this category of allegations that demonstrate the Defendants' alleged misrepresentations made in regional newspaper articles, the Court does not consider it sufficient for *Rule 9(b)* purposes because it does not contain any direct quote or comment made by a Defendant, but rather entails a generalized observation attributable to "poultry experts." *See id.* ¶ 238 ("A December 2008 Star Tribune **[*33]** article identified the industry's collective actions as the cause of high prices: [T]he most significant influence on pricing may well have been the industry's own doing. Over the past two years, after a several-year slump, egg farmers have cut back on the size of their hen flocks at a pace not seen in more than 20 years. The result: Fewer hens means fewer eggs, which in turn means higher prices. In dozens of interviews, poultry experts point to the industry's move in 2002 to give hens more room as an underlying cause of higher prices. The United Egg producers (UEP), the industry's leading trade group, adopted guidelines for hens to have at least 67 square inches of space. Many producers used cages of just 50 to 60 square inches." (alteration in original).

increase egg prices, and so the Defendants' comments in these **[*35]** newspapers articles cannot be fairly said to be false or misrepresentative.[12]

Similarly, allegations concerning Gene Gregory's testimony before a House Subcommittee in regard to the role a scientific advisory committee played in developing UEP's Certification Program do not plausibly suggest that the Defendants affirmatively concealed a material fact or a fact that would prompt a plaintiff's inquiry notice as to their wrongdoings. As **[*36]** pled in the IPSAC, Mr. Gregory testified:

> [T]o ensure its objectivity the [scientific advisory] committee did not include any producers as members. The scientific committee recommended significant changes in egg production practices. UEP accepted the recommendations and today about 85% of our industry has implemented them. [ ] As the years have gone by, the scientific committee has made a number of additional recommendations. UEP has never rejected a recommendation by the committee - a remarkable track record that reflects our industry's determination to follow the best available science. [ ] The committee's recommendations became what is now know as the UEP Certified Program.

Id. ¶ 296 (alterations in original). Plaintiffs further plead that the author of the UEP Certification Program's guidelines was the UEP's "Animal Welfare" Committee and that its members drafted "the guidelines based on the economic analysis performed by Donald Bell, not based on any concern whatsoever for humane treatment of poultry." *Id.* ¶ 297. Contrary to the Plaintiffs' intimation otherwise, however, these factual allegations do not plausibly suggest that Mr. Gregory's testimony concerning the scientific committee **[*37]** was an affirmative concealment of a material fact. Indeed, it is entirely unclear from the IPSAC what the Animal Welfare Committee actually recommended in terms of "changes in egg production practices." In their arguments, Plaintiffs appear to suggest that the committee's recommendations concerned animal welfare and husbandry practices and did not contemplate economic considerations, but no allegations in the IPSAC suggest such a fact. Thus, although the IPSAC pleads that the guidelines were based upon economic analyses, such an allegation does not undermine the truth of Mr. Gregory's statement that the scientific committee's recommendations were never rejected by the UEP Animal Welfare Committee in developing the UEP Certified Program and that the committee's recommendations "became" the Program.

It follows from this assessment of the IPSAC's factual allegations that Plaintiffs have insufficiently addressed the demands of *Rules 8* and *9(b)* to plead the "affirmative act of concealment" element as to each of the 17 jurisdictions at issue. Accordingly, the Court grants the Defendants' motion to dismiss without prejudice for Plaintiffs to seek leave to amend the IPSAC as to statutes of **[*38]** limitations and equitable tolling.

C. Fraudulent Concealment Doctrine Under Kansas Law

Defendants seek the partial dismissal of the Plaintiffs' antitrust and unjust enrichment claims arising under Kansas law on the grounds that they are barred by the applicable statutes of limitation. They argue that fraudulent concealment in Kansas is unavailable to toll the statute of limitations for such claims.

However, the Court need not consider at this time whether Kansas courts recognize the fraudulent concealment doctrine in relation to the Plaintiffs' Kansas Restraint of Trade Act and unjust enrichment claims. Even assuming, *arguendo,* that the doctrine is available as to those claims, in accord with the discussion in Section B, *supra,* the

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[12] Plaintiffs do not argue that the Defendants' statements failed to enumerate all of the various coordinated efforts allegedly undertaken to advance the conspiracy, or the existence of the alleged agreement among Defendants, and that omissions of such information rise to the level of a misrepresentation.

Additionally, no parties have argued whether the Defendants' comments as published in newspaper articles (and ostensibly are excerpts from interviews with reporters) can constitute an affirmative act of concealment *made by* Defendants when the IPSAC does not allege that Defendants were the actual authors of the newspaper articles, nor plead any facts to suggest that Defendants exercised some control or influence over the drafting of the newspaper articles.

Court has determined that Plaintiffs have failed to allege facts sufficient to plead fraudulent concealment under Kansas law.

IV. Conclusion

The Court grants the Defendants' motion to dismiss without prejudice in light of the pleading deficiencies discussed herein with respect to *Rules 8* and *9(b)*. Plaintiffs may seek leave to amend their complaint as to fraudulent concealment and equitable tolling so long as they do so expeditiously.

An Order consistent with this **[*39]** Memorandum follows.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

ORDER

AND NOW, this 4th day of April, 2012, upon consideration of the Defendants' Motion to Dismiss the Indirect Purchaser Plaintiffs' Claims for Damages Barred by the Statutes of Limitations of Various States (Doc. No. 331), the Plaintiffs' response (Doc. No. 353) and the Defendants' reply (Doc. No. 384), and the parties' supplemental filings thereto, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that the Motion (Doc. No. 331) is GRANTED without prejudice.

Accordingly, the following claims for damages are dismissed without prejudice:

a. All claims for damages arising before November 17, 2004 for violation of the Arizona Antitrust Act or for unjust enrichment under Arizona common law contained in Count II.

b. All claims for damages arising before November 13, 2004 for violation of the Cartwright Act or California's Unfair Competition Law contained in Count III.

c. All claims for damages arising before November 17, 2005 for violation of the District of Columbia Consumer Protection Procedures Act or for unjust enrichment under District of Columbia common law **[*40]** contained in Count IV.

d. All claims for damages arising before November 17, 2004 for violation of the District of Columbia Antitrust Act contained in Count IV.

e. All claims for damages arising before December 2, 2004 for violation of the Florida Deceptive Trade Practices Act or for unjust enrichment under Florida common law contained in Count V.

f. All claims for damages arising before February 27, 2005 for violation of the Iowa Competition Law contained in Count VI.

g. All claims for damages arising before February 27, 2004 for unjust enrichment under Iowa common law contained in Count VI.

h. All claims for damages arising before November 17, 2005 for violation of the Kansas Antitrust Act, or for unjust enrichment under Kansas common law contained in Count VII.

i. All claims for damages arising before January 8, 2005 for violation of the Michigan Antitrust Reform Act contained in Count X.

j. All claims for damages arising before November 17, 2004 for violation of the Minnesota ***Antitrust Law*** contained in Count XI.

k. All claims arising before November 17, 2002 for unjust enrichment under Minnesota common law contained in Count XI.

l. All claims for damages arising before February 27, 2006 **[*41]** for violation of the Mississippi Antitrust Act or for unjust enrichment under Mississippi common law contained in Count XII.

m. All claims for damages arising before November 17, 2004 for violation of the Nebraska Consumer Protection Act or for unjust enrichment under Nebraska common law contained in Count XIII.

n. All claims for damages arising before November 17, 2004 for violation of the Donnelly Act contained in Count XVI.

o. All claims arising before November 17, 2002 for unjust enrichment under New York common law contained in Count XVI.

p. All claims for damages arising before November 17, 2005 for unjust enrichment under North Carolina law contained in Count XVII.

q. All claims for damages arising before November 17, 2004 for violations of the North Carolina Unfair and Deceptive Trade Practices Act contained in Count XVII.

r. All claims for damages arising before February 27, 2005 for violation of the North Dakota Antitrust Act contained in Count XVIII.

s. All claims for damages arising before January 8, 2005 for violation of South Dakota ***antitrust law*** contained in Count XX.

t. All claims for damages arising before January 8, 2004 for unjust enrichment under South Dakota common law **[*42]** contained in Count XX.

u. All claims for damages arising before January 8, 2006 for violation of the Tennessee Trade Practices Act or for unjust enrichment under Tennessee common law contained in Count XXI.

v. All claims for damages arising before February 27, 2005 for unjust enrichment under Utah common law contained in Count XXII.

w. All claims arising before December 2, 2002 for violation of the Vermont Consumer Fraud Act or for unjust enrichment under Vermont common law contained in Count XIII.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

LexisNexis

Kolon Indus. v. E.I. du Pont de Nemours & Co.

United States District Court for the Eastern District of Virginia, Richmond Division

April 5, 2012, Decided; April 5, 2012, Filed

Civil Action No. 3:11cv622

Reporter
2012 U.S. Dist. LEXIS 48722 *; 2012-1 Trade Cas. (CCH) P77,857; 2012 WL 1155218

KOLON INDUSTRIES, INC., Plaintiff, v. E.I. DU PONT DE NEMOURS AND COMPANY, Defendant.

Subsequent History: Motion granted by, in part, Motion denied by, in part *Kolon Indus. v. E.I. Du Pont de Nemours & Co., 2012 U.S. Dist. LEXIS 55982 (E.D. Va., Apr. 20, 2012)*

Affirmed by *Kolon Indus. v. E.I. Dupont De Nemours & Co., 2014 U.S. App. LEXIS 6161 (4th Cir. Va., Apr. 3, 2014)*

Prior History: *Kolon Indus. v. E.I. DuPont de Nemours & Co., 2012 U.S. Dist. LEXIS 25760 (E.D. Va., Feb. 28, 2012)*

Core Terms

para-aramid, market share, foreclosure, monopolization, customers, monopoly power, relevant market, relevant time period, summary judgment, competitor, prices, summary judgment motion, fiber, foreclosed, anticompetitive, discovery, contracts, courts, anti trust law, segments, volume, antitrust, barriers, contends, trade secret, counterclaim, deposition, non-moving, undisputed, consumers

Counsel: **[*1]** For Kolon Industries, Inc., Counter Claimant: Brian Ankenbrandt, Jeffrey Graham Randall, Michael Christopher Hendershot, Robert McHenry, Paul Hastings Janofsky & Walker LLP (CA-NA), Palo Alto, CA; Mor Wetzler, PRO HAC VICE, Carla Walworth, Daniel Bruce Goldman, William Novomisle, Paul Hastings Janofsky & Walker LLP, New York, NY; Christina Davidson Trimmer, Rhodes Beahm Ritenour, LeClairRyan PC (Richmond), Richmond, VA; Dana Johannes Finberg, SNR Denton US LLP, Palo Alto, CA; Daniel Prince, Paul, Hastings, Janofsky & Walker, Los Angeles, CA; Igor Victor Timofeyev, Scott Mitchell Flicker, Stephen B. Kinnaird, Paul Hastings Janofsky & Walker LLP, Washington, DC; Samer M. Musallam, PRO HAC VICE, Paul Hastings LLP, Washington, DC; Thomas Peter O'Brien, Paul, Hastings, Janofsky & Walker LLP, Los Angeles, CA.

For E. I. du Pont de Nemours and Company, Counter Defendant: Rodney A. Satterwhite, LEAD ATTORNEY, Brian Charles Riopelle, Kristen Marie Calleja, Thomas Moultrie Beshere, III, McGuireWoods LLP, Richmond, VA; Andrew David Kaplan, Crowell & Moring LLP (DC), Washington, DC; Astor Henry Lloyd Heaven, III, Kathleen Mary Clair, Luke Peter van Houwelingen, PRO HAC VICE, David Daniel Cross, **[*2]** Jeffrey L. Poston, Michael Joseph Songer, Shari Ross Lahlou, Stephen Matthew Byers, Crowell & Moring LLP (DC-NA), Washington, DC; Kent Alan Gardiner, Terence P. Ross, Crowell & Moring LLP, Washington, DC; Matthew Devane Fender, McGuire Woods LLP, Richmond, VA; Robyn Suzanne Gray, McGuireWoods LLP (Richmond), Richmond, VA.

Judges: Robert E. Payne, Senior United States District Judge.

Opinion by: Robert E. Payne

Opinion

MEMORANDUM OPINION

This matter is before the Court on the MOTION FOR SUMMARY JUDGMENT (Docket No. 254) filed by E.I. du Pont Nemours and Company ("DuPont"). For the reasons set forth below, DuPont's motion will be granted and the counterclaim will be dismissed with prejudice.

PROCEDURAL HISTORY

On February 3, 2009, DuPont filed a Complaint against Kolon claiming, inter alia, that Kolon had "engaged in concerted and persistent actions to wrongfully obtain DuPont's trade secrets and confidential information about [DuPont's] KEVLAR [] aramid fiber." Compl. ¶ 1. DuPont also alleged claims for conspiracy, business torts, and conversion. All claims, but the trade secret misappropriation claim, were dismissed either voluntarily by DuPont before trial or upon motion by Kolon before the case was submitted to the **[*3]** jury. Hereafter, the action by DuPont will be referred to as the "Trade Secrets Case."

On April 20, 2009, Kolon filed its ANSWER and a COUNTERCLAIM alleging that DuPont had violated *Section 2* of the Sherman Act, *15 U.S.C. § 2*, by engaging in anticompetitive activity, attempted monopolization (FIRST CAUSE OF ACTION) and monopolization (SECOND CAUSE OF ACTION). See Defs.' Answer at 35. DuPont filed a MOTION TO DISMISS the antitrust counterclaim which was granted, with leave to amend. On August 25, 2009, Kolon filed its AMENDED COUNTERCLAIM (Docket No. 50); and on August 31, 2009, Kolon filed its SECOND AMENDED COUNTERCLAIM ("SACC") (Docket No. 59) which was dismissed, again for failing to state a claim, but also with leave to amend (Docket No. 100).

Kolon declined to further amend the counterclaim and, after the Court entered an Order under *Fed. R. Civ. P. 54(b)*, Kolon appealed the dismissal of the counterclaim. On March 11, 2011, the United States Court of Appeals for the Fourth Circuit decided that Kolon adequately had pled antitrust claims of monopolization and attempted monopolization and remanded the matter for further proceedings. *E.I. du Pont de Nemours and Co. v. Kolon Industries, Inc., 637 F.3d 435 (4th Cir. 2011)*. **[*4]** The counterclaim will be referred to as the "Antitrust Case." Following remand, the parties engaged in several months of discovery. Thereafter, DuPont filed this motion for summary judgment.

BACKGROUND FACTS

The following generally applicable facts are either undisputed or recited giving all favorable inferences to Kolon, the non-moving party. Other facts will be recited in the legal analysis to which they are pertinent and those facts also are either not in dispute or recited giving all favorable inferences to Kolon.

The product at issue in the Antitrust Case, as well as the Trade Secrets Case, is para-aramid fiber. Dupont's para-aramid product is Kevlar. Kolon's corresponding product is Heracron.

Para-aramid fiber is a high-strength, non-conductive, lightweight material with no melting point and high resistance to abrasion. Production of para-aramid is very time-intensive and expensive. Typically, a seller of para-aramid must "qualify" its product with a purchaser before the product can be sold. This involves laboratory testing, in-use testing in the customer's product, and in-use testing on a larger scale, and it takes anywhere from six months to three years. See Mem. Supp. Summ. J. **[*5]** SOF ¶ 11 (uncontested fact); Opp. Summ. J. at 4-5. The para-aramid product comes in three general forms: filament (yarn), staple (yarn cut into short pieces); and pulp (yarn cut up then manipulated, which comes in both wet and dry varieties). Mem. Supp. Summ. J. SOF ¶ 1. In 1965, DuPont invented para-aramid fiber. DuPont began production of its para-aramid fiber in 1971 and trademarked its product Kevlar in 1973. Id. at 3.

Para-aramid fiber is used in, amongst other things, tires, fiber optic cables, body armor, cables, sporting goods, and automotive belts, hoses, and gaskets. DuPont was the only manufacturer of para-aramid in the United States from 1971 until the 1980s. Mem. Supp. Summ. J. SOF ¶ 2. At that time, Akzo N.V., a Dutch company, which was later purchased by Teijin Aramid, sought to introduce its para-aramid product, Twaron, into the United States market. Teijin started selling Twaron in the United States and worldwide in 1987. From 1990 to 2009, Teijin's share of the United States para-aramid market increased as DuPont's share decreased. By 2006, Teijin controlled 41 percent of the United States market, and by 2009, it controlled 44 percent of that market. See Mem. Supp. **[*6]** Summ. J. at Exhibit 21, Dr. Bamberger Rpt. at 17. Teijin surpassed DuPont in the worldwide para-aramid market in 2006. DuPont's global market share went from 91 percent in 1990 to 46 percent in 2006. Reply Mem. Supp. Summ. J. at 7 n. 3. DuPont's share in the United States went from 100 percent to 59 percent during that same time period. Mem. Supp. Summ. J. at 5 at Exhibit 21, Dr. Bamberger Rpt. at 16. By 2009, DuPont's market share in the United States had decreased further to 55 percent. Id.

In 2006, Kolon began producing its para-aramid product, Heracron, and thereafter started to market it in the United States. SACC ¶ 8 (Docket No. 2); Opp. Summ. J. at 6.[1] To that end, Kolon engaged seven sales agents in the United States: Aramid Fiber Systems (Michael Mitchell), Gane, Inc. (H.K. Jung), K-Tex, LLC (Joe Kaminsky), KTL Trading Resource (Bruce Lindley), Scarponi Textiles (David Scarponi and David Murphy), Sekka-Tex (Brian Seekamp), and Techtrade (Steve S.K. Chung). In its SACC, Kolon alleged that:

> DuPont's substantial market power is evidenced by its historic market shares, a shortage of U.S. supply and high U.S. prices for Kevlar. Upon information and belief, DuPont's market share remains **[*7]** greater than 70% of all sales by purchase volume of para-aramid. ¶ 17.
> The relevant product market is the market for para-aramid fibers . . . . ¶ 18.
> The relevant geographic market is worldwide supply of para-aramid fiber to commercial purchasers in the United States . . . . ¶ 24.
> Over the past three years, for example, DuPont committed various high volume U.S. para-aramid fiber buyers to multi-year supply agreements that required the customer to purchase from 80% to 100% of the customer's requirements from DuPont (¶ 29) . . . the depressed supplier acceptance caused by DuPont's long-term supply arrangements has reduced Kolon's sales volume and consequent market share to a level significantly lower than it would have been in the absence of these arrangements (¶ 34).

In sum, the central allegation of Kolon's case is that DuPont's use of long-term, multi-year, supply contracts with high volume para-aramid purchasers from January 2006 to April 20, 2009 (the relevant time period)[2] were evidence of attempted monopolization and monopolization of the para-aramid market (the relevant product market) in the United States (the relevant geographic market). See also *E.I. du Pont de Nemours and Co. v. Kolon Industries, Inc., 637 F.3d 435 (4th Cir. 2011)* **[*8]** (reviewing the SACC and noting that Kolon had alleged that DuPont violated the Sherman Act through the use of exclusive contracts with high-volume customers).

The foregoing facts form the basic context for the assessment of DuPont's motion for summary judgment. **[*9]** Other facts will be outlined in the discussion of the analytical component to which they relate.

THE POSITION OF THE PARTIES

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[1] Kolon had attempted for several years in the 1990's to develop a commercial para-aramid product. That effort was unsuccessful and in 1995 Kolon abandoned the effort. See Sept. 7, 2011 Trade Secrets Case Trial Tr. at 5067 (3:09cv58); Kolon's Opp. Permanent Injunction at Exhibit 3 (3:09cv58) (Docket No. 1641). It resumed the effort in approximately 2004. Id.

[2] The relevant time period begins when Kolon says it first attempted to enter the relevant market and ends on April 20, 2009, the date on which Kolon first filed the counterclaim in the Antitrust Case. Kolon does not dispute that the relevant supply agreements are those within the January 2006 to April 20, 2009 time frame. See Mem. Opp. Summ. J. at 5 n. 5. Kolon disputes whether it is confined to the 2006 to 2009 time period to show its harm for the purposes of damages calculation. That, however, is a moot point given that DuPont's motion for summary judgment will be granted.

In its First Cause of Action, Kolon alleges that, during the relevant period, DuPont monopolized the para-aramid market in the United States. DuPont raises five contentions in support of its motion for summary judgment on the monopolization claim: (1) Kolon has not proven that DuPont possessed monopoly power during the time period in question; (2) Kolon has not proven harm to competition; (3) there is no evidence of substantial market foreclosure; (4) Kolon does not have standing to pursue its claims because it cannot prove antitrust injury and because it was not a lawful competitor of DuPont during the relevant time period; and (5) Kolon cannot prove damages.

First, DuPont points out that Kolon's own expert, Dr. Bamberger, estimated that DuPont's relevant share of the market was no more than 59 percent during the relevant time period. Mem. Supp. Summ. J. at 28. According to DuPont, decisional law in the Fourth Circuit establishes that at least 70-75 percent market share is required to support a finding of monopolization. Id. (citing *R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362 (M.D.N.C. 2002)*, **[*10]** aff'd sub nom. *67 F. App'x 810 (4th Cir. 2003)*; *E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 450 (4th Cir. 2011)* (quotations omitted)). DuPont also emphasizes that Teijin, its major competitor, obtained a majority share of the global para-aramid market in 2006, and that Teijin's market share continued to increase as DuPont's market share decreased during the relevant time period. Id. at 29.

Second, DuPont argues that Kolon has not satisfied its burden of showing harm to competition. DuPont points out that Kolon's own expert testified that any harm occurred after the relevant time period; and, according to DuPont, the fact that no harm took place during the relevant time period eliminates the basis for Kolon's Counterclaim. Id. at 30.

Third, DuPont claims that none of its agreements with customers excluded Kolon from a "substantial share" of the market. Id. at 31 (citing *Chuck's Feed & Seed Co. v. Ralston Purina Co., 810 F.2d 1289, 1293 (4th Cir. 1987)* (citing *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)))*. According to DuPont, Kolon has not quantified any portion of the relevant market that DuPont allegedly foreclosed. Id. at 32. Kolon's expert, **[*11]** Dr. Bamberger, testified that the only United States customers that could have been foreclosed by DuPont are those with whom Kolon attempted to become qualified who then declined Kolon's business for reasons related to DuPont's activities. Id. at 33. DuPont points out that Kolon attempted to become qualified with nine such customers during the relevant time period, eight of which had no supply agreement with DuPont, and one of which declined Kolon's business because of Kolon's price increase. Id. at 33-34. Finally, on this point, DuPont says that, wholly apart from Dr. Bamberger's testimony, Kolon's own witnesses identified only three customers (out of nearly 1,000 commercial customers) with whom Kolon allegedly could not do business. Id. at 34.[3] According to DuPont, Kolon has not shown any market foreclosure, and it has not come close to establishing the minimum threshold. Id. (citing *R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362, 388 (M.D.N.C. 2002)*, aff'd sub nom. *67 F. App'x 810 (4th Cir. 2003)* (noting that "provisions involving foreclosure as high as 50% have been upheld")).

Fourth, DuPont contends that Kolon does not have standing because it cannot show that its commercial activities as a competitor were lawful, and also cannot show that it would have had more customers but for DuPont's allegedly unlawful supply contracts. Id. at 37. See *Schuylkill Energy Res., Inc. v. Pa. Power & Light Co., 113 F.3d 405, 415 (3d Cir. 1997)*. According to DuPont, Kolon could not make sales because of its low quality products, lack of supply, long shipment times, high prices, and practice of requiring full payment before shipping. Id. at 39-40.

Fifth, DuPont contends that Kolon has not shown, and cannot show, damages. Because Kolon lacked the capacity to make any alleged "lost sales," there are no possible damages. Id. at 42. Even if there were, says DuPont, **[*13]** Dr. Bamberger has used Kolon's European market share as a predicate for determining damages in the

[3] According to DuPont, these three customers were: (1) Goodyear, which rejected Kolon's **[*12]** products because of poor quality, and which, therefore, did not qualify Kolon's products; (2) Akebono, which sought Kolon's business but was told that Kolon did not have sufficient supply; and (3) OFS, which requested bids from Kolon, DuPont, and Teijin for a supply contract, and which was told 'by Kolon that Kolon did not have sufficient supply to fulfill the contract and therefore was not submitting a bid. Id. at 34-36.

United States, which is inappropriate considering that the United States market (and Kolon's business in it) is considerably different from the European market. Id.[4]

Unsurprisingly, Kolon suggests several reasons why DuPont's motion should be denied.

First, Kolon argues that DuPont's share of 54 to 59 percent of the market is enough to establish monopolization when coupled with the high barriers to entry in the United States para-aramid market, the market's highly concentrated nature, DuPont's use of price discrimination, and DuPont's alleged decision to shut down production to control prices. Opp. Summ. J. at 3, 28 (citing *Reazin v. Blue Cross & Blue Shield of Kan., 899 F.2d 951, 968 (10th Cir. 1990)*; **[*14]** *Defiance Hosp. v. Fauster-Cameron, Inc., 344 F. Supp. 2d 1097, 1113 (N.D. Ohio 2004)*; *Hayden Pub. Co. v. Cox Broad Corp., 730 F.2d 64, 69 (2d Cir. 1984)*; *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 489 (5th Cir. 1984))*. See also id. at 29 (citing *Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 212 (3d Cir. 1992))*.

Second, Kolon submits that supply agreements, by their very nature, result in foreclosure of the market. Id. at 3, 31 (citing *LePage's, Inc. v. Minnesota Mining & Mfg., 324 F.3d 141, 147 (3d Cir. 2003)* (citations omitted)).

Third, Kolon argues that it need not show that DuPont foreclosed any quantum of the market in order to prevail, so long as it shows that DuPont severely restricted the market. Id. at 33. (citing *LePage's, 324 F.3d at 161-62*); *United States v. Microsoft Corp., 253 F.3d 34, 70, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*; *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328-29, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*. Fourth, Kolon argues that DuPont's anticompetitive conduct prevented it from conducting business with Goodyear, AFL, Corning, Akebono, Federal Mogu, Nisshinbo, Garlock, and Hollingsworth & Vose. Fifth, Kolon contends that DuPont is guilty of "attempted monopolization" because **[*15]** DuPont had a "dangerous probability" of achieving a monopoly. Id. at 36-37.

Sixth, Kolon contends that it has presented adequate evidence of damages because there is "sufficient evidence of causation," *Perkins v. Standard Oil Co. of Cal., 395 U.S. 642, 648, 89 S. Ct. 1871, 23 L. Ed. 2d 599 (1969)*, and because "the illegality" was "a material cause of [Kolon's] injury." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. Kolon points out that its market share in Europe is seven times as high as its market share in the United States. Id. at 39.

Seventh, Kolon argues that it can show harm to competition because it can show that consumers now have less choice about who they purchase para-aramid products from, and because it can also show that, in 2011, it was forced to suspend the TROY-2 expansion project, which would have doubled Kolon's manufacturing capacity for Heracron and reduced prices for the product for consumers. Id. at 40.

Eighth, Kolon rejects DuPont's argument that its activity was procompetitive, claiming that stable supply and pricing could have been achieved without the near-exclusive contracts used by DuPont. Id. at 41.

Ninth, Kolon contends that it does have standing because public **[*16]** policy favors antitrust suits and promoting fair competition and because a plaintiff's conduct cannot bar it from asserting an antitrust action. Id. (citing *Burlington Indus., Inc. v. Milliken & Co., 690 F.2d 380, 388 (4th Cir. 1982)*; *Memorex Corp. v. Int'l Business Machines Corp., 555 F.2d 1379 (9th Cir. 1977))*.

Finally, Kolon contends that DuPont's motion is premature because of the ongoing discovery disputes and outstanding motions related thereto. Id. at 43 (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Phillips v. Gen. Motors Corp., 911 F.2d 724, 1990 WL 117981, at *4 (4th Cir. 1990)*; *Ingle v. Yelton, 439 F.3d 191, 196 (4th Cir. 2006))*. Kolon asks the Court to deny or stay the summary

[4] DuPont also notes that, even if Kolon could show a monopoly, damages, harm to competition, and foreclosure, it cannot show that DuPont's activities were not "procompetitive." According to DuPont, market foreclosure can be justified when it is "procompetitive." (citing *Chuck's Feed, 810 F.2d at 1294*). DuPont claims its supply agreements were economically beneficial, ensuring stable supply and pricing. Id. at 44.

judgment motion pursuant to Rule 56(d) until the resolution of Kolon's pending motions to compel and pending receipt by Kolon of any subsequently ordered discovery. Id. at 45.

SUMMARY JUDGMENT STANDARD

"Summary judgment is an important tool for dealing with antitrust cases." See Oksanen v. Page Memorial Hosp., 945 F.2d 696, 708 (4th Cir. 1991) (citing Steuer v. National Med. Enterps., Inc., 672 F. Supp. 1489, 1500-01 (D.S.C. 1987) (noting that the Supreme Court and the **[*17]** Fourth Circuit have found summary judgment to be important in deciding antitrust cases)); see also Thompson Everett, Inc. v. Nat'l Cable Adver., L.P., 57 F.3d 1317, 1322 (4th Cir. 1995) ("Because of the unusual entanglement of legal and factual issues frequently presented in antitrust cases, the task of sorting them out may be particularly well-suited for Rule 56 utilization."). Granting summary judgment is appropriate where there is no genuine issue as to any material fact in a case. Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) ("Rule 56 must be construed with due regard [] for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury."). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). A material fact in dispute appears when its existence or non-existence could lead a jury to different outcomes. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A genuine issue of material fact exists when **[*18]** there is sufficient evidence on which a reasonable jury could return a verdict in favor of the non-moving party. Id.

Hence, summary judgment is only appropriate when, after discovery, the non-moving party has failed to make a "showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. When a motion for summary judgment is made, the evidence presented must always be taken in the light most favorable to the non-moving party. Smith v. Virginia Commonwealth Univ., 84 F.3d 672, 675 (4th Cir. 1996).

Nevertheless, a party cannot "create a genuine issue of material fact through mere speculation or the building of one inference upon another." Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985). Accordingly, the party who bears the burden of proof at trial cannot survive summary judgment without sufficient evidence to sustain his or her burden of proof on that point. Celotex Corp., 477 U.S. at 327.

In sum, summary judgment is called for when no reasonable jury could return a verdict in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). **[*19]** When the fact record is in that posture on a claim, or on an element of a claim, the non-moving party cannot prevail as a matter of law. Id.; Celotex, 477 U.S. at 322.

DISCUSSION

A. Preliminary Matters

There are three preliminary matters that must be addressed before considering the substance of the summary judgment motion. First, Kolon argues that the motion is premature and ought to be deferred pursuant to Rule 56(d). Second, DuPont contends that its motion should be granted because Kolon's response brief is in violation of Local Civil Rule 56(B) which requires a brief in opposition to summary judgment to contain a section that confronts - item by item - each fact that the movant shows to be undisputed and supports that response by listing record citations proving the dispute. Third, DuPont contends that Kolon lacks standing to assert an antitrust claim because, in the Trade Secrets Case, Kolon was found to have acted wrongfully in misappropriating DuPont's trade secrets.

1. *Fed. R. Civ. P. 56(d)*

Kolon argued in its brief opposing summary judgment that, pursuant to *Rule 56(d)*, the Court should stay or deny DuPont's motion for summary judgment. *Rule 56(d)* gives the Court discretion to **[*20]** defer or deny consideration of a summary judgment motion "if a nonmovant shows by affidavit or declaration, that, for specified reasons, it cannot present facts essential to justify its opposition."[5]

Courts look to whether the nonmovant's requested information has the potential to "create [] a genuine issue of material fact sufficient to defeat summary judgment," whether the sought-information is "the subject of pending discovery requests," and whether the information is "wholly within the defendants' possession" to determine whether to stay proceedings under *Rule 56(d)*. *Ingle v. Yelton, 439 F.3d 191, 197 n. 2 (4th Cir. 2006)* (quoting *Strag v. Bd. of Trustees, 55 F.3d 943, 954 (4th Cir. 1995))*; see also *Crawford-El v. Britton, 523 U.S. 574, 600, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998)* **[*21]** (describing the Court's discretion to postpone a decision on summary judgment in situations where a plaintiff "needs additional discovery to explore 'facts essential to justify the party's opposition.'") (citing *Rule 56(f)*).

Exhibit 74 to Kolon's opposition brief, the Declaration of Daniel Goldman, articulated Kolon's reasons for asking the Court to postpone consideration of, or to deny, DuPont's summary judgment motion. The affidavit identifies several specific then-pending discovery motions as warranting denial or deferral under *Rule 56(d)*. The Court resolved all of those motions, with one exception, in February, granting some and denying others.[6] The discovery motions that formed the basis for the *Rule 56(d)* request will be briefly addressed below.

a. Long-Term Supply Agreements

First, in its opposition brief, Kolon argued that the Court should delay or deny summary judgment because its Motion to Compel Production of Documents (Docket No. 133) was still pending. In that motion, Kolon contended that DuPont had failed to produce all of the 2008 supply agreements that were requested in its Second Set of Requests for Production. Opp. Summ. J. at Exhibit 74, ¶¶ 5-6. To make that point, Kolon relied on a PowerPoint presentation conducted by a DuPont employee suggesting that 36 such agreements existed. Id. ¶ 6. The Court granted Kolon's motion in part on February 22, 2012, ordering DuPont to turn over all relevant 2008 contracts (Docket No. 402).

b. Pricing Data and High Variable Margins

Kolon next contended that the pricing and margin-related data it requested in its Motion to Compel Production of Economic and Financial Data (Docket No. 145), which it claimed it also requested in its First Set of Interrogatories, its Second Set of Requests for Production, and its Third Set of Requests **[*23]** for Production, was essential to proving monopoly power. Id. ¶¶ 10-11. On February 23, 2012, the Court granted Kolon's Motion to Compel with respect to Interrogatory No. 9 and Request No. 17, and denied Kolon's Motion to Compel in all other respects.

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[5] In 2010, the Federal Rules of Civil Procedure were revised, and *Rule 56(d)* replaced *Rule 56(f)*. Committee Notes on Rules - 2010 Amendments ("*Subdivision (d)* carries forward without substantial change the provisions of former *subdivision (f)*."). *Rule 56(f)* provided that, if a party, for good reason, could not present facts "essential to justify the party's opposition," the Court could stay a summary judgment motion to allow for further discovery.

[6] The Court waited to address one of the motions upon the request of the parties, who represented that they believed they could come to an agreement on the issues therein. The only unresolved issue goes to specific intent, an element of the attempted monopolization claim. However, as explained below, the Court has assumed, for purposes of the summary judgment motion, that a triable issue of fact on the specific intent element has been made **[*22]** out. Thus, any additional discovery Kolon might receive before trial helping it prove specific intent would not aid the Court in deciding summary judgment.

(Docket No. 406). Interrogatory No. 9 requested "aggregate" gross and net profits and Request No. 17 concerned worldwide pricing data.

c. DuPont's Lobbying Efforts, the ITC Proceedings, and Akzo Litigation

Kolon also argued that the Court should employ *Rule 56(d)* because of its then-pending request for *Rule 30(b)(6)* deposition testimony and third-party subpoenas (Docket No. 139) respecting Dupont's lobbying efforts, certain 1987 ITC proceedings, and the patent litigation between Akzo and DuPont. Kolon contended that production of this discovery might help to establish DuPont's specific intent to monopolize, an element of an attempted monopolization claim. Id. ¶ 14.

On March 13, 2012, the parties informed the Court that they had reached an agreement concerning Kolon's Motion to Compel *30(b)(6)* Deposition Testimony as to the lobbying and ITC points. (Docket No. 139). Thus, the only unresolved aspect of the outstanding discovery was that relating **[*24]** to the patent litigation between Akzo and DuPont. After a hearing on Friday, March 16, 2012, the Court ordered Kolon to provide a list of all relevant claims that DuPont had brought against Akzo, on which DuPont did not prevail, that Kolon believed to be "sham litigation." Mar. 16, 2012 Tr. 43. If the Court found that the request had merit, the Court advised that it would order DuPont to produce a witness to testify about the business reasons for bringing the alleged "sham litigations." Id. Thereafter, Kolon submitted the list, and the Court concluded that three items on the list could be inquired of in a *Rule 30(b)(6)* deposition. Order, Mar., 22, 2012 (Docket No. 539). As Kolon has acknowledged, the issues to be examined on those three depositions may bear on the intent element of the attempted monopolization claim. For purposes of determining DuPont's motion for summary judgment, it will be assumed that there is a triable issue respecting intent. Thus, the pending *Rule 30(b)(6)* deposition on the allowed topic does not preclude consideration of the motion for summary judgment.[7]

d. Pascal Renaud's Deposition

Finally, Kolon also asserted that the motion for summary judgment was premature because the Court had not yet decided a Motion to Compel the Deposition of Pascal Renaud, DuPont's former previous competitive intelligence manager. Id. ¶ 15. Kolon had also filed a Motion for Issuance of Letters Rogatory to Pascal Renaud (Docket No. 113) in the event the Court denied the Motion to Compel that was still pending when Kolon filed its brief opposing summary judgment. On February 22, 2012, the Court resolved both motions, issuing an Order denying Kolon's Motion to Compel and granting its request for Issuance of Letters Rogatory (Docket No. 401).

And, at the hearing on February 27, 2012, counsel for Kolon represented that taking the deposition of Pascal Renaud might take more than a month and that "at this point we would not be in favor of **[*26]** moving the trial date just because we think we have to take the deposition of Pascal Renaud." Feb. 27, 2012 Tr. 32.

As the record now stands, the discovery motions on which Kolon sought delay of the summary judgment motion decision no longer stand as impediments to deciding the motion. The summary judgment hearing was held on March 16, 2012, and, at that hearing, Kolon did not suggest that any of the February Orders had not been complied with, that it was in need of further discovery, or that it was not prepared to go forward with the motion. Nor, after receiving the discovery ordered by the Court, did Kolon supplement its brief opposing summary judgment.

For the foregoing reasons, there is no reason under *Rule 56(d)* to defer deciding the motion for summary judgment or to deny it. Hence, the motion will be decided on its merits.

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[7] At one stage in the briefing process, Kolon argued that discovery into the patent litigations between Akzo **[*25]** and DuPont was relevant to the existence of monopolization. Mem. Supp. Motion to Compel *30(b)(6)* at 17 (Docket No. 140). However, that conclusory argument was not supported in the *Rule 56(d)* affidavit. See Opp. Summ. J. at Exhibit 74 ¶ 14. Nor was it ever explained sufficiently to warrant allowing the deposition for that purpose.

2. Local Civil Rule 56(B)

Local Civil Rule 56(B) provides that:

> (B) Summary Judgment - Listing Of Undisputed Facts: Each brief in support of a motion for summary judgment shall include a specifically captioned section listing all material facts as to which the moving party contends there is no genuine issue and citing the parts of the record relied on to support **[*27]** the listed facts as alleged to be undisputed. A brief in response to such a motion shall include a specifically captioned section listing all material facts as to which it is contended that there exists a genuine issue necessary to be litigated and citing the parts of the record relied on to support the facts alleged to be in dispute.
>
> In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.

DuPont's brief in support of the motion for summary judgment complied with the first sentence in the rule. Kolon's response did not comply with the second sentence, which imposes duties on the non-moving party.

While Kolon's brief contained a section entitled "MATERIAL CONTESTED FACTS," that section did not identify which of the material facts asserted by DuPont as undisputed were thought by Kolon to be in dispute. Nor did that section set out citations showing why there was dispute as to the facts that DuPont had asserted (with record support) to be undisputed. Instead, that section of Kolon's brief **[*28]** was 24 pages of argument, positing some factual assertions that were followed by citations to the record and many others that were not. And, indeed, many of the factual assertions in that section were not in dispute but instead, were facts that DuPont asserted to be undisputed which Kolon merely recast in argumentative style.

That approach, predictably, made it difficult and time-consuming to sort out what, if any, facts really were in dispute and whether any asserted dispute was genuine or related to material facts. This kind of obfuscatory presentation is exactly what *Local Civil Rule 56(B)* is intended to prevent.

These violations of the local rule would warrant a finding that the facts listed by DuPont are not in dispute and, thereafter, a resolution of the motion in DuPont's favor. However, given the significance of summary judgment and considering the interest of justice, it is preferable to determine the motion on its merits, rather than on Kolon's breach of *Local Civil Rule 56(B)*.[8]

3. Standing

DuPont contends that Kolon lacks standing because Kolon wrongfully **[*29]** appropriated DuPont's trade secrets. And, as evinced by the verdict in the Trade Secrets Case, Kolon certainly did misappropriate many of DuPont's trade secrets and has used them to its competitive advantage. However, Kolon's wrongful conduct does not render DuPont immune from an antitrust suit by Kolon. See *Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)* (explaining that "[t]he plaintiff who reaps the reward of treble damages [in an antitrust suit] may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition"); *Burlington Indus., Inc. v. Milliken & Co., 690 F.2d 380, 388 (4th Cir. 1982)* ("[U]nclean hands is no bar to antitrust recovery.").

I. THE MONOPOLIZATION CLAIM: FIRST CAUSE OF ACTION

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[8] Violations of like kind by other litigants in other cases likely will not be met with as charitably by any judge of this Court.

"To prove a *Section 2* monopolization offense, a plaintiff must establish two elements: (1) the possession of monopoly power; and (2) willful acquisition or maintenance of that power . . . ." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 441 (4th Cir. 2011)* (citing *Eastman Kodak Co. v. Image Technical. Servs., Inc., 504 U.S. 451, 480, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* and *Cavalier Tel., LLC v. Verizon Va., Inc., 330 F.3d 176, 183 (4th Cir. 2003))*. **[*30]** Of course, the monopoly power must exist in the relevant market. *Id. at 450*. For purposes of proceedings in this Court, the relevant product market is para-aramid fiber, and the relevant geographic market is the United States.[9] The defendant "must engage in conduct 'to foreclose competition, gain a competitive advantage, or to destroy a competitor.'" Id. (quoting *Eastman Kodak, 504 U.S. at 480*).

1. Monopoly Power

A defendant possesses "monopoly power in the relevant market," if it is "truly predominant in the market." *White Bag Co. v. Int'l Paper Co., 579 F.2d 1384, 1387 (4th Cir. 1974)*. The Fourth Circuit observed that: "[p]redominance" is established in situations where the defendant controls "seventy to one-hundred per cent of the relevant market." *E.I. du Pont de Nemours, 637 F.3d at 450* (quoting *White Bag, 579 F.2d at 1387*). In situations where the defendant controls less than seventy percent of the relevant market, it is unlikely that the plaintiff will be able to establish **[*31]** the requisite predominance. *R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362 (M.D.N.C. 2002)*, aff'd sub nom. *67 F. App'x 810 (4th Cir. 2003)* ("Seventy to seventy-five per cent is generally considered the minimum market share necessary to support a finding of monopoly power.") (citing *White Bag, 579 F.2d at 1387*).

Notwithstanding the foregoing observations, there has been much discussion amongst and within circuits about whether a certain percentage market share dispositively resolves whether monopoly power is extant or nonexistent. The Supreme Court of the United States provided some guidance in *United States v. United States Steel Corp., 251 U.S. 417, 444, 40 S. Ct. 293, 64 L. Ed. 343 (1920)* in which it reasoned that no monopoly power could exist on a market share of less than 50 percent ("The power attained was much greater than that possessed by any one competitor - it was not greater than that possessed by all of them . . . monopoly, therefore, was not achieved . . ."). Since its decision in United States Steel, the Supreme Court has never found a party with less than 75 percent market share to have monopoly power. See Antitrust Laws & Trade Regulation: Desk Ed. § 3.02 (2011).

Judge Learned **[*32]** Hand, evaluating the issue for the Second Circuit, concluded that, although a market share of over 90 percent is enough to constitute a monopoly, "it is doubtful whether sixty or sixty-four per cent" is sufficient "and certainly thirty-three percent is not." *United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945)*, superseded by statute on other grounds; see also Antitrust Laws & Trade Regulation: Desk Ed. § 3.02 (2011).

Many courts have found monopoly power of less than 70 percent insufficient to support a claim of monopolization. See *Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 201 (3d Cir. 1992)*, cert. denied, *507 U.S. 921, 113 S. Ct. 1285, 122 L. Ed. 2d 677 (1993)* (55 percent share insufficient); *R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362 (M.D.N.C. 2002)*, aff'd sub nom. *67 F. App'x 810 (4th Cir. 2003)* (51.3 percent share insufficient); *Holleb & Co. v. Produce Terminal Cold Storage Co., 532 F.2d 29, 33 (7th Cir. 1976)* ("Even if plaintiff had properly defined a relevant market, [it would not prevail because] it failed to prove that Produce Terminal had a dominant share exceeding 60 percent of the market."); *Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968, 974, 974 n. 6 (8th Cir. 1968)*, **[*33]** cert. denied, *395 U.S. 961, 89 S. Ct. 2096, 23 L. Ed. 2d 748 (1969)* (noting that "a substantial part of the market must be controlled by the monopolist to enable the raising and lowering of prices and the undue restriction on competition" and citing nine monopolization cases in which the market share ranged from 70 to 90 percent); *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683, 694 n. 18 (10th Cir. 1989)* (citing 2 E. Kintner, Federal ***Antitrust Law*** § 12.6 (1980)) ("While the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share of between 70 percent and 80 percent.").

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[9] SACC ¶¶ 18, 24; Opp. Summ. J. at 4 ("The relevant market in this case is para-aramid fiber for commercial applications in the United States."). The Fourth Circuit has approved this definition of the relevant market.

Other decisions have given somewhat different signals. In *Broadway Delivery Corp. v. United Parcel Serv., 651 F.2d 122, 130 (2d Cir. 1981)*, cert. denied, *454 U.S. 968, 102 S. Ct. 512, 70 L. Ed. 2d 384 (1981)*, the Second Circuit held that a jury instruction was erroneous because the instruction suggested that, if a party had less than 50 percent market share, the party could not be guilty of monopolization. In *Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 207 n. 2 (5th Cir. 1969)*, the Fifth Circuit held that no monopoly power exists if market share **[*34]** is less than 50 percent without discussing higher percentages. In *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1443 (6th Cir. 1990)*, cert. denied, *502 U.S. 808, 112 S. Ct. 51, 116 L. Ed. 2d 29 (1991)*, the Sixth Circuit found that an average market share of 58 percent over a 7 year-period, where market share did not decrease, coupled with other factors, was enough to defeat a motion for directed verdict, but quoted "prominent authority" for the proposition that "there is substantial merit in a presumption that market shares below 50 or 60 percent do not constitute monopoly power" (quoting Areeda & Hovenkamp, ***Antitrust Law*** § 518.3 (1988 Supp.)). In *Reazin v. Blue Cross & Blue Shield of Kan., 899 F.2d 951, 968 (10th Cir. 1990)*, cert. denied, *497 U.S. 1005, 110 S. Ct. 3241, 111 L. Ed. 2d 752 (1990)*, the Third Circuit held that a market share of 60 percent did not preclude a finding of monopoly power, at least where the power possessed was "durable."

In sum, market share is quite important in determining whether monopoly power exists, but it is not the only consideration. Thus, courts finding monopoly power even in the absence of a 70 percent or higher market share generally do so after analyzing the "durability" of the defendant's power. **[*35]** Areeda & Turner, ***Antitrust Law*** ¶ 505 (1989 supp.) (noting that "durability" and not just "degree" determine the "significance of market power"); *E.I. du Pont de Nemours, 637 F.3d at 451* (noting that some courts have analyzed the "durability of the defendant's market power" along with the degree of market share) (citing *Reazin v. Blue Cross & Blue Shield of Kan., 899 F.2d 951, 967-68 (10th Cir. 1990))*. The Reazin Court commented that market share alone is not enough to show the presence or absence of monopoly power in cases in which it does "not reflect actual power to control price or exclude competition." *899 F.2d at 967* (citations omitted); see *United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)* ("Monopoly power is the power to control prices or exclude competition."). The durability inquiry then is conducted to decipher whether a defendant had the ability to manipulate pricing and define the field of competition.

Durability is the ability to maintain power over pricing and competition "for a significant period without erosion by new entry or expansion." 2B Phillip E. Areeda, et al., ***Antitrust Law*** P 501, at 111 (3d ed. 2007) (defining monopoly power to include **[*36]** this durability element). In determining whether market power is "durable," courts have examined: (1) the existence of entry barriers;[10] (2) the difference in the defending party's market share and the next closest competitors' share; and (3) whether the defendant's market share declined or increased throughout the relevant time period.[11] In Reazin, the Third Circuit considered several factors in determining that a jury could reasonably have found monopoly power, notwithstanding that the defendant's market was approximately 60 percent. First, the court looked for the existence of "entry barriers." *899 F.2d at 968* ("Entry barriers are particular characteristics of a market which impede entry by new firms into that market."). Second, the court noted that, although the market share was low enough to possibly support a presumption against monopoly, the defendant

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[10] The Fourth Circuit noted other courts' analysis of entry barriers in its discussion of durability. *E.I. du Pont de Nemours, 637 F.3d at 451*.

[11] See, e.g., *Adv. Health-Care Servs. v. Giles Memorial Hosp., 846 F. Supp. 488, 494 (W.D. Va. 1994)* ("If the defendants' market share is declining and/or other competitors' market shares are rising, then the defendants can hardly possess monopoly power."); *Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 826 (6th Cir. 1982)* (noting that a defendant's declining market share undermined any "inference of capacity to monopolize" that could be drawn from the size of the defendant's market share in considering an attempted monopolization claim); *United States v. Syufy Enterprises, 903 F.2d 659, 666-70 (9th Cir. 1990)* (emphasizing the importance of evaluating the ability of a defendant to "maintain" market share and, after noting the defendant's declining market share, affirming the district court's finding that no monopoly power existed); *Greyhound Computer Corp. v. International Business Machines Corp., 559 F. 2d 488, 496 n. 18 (9th Cir. 1977)* **[*38]** (noting that declining market share "may reflect an absence of market power"); *Alpha Lyracom Space Communs. V. Comsat Corp., 968 F. Supp. 876, 895 (S.D.N.Y. 1996)* (granting defendant's motion for summary judgment after noting that although entry barriers existed, the defendant's market share declined rather than increased during the relevant time period).

completely dominated the market, receiving some 62 percent of all earned health insurance premiums while its closest competitors retained less than 5 percent. *Id. at 969 n. 26*. Third, the court observed that, while it was possible that the defendant's share might have declined some during the relevant time period, that alone was **[*37]** not enough to make the jury's finding unreasonable. *Id. at 970*. Based on all these facts, the Third Circuit found that a jury reasonably could have found that the defendant had monopoly power.

The Fourth Circuit previously considered Kolon's SACC in this case and found that it alleged "sufficient facts to state a claim that [wa]s 'plausible on its face.'" *E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 440 (4th Cir. 2011)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. With respect to Kolon's monopolization claim, the Court of Appeals pointed to Kolon's allegation that DuPont's market share was "over 70 percent." *Id. at 451*. Thus, taking Kolon's allegation to be true, the Fourth Circuit concluded that it appeared possible that DuPont had "predominated" the relevant market. Hence, the Court of Appeals left it to discovery to ascertain whether what Kolon had alleged about DuPont's market power (more than 70 percent) was factually correct.

Now, months after extensive discovery, it is clear, **[*39]** and both parties readily admit, that DuPont did not control more than 70 percent of the relevant market during the relevant time period. See Mem. Supp. Summ. J. at 29; Opp. Summ. J. at 28. In fact, Kolon's own expert takes the view that DuPont had a maximum market share of 59 percent during the relevant time period, and that DuPont's market share decreased to 55 percent during that three year period rather than increased. Mem. Supp. Summ. J. at Exhibit 21, Dr. Bamberger Rpt. at 16-17.

And, as the uncontested facts demonstrate, DuPont's decline in market share did not begin in 2006. The recent decrease in market share is simply part of a longer trend that began when Teijin first entered the para-aramid market in 1987. DuPont initially controlled the entire domestic para-aramid market, but its market share has steadily declined to present levels. In 2006, when Kolon says it first tried to enter the United States market, Teijin controlled 41 percent of the relevant market. By 2009, Teijin controlled 44 percent of that market. See Mem. Supp. Summ. J. at Exhibit 21, Dr. Bamberger Rpt. at 17.

Further, Dr. Bamberger's entire report is based on the assumption that European and United States' **[*40]** markets are properly comparable. See id. at 30 ("In particular, Kolon's experience in Europe is a reasonable benchmark for Kolon's but-for world experience in the United States."). If the two markets were comparable and DuPont had control over pricing and competition, it would defy logic for DuPont to charge lower prices in the United States than in the European market. Yet, it is not disputed that DuPont's prices in the United States are lower than in Europe.

Kolon argues that there are significant entry barriers to the para-aramid market. Assuming that to be true for the purposes of summary judgment, that fact alone is not sufficient to show monopoly power. Here, DuPont indisputably controlled less than 70 percent of the market. And, it had not demonstrated the ability to maintain power "for a significant period without erosion." To the contrary. DuPont's market share steadily declined from 1990 to 2009. And, unlike the defendant in Reazin, DuPont had a major competitor who controlled almost as much of the market as it did during the relevant time period. DuPont also charged lower prices than "comparable" markets were charging. On this record, virtually undisputed as to the relevant **[*41]** product and geographic markets, the fact that there are significant entry barriers is insufficient to fill the factual gaps in Kolon's monopolization claim.[12]

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[12] Kolon also argues that DuPont engaged in "price discrimination" (sometimes Kolon calls it "value pricing") and asserts that the fact that DuPont reduced production dramatically in 2009 should raise suspicion. There is no evidence presented here that DuPont's use of value pricing supports an inference that it possessed monopoly power. Quite the opposite. Kolon's expert admitted that Kolon also engages in the same practice; that it is, in fact, a common practice; that it is not generally an anticompetitive practice; and that it can promote efficiency. Reply Mem. Summ. J. at 6, Exhibit 3, Bamberger Tr. 293; id. at Exhibit 2, Bamberger Tr. 199-201.

With respect to DuPont's decrease in production in 2009, Kolon itself admitted that the United States was facing an economic crisis in 2009; that it is not anticompetitive to reduce production when demand decreases; and that Kolon itself had decreased sales during the same time period. Id. at Exhibit 2, Bamberger Tr. 45-46; see generally Reply Supp. Summ. J. at 7. And, as with

DuPont clearly lacks the power to control prices and exclude competition - otherwise, it would have been able to prevent the decrease in its market share and the rise of one of its major competitors. On this record, no reasonable jury could conclude that DuPont had monopoly power during the relevant time period. Summary judgment is granted with respect to Kolon's First Cause of Action on that ground alone.

2. Willful Maintenance — Substantial Foreclosure

Even if Kolon had presented a triable issue on the monopoly power element, Kolon would also need to show that DuPont willfully maintained that power. On this element of its monopolization claim, Kolon's theory is that DuPont maintained its monopoly power through the use of long-term multi-year, exclusive supply agreements.[13] Kolon also has failed to make out a triable issue on this element.

It is, of course, necessary to remember that exclusive dealing arrangements, in and of themselves, are not illegal. To violate antitrust laws, exclusive dealing arrangements must "foreclose competition in a substantial share of the line of commerce affected." *E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 451 (4th Cir. 2011)* (quoting *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*. **[*44]** The burden is on Kolon to demonstrate substantial foreclosure. *United States v. Microsoft Corp., 253 F.3d 34, 69, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* ("[I]n all cases, the plaintiff must both define the relevant market and prove the degree of foreclosure.").

Courts considering substantial foreclosure claims evaluate the proven percentage/degree of foreclosure, with the focus being on the competing manufacturers that have been closed-out of the relevant market due to the exclusive arrangements. Id.[14] ("Following Tampa Electric, courts considering antitrust challenges to exclusive contracts have taken care to identify the share of the market foreclosed."). Exclusive arrangements which "affect[] a small fraction of a market clearly cannot have the requisite harmful effect upon competition." Id.

Decisional law has not defined clearly a threshold at which foreclosure becomes substantial. Some courts have found foreclosure of 15 percent or less to be insubstantial. See *Chuck's Feed & Seed Co. v. Ralston Purina Co., 810 F.2d 1289, 1293 (4th Cir. 1987)* (noting the same and citing cases that have done so, *American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1252 (3d Cir. 1975)*; *Cornwell Quality Tools Co. v. CTS Co., 446 F.2d 825, 831 (9th Cir. 1971)*, cert. denied, *404 U.S. 1049, 92 S. Ct. 715, 30 L. Ed. 2d 740 (1972))*. Other courts have noted or found that foreclosure of 40 to 50 percent was insubstantial. See *R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362, 388 (M.D.N.C. 2002)*, aff'd sub nom. *67 F. App'x 810 (4th Cir. 2003)* (citing *Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196, 1213, 1218-20 (W.D.N.C. 1989)*, aff'd in part, *912 F.2d 463 (4th Cir. 1990)* (40 percent lawful where no anticompetitive harm shown)); *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d*

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value pricing, **[*42]** Kolon presented no evidence linking DuPont's decreased production to its claim that DuPont possessed monopoly power during the relevant time period.

[13] See SACC ¶¶ 28-37, 29 (alleging that, from 2006 to 2009, DuPont committed "various high-volume United States para-aramid fiber buyers to multi-year supply agreements that required the customer to purchase **[*43]** from 80% to 100% of the customer's requirements from DuPont," and that, "[b]ecause Dupont's supply contracts severely restricted access to customers and preclude effective competition, DuPont's conduct has had a direct, substantial and adverse effect on competition"); *E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 451 (4th Cir. 2011)* ("As to the second element of a monopolization claim, willful maintenance of monopoly power, Kolon's Counterclaim focuses on DuPont's use of essentially exclusive agreements with key para-aramid fiber purchasers."); Opp. Summ. J. at 2 (stating that DuPont attempted to maintain its monopoly power through "restrictive, long-term supply agreements"). As was the case with Kolon's market share allegations, its allegations about the supply agreements were not borne out in discovery.

[14] See *Chuck's Feed & Seed Co. v. Ralston Purina Co., 810 F.2d 1289, 1295 (4th Cir. 1987)* (noting that courts evaluating exclusive dealing arrangements also consider: (1) the type of goods and the geographic area; (2) how much of the market has been closed off to competing manufacturers because of the exclusive dealing arrangements of the defendant, and, in conjunction with this, whether competitors have found or are **[*45]** likely to find it difficult to enter or remain in the market; and (3) the procompetitive effects of the dealing arrangements that might justify their use).

227, 236-37 (1st Cir. 1983) (50 percent lawful where little **[*46]** anticompetitive harm)); see also United States v. Microsoft Corp., 253 F.3d 34, 70, 346 U.S. App. D.C. 330 (D.C. Cir. 2001) (indicating that foreclosure of 40 to 50 percent might be considered insubstantial absent "certain circumstances."). And, at least one court has found that foreclosure of 24 percent, in the context of 10 year requirements contracts, was substantial. See Reynolds, 199 F. Supp. 2d at 388 (citing Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 676 F.2d 1291, 1301, 1304 (9th Cir. 1982)).

In Tampa Electric and Chuck's Feed, the Supreme Court and the Fourth Circuit, respectively, discussed the substantial foreclosure analysis and the role of percentages in conducting that analysis. In Tampa Electric, the Court first determined the relevant market, and then determined the percent of that market that the defendant's exclusive dealing arrangement, which was a 20-year, 100 percent requirements contract, foreclosed. 365 U.S. at 330-33. Finding that foreclosure was less than 1 percent, it determined that there could be no substantial foreclosure based on this percentage. Id. at 333. It then went on to analyze whether the contract at issue had substantially lessened competition in the **[*47]** relevant market. Id. It examined the contract dollar amount and the amount of product locked into the contract in the context of the annual profits and product traded in the relevant market. Id. at 334. Noting the many advantages of exclusive dealing arrangements, and that the contract constituted but a small portion of the relevant market, the Court held that the arrangement did not substantially decrease the volume of competition. Id. at 335.

In Chuck's Feed, a dog food company had an exclusive dealing arrangement with a pet food owner for an indeterminate period of time. Chuck's Feed & Seed Co. v. Ralston Purina Co., 810 F.2d 1289, 1291 (4th Cir. 1987). The dog food company terminated the arrangement when the pet owner added a competing brand of dog food to his inventory. Id. After conducting the substantial foreclosure analysis, the Court of Appeals found that the district court had erred in failing to grant judgment notwithstanding the verdict. Id. at 1295. The Court explained that the plaintiff was required to "show a negative impact on competition in the market as a whole." Id. Because the plaintiff had not met its burden to show "the extent to which [the dog food company] may **[*48]** have used exclusive dealing arrangements to 'foreclose the market,' or in other words, to keep competing brands of feed out of a substantial percentage of the [relevant market]," his claim failed as a matter of law. Id. (emphasis added).

The relevant market here is para-aramid fiber in the United States. Turning then to the matter of substantial foreclosure of that market and following the approach in Tampa Electric and Chuck's Feed, the Court must look first to what Kolon has shown with respect to the degree of foreclosure, or "how much of the market has been closed off" as a result of DuPont's supply agreements. Kolon simply has not made such a showing. In fact, Kolon has not even attempted to quantify foreclosure of the relevant market or to show how much of the market was closed off by DuPont's supply agreements.

Kolon's only analysis of percentage or degree is in its discussion of three particular segments of the para-aramid market. See Opp. Summ. J. at 9, 12. Possibly recognizing that it could not show substantial foreclosure in the relevant market it had defined in the SACC and has pressed throughout the case, Kolon switched gears in its opposition to summary judgment, arguing **[*49]** there that it was foreclosed from operating in three particular segments of the para-aramid market. Kolon's evidence of the degree of foreclosure in those segments, which is scant at best,[15] does nothing to reveal the amount of foreclosure in the market as a whole, a market which consists of numerous segments of varying size and a market that extends well beyond the few segments to which Kolon now points.[16]

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[15] Kolon does not quantify one of those three segments (tires) at all; it fails to address a significant portion of the pulp segment (omitting discussion of gaskets), and its analysis of fiber optic cable and the brakes sub-segment of pulp is incomplete and rife with false assumptions. Opp. Summ. J. at 9, 12.

[16] See DuPont, 637 F.3d at 452 n. 12 (noting that, although Kolon had failed to calculate a specific percentage of market foreclosure in its SACC, it would not dismiss the counterclaim on that basis because the litigation was in the "pre-discovery" phase and Kolon had "insufficient information" to calculate the percentage at this stage). Of course, discovery is now over and Kolon has not done what the law clearly requires it to do.

Perhaps Kolon has abandoned any attempt to prove **[*50]** the extent of market foreclosure[17] because it realizes that the record shows that the degree of foreclosure here, if it exists at all, is de minimus. DuPont had supply agreements with, at most, 21[18] out of approximately 1,000 potential commercial United States para-aramid customers during the relevant time period, resulting in, at best, 2 percent of that market being foreclosed. Mem. Supp. Summ. J. SOF ¶ 23 (uncontested fact); Mar. 16, 2012 Tr. 68.[19] But, examination of the agreements themselves reveals that this 2 percent figure greatly exaggerates the percent of foreclosure. Many, if not most, of the 21 agreements cannot even be classified as "exclusive" or "multi-year."

Some of the contracts were not volume requirements contracts at all, imposed no obligation on customers to purchase from DuPont, and can certainly not be considered "exclusive."[20] Even the volume requirements contracts themselves are not all "exclusive" because they ranged in their **[*52]** requirements, with some requiring the purchase of a certain amount of pounds per month or per year, and with others obligating customers to purchase from 58 percent to 100 percent of their requirements from DuPont.[21] Further, the volume requirement contracts, with the exception of Akebono,[22] were all of two years or less duration. Several agreements were active for only one-year of the relevant time period, and several others were active for only a few months.[23]

The **[*54]** non-exclusivity and the relatively short length of time the contracts were in place allowed for DuPont's competitors to conduct business with these 21 customers, belying any claim of foreclosure. Several of those 21 customers did business with Teijin, Kolon, or both, during the relevant time period.[24] Others sought to do business

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17 In fact, in its opposition, Kolon impliedly agrees with DuPont's assertion that its supply agreements did not tie up a significant portion of the customer base. Opp. Summ. J. at 33 ("[T]hat DuPont did not tie up the entire or even a significant portion of the customer base with onerous contracts is irrelevant.").

18 An examination of the summary judgment papers, considering every agreement mentioned by both sides, reveals agreements with the following 21 customers to be potentially at issue: AFL, Akebono, OFS, Sumitono, **[*51]** Oceaneering, Corning, Nisshinbo, Affinia, Garlock, Gates, Goodyear, Avon, Hollingsworth & Vose, Federal Mogul, MW Customer Papers, Toray, Fabric Development, Interface, Micro-Coax, Saint Gobain, and Tex Tech.

Kolon mentioned in its opposition to summary judgment that it believed contracts existed that had not yet been produced. This contention is based on arguments in Kolon's Motion to Compel Production of Documents (Docket No. 133). That motion was pending when Kolon filed its opposition brief on December 23, 2011. (Docket No. 275). The Court granted the motion on February 22, 2012 (Docket No. 402). Kolon has not since altered its brief on this point. Nor did Kolon thereafter tell the Court that DuPont had not supplied all the relevant contracts.

19 Even if the relevant market only included DuPont's 400 United States commercial para-aramid customers, the percent of foreclosure would be, at most, 5 percent.

20 See, e.g., Mem. Supp. Summ. J. at Exhibits 63 (Interface), 65 (MW Custom Papers), 67 (Saint-Gobain).

21 See, e.g., Mem. Supp. Summ. J. at Exhibits 69 (Affinia Group 100 percent requirements contract); 76 (MW Custom Papers 58 percent requirements contract); 81 (Federal Mogul 300,000 lbs/year contract).

22 The parties agree that, of the 21, certain agreements did not contain volume requirements. However, they disagree as to the number. DuPont claims that nine contracts did not contain volume requirements. Kolon contends that three of these contracts, one with Akebono, one with Oceaneering, and one with Fabric Development, were in fact volume requirements contracts. See Opp. Summ. J. at 15 n. 25. For the purposes of summary judgment, **[*53]** the Court will assume that Kolon's representations are correct.

23 Goodyear, Corning, and Oceaneering are among those who entered into contracts with obligations that lasted approximately one-year during the relevant time period. AFL, Tex Tech, and OFS are among those who had contract-obligations that lasted only a few months of the relevant time period. Many of the contracts allowed customers to terminate the contract without cause or with a certain amount of notice. See, e.g., Mem. Supp. Summ. J. at Exhibits 69 (Affinia group; terminable without cause on 90 days-notice); 70 (AFL; terminable without cause on 180 days-notice); 72 (Corning; terminable yearly); 76 (MW Custom Papers; terminable without cause on 1 year-notice); 82 (Nisshinbo; terminable without cause on 3 months-notice after first year of contract); 83 (Nisshinbo (second contract); terminable without cause on 180 days-notice).

with Kolon but were turned away due to qualification or capacity issues.[25] And, there is no dispute that these 21 customers were not the only customers in the various para-aramid segments in which they operated (tires, MRG, pulp, fiber optic cable). Nor is there any dispute that the supply agreements, as a group, left entire areas and segments of the para-aramid market in the United States completely untouched.

The supply agreements made up only a small fraction of DuPont's revenue from sales of Kevlar in the United States. And, because DuPont's share of the market was 59 percent or less during the relevant time period, those agreements accounted for an even smaller fraction of the total revenue from para-aramid sales in the United States. Pl. Mem. Supp. Motion to Compel at 5 (Docket No. 164); Mem. Supp. Summ. J. at 11.

On this record, the percentage of foreclosure here, cannot as a matter of law, constitute sufficient grounds for a finding of substantial foreclosure. And, no reasonable jury could find otherwise.

The inquiry next turns to the record respecting the effect of the supply agreements, such as they were, on overall competition, focusing on whether other competitors **[*57]** have been able to remain in or to enter the market. See *Chuck's Feed & Seed Co. v. Ralston Purina Co., 810 F.2d 1289, 1295 (4th Cir. 1987)*. Kolon has put forth no evidence demonstrating that other competitors have been shut-out of the market. All the evidence in the record is to the contrary. Teijin's market share grew during the relevant time period as DuPont's declined. Hyosung, a Korean company, began marketing para-aramid in the United States in early 2008. Mem. Supp. Summ. J. SOF ¶ 5 n. 7 (uncontested fact). In a market as specialized as the para-aramid market, where DuPont was the only seller in the United States throughout the 1970s and well into the 1980s, the entry of two new competitors (Kolon and Hyosung) along with the continued, relentless ascendance of a third competitor (Teijin) is marked evidence that renders hollow Kolon's contention that the supply agreements adversely affected overall competition in the relevant period.

Along with foreclosure percentage and competitor viability, in determining the degree of foreclosure caused by an exclusive dealing arrangement, courts also consider "the duration of the agreement, the ability of consumers to comparison shop and their **[*58]** propensity to switch products, the existence of barriers to entry, and the availability of alternative channels of distribution." *R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362, 389 (M.D.N.C. 2002)*, aff'd sub nom. *67 F. App'x 810 (4th Cir. 2003)* (citing *Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1232 (8th Cir. 1987))*; XI Herbert Hovenkamp ***Antitrust Law*** 1821d (1998)). "The lower the foreclosure percentage, the more salient these factors become in determining whether there has been substantial foreclosure." Id.

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[24] See, e.g., Mem. Supp. Summ. J. at Exhibit 16, Decl. Jerry Peters, Supply Chain Manager at Gates (explaining that Gates had purchased from Teijin, Kolon, and DuPont during the relevant time period, and that decisions were based on pricing); Mem. Supp. Summ. J. at Exhibit 10, Decl. Paul Williams, Prior Purchasing Manager OFS (explaining that OFS has started to purchase yarn from Kolon despite DuPont's recent supply agreement with OFS and that OFS did **[*55]** not do so previously because Kolon did not have adequate supply); see also Mem. Supp. Summ. J. SOF ¶ 47 (uncontested fact) (explaining that Kolon sold Heracron to Corning, Garlock, Federal Mogul, and MW Custom Papers during the relevant time period).

[25] See, e.g. Mem. Supp. Summ. J. at Exhibit 30, Dep. of David Murphy, Kolon United States sales representative, at 28-29, 31:17-32:20, 151-152 (explaining that he did not approve sales to Goodyear during the relevant time period, and that Kolon did not qualify its product with Goodyear until 2011); Mem. Supp. Summ. J. at Exhibit 12, Decl. of Mr. Jain, Chief Engineer Team Leader at Goodyear, ¶ 21 ("Prior to February 2011, Goodyear could not have and would not have purchased Heracron because it had not met Goodyear's standards and specifications."); Opp. Summ. J. at Exhibit 44-A, Aug. 2008 email from Mr. Kang in response to Akebono's request for quotations for Heracron ("Several month back, we negotiated with Akebono brake (Japan) for long term biz plan and Quality . . . [s]o, we don't have enough room for supplying to Akebono Brake Corporation in North America this year."); Mem. Supp. Summ. J. at Exhibit 96, email from United States Kolon **[*56]** sales representative Michael Mitchell to OFS ("Thank you for the opportunity to bid on the OFS business . . . unfortunately, all our production capacity for high modulus yarn has already been allocated to existing customers."); see also Seo Dep. Mem. Supp. Summ. J. at Exhibit 56, 140-41 ("The overall amount to be used by OFS is 255 tons . . . [f]or us, to provide a price for 80 percent of that, that is too much of a quantity.").

Here, these factors show a lack of substantial foreclosure. First, as explained above, the duration of nearly all of the agreements on which Kolon rests its case was approximately two years or less. Second, the evidence does not show that consumers have difficulty comparison shopping. The record shows that, amongst others, Corning, Garlock, Federal Mogul, OFS, Gates, Akebono, MW Customer Papers, and Goodyear all did business with Kolon during the relevant time period. See Mem. Supp. Summ. J. SOF ¶ 47 (uncontested fact); supra n. 24 & n. 25. And, Kolon has not demonstrated that consumers have a low propensity to switch sellers. In fact, the record shows that **[*59]** OFS and Goodyear actually did switch some of their business to Kolon after Kolon increased its supply capacity and was qualified. Id. Further, Gates switched between Teijin, Kolon, and DuPont during the relevant time period. The record on this aspect of the analysis also disproves substantial foreclosure.

There is no question that the para-aramid market, by its very nature, presents entry barriers, and taking the evidence in the light most favorable to Kolon for the purposes of summary judgment, these barriers are even higher in the United States where the Berry Amendment prevents international firms from providing para-aramid fiber to the United States Department of Defense. SACC ¶ 27 (Docket No. 2). However, the existence of entry barriers alone does not demonstrate substantial foreclosure.[26]

Not surprisingly, Kolon does not now contend that it has shown any particular degree of foreclosure or that DuPont's supply agreements have locked up a significant portion of the market. Instead, Kolon argues that it has met its burden by demonstrating that the exclusive dealing arrangements at issue formed a "critical bridge" to "high volume" customers, thereby substantially foreclosing competition. Kolon cites to *LePage's, Inc. v. Minnesota Mining & Mfg., 324 F.3d 141, 147 (3d Cir. 2003)* and *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 189 (3d Cir. 2005)* in support of this argument.

In LePage's, the defendant had a 90 percent market share and conceded that it had monopoly power. *324 F.3d at 144*. The Third Circuit was left to determine whether the defendant's exclusive dealing arrangements, when coupled with bundled rebate packages it had offered to induce the plaintiff's major customers into reducing or eliminating their business with the plaintiff, substantially foreclosed the relevant market.

The Court found **[*61]** that, in light of the facts that the defendant had monopoly power and that the plaintiff had shown that it had been foreclosed from doing business with most of its major customers by the defendant's purposeful use of the new bundled rebate programs, a jury could reasonably find that there was substantial foreclosure. *Id. at 152-62*. It noted that "a monopolist is not free to take certain actions that a company in a competitive [] market may take, because there is no market constraint on a monopolist's behavior," *id. at 150*, and that "exclusionary conduct by a monopolist [is] more likely to be anticompetitive than ordinary *§ 1* exclusionary conduct." *Id. at 159* (citing *United States v. Microsoft Corp., 253 F.3d 34, 70-71, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* in which the monopolist had a 95 percent market share)).

In United States v. Dentsply, the defendant-manufacturer had a 75-80 percent market share, while the next largest competitor had a 5 percent market share. *399 F.3d at 188*. The defendant-manufacturer made strategic exclusive dealing arrangements with product distributors, such that the only way for competitors to enter the market was by selling directly to product users. Id. The district court determined **[*62]** that, because other manufacturers could still sell directly, the market was not foreclosed. Id. The Court of Appeals held that the district court had erred in discerning the relevant market by failing to recognize that the mode of business in the market was to work through distributors, and that direct selling was not practical. *Id. at 189-90* ("[T]he Court's scrutiny should have been applied not to the 'ultimate consumers' who used the [product], but to the 'customers' who purchased the [product].").

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[26] If this were true, then both Kolon and Teijin would have "substantially foreclosed" the market during the relevant time period, because both entered into long-term exclusive supply contracts in the para-aramid market during that time frame. See Mem. Supp. Summ. J. SOF ¶¶ 22, 47 (uncontested fact).

Supply agreements, even in markets with high-entry barriers, have certain advantages for both customers **[*60]** and producers. In fact, customers often request these agreements to ensure stable pricing and supply. See *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 334, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*.

In *LePage's*, the plaintiff's description of the "exclusionary conduct" at issue specifically covered: (1) exclusionary dealing contracts; and (2) bundled rebate programs with major distributors. Unlike in this case, the plaintiff demonstrated that the defendant's "bundle rebate" program effectively cut off its business with the major retailers in the relevant market, and that this rebate program was introduced in response to the plaintiff's entry into the market with the purpose of reducing/eliminating plaintiff's sales to the retailers. The plaintiff also showed that the defendant's efforts had been successful, that the defendant had reached out to many of its former customers and that, **[*63]** as a result, those customers had reduced business with the plaintiff. In this case, on the other hand, it is undisputed that DuPont had supply contracts before 2006, and Kolon has not shown that customers it reached out to refused to do business with it because of the supply contracts.[27] And, in *Dentsply*, unlike in this case, the issue was the definition of the relevant market. This, of course, is at the heart of cases finding substantial foreclosure based on the "critical bridge" line of reasoning. In markets where, to be truly competitive, one must sell to a specific group of individuals "distributors," who then sell to "consumers," or in which there is necessarily a "middle-man," defining the relevant market to include both the distributors and the consumers is misleading. If a monopolist ties up the distributors, there is no practical way to reach the consumers and effectively compete.

That simply is not what the record shows here. Kolon has not argued that the customers with whom DuPont has supply agreements are "distributors" or "middle-men." The record presents no reason to think that Kolon could not sell to other customers occupying the same segment of the para-aramid market (pulp, tires, MRG, fiber optic cables) as customers that have supply agreements with DuPont. Further, Kolon offered no explanation as to why DuPont's supply agreements prevent it and other competitors from seeking business in other unimpeded segments of the para-aramid market. Nor has Kolon shown why the particular segments on which it focuses are, in fact, "key" or "critical" in the para-aramid market.

In sum, neither LePage's nor Dentsply is applicable here. In both cases, monopoly power was clearly established. The courts necessarily viewed the substantial foreclosure inquiry through that lens. *E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 441 (4th Cir. 2011)* ("Conduct that might otherwise be lawful may be impermissibly exclusionary under ***antitrust law*** when practiced **[*66]** by a monopolist."). Moreover, the facts in LePage's and Dentsply simply are not present in this case. On the whole, the facts of those cases and the presence there of clearly established monopoly power make it impossible to conclude, as Kolon would have it, that those cases govern this quite different case.

Having failed to establish that DuPont had monopoly power, and having failed to prove substantial foreclosure, Kolon cannot defeat DuPont's motion for summary judgment on the First Cause of Action.[28]

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[27] Kolon cites to two portions of its sales representatives' testimony to support its argument that DuPont's supply agreements interfered with its business: (1) Mr. Mitchell testified that he believed that Corning did business only with DuPont and Teijin because of supply agreements Corning had with **[*64]** them; and (2) Mr. Murphy testified that he was unable to sell Heracron to Goodyear because of Goodyear's supply agreement with DuPont. Opp. Summ. J. at 17.

However, the records shows both Mr. Mitchell and Mr. Murphy testified that factors other than the supply agreements were responsible for their lack of business. Mem. Supp. Summ. J. at Exhibit 7, Mitchell Tr. 84 (explaining that he was not "aware" that DuPont's or Teijin's contracts limited Kolon's ability to sell in the United States); id. at Exhibit 30, Murphy Tr. 28. (explaining that Kolon could not sell to Goodyear during the relevant time period because of qualification and approval issues).

During the relevant time period, Kolon acknowledged that, out of approximately 1,000 potential United States commercial para-aramid customers in the United States, it attempted to qualify Heracron with only nine customers and contacted approximately 68. See Mem. Supp. Summ. J. SOF ¶ 46 (uncontested fact) (citing Exhibit 97, Kolon's Resp. to 2nd Set of Interrogs., 10/4/09, at 5-10). Thus, it attempted to qualify Heracron with less than 1 percent of United States customers and actually contacted less than 7 percent. The record shows that this **[*65]** frail effort, and not DuPont's supply agreements, explains Kolon's low market share in the United States.

[28] It is not necessary to address whether DuPont's activity was "procompetitive" since it is clear that DuPont did not have monopoly power and since Kolon has not proven foreclosure.

II. THE ATTEMPTED MONOPOLIZATION CLAIM: SECOND CAUSE OF ACTION

A party is guilty of "attempted monopolization" if it employs "methods, means, and practices which would, if successful[] accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it." See, e.g., *American Tobacco Co. v. United States, 328 U.S. 781, 785, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*. To prevail on a claim of attempted monopolization then, a plaintiff must demonstrate:

(1) a specific intent to monopolize **[*67]** a relevant market;

(2) predatory or anticompetitive acts;

(3) a dangerous probability of successful monopolization.

R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362, 394 (M.D.N.C. 2002), aff'd sub nom. *67 F. App'x 810 (4th Cir. 2003)* (citing *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*.

Kolon alleges that DuPont's past conduct and direct statements demonstrate that it had specific intent to monopolize the para-aramid market. Kolon further alleges that DuPont has engaged in anticompetitive activity through its supply agreements with high-volume para-aramid customers. See SACC ¶ 44 ("DuPont's long-term supply contracts severely restrict access to key United States para-aramid purchasers necessary to gaining threshold sales required to effectively compete in the United States."); see also *E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 452, 453 (4th Cir. 2011)* ("Here, Kolon alleged that DuPont's use of multi-year exclusive contracts with high-volume para-aramid fiber purchasers constituted improper anticompetitive conduct."). And, Kolon claims that DuPont's market share, prices in the United States, and supply shortage in the United States **[*68]** for para-aramid "indicate a dangerous probability of success." SACC ¶ 44.

1. Anticompetitive Conduct[29]

We turn first to Kolon's contention that DuPont engaged in anticompetitive acts through its use of exclusive agreements with high-volume para-aramid customers. As explained in Part I.2 above, exclusive agreements are not per se illegal. **[*69]** See *Chuck's Feed & Seed Co. v. Ralston Purina Co., 810 F.2d 1289, 1293 (4th Cir. 1987)*. To violate antitrust laws, an exclusive dealing arrangement must "foreclose competition in a substantial share of the line of commerce affected." *E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 451 (4th Cir. 2011)* (quoting *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*; *Chuck's Feed, 810 F.2d at 1293* (quoting the same and also citing *Standard Oil Company of California v. United States, 337 U.S. 293, 314, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949)* and *Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356-57, 42 S. Ct. 360, 66 L. Ed. 653 (1922)* for the proposition)).

For the reasons set forth above in Part I.2, Kolon has failed to show that there is a genuine issue of material fact that DuPont has substantially foreclosed the relevant market with the so-called long-term supply agreements. The

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[29] It will be assumed for purposes of the motion for summary judgment that there is a triable issue of fact as to whether DuPont had specific intent to monopolize the para-aramid market in the United States. Kolon's argument on this point is that DuPont discovered the segments of the market that Kolon planned to enter and then implemented supply contracts in order to prevent Kolon's entry. See Mem. Opp. Summ. J. at 6-9.

Of course, the desire to prevent a competitor from taking one's customers or to prevent the loss of market share is not, in and of itself, illegal. The purpose of the antitrust laws is to promote and protect competition, not to thwart it. See *Abcor Corp. v. AM Int'l, Inc., 916 F.2d 924, 931 (4th Cir. 1990)* (citing *Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. No competitor can be expected to welcome news of a new entrant in the market.

supply agreements at issue constituted a small percentage of DuPont's total sales. DuPont's market share decreased from 59 to 55 percent during the relevant time period. Out of a pool of some 1,000 customers, DuPont had supply agreements with only 21, exclusive volume agreements with only 14, and exclusive volume agreements that were **[*70]** active for a period longer than one-year during the relevant time period with only 11 customers.[30] There were entire segments of the para-aramid market in which DuPont had no supply agreements.[31] And, important customers with which DuPont had supply agreements actually conducted and sought business with Kolon and with Teijin during the relevant period. And, during the relevant period, Kolon and Teijin both had their own supply agreements with para-aramid customers in the United States; Hyosung, a Korean competitor, entered the United States market; and Teijin's market share continued to grow.

On this record, no reasonable jury could find that the so-called long-term contracts constituted substantial foreclosure of the para-aramid market in the relevant period. Therefore, there is no genuine issue of material fact on the anticompetitive element of the attempted monopolization claim, and DuPont's motion for summary judgment as to that claim must be granted for that reason alone.

2. Dangerous Probability of Success

Even if Kolon had made out a triable issue on the anticompetitive element of its Second Cause of Action, it would have to prove the third element of an attempted monopolization claim: that there was a dangerous probability of successful monopolization. An analysis of this element looks at the defendant's ability to control the relevant market. *E.I. du Pont de Nemours & Co. v. Kolon Industries, Inc., 637 F.3d 435, 453 (4th Cir. 2011)*. The analysis examines market share, the ability to control prices and the ability to exclude competitors. The plaintiff must prove that the alleged anticompetitive **[*72]** acts and the specific intent to monopolize "result in a reasonable probability that monopolization will sooner or later occur." O'Malley, Grenig, Lee, Federal Jury Practice and Instruction, § 150.32 (5th ed. 2001); Sand, Siffert, Reiss, Batterman, Modern Federal Jury Instructions (Civil), Instruction 80-29; *Spectrum Sports v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)* (citing *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* ([conduct] "is unlawful only when it threatens actual monopolization . . . judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.")).

This record shows that, in the relevant years, DuPont's market power declined from 59 percent to 55 percent, a continuation of a 17 year decline in market power. At the same time, the market power of Teijin was increasing, and significantly so. Teijin went from 41 percent market share in 2006 to 44 percent in 2009. Two new companies, Hyosung and Kolon, entered the market.

The record does not establish that DuPont had the ability to control prices. Indeed, the record shows that DuPont had to charge lower prices in the United **[*73]** States market than in the European market, a market Kolon claims to have been comparable to the United States market and a market in which Kolon says it was able to compete.

And, while it appears that Kolon had difficulty entering the United States market, the record shows that was through no fault of DuPont. Instead, the record shows that, during and after the relevant time period (2005-2011), Goodyear, one of DuPont's biggest customers, wanted to buy from Kolon and was helping Kolon in an effort to qualify Heracron to meet Goodyear specifications. Mem. Supp. Summ. J. at Exhibit 30, Dep. of David Murphy, Kolon United States sales representative, at 28-29, 31:17-32:20, 151-152. Kolon, however, could not achieve qualification

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[30] Some of these 11 customers could terminate the contract without cause after a certain period of time, most often one-year, so those contracts would likely be considered one-year contracts instead of multi-year contracts. And, some could be considered non-exclusive in the sense that they had low volume requirements, only required the buyer not to exceed a maximum amount of purchases per year, or only limited purchases of a particular type. However, granting every inference in Kolon's favor for the purposes of summary judgment, the Court assumes they could be classified as multi-year contracts.

[31] Kolon **[*71]** has offered no evidence as to why it did not do business in these other segments or as to what percent of the market each segment (tires, MRG, aerospace, pulp, etc.) covered.

during the relevant period. Id. In addition, OFS solicited bids from Kolon in 2008, but Kolon chose not to bid because of its own capacity limitations. Mem. Supp. Summ. J. at Exhibit 96, email from Kolon's sales representative in the United States, Michael Mitchell, to OFS.[32] And, other customers that had supply contracts with DuPont actually did business with Kolon during the relevant time period.[33] On this record, it cannot be said that Kolon has shown a triable **[*74]** issue respecting DuPont's ability to exclude competitors from the market.

Indeed, Kolon has not demonstrated the existence of evidence that would permit a reasonable jury to find that the alleged anticompetitive acts (which have not been shown) and the alleged intent to monopolize (as to which a triable issue is assumed) presented a reasonable probability that monopolization would sooner or later occur.

Hence, there is no triable issue of fact on the "anticompetitive acts" or the "dangerous probability" elements of Kolon's Second Cause of Action: Attempted Monopolization. Therefore, that claim cannot withstand summary judgment.

CONCLUSION

For the foregoing reasons, Dupont's MOTION FOR SUMMARY JUDGMENT (Docket No. 254) will be granted.

It is so ORDERED.

/s/ Robert E. Payne

Robert E. Payne

Senior United States District Judge

Richmond, Virginia

Date: April 5, 2012

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[32] Once Kolon had capacity, Kolon did do business with OFS.

[33] Corning, Garlock, Federal Mogul, Gates, Akebono, MW Customer Papers, and Goodyear all did business with Kolon during the relevant time period. See Mem. Supp. Summ. J. SOF ¶ 47 (uncontested fact); supra n. 24 & n. 25.

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Behrend v. Comcast Corp.

United States District Court for the Eastern District of Pennsylvania

April 12, 2012, Decided; April 12, 2012, Filed

CIVIL ACTION NO. 03-6604

Reporter

2012 U.S. Dist. LEXIS 51889 *; 2012-1 Trade Cas. (CCH) P77,862; 55 Comm. Reg. (P & F) 967

CAROLINE BEHREND, et al. v. COMCAST CORPORATION, et al.

Subsequent History: Motion denied by, Motion granted by, Stay granted by *Behrend v. Comcast Corp., 2012 U.S. Dist. LEXIS 137451 (E.D. Pa., Sept. 25, 2012)*

Prior History: *Behrend v. Comcast Corp., 655 F.3d 182, 2011 U.S. App. LEXIS 17524 (3d Cir. Pa., 2011)*

Core Terms

cable, clustering, overbuilding, competitors, swap, franchise, subscribers, asserts, contractors, markets, acquisition, Undisputed, customers, prices, Counterparties, transactions, summary judgment, anticompetitive, genuine issue of material fact, cable system, antitrust, Deposition, argues, monopolization, geographic, compete, non-compete, providers, installation, allocate

Counsel: **[*1]** For STANFORD GLABERSON, Plaintiff: ANN D. WHITE, LEAD ATTORNEY, ANN D. WHITE LAW OFFICES, P.C., JENKINTOWN, PA; ANTHONY J. BOLOGNESE, JOSHUA H. GRABAR, LEAD ATTORNEYS, BOLOGNESE & ASSOCIATES, LLC, PHILADELPHIA, PA; BARRY C. BARNETT, DANIEL H. CHAREST, DONNA MCNAMARA, LEAD ATTORNEYS, SUSMAN GODFREY LLP, DALLAS, TX; DAVID R. WOODWARD, JESSICA N. SERVAIS, SAMUEL D. HEINS, LEAD ATTORNEYS, HEINS MILLS & OLSON, PLC, MINNEAPOLIS, MN; DOUGLAS A. MILLEN, WILLIAM H. LONDON, LEAD ATTORNEYS, FREED KANNER LONDON & MILLEN LLC, BANNOCKBURN, IL; HILARY K. RATWAY, LEAD ATTORNEY, HAUSFELD LLP, WASHINGTON, DC; JAYNE A. GOLDSTEIN, LEAD ATTORNEY, SHEPHERD FINKELMAN MILLER & SHAH, MEDIA, PA; JOSEPH GOLDBERG, LEAD ATTORNEY, FREEDMAN BOYD DANIELS HOLLANDER & GOLDBERG PA, ALBUQUERQUE, NM; SARA BERGER, LEAD ATTORNEY, FREEDMAN BOYD HOLLANDER GOLDBERG & IVES, P.A., ALBUQUERQUE, NM; SHAWN JONATHAN RABIN, LEAD ATTORNEY, SUSMAN GODFREY, L.L.P., NEW YORK, NY; WILLIAM R.H. MERRILL, LEAD ATTORNEY, SUSMAN GODREY LLP, HOUSTON, TX; CAROL A. MAGER, CONSOLE LAW OFFICE LLC, PHILADELPHIA, PA; DAVID ANZISKA, MARTIN I. TWERSKY, BERGER & MONTAGUE PC, PHILADELPHIA, PA; ROBERTA D. LIEBENBERG, FINE, KAPLAN AND BLACK, PHILADELPHIA, **[*2]** PA.

For ERIC BRISLAWN, JOAN EVANCHUK-KIND, Plaintiffs: ANN D. WHITE, LEAD ATTORNEY, ANN D. WHITE LAW OFFICES, P.C., JENKINTOWN, PA; BARRY C. BARNETT, DANIEL H. CHAREST, DONNA MCNAMARA, LEAD ATTORNEYS, SUSMAN GODFREY LLP, DALLAS, TX; DAVID R. WOODWARD, JESSICA N. SERVAIS, SAMUEL D. HEINS, LEAD ATTORNEYS, HEINS MILLS & OLSON, PLC, MINNEAPOLIS, MN; DOUGLAS A. MILLEN, WILLIAM H. LONDON, LEAD ATTORNEYS, FREED KANNER LONDON & MILLEN LLC, BANNOCKBURN, IL; GARY L. SPECKS, LEAD ATTORNEY, KAPLAN FOX & KILSHEIMER LLP, HIGHLAND PARK, IL; HILARY K. RATWAY, LEAD ATTORNEY, HAUSFELD LLP, WASHINGTON, DC; JAYNE A. GOLDSTEIN, LEAD ATTORNEY, SHEPHERD FINKELMAN MILLER & SHAH, MEDIA, PA; JOSEPH GOLDBERG, LEAD ATTORNEY, FREEDMAN BOYD DANIELS HOLLANDER & GOLDBERG PA, ALBUQUERQUE, NM; JOSHUA H. GRABAR, LEAD ATTORNEY, ANTHONY J. BOLOGNESE, BOLOGNESE & ASSOCIATES, LLC, PHILADELPHIA, PA; SARA BERGER, LEAD ATTORNEY, FREEDMAN BOYD HOLLANDER GOLDBERG & IVES,

P.A., ALBUQUERQUE, NM; SHAWN JONATHAN RABIN, LEAD ATTORNEY, SUSMAN GODFREY, L.L.P., NEW YORK, NY; WILLIAM R.H. MERRILL, LEAD ATTORNEY, SUSMAN GODREY LLP, HOUSTON, TX; CAROL A. MAGER, CONSOLE LAW OFFICE LLC, PHILADELPHIA, PA; DAVID ANZISKA, MARTIN I. TWERSKY, **[*3]** BERGER & MONTAGUE PC, PHILADELPHIA, PA; ROBERTA D. LIEBENBERG, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA.

For CAROLINE BEHREND, Plaintiff: ANN D. WHITE, LEAD ATTORNEY, ANN D. WHITE LAW OFFICES, P.C., JENKINTOWN, PA; ANTHONY J. BOLOGNESE, JOSHUA H. GRABAR, LEAD ATTORNEYS, BOLOGNESE & ASSOCIATES, LLC, PHILADELPHIA, PA; BARRY C. BARNETT, DANIEL H. CHAREST, DONNA MCNAMARA, STEPHEN SHACKELFORD, JR., LEAD ATTORNEYS, SUSMAN GODFREY LLP, DALLAS, TX; CAROL A. MAGER, LEAD ATTORNEY, CONSOLE LAW OFFICE LLC, PHILADELPHIA, PA; DOUGLAS A. MILLEN, WILLIAM H. LONDON, LEAD ATTORNEYS, FREED KANNER LONDON & MILLEN LLC, BANNOCKBURN, IL; HILARY K. RATWAY, LEAD ATTORNEY, HAUSFELD LLP, WASHINGTON, DC; JAYNE A. GOLDSTEIN, LEAD ATTORNEY, SHEPHERD FINKELMAN MILLER & SHAH, MEDIA, PA; JESSICA N. SERVAIS, SAMUEL D. HEINS, KATHERINE T. KELLY, LEAD ATTORNEYS, HEINS MILLS & OLSON, PLC, MINNEAPOLIS, MN; JOSEPH GOLDBERG, LEAD ATTORNEY, FREEDMAN BOYD DANIELS HOLLANDER & GOLDBERG PA, ALBUQUERQUE, NM; SARA BERGER, LEAD ATTORNEY, FREEDMAN BOYD HOLLANDER GOLDBERG & IVES, P.A., ALBUQUERQUE, NM; SHAWN JONATHAN RABIN, LEAD ATTORNEY, SUSMAN GODFREY, L.L.P., NEW YORK, NY; WILLIAM R.H. MERRILL, LEAD ATTORNEY, SUSMAN GODREY LLP, **[*4]** HOUSTON, TX; ANNIKA K. MARTIN, PRO HAC VICE, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, NEW YORK, NY; DAVID ANZISKA, MARTIN I. TWERSKY, BERGER & MONTAGUE PC, PHILADELPHIA, PA; JOSEPH R. SAVERI, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, SAN FRANCISCO, CA; ROBERTA D. LIEBENBERG, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA.

For COMCAST CORPORATION, COMCAST CABLE HOLDINGS, LLC, COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., COMCAST CABLE COMMUNICATIONS, INC., COMCAST HOLDINGS CORPORATION, Defendants: ALYCIA REGAN BENENATI, DAVID M. MAX, DORIT UNGAR, JAMES T. CAIN, MICHAEL E. HAGENSON, MICHAEL S. SHUSTER, SHERON KORPUS, LEAD ATTORNEYS, KASOWITZ, BENSON, TORRES & FRIEDMAN LLP, NEW YORK, NY; DARRYL J. MAY, LEAD ATTORNEY, BURT M. RUBLIN, BALLARD SPAHR ANDREWS & INGERSOLL, LLP, PHILADELPHIA, PA.

For DIRECTV, INC., Interested Party: ANDREW E. PARIS, LOUIS A. KARASIK, LEAD ATTORNEYS, ALSTON & BIRD LLP, LOS ANGELES, CA; JERRY DESIDERATO, LEAD ATTORNEY, Mitts Milavec, LLC, Philadelphia, PA.

Judges: John R. Padova, J.

Opinion by: John R. Padova

Opinion

MEMORANDUM

Padova, J.

I. INTRODUCTION

Presently before the Court in this class action suit alleging violations of sections 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1*, *2*, is the motion of Defendants **[*5]** Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively "Comcast") for summary judgment pursuant to *Fed. R. Civ. P. 56*. The Third Amended Complaint alleges that Comcast entered into agreements with its competitors to allocate the nation's regional cable markets amongst themselves through swaps of their respective cable assets. The Class alleges that, as a result of all the swap agreements, Comcast unreasonably restrained trade and willfully obtained and maintained monopoly power in the relevant geographic market, the Philadelphia direct marketing area ("DMA"). The Class contends that Comcast has used its monopoly power to raise cable prices to artificially high, supra-competitive levels. For the following reasons, we grant Comcast's motion for summary judgment on the Class's section 1 claim, insofar as it charges that Comcast's conduct was a *per se* violation of the antitrust laws. We also grant the motion in part on the Class's *section 2* claims.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to **[*6]** any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. When the moving party also bears the burden of proof at trial, that party must support its motion with sufficient evidence that would entitle it to a directed verdict. *In re Bressman, 327 F.3d 229, 237 (3d Cir. 2003)* (citations omitted). Once the moving party has made such a showing, the non-moving party can defeat the motion "with probative evidence that would demonstrate the existence of a triable issue of fact." *Id. at 238* (citations omitted).

III. SECTION 1 *PER SE* LIABILITY BASED UPON HORIZONTAL MARKET [*7] ALLOCATION

In order to prove its antitrust claims, the Class must establish: (1) a violation of the antitrust laws, here *sections 1* and *2* of the Sherman Act, (2) individual injury resulting from that violation (antitrust impact), and (3) measurable damages. *15 U.S.C. § 15*; *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008)* (citing *Am. Bearing Co. v. Litton Indus., Inc., 729 F.2d 943, 948 (3d Cir. 1984))*. Section 1 of the Sherman Act condemns contracts, conspiracies, and combinations in restraint of trade. *15 U.S.C. § 1*. Because even beneficial legitimate contracts or combinations restrain trade to some degree, *section 1* has long been interpreted to prohibit only those contracts or combinations that are "unreasonably restrictive of competitive conditions." *Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 58, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*. "Three general standards have emerged for determining whether a business combination unreasonably restrains trade under *section 1*." *United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993)*.

Under traditional "rule of reason" analysis, a fact finder "weighs all of the circumstances of a case in deciding whether a restrictive practice should **[*8]** be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. "The inquiry is whether the restraint at issue 'is one that promotes competition or one that suppresses competition.'" *Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830 (3d Cir. 2010)* (quoting *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 691, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978))*. To establish a section 1 violation under the rule of reason test, a plaintiff must prove: (1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action was illegal; and (4) that the plaintiff was injured as a proximate result of the concerted action. *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 464-65 (3d Cir. 1998)* (citation omitted).

> "The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets." *Brown [Univ.], 5 F.3d at 668*. "The plaintiff may satisfy this burden by proving the existence of actual

> anticompetitive effects," or **[*9]** defendant's market power. Id. "If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective." *Id. at 669*. "To rebut, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective." Id.

Deutscher Tennis Bund, 610 F.3d at 830.

Certain restraints are *per se* illegal '"because of their pernicious effect on competition and lack of any redeeming virtue. . . .'" Id. (quoting *Brown Univ. 5 F.3d at 669*); see also *N.W. Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co., 472 U.S. 284, 289-90, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)*. However, '"[p]er se liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" *Deutscher Tennis Bund, 610 F.3d at 830* (quoting *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* (stating "this Court presumptively applies rule of reason analysis. . . .") (quoting *Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 692*)); see also *State Oil v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)* ("Per **[*10]** se treatment is appropriate '[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.'" (quoting *Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)* (alteration in original)). A horizontal market allocation agreement is one of the species of perniciously anticompetitive conduct that is *per se* illegal. See *Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)* (per curiam); *United States v. Topco Assocs., Inc., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*.

Finally, courts apply an intermediate or "quick look" rule of reason analysis "in cases where *per se* condemnation is inappropriate but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint." *Deutscher Tennis Bund, 610 F.3d at 830* (quoting *Brown Univ., 5 F.3d at 669* (internal quotation marks omitted)). "Under 'quick look' analysis, the competitive harm is presumed, and 'the defendant must promulgate 'some competitive justification' for the restraint.'" *Id. at 831* (quoting *Brown Univ., 5 F.3d at 669* quoting *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 110, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984))*. [1]

Comcast argues that application of the *per se* rule here is improper for several reasons. First, it asserts that courts are increasingly reluctant to apply the *per se* label, especially where the economic **[*12]** impact of the challenged business practice is not immediately obvious. Second, no court has previously condemned as a *per se* violation transactions that have been approved by federal antitrust or regulatory agencies. [2] Third, it asserts that the alleged

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[1] The selection of the mode of **[*11]** analysis to apply to an antitrust claim is a question of law for the court to determine. *California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1124 (9th Cir. 2011)* (holding that the selection of the proper mode of antitrust analysis is a question of law, to be reviewed *de novo* on appeal (citing XI Phillip Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1909b, at 279 (2d ed. 2005))); *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 61 (1st Cir. 2004)* (stating that whether a plaintiff's alleged facts comprise a *per se* claim is normally a question of legal characterization that can often be resolved by the judge on a motion to dismiss or for summary judgment); *Deutscher Tennis Bund, 610 F.3d at 833* (holding that the "application of the quick look analysis is a question of law to be determined by the court," and therefore has no application to jury inquiry (citing ABA Section of ***Antitrust Law***, Model Jury Instructions in Civil Antitrust Cases A-8 n. 2 (2005))).

[2] Comcast's argument about *per se* liability and regulatory approval is not new. In deciding Comcast's Rule 12(b)(6) motion, we rejected - both on initial review and on reconsideration - its argument that the initial Class Complaint failed to state a *per se* violation, finding that the allegations supported a claim that the swap agreements constituted a horizontal market allocation. Addressing one of Comcast's **[*13]** main arguments, we held that "[t]he mere fact that regulatory and law enforcement agencies may have reviewed and approved the challenged transactions is not ground for dismissal of Plaintiffs' claims." *Glaberson v. Comcast Corp., Civ. A. No. 03-6604, 2006 U.S. Dist. LEXIS 62672, 2006 WL 2559479, at *10 (E.D.Pa. Aug. 31, 2006)* *modified by* *Glaberson v. Comcast Corp., Civ. A. No. 03-6604, 2006 U.S. Dist. LEXIS 91990, 2006 WL 3762028 (E.D.Pa. Dec. 19, 2006)* (citing *Otter Tail Power Co. v. United States, 410 U.S. 366, 372, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)* (explaining that "[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless maybe subject to scrutiny under the antitrust

market allocation here was not among competing firms. [3] Finally, Comcast contends that the swap transactions were not naked restraints on trade because no markets were actually allocated since the swap agreements did not contain no-compete clauses restricting the Counterparties from re-entering the market and competing with one another. The Class responds that the summary judgment record establishes a horizontal allocation of markets between competitors that is a naked restraint on trade constituting a *per se* violation of *section 1*.

A. Comcast's Acquisition of Cable Companies and Cable Assets

Beginning in 1998, Comcast embarked upon a course of conduct to create a cable "cluster" in the Philadelphia DMA by acquiring the cable systems of other large multi-system operators ("MSOs") that operated and offered multichannel video programming distributor ("MVPD") service in various franchise areas in the Philadelphia DMA. (See Class Certification Memorandum Opinion, Doc. No. 430, entered January 7, 2010 ("Class Cert. Mem."), at 7-8 n. 8; Def. Ex. 59, Deposition of Michael A. Williams, Ph. D. on May 29, 2009 ("Williams Dep."), at 104-105.) In the first acquisition transaction, occurring in April 1998, Comcast acquired from Marcus Cable certain cable systems operating as the incumbent wireline MVPD provider in franchise areas located in Kent County, Delaware, serving approximately 27,000 subscribers. (See Compl., ¶ 52(a) [4]; Class Cert. Mem., p. 7-8 n.8.) In June 1999, Comcast acquired from Greater Philadelphia Cablevision, Inc. certain cable systems operating as the incumbent wireline MVPD provider in franchise **[*15]** areas located in one of the four franchise areas in the City of Philadelphia. The system had approximately 79,000 subscribers. (Compl. ¶ 52(b); Class Cert. Mem., p. 7-8 n.8.)

In January 2000, Comcast acquired certain cable systems previously owned and operated by Lenfest Communications, Inc. ("Lenfest") in the Philadelphia region. The Lenfest systems operated as the incumbent wireline MVPD operator in franchise areas located in Berks, Bucks, Chester, Delaware, and Montgomery Counties, Pennsylvania; Atlantic, Camden, Burlington, Cape May, Cumberland, and Salem Counties, New Jersey; and New Castle County, Delaware. These cable systems served approximately 1.1 million cable subscribers. (See Compl., ¶ 52(c); Class Cert. Mem., p. 7-8, n.8.) Comcast also acquired Lenfest's ownership interests in Garden State Cablevision L.P. and its 212,000 subscribers located in the Philadelphia DMA. (Expert Decl. of Michael Williams, Ph.D. ¶ 113 ("Williams Decl.").) Thus, Comcast acquired a total of approximately 1.25 million subscribers from Lenfest.

Comcast's acquisition of the Lenfest systems was part of a larger course **[*16]** of conduct of swapping cable assets to build Comcast's cable cluster in the Philadelphia DMA. In December 2000 and April 2001, Comcast and AT&T Corporation swapped certain cable system assets that were previously owned by MediaOne Group, Inc., including AT&T-owned systems operating as the incumbent wireline MVPD provider in franchise areas located in the Philadelphia region. (See Compl., ¶ 55(a), (c); Class Cert. Mem., p. 7-8, n. 8.) Prior to the transaction, Comcast had sought a merger agreement with MediaOne, but AT&T had made a superior bid. (Pl. Ex. 32 at COM-PA1151021.) Rather than engage in "another round of competitive bidding," Comcast and AT&T "reach[ed] an amicable and acceptable alternative" calling for Comcast to terminate its proposed merger and for the two companies to divide the MediaOne assets between themselves. (Id.) In the transaction, Comcast acquired from AT&T approximately 1.365 million MediaOne and legacy AT&T subscribers in the Philadelphia DMA - representing all of AT&T's cable assets and subscribers in the Philadelphia DMA - in exchange for AT&T's receipt of all of Comcast's cable assets and subscribers in Chicago and certain parts of California, Colorado, **[*17]** Florida, Georgia and Pennsylvania (all of which were outside the Philadelphia DMA). (Williams' Decl. ¶ 113; Compl. ¶ 55(b).) As a result of the transaction, AT&T exited the Philadelphia DMA.

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laws"); *Cableamerica Corp. v. Fed. Trade Comm'n, 795 F. Supp. 1082, 1092 (N.D. Ala.1992)* (stating that "'[a]ntitrust immunity is not conferred by the bare fact that defendants' activities might be controlled by an agency having broad powers over their conduct'" and that "'[t]here is no general presumption that Congress intends the antitrust laws to be displaced whenever it gives an agency regulatory authority over an industry'" (quoting *Phonetele, Inc. v. Am. Tel. & Tel. Co., 664 F.2d 716, 729 (9th Cir. 1981))))*.

[3] Comcast argues that because the transactions were not among competitors, **[*14]** the entire section 1 claim fails, even if analyzed under the rule of reason. We will return to this issue *infra.*

[4] All references herein to the Complaint are to the Class's Third Amended Complaint.

Leo Hindery, the former CEO of TCI, as well as AT&T Broadband after it acquired TCI, authored a book in which he described how Comcast's acquisition of Lenfest was intimately tied to the AT&T/Comcast/MediaOne swap transaction. At that time, AT&T owned 50% of Lenfest, with the other 50% owned by the company's founder, Harold "Gerry" Lenfest, and his family. Hindery, who wanted to acquire MediaOne to both build AT&T's cable business and to create cross-marketing opportunities for AT&T's branded telephone service, developed a strategy to combat Comcast's bid for MediaOne by attempting to purchase the other half of Lenfest in order to offer it as "trade bait" to Comcast in exchange for Comcast dropping its pursuit of MediaOne. (Pl. Ex. 52, Hindery, The Biggest Game of All, p. 133, 146-151.) Hindery was successful, and the combined result of the transactions gave Comcast control of its own legacy franchises in the Philadelphia DMA, the much larger holdings of Lenfest, and AT&T's former legacy franchises **[*18]** in the Philadelphia DMA.

In January 2001, Comcast and Adelphia Communications Corporation swapped certain cable system assets, including Adelphia-owned systems operating as the incumbent wireline MVPD provider in franchise areas located in Chester, Delaware and Montgomery Counties, Pennsylvania, involving 464,000 subscribers - representing all of Adelphia's cable assets and subscribers in the Philadelphia DMA. As a result of the transaction, Adelphia exited the Philadelphia DMA. (See Compl., ¶ 55(b); Class Cert. Mem., p. 7-8, n. 8; Williams Decl. ¶ 113.)

In July 2006, Time Warner Cable, Inc. ("Time Warner") and Comcast acquired, pursuant to a joint bid, certain cable systems from the bankruptcy estate of Adelphia (the "Time Warner/Comcast/Adelphia Transaction"). As part of the Time Warner/Comcast/Adelphia Transaction, Comcast and Time Warner swapped certain cable systems, including both self-owned systems as well as Adelphia-owned systems. One of the systems Comcast acquired was a Time Warner-owned cable system operating as the incumbent wireline MVPD provider in the city of Philadelphia, serving approximately 40,000 subscribers. (See *Adelphia Comm'ns Corp., 21 FCC Rcd 8203 (2006)* ("Time **[*19]** Warner/Comcast/Adelphia Order"), ¶ 12; see also Class Cert. Mem., p. 7-8, n. 8.) The transaction involved all of Time Warner's cable assets and subscribers in the Philadelphia DMA. As a result of the transaction, Time Warner exited the Philadelphia DMA.

Finally, in August of 2007, Comcast acquired from Patriot Media & Communications ("Patriot") certain cable systems operating as the incumbent wireline MVPD provider in franchise areas located in Somerset, Hunterdon, Morris and Mercer counties in New Jersey, serving approximately 81,000 subscribers. (See Class Cert. Mem., p. 7-8, n. 8; Def. Ex. 38, Plaintiffs' Class Certification Hearing Ex. 91; see also Def. Ex. 27, Comcast Press Release, Comcast Corporation to Acquire Patriot Media, April 3, 2007.)

B. The Class's Evidence of Comcast's Anticompetitive Intent in Forming the Philadelphia Cluster.

The Class presents evidence in several areas to support its contention that there are genuine issues of material fact concerning whether Comcast had anticompetitive intent in entering into the swap transactions.

1. Evidence that Comcast had a long-standing corporate strategy to develop clusters.

The Class cites to internal Comcast documents evincing **[*20]** a twenty-year strategy of acquiring cable properties in contiguous areas, including the Philadelphia DMA. (See e.g., Pl. Ex. 49, "Comcast History - 1998-1999," p. 3 ("For nearly twenty years, Comcast had pursued a strategy of acquiring cable properties in contiguous areas, especially in the Atlantic seaboard region. . . ."); Pl. Ex. 51, Special Board Mtg. Minutes of May 24, 1999, p. 1 (concerning the Adelphia swaps, Comcast CEO Brian Roberts "noted that the Company, under the proposed swaps, would acquire cable systems in New Jersey and Eastern Pennsylvania to enhance the Company's clustering strategy in its mid-Atlantic region.").) In announcing the bid to acquire MediaOne assets, CEO Roberts emphasized that the combination would have a direct clustering effect, giving Comcast clusters in the top 20 markets representing 80% of the cable market and would leave Comcast a "well-clustered company." (Pl. Ex. 54, Tr. of Conf. Call of March 22, 1999, p. 2.) After the agreement with AT&T supplanted Comcast's initial MediaOne bid, and resulted in Comcast and AT&T allocating Lenfest's cable systems to Comcast, Roberts stated that Comcast's "clustering position becomes even better." (Pl. Ex. **[*21]** 49, Comcast History 1998-1999, p.12.) Comcast COO Steven Burke testified that Comcast's goal was "to have clusters that were as big as possible in each DMA, our goal was and is." (Pl. Ex. 82, Dep. of Steven Burke on December 5, 2008 ("S. Burke Dep."), 117:10-12.) Burke wrote to the attendees of a corporate retreat that, "[f]ully 85% of our 8.2 million subscribers will be in clusters over 200,000 subscribers. These clusters represent a unique opportunity to maximize our business if we learn how to manage them as efficiently as possible." (Pl. Ex. 63, "Clusters/2000 Management Retreat," p.1 (emphasis in original).) Robert Pick, Comcast's executive in charge of corporate development wrote that clustering "is the impetus for the next wave of cable acquisitions." (Pl. Ex. 26A, "Trades/Swap Memo.") In testimony before the FTC in the Adelphia acquisition case, Pick stated that Comcast and Time Warner agreed to divide Adelphia assets between themselves to enable geographic clustering, which "was really most important to Comcast. . . . [T]o the extent we could get an entire market, that was important because we wanted - we wanted clustering." (Pl. Ex. 26, Dep. of Robert Pick of July 19, 2005, **[*22]** 36:5-21.)

2. Evidence that the purpose behind the swaps and acquisitions strategy was to control, dominate and consolidate cable markets.

The Class cites numerous Comcast internal documents as evidencing its strategy to gain control over cable markets. In announcing Comcast's acquisition of Lenfest, Roberts stated that "Comcast views geographic consolidation of key markets as critically important to the company's future." (Pl. Ex. 62, Comcast Press Release of January 18, 2000, p.1.) Joseph Donnelly of Comcast's corporate development unit wrote about the Adelphia acquisition, "step back and say where does it get us - ie - can we dominate mkt, etc." (Pl. Ex. 29, Handwritten note on Letter of July 22, 1999.) An analysis of a Toledo, Ohio cable company noted its acquisition "would present Comcast with the opportunity to own approximately 50% of the 66th largest DMA in the nation." (Pl. Ex. 39, Memo of May 27, 1999.) An analysis of Cablevision properties stated that the "Cleveland market offers Comcast the opportunity to consolidate the 13th largest DMA in the country, as currently, no MSO dominates this market" and the "Kalamazoo system offers Comcast the opportunity to dominate a top-50 **[*23]** DMA, provided Comcast does a second swap with AT&T to obtain its subscriber base in this market." (Pl. Ex. 40, Memo of October 13, 1999, p. 4.) A 2005 memo about New Hampshire stated Comcast had a "real opportunity to consolidate this market along DMA-rational lines and effectively lock up one of the real growth areas in New England." (Pl. Ex. 41, Email of October 19, 2005.)

3. Evidence that clustering was a common strategy among market participants.

In his book, Leo Hindery declared that shared markets made no sense in the cable industry; that the industry would benefit from clustering with one cable operator per market; and to effectuate this happening, cable operators would have to voluntarily swap systems across the country. (Pl. Ex.52, Hindery, The Biggest Game of All, p. 73-74. [5]) In his deposition, Hindery testified that "the whole premise . . . was that some operators would leave an area and others would stay and you would become the significant operator in that DMA." (Pl. Ex. 89, Dep. of Leo Hindery of November 14, 2008 ("Hindery Dep."), 190:14-16.) He stated that "all of the cable operators by 1997, 1998, at TCI's urging, adopted [his strategy]. . . . Every major company participated **[*24]** in the exchange of systems over those 24 months, roughly." (Id. at 86:14-18.)

When asked about Comcast's desire to control DMAs, Brian Roberts stated in his deposition that, during the time frame of the July 2006 Time Warner/Comcast/Adelphia swap transaction, "there was a lot of swapping going on, as you referred to, that Mr. Hindery facilitated. Satellite is there, as a real competitor. There are other competitors in the market, real and future competitors, like phone companies. I think it's, **[*25]** you know, the notion of aggregating more customers in one cluster. Once you do so, there's only an incumbent cable company in each of these different 30,000 franchises, and if somebody is able to secure acquiring them, then they have a major presence in the market." (Pl. Ex. 93, Roberts Dep., 127:22-128:11.)

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[5] Hindery wrote that cable systems owning spread out franchises,

> had always struck me as nonsensical. It was inefficient for cable operators and confusing for customers. I strongly believed that the entire industry, including TCI, would benefit enormously by "clustering" cable systems into specific markets, with one cable operator per market. To make this plan work, however, we'd have to convince other cable operators to voluntarily swap systems across the country. This was no small challenge. To pull it off, we'd have to get everybody to agree to basic valuations and stick to them. But I knew it was quite doable, provided we could get everybody rowing in the same direction.

(Pl. Ex.52 at 73-74.)

4. Evidence that the swap agreements were naked restraints of trade as market and customer allocations.

To support its position that Comcast engaged in an illegal market allocation scheme, the Class cites to numerous Comcast internal documents, wherein company executives discussed "rationalizing" the cable industry through possible cable swaps and acquisitions that would consolidate Comcast's position in certain markets in exchange for its giving up positions in other markets. (See Pl. Ex. 28, Memo of August 15, 1996, p. 2 ("Both Comcast and Adelphia would like to obtain the other's eastern Florida systems."); Pl. Ex. 32, Special Bd. Mtg. Minutes of May 4, 1999, p. 3 (listing systems to be swapped between Comcast and AT&T); Pl. Ex. 36, Memo of July 11, 1996 (discussing Philadelphia DMA as a "Comcast Sacrosanct System"; and proposing swaps in California); Pl. Ex. 37, Memo of September **[*26]** 29, 1997 (discussing swap of Pittsburgh system for New Jersey and Tennessee systems to "further rationalize the NYC"); Pl. Ex. 38, Memo of May 25, 1999 (discussing clustering opportunity in Southeast Georgia and South Carolina, including swaps of Savannah and Macon, Georgia systems where Comcast "currently dominates each of these markets"); Pl. Ex. 42, Memo of April 6, 2000 (discussing swap of Muncie, Indiana for Kentucy systems to enable Comcast to "get even better clustered" in the Indianapolis DMA in exchange for "get[ting] out of Kentucky"); Pl. Ex. 44 at COM-PA2107968, (attachment to email of April 8, 2003 discussing swaps in Ohio, Kentucy, Indiana, and New Mexico "to rationalize the large Ohio markets"); Pl. Ex. 46, Email of November 13, 2003 (discussing swaps in Tennessee, Colorado and New Mexico that were never consummated)). The Class also cites Steve Burke's testimony that Comcast and AT&T agreed to swap their respective cable assets in Philadelphia and Chicago because "there was no clear path to [Comcast] having a big cluster in Chicago, it would make more sense for us to get Philadelphia and to swap Chicago." (Pl. Ex. 82, S. Burke Dep. 109-110.) Robert Pick described the **[*27]** swapping of cable assets between Comcast and Time Warner as "horse trading" among the companies. (Pl. Ex. 26, Pick FTC Testimony, at 23:25-25:6; Pl. Ex. 92, Pick Dep. 228:3-8.)

5. Evidence that Comcast had anticompetitive intent to allocate markets.

The Class asserts that Comcast had an anticompetitive intent to allocate the Philadelphia DMA in entering into the AT&T transaction, based primarily upon the content of Leo Hindery's book describing the negotiations between Comcast and AT&T. [6] The Class describes the deal as an agreement by Comcast to stand down from competitive bidding with AT&T for MediaOne in return for receiving Lenfest. (Class Pl. Mem. at 43.) Its evidence of anticompetitive intent includes the Comcast Board minutes describing "discussions with AT&T to reach an amicable and acceptable alternative to another round of competitive bids," (Pl. Ex. 32, Special Mtg. Of Bd. Minutes of May 4, 1999, p. 2), as well as deposition evidence that the transaction made Comcast the dominant cable operator in the Philadelphia DMA. (See Pl. Ex. 31, Donnelly "Lenfest Due Diligence" Memo at 4 ("The acquisition of Lenfest will make Comcast the dominant CATV operator in the Philadelphia DMA **[*28]** (rank - 4th)"); Pl. Ex. 89, Hindery Dep., 53:16-20 ("Q. When it attained Lenfest, did Comcast become dominant within the Philadelphia DMA? . . . A. It certainly became the largest cable operator in that market, yes.); Pl. Ex. 102, AT&T Bd. of Directors Mtg. of March 17, 1999 "Executive Summary" (noting Lenfest "is the leading cable television operator in the greater Philadelphia market."). [7]

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[6] In his book, Hindery wrote,

> Comcast, which is based in Philadelphia, had been trying for years to buy Lenfest Communications, which owned the cable systems in suburban Philadelphia. Gerry Lenfest, the company's founder and namesake, had always refused to sell. Luckily for me, AT&T owned 50 percent of Lenfest. To entice Brian [Roberts] to stand down on MediaOne, I decided to offer him Lenfest Communications. . . .
>
> I told Brian flat out that he could have Lenfest, and therefore the Philadelphia systems he'd wanted for so long, on one condition. He had to promise right then and there not to fight me on MediaOne. He had to agree to take Lenfest as a consolation prize and walk away. . . . Brian considered my offer, then extended his had to shake on the deal.

(Pl. Ex. 52, Hindery, The Biggest Game of All, **[*29]** p. 2.)

[7] In response to this evidence, Comcast asserts that the Class's reliance upon the Lenfest transaction to support a *per se* claim of market allocation is improper because the Lenfest transaction was an acquisition transaction, not a swap of cable assets. Comcast argues that the Class seeks to mischaracterize the Lenfest sale as a swap because we have previously held that the

6. Evidence of non-compete provisions.

The Class argues that the existence of non-compete clauses further supports application of the *per se* rule. Contrary to Comcast's factual assertion, the Class asserts that following **[*30]** the MediaOne deal, Comcast obtained non-compete agreements with Gerry Lenfest and members of his family. (Pl. Ex. 25, Non-Compete Agreement of January 18, 2000.) The term was 3 years and covered Pennsylvania, Delaware and New Jersey. (Id.) While it does not assert that the non-compete agreements were themselves a *per se* violation, [8] the Class asserts that the non-compete agreements are evidence that Lenfest exited the market, and of Comcast's intention to dominate the Philadelphia market.

7. Evidence of the consequences of the swaps.

Finally, the Class contends that there is ample evidence of anticompetitive consequences arising from Comcast's clustering activity. It offers Dr. Williams' opinions that Comcast's gain in market share was a consequence of the swap transactions, making the Philadelphia DMA more concentrated, creating entry barriers, removing firms that competed in the geographic **[*31]** market, deterring overbuilding, and increasing prices. (Williams Decl. ¶ 56 ("In sum, economic analysis shows that Comcast's alleged anticompetitive conduct in the Philadelphia DMA reduced the extent of competition provided by overbuilders in the Philadelphia DMA. Econometric evidence shows that reductions in overbuilding cause cable rates to increase, all else equal. Thus, Comcast's conduct led to rates being increased or maintained above the level that would prevail in the absence of that conduct throughout the Philadelphia DMA."); ¶ 120 ("the effect of the swaps is to allocate that geographic market between the firms;" "market allocation has diminished competition in the Philadelphia DMA".)

C. Comcast's Evidence of Pro-Competitive Justifications.

Comcast responds to the Class's evidence by contending that none of the swap transactions were "naked" market allocation agreements with no other purpose or effect; that each involved real, substantial exchanges of plant, infrastructure, employees, contracts and other business resources; and its growth strategy to use clustering did not transform otherwise lawful swap agreements into a horizontal market allocation because cable firms have **[*32]** legitimate business reasons for clustering that have been recognized by regulators and the Class's own experts. Comcast asserts that the summary judgment record establishes that clustering the Philadelphia DMA allowed it to introduce new products, such as high-speed internet, telephone, pay per view, video on demand, digital video recorders, digital cable, substantially increased channel choice and high-definition television. (Def. Statement of Undisputed Facts ¶ 48; Def. Ex. 50, Doyle Dep., 91:12-92:3. [9]). It also asserts that the economies of scale associated with clustering enable cable providers to compete against DBS companies with a national

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per se claim is limited to the Class's allegations in the Third Amended Complaint that only the swap agreements constituted *per se* violations, while the Class separately alleged that the acquisition agreements were subject to rule of reason analysis. See *Glaberson, 2006 U.S. Dist. LEXIS 62672, 2006 WL 2559479, at *9 n.7* (citing Third Amended Complaint ¶¶ 73-74.) Based on the Hindery evidence, we find that the Class has met its summary judgment burden to demonstrate a genuine issue of fact whether AT&T's agreement to sell the Lenfest assets was an integral part of a broader agreement to swap cable assets between AT&T and Comcast.

[8] We have previously held that non-compete agreements executed upon the sale of a business are generally not recognized as antitrust violations, see Class Cert. Mem. at 18-19, and rejected the Class Expert's market structure analysis to the extent he relied upon the Lenfest non-compete agreement. (Id.)

[9] Michael Doyle, the president of Comcast's Eastern Division, testified that

> one additional advantage of the clustering, too, is your ability of getting into the new products. In a lot of Comcast acquisitions where companies were smaller, they didn't have and didn't spend the capital necessary to offer the new products. **[*34]** And so certainly the advantage to clustering is you have the resources and you have the personnel who can run the new products. And in this day and age, as well as it's been over the last years, it's not a video industry anymore. It's a video, Internet, and telephone industry. It's a commercial business application.
>
> So, I think the clustering certainly gives you the ability to offer more advanced services to consumers.

(Def. Ex. 50, Doyle Dep., 91:12-92:3.)

footprint, as well as telephone companies, who by virtue of their existing telephone clusters, and possessing vastly larger resources, were emerging as competitors in multiple product markets - video, data and telephone. (Def. Statement of Undisputed Facts ¶ 49-51; Def. Ex. 54, Deposition of Robert S. Pick on October 28, 2008 ("Pick Dep."), 56:1-57:23 [10]; see also Def. Ex. 51, Hindery Dep., 132:11-15 [11]; Def. Ex. 56, Roberts Dep., 144:23-145:22. [12]). Finally, it asserts that the FCC has recognized the efficiencies associated with clustering **[*33]** and expressly considered the potential effects of clustering when it approved the Time Warner/Comcast/Adelphia transaction in 2006, well after clustering in the Philadelphia DMA had already occurred. (Def. Statement of Undisputed Facts ¶ 52-53; Def. Ex. 17, FCC 99-418, Sixth Annual Competition Report, ¶¶ 161-162 [13]; see also Def. Ex. 18, FCC 01-1, Seventh Annual Competition Report, ¶ 166 (clustering "permits cable operators to . . . gain efficiencies related to economies of scale and scope resulting in lower administrative costs, enhanced deployment of new technologies and services, and encouraging the extension into previously unserved areas"); Def. Ex. 19, FCC 01-389, Eighth Annual Competition Report, ¶ 14 ("By clustering their systems, cable operators may be able to achieve efficiencies that facilitate the provision of cable and other services, such as telephony.").).

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[10] Robert Pick, Comcast's senior vice president of corporate development, testified that

> the idea of clustering just sort of morphed from the industry. Part of it was competitively driven when you have - when you had like the direct broadcast satellite providers come into being. Their footprint by nature is national. They just put a satellite up in the air and then the signal can reach most of the country.
>
> So when their footprint is national, you know, and we're dealing with small franchises, we obviously cannot compete effectively. They can tell one story. They have an upgraded network. They give one channel lineup. They can offer more channels. So for us to compete when we're just a particular franchise in a market makes it more difficult. **[*35]** It also started to develop as the telephone companies got into the business and their - their footprint by nature is much larger than ours. And so - and then it just sort of happened when you - you know, TCI at one point in time was the largest cable operator in the U.S. and they were financially and operationally stressed at one point in time, so they looked to create clusters or they were giving - they've either sold systems or created joint ventures with - with operators where they would put the systems, clustered systems, on a local basis and said to an operator, here, you run it, you're better able to run these things because of the scale economies within a cluster.

(Def. Ex. 54, Pick Dep., 56:6-57:13.)

[11] Hindery testified that clustering "had nothing to do with controlling the market. It had everything to do with putting ourselves in an operating cost structure that mirrored as closely as possible our nearest and closest competitors." (Def. Ex. 51, Hindery Dep., 132:11-15.)

[12] Roberts testified that

> [t]here was, post-'92, as I have said repeatedly, a desire to take this patchwork of cable systems, and create more sensible businesses so we can compete more effectively in the future **[*36]** against the oncoming competitors, who all had complete DMAs, where in case of satellite, two competitors for every market who had a hundred percent market share in the United States. So every home in America can get the product. They [national footprint DBS providers] can run an ad in the middle of the Super Bowl, let alone, in local broadcast television.
>
> So there was, no question, a lot of desire to try to get larger in markets.

(Def. Ex. 56, Roberts Dep., 144:23-145:22.)

[13] The FCC stated that

> Clustering of cable systems can create greater economies of scale and size. Accordingly, it can enable cable operators to offer a wider variety of broadband services at lower prices to customers in geographic areas that are larger than single cable franchise areas. Clustering can thus make cable operators more effective competitors to LECs whose local service areas are usually much larger than a single cable franchise area. The General Accounting Office, in its report on the changing status of competition to cable television, also found that ownership ties and clustering strategies may provide cost savings and possible competitive advantages.

(Def. Ex. 17, FCC 99-418, Sixth Annual Competition Report, **[*37]** ¶ 162.)

Based in large part upon these governmental reports, Comcast's expert Dr. David Tecce opined that the entry of the DBS companies, who were capable of offering higher quality digital television in a nationwide footprint, created a competitive crisis for cable firms, who up to that time were providing analog signals to non-contiguous individual franchise areas.

> The need to make significant investments in order to upgrade cable systems to compete with DBS providers led to consolidation among cable operators. DBS had large-scale national operations, which gave them ability to take advantage of scale economies. To compete effectively, most cable firms needed to achieve larger scale.

(April 10, 2009 Expert Report of David J. Teece, Ph.D. ("Teece Report") at ¶ 17.) "As a result, cable firms sought to achieve economies of scale through mergers and acquisitions. Many old-line cable firms decided to sell their systems rather than make the investments in system upgrades necessary to stay competitive with DBS providers in the new competitive environment." (Id. ¶ 18.) Teece recounts the history of the "deployment of digital cable transmission that paved the way for cable firms to offer other **[*38]** advanced services. In addition to offering superior video picture quality, digital transmission allows for the provision of several other advanced digital services such as HDTV, Video-on-Demand ("VOD"), Digital Video Recorder ("DVR"), broadband Internet, and cable telephony. These technological advances have ushered a new paradigm in the telecommunications industry, dubbed 'convergence,' under which multiple forms of telecommunications content (audio, video, and data) are delivered to the consumer by a single firm." (Id. ¶ 16 (citations omitted).) He concludes that:

> Regional clustering created significant efficiencies, including achieving economies of scale in upgrading systems to digital and to offer advanced services such as broadband Internet and cable telephony. . . . Clustering allowed cable operators to achieve regional scale comparable to DBS providers and ILECs. For instance, a former TCI and AT&T executive testified that clustering "had everything to do with putting ourselves in an operating cost structure that mirrored as closely as possible our nearest and closest competitors."

(Id. ¶ 21.)

Comcast also presents evidence that the entry of incumbent local exchange carriers ("LECs" **[*39]** or "ILECs") such as Verizon's FiOS system, also created new competition for the cable industry. Dr. Teece reports that ILEC competition, which by 2008 had captured 18% market share, is expected to continue to provide significant competition to cable and DBS firms in the next few years. (Id. ¶ 25-26.) He states:

> The threat of competition from ILECs has been another factor contributing to cable operators' clustering strategy. Because the ILECs' phone footprints were much larger than a typical cable franchise area, clustering allowed cable firms to capture economies of scale and compete effectively in offering advanced services and selling advertising. According to testimony from a former TCI and AT&T executive, clustering was designed to "meet the challenge of these regional phone companies coming and providing video and providing Internet over their existing phone lines.

(Id. ¶ 28 (citations omitted).) Dr. Teece concludes that Comcast's clustering in response to new sources of competition has benefitted consumers. He asserts that consumers benefit from the programming diversity brought about by increased MVPD channel capacity (id. ¶ 32-33), and from the ability of a clustered system to **[*40]** provide advanced services such as HDTV, internet and cable telephony (id. ¶ 34-39). [14]

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[14] Michael Salinger, Director of the Federal Trade Commission's Bureau of Economics, testified before the Senate Judiciary Committee on the Time Warner/Comcast/Adelphia transaction that:

> It was also very clear from the outset that the parties' principal objective in making the acquisition and asset swap was to increase "clustering" in the TWC and Comcast cable assets. Clustering enables cable firms to realize economies of scale associated with providing cable service in contiguous areas. By acquiring contiguous systems, TWC and Comcast could lower several categories of costs, such as management, administrative and marketing costs, as well as the expense of providing system upgrades. In addition, TWC and Comcast could use clustering to position themselves better to compete with local telephone companies and other providers in the delivery of video and telephone service.

(Def. Ex. 22, Michael Salinger, Dir. Bureau of Econ., Prepared Statement of the FTC: Sports Programming and Cable Distribution: The Comcast/Adelphia/Time Warner Transaction (Dec. 7, 2006), p. 4.)

Another Comcast expert, Dr. Stanley Besen, **[*41]** opines that entry into the MVPD market by ILECs, who are essentially in the same shoes as wireline overbuilders, has not been impeded by clustering. He opines that,

> Verizon is currently an actual competitor, providing service that is comparable to that provided by the other operators in large sections of the Philadelphia Cluster. Moreover, Verizon is a well-financed, sophisticated company, with access to the same programming that is available to Comcast, an established brand-name, and long-standing consumer relationships. In addition, it is able to offer both telephone and high-speed internet services along with television programming, in what has come to be called "Triple Play" packages. In short, it poses a formidable competitive threat to Comcast and other cable operators not only as a potential but as an actual competitor. Verizon was not eliminated as either an actual or potential competitor by the transactions at issue so that, on Plaintiffs' theory, households in the areas that they serve, or might serve in the future, have not been harmed by the transactions at issue.

(May 6, 2009 Expert Report of Dr. Stanley Besen ¶ 32 (citations omitted).)

D. Analysis

The United States Supreme **[*42]** Court has held that the *per se* test applies to naked restraints on trade, one where the "purpose of the practice are to threaten the proper operation of our predominantly free-market economy - that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broad. Music, Inc v. CBS., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)* ("BMI") (quoting *United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)*; see also 2 Areeda and Hovenkamp, ***Antitrust Law***, § 305 (3d ed. 2007) (*per se* rule "rests on various judgments about facts, economics, and social policy: that naked price fixing usually harms the economy if the collaborators have any marked power; that legitimate objectives are so rarely present that they should be disregarded; and that little or nothing worthwhile is lost by a categorical prohibition, which dispenses with unnecessary and costly litigation about power, purpose, effect, or claimed redeeming virtues, and which establishes the 'bright line' permitting those severe **[*43]** punishments that deter and guide private conduct."). The geographic division of markets among competitors is a *per se* violation of the Sherman Act. See *Palmer, 498 U.S. at 49* (per curiam) ("[A]greements between competitors to allocate territories to minimize competition are illegal"); *Topco Assocs., Inc., 405 U.S. at 608* ("This Court has reiterated time and time again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose other than stifling of competition.' Such limitations are *per se* violations of the Sherman Act." (alteration in original; internal citations omitted)).

However, even when the *per se* label has been applied to a category of anticompetitive conduct, the cases establish that courts may still look to see whether the economic effects of a particular practice in a particular industry justify abandoning a rule of reason analysis. In BMI, the Court found that, because the blanket license at issue, granting a licensee access to an entire music catalog, created an entirely different product from one that any given composer was able to sell by himself, and did not restrain the right of any individual copyright owner to sell his own compositions **[*44]** separately to any buyer at any price, it could not "be wholly equated with a simple horizontal arrangement among competitors." *441 U.S. at 23-24*. The Court cautioned that when reviewing courts "have some doubt . . . about the extent to which [a] practice threatens the 'central nervous system of the economy,' . . . that is, competitive pricing as the free market's means of allocating resources," application of the *per se* rule should not be used to short circuit a more critical analysis of the practice. Id. (quoting *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59, 60 S. Ct. 811, 84 L. Ed. 1129 (1940))*. Similarly, in Eichorn, the United States Court of Appeals for the Third Circuit held that even where the plaintiff alleged a classic variety of *per se* violation, in that case a group boycott, where the facts used to establish the antitrust violation "are substantially different from the classic *per se* horizontal price fixing and group boycott conspiracies the Court has generally found to be *per se* antitrust violations," the rule of reason must be used to determine whether the practice is condemned by *section 1*. *Eichorn, 248 F.3d at 139* (citing *BMI, 441 U.S. at 8* ("Easy labels [like price fixing] do not **[*45]** always supply ready answers.")).

The authorities agree that this "modern approach" to antitrust analysis should apply where the rationale of the *per se* rule does not neatly fit the industry involved. In BMI, the Supreme Court held that countervailing pro-competitive virtues, like the creation of efficiencies in the operation of a market or in the provision of goods and services, made application of the *per se* test inappropriate to blanket licenses for copyrighted music. *441 U.S. at 20* ("The blanket license, as we see it, is not a 'naked restrain[t] of trade with no purpose except stifling of competition,' *White Motor Co. v. United States, 372 U.S. 253, 263, 83 S.Ct. 696, 702, 9 L.Ed.2d 738 (1963)*, but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use.")

In light of BMI, the earlier Topco decision, holding that horizontal market allocation agreements were a *per se* section 1 violation, has been criticized as going too far. One commentator stated,

> The Court in Topco was a bit like a driver who, because of his "rule" never to pick up hitchhikers, refuses to give a ride to a close friend whose car has broken down. This wooden approach **[*46]** to *per se* rules has been abandoned in subsequent horizontal restraint cases, particularly Broadcast Music, which emphasized the need to characterize restraints before applying a *per se* rule. . . . [U]nder Broadcast Music, a court must determine whether the restraint at issue is one to which the rationale of the rule applies. The Topco association could not possibly have been a cartel, because no licensee had a significant market share in its designated territory; the market shares were so trivial, that the licensees could have merged - at least under modern standards - without drawing the attention of the enforcement agencies. Moreover, the defendants articulated and proved procompetitive benefits. The association seems clearly to have been ancillary to a larger productive purpose.

2 Kintner, Federal ***Antitrust Law***, § 11.39 (2002) (citing Eichorn; *Polk Bros. v. Forest City Enter., 776 F.2d 185, 189-90 (7th Cir. 1985)* (holding that *per se* rule is designed for "naked" restraints rather than agreements that facilitate productive activity)); see also *Augusta News Co. v. Hudson News Co., 269 F.3d 41, 48 (1st Cir. 2001)* ("Despite unguardedly broad language in [Topco], it is commonly understood **[*47]** today that *per se* condemnation is limited to 'naked' market division agreements, that is, to those that are not part of a larger pro-competitive joint venture."). In Polk Bros., the United States Court of Appeals for the Seventh Circuit noted that courts "must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote." *Id. at 188* (citing *National Collegiate Athletic Assoc. v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984))*. Noting the Supreme Court's admonition in *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* that "it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects," Polk Bros. stressed that

> a court must be very sure that a category of acts is anti-competitive before condemning that category *per se.* See [BMI] and *NCAA, supra*, both of which assess under the Rule of Reason horizontal agreements that also involve cooperation among rivals that might produce larger output and more desirable products. Both BMI and NCAA emphasize **[*48]** that condemnation *per se* is an unusual step, one that depends on confidence that a whole category of restraints is so likely to be anticompetitive that there is no point in searching for a potentially beneficial instance.

776 F.2d at 189; accord *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* ("Accordingly, 'we have expressed reluctance to adopt *per se* rules . . . 'where the economic impact of certain practices is not immediately obvious." " quoting *State Oil Co., 522 U.S. at 10*); *Eichorn, 248 F.3d 131, 144 n.2*.

We find that the Class has failed to meet its summary judgment burden with respect to whether the swap transactions were naked market division agreements, rather than merely ancillary restraints on trade. The Class's evidence, for example, that Comcast executives, as well as Leo Hindery, had a long standing desire to "rationalize" the cable industry by consolidating positions in certain markets in exchange for giving up positions in other markets, does not support the conclusion that the swap agreements were naked restraints of trade that were "'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" *Deutscher Tennis Bund, 610 F.3d at 830* **[*49]** (quoting *Texaco Inc., 547 U.S. at 5*). Moreover, the ability of cable companies to provide new and advanced services, achieved through clustering their systems, requires proof of facts that "are substantially different from the classic *per se* horizontal price fixing and group boycott conspiracies the Court has generally found to be *per se* antitrust violations.'" *Eichorn, 248 F.3d at 139*. The competitive efficiencies achieved by clustering - economies of scale needed to upgrade systems to digital service, and creating the ability to offer advanced services such as broadband Internet and cable telephony in larger geographic footprints to effectively compete with DBS providers and ILECs - are the type of pro-competitive conditions that the Third Circuit held can render an industry practice "substantially different from the classic" horizontal restraints subjected to *per se* treatment. *Eichorn 248 F.3d at 139* (citing *BMI, 441 U.S. at 8* ("Easy labels [like price fixing] do not always supply ready answers.")). Like the creation of the blanket license in BMI, creation of cable clusters in order to allow MVPD providers to offer new and improved products is not a categorically "naked restrain[t] **[*50]** of trade with no purpose except stifling of competition." *BMI, 441 U.S. at 20*. Accordingly, we hold that the rule of reason test is the proper method of analyzing the Class's section 1claim.

IV. SECTION 1 RULE OF REASON ANALYSIS - ACTUAL AND POTENTIAL COMPETITION

Having addressed the parties' arguments on the issue of *per se* liability, the only section 1 issue remaining to be decided is Comcast's argument that summary judgment must be entered in its favor because the transaction counterparties were never "competitors." In granting class certification, we determined that class treatment of the section 1 liability issue was limited to whether the Class could demonstrate that Comcast conspired **with competitors** to allocate markets. (See Amended Class Certification Order, Doc. No. 432, entered January 13, 2010 ("1/13 Order"), ¶ 11(a) (emphasis added).) Comcast argues that, even applying a rule of reason analysis to the section 1 claim, the Class has failed to meet its *Rule 56* burden to create a genuine issue of fact that Comcast conspired with its competitors to allocate markets because the Transaction Counterparties never directly competed for cable subscribers. We find that the Class has **[*51]** met its *Rule 56* burden to create a jury issue on whether Comcast and the Counterparties were competitors.

A. Evidence of Actual Competition.

Comcast concedes that, prior to the Transactions, Comcast and the Counterparties each offered cable services to subscribers in the Philadelphia DMA. However, it asserts that they were never "competitors" because, at all times, they operated cable systems in their own respective, non-overlapping franchise areas and never offered services to the same subscribers, at the same time, anywhere in the Philadelphia region. (Def. Ex. 59, Williams Dep., at 80:12-25, 104:24-105:3; Def. Ex. 46, Deposition of Steve Burke on December 5, 2008 ("S. Burke Dep."), at 15:23-16:6; 24:23-25:1, 51:17-22, 205:19-21; Def. Ex. 47, Deposition of Scott Burnside on November 11, 2008 ("Burnside Dep."), at 183:16-184:5; Def. Ex. 55, Deposition of Thomas Steel on July 17, 2008 ("RCN 30(b)(6) Dep."), at 192:21-193:17; Def. Ex. 51, Deposition of Leo Hindery, Jr., on November 14, 2008 ("Hindery Dep."), at 94:5-8; 167:9-12; Def. Ex. 52, Deposition of Harold (Gerry) Lenfest on November 18, 2008 ("Lenfest Dep.") at 89:14- 90:5, 95:9-14; Def. Ex. 50, Deposition of Michael Doyle on November **[*52]** 6 and 20, 2008 ("Doyle Dep."), at 155:1-18; Def. Ex. 56, Deposition of Brian Roberts on September 23, 2008 ("Roberts Dep."), at 208:14-17.)

Prior to the Transactions, no class member had the option of simultaneously obtaining video programming from both Comcast and any of the Counterparties at the same household or within the same local franchise area. (See Def. Ex. 59, Williams Dep., at 104:24-105:3; Def. Ex. 51, Hindery Dep., at 167:9-12; Def. Ex. 46, S. Burke Dep., at 15:23-16:6; 24:23-25:1, 51:17-22, 205:19-21; Def. Ex. 50, Doyle Dep., at 155:1-18; Def. Ex. 56, Roberts Dep., at 208:14-17.) Because each cable company offered MVPD service within separate, non-overlapping franchise areas, Comcast asserts that it did not actually and directly compete with any Counterparty for the business of any cable subscriber. (See Def. Ex. 51, Hindery Dep., at 94:5-8, 167:9-12; Def. Ex. 52, Lenfest Dep., at 89:14-90:5, 95:9-15; Def. Ex. 46, S. Burke Dep., at 24:23-25:1; see also Def. Ex. 22, Michael Salinger, Dir., Bureau of Econ., Prepared Statement of the FTC, before the Cmte. on the Judiciary United States Senate: Sports Programming and Cable Distribution: The Comcast/Time Warner/Adelphia Transaction **[*53]** (Dec. 7, 2006), at 4 (testifying that "the FTC staff determined that [Time Warner] and Comcast were not acquiring any cable assets that competed with their existing assets. In other words, the transaction eliminated no horizontal competition between the parties.")

Comcast supports its assertion by citing the rationale of the Federal Communications Commission in rejecting an objection to the Time Warner/Comcast/Adelphia Transaction that it reduced competition between Comcast and Adelphia or Time Warner. The FCC determined that, prior to the Transaction, Comcast did not compete directly with Adelphia or Time Warner because each offered cable services in adjacent franchises and, thus, consumers did not have the ability to choose between them. [15] (See Def. Ex. 16, Time Warner/Comcast/Adelphia Order, ¶ 82.) Similarly, the FCC rejected an objection to the Comcast/AT&T/MediaOne Transaction on the ground that Comcast and AT&T, or AT&T and MediaOne were competitors, finding that actual competition exists only among cable firms that overbuild each other's franchise areas and that there was no evidence that Comcast and AT&T, or AT&T and MediaOne, would have overbuilt one another in the absence **[*54]** of the transactions. [16] (See Def. Ex. 15, AT&T/Comcast Order, ¶ 94; Def. Ex. 14, *MediaOne Group, Inc., 15 FCC Rcd 9816 (2000)* ("AT&T/MediaOne Order"), ¶¶ 94-95.) Finally, Comcast asserts that the swap agreements did not contain non-compete or other enforceable provisions restricting Comcast or the Counterparties from re-entering the area and competing with one another. However, as noted, the Lenfest acquisition agreement involved a contractual covenant not to compete binding upon Gerry Lenfest, and other family member owners of Lenfest.

The Class responds that each Counterparty offered the same product in the same geographic market; namely, each operated as an MVPD distributor at the same level of the market within **[*57]** the Philadelphia DMA, and therefore were actual competitors prior to the Transactions. Its economics expert, Dr. Michael A. Williams, opines that Comcast and each of the Counterparties were competitors because they engaged in the same business in the same product market and geographic market. (Williams Decl. ¶ 164; Expert Reply Decl. Of Michael Williams, Ph.D. ("Williams Reply Decl.") ¶ 15 (stating that at least eight cable companies provided service in the Philadelphia DMA in areas adjacent to Comcast franchises, before being acquired by Comcast)).

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[15] The FCC's Time Warner/Comcast/Adelphia Order stated, in response to an objection to the proposed merger that:

> In DMAs where both Time Warner and Comcast currently operate, however, they generally do not compete directly for subscribers. Their systems usually operate in adjacent franchise areas within a DMA, and consumers do not have the ability to choose between them. Accordingly, the elimination of Time Warner's or Comcast's presence in a particular DMA does not likely indicate the loss of head-to-head competition.

(Def. Ex. 16 ¶ 82.) The Class concedes that the FCC approved the transaction, but contends that neither the FCC's approval nor its legal **[*55]** conclusion are proper evidence of competition. (Counterstatement of Facts ¶ 33.)

[16] In approving the Comcast/AT&T Transaction, the FCC stated:

> CFA offers no evidence to suggest that AT&T and Comcast would overbuild each other's cable systems such that the proposed merger would diminish competition in these local franchise areas. Applicants deny having any intentions to overbuild, and confirm that they have not overbuilt in each other's franchise areas, with the exception of the few non-consolidated affiliate systems. Accordingly, we cannot conclude from the record that AT&T and Comcast had intentions of overbuilding each other's local markets, or that they were likely to do so.

(Def. Ex. 15 ¶ 94.) In the AT&T/MediaOne order, the FCC found:

> BellSouth argues that the merger will eliminate current and future MVPD competition between AT&T and MediaOne in local areas where the Applicants have overlapping or adjacent cable franchise areas. BellSouth contends that, in the absence of the proposed merger, AT&T and MediaOne would build over ("overbuild") each other's cable systems, thereby offering consumers in those areas two MVPD cable choices. However, we find no evidence in the record to suggest **[*56]** that AT&T and MediaOne would overbuild each other's cable systems such that the proposed merger would diminish competition in these local areas.
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> . . .
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> Since the initial acquisition of the Fayetteville and Powder Springs overbuilt systems, the system owners have not constructed anymore overbuilds, and there is no evidence to suggest that AT&T and MediaOne would overbuild one another absent the merger. AT&T and MediaOne hold overlapping franchise authority in 13 other areas, but have no overbuilds in these areas. There is no evidence that they would overbuild each other in these areas absent the merger. We find that the proposed merger is unlikely to diminish MVPD competition between the Applicants to a degree that would warrant the denial of the Application or the imposition of conditions.

(Def. Ex. 14 ¶¶ 94-95.) The Class concedes that the FCC approved the transactions, but contends that neither the FCC's approval nor its legal conclusion are proper evidence of competition. (Counterstatement of Facts ¶ 34.)

Comcast's internal documents show that the company itself viewed other MSOs as its competitors. (See Pl. Ex. 134 (Comcast internal emails identifying companies that are Comcast's major competitors.)) Comcast required the CEO of Lenfest to sign a non-compete agreement as part of the Lenfest acquisition. According to Dr. Williams, the non-compete clause "demonstrate[s] that in Comcast's view, the relevant geographic area where these individuals represented a continuing competitive threat to Comcast was not only larger than [a local franchise area], it was larger than the footprints [in which the companies had previously provided service] . **[*58]** . . showing that Comcast viewed MVPD companies in these neighboring geographic locations as competitors and/or potential competitors, even though Comcast was not an incumbent cable provider in those locations at that time." (Williams Decl. ¶ 79-80.) [17]

Comcast also viewed other MSOs as competitors for the purchase of cable assets and customers. (Pl. Ex. 32, "Minutes of a Special Mtg. of Bd. of Directors of Comcast Corp. of May 4, 1989, at COM PA1151021 (describing the arrangement by which Comcast and AT&T agreed to abandon their competition to purchase MediaOne's cable assets and, instead, "reach[ed] an amicable and acceptable alternative to another round of competitive bids," involving a swap of various AT&T and Comcast cable assets resulting in the addition of 750,000 subscribers for Comcast.) Dr. Williams cites the MediaOne transaction, as well as the competition between Comcast, Lenfest and Mediacom for **[*59]** Marcus Cable's Eastern Shore Systems, and the competition between Comcast and several other MSOs for the assets of Cablevision systems in Ohio, Massachusetts and Michigan, to support his assertion that Comcast competed with the Counterparties to acquire cable assets before they were themselves acquired by Comcast. (Williams Decl. ¶ 122.) Brian Roberts, Comcast's CEO, also acknowledged that Lenfest, prior to its acquisition, was a potential competitor for other cable systems in the Philadelphia DMA. (Pl. Ex. 93, Roberts Dep., 231-32.)

Finally, the Class contends that Comcast's competitors also considered other MSOs to be competitors. For example, AT&T Board of Directors' internal documents list other MSOs, including Comcast, as competitors. (Pl. Ex. 101, October 1999 AT&T Bd. of Directors Mtg., "Competitive Cable TV Statistics"; Pl. Ex. 102, March 1999 AT&T Bd. of Directors Mtg. "Acquisition of 50% Interest in Lenfest Communications Executive Summary".) Gerry Lenfest likewise testified that Comcast was a "competitor in acquiring systems," although he stated that Comcast was not a direct competitor for subscribers. (Pl. Ex. 90, Dep. of Harold Lenfest on November 18, 2008, 89:10-25.) [18]

B. Evidence of Potential Competition.

Comcast also argues that the Class cannot create a genuine issue of material fact that the transactions eliminated any potential competition between itself and the Counterparties because there is no evidence that it or any Counterparty ever intended to enter another's market as an overbuilder. Comcast asserts that the Class has produced no evidence that Comcast, Lenfest, or any of the other Counterparties intended to overbuild one another in the Philadelphia DMA at some future time. (See 10/15 Tr. 84:24-85:16; Def. Ex. 59, Williams Dep., 105:9-106:18. [19]) It also asserts that there is no evidence that any Counterparty had any intention of **[*61]** overbuilding Comcast or took affirmative steps toward doing so. Rule 30(b)(6) representatives of Lenfest and AT&T, the only two Counterparties deposed by Plaintiffs, each testified that the companies had no intention of overbuilding Comcast,

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[17] Dr. Williams also notes that a non-compete agreement was executed between Comcast and executives at Prime Communications, as part of a loan agreement. (Williams Decl. ¶ 23.) There is no evidence that Prime Communication was involved in any of the acquisition or swap transactions.

[18] The **[*60]** Class makes additional arguments that Comcast also competed with other MSOs for original cable franchises and engaged in "benchmark competition" with other MSOs. We have already rejected these portions of the Class expert's market structure analysis. (See Class Cert. Mem. at 18 (rejecting theory of competition for the award of original franchises because all awards occurred before the class period); id. at 51-52 (rejecting theory of benchmark competition as not capable of proof at trial through common evidence).)

[19] Dr. Williams conceded that, in reviewing all of the documents and depositions in the case, he had seen no business plan suggesting that Comcast or another MSO was planning to overbuild another MSO in the Philadelphia DMA. (Def. Ex. 59, Williams Dep., 105:9-106:18.)

had not taken any affirmative steps toward doing so, and did not consider overbuilding to be economically viable. (See 10/14 Tr., 140:9-14; Def. Ex. 52, Lenfest Dep., 82:25-85:3, 89:23-90:5; Def. Ex. 51, Hindery Dep., 181:7-23.)

Comcast also asserts:

• It had no interest in, or intent to, overbuild any Counterparty nor had it taken any affirmative steps toward doing so, such as seeking to obtain the necessary franchise approvals, building out infrastructure, setting aside capital for that purpose or otherwise performing any planning whatsoever for such a move, because Comcast did not consider overbuilding to be an economically viable business model. (See Def. Ex. 46, S. Burke Dep., 13:7-14:8, **[*62]** 52:16-57:7; Def. Ex. 56, Roberts Dep., 173:4-174:24.)

• Its pricing decisions were not based on a concern that other MSOs might overbuild Comcast. (See Def. Ex. 46, S. Burke Dep., 207:14-20; Def. Ex. 50, Doyle Dep., 183:14-23; Def. Ex. 57, Deposition of David Scott on December 3, 2008 ("Scott Dep."), 107:19-108:6.)

• There is no evidence that any of the Counterparties based their pricing decisions on Comcast prices. To the contrary, Gerry Lenfest testified that Lenfest did not base its pricing decisions on a concern that Comcast might overbuild Lenfest franchise areas. (Def. Ex. 52, Lenfest Dep., 70:8-16, 72:6-73:16, 90:21-91:9.)

• The Federal Communications Commission determined in evaluating several of the Transactions that the merging entities had no intention of overbuilding one another's franchise areas, nor were they likely to do so. (See Def. Ex. 15, AT&T/Comcast Order, ¶ 94; Def. Ex. 14, AT&T/MediaOne Order, ¶¶ 94-95.)

Based upon these averments, Comcast argues that the Class cannot demonstrate a jury issue that any Counterparty's presence on the fringe of a Comcast franchise prior to the merger, tempered Comcast's competitive behavior.

The Class responds that it has produced evidence **[*63]** that there was a "potential for incumbent MSOs in the Philadelphia DMA to overbuild each other's territories, since they have done so in other markets," and that the FCC recognizes that adjacent cable operators are the most likely entrants. (Counterstatement of Facts ¶ 36). To support its factual assertions of potential overbuilding in the Philadelphia DMA, the Class relies upon specific instances of overbuilding in **other** parts of the country; [20] deposition testimony from Leo Hindery that it is not uncommon for MSOs to overbuild each other's franchise areas (Pl. Ex. 89, Hindery Dep. at 95-96); an assertion by its expert, Dr. Williams, that "there's certainly a potential for the incumbent MSOs in the Philadelphia DMA to overbuild each other's territories because they have done it in other places, (Pl. Ex. 100, Williams Dep. at 46-47); and the FCC's Thirteenth Annual Report, which states that "clustering can present a barrier to entry for the most likely potential overbuilder, (i.e. an adjacent cable operator)" (Pl. Ex. 146, Thirteenth Annual Report ¶ 180 (parenthetical in original)). It asserts that, to the extent that Comcast and other MSOs avoid overbuilding adjacent franchise areas,

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[20] See Counterstatement of Facts ¶ 8. The Class cites overbuilding that occurred in **New York City** (Pl. Ex. 89, Hindery Dep., 95-96); **Dover, Delaware** (where Storer Cable, a competitor to a corporate predecessor of Marcus Cable - itself now a Comcast corporate predecessor - overbuilt approximately 500 homes) (Pl. Ex. 27 at COM-PA0776597); **Terre Haute, Indiana** (where 20-25% of Time Warner's territory had been overbuilt by Charter) (Pl. Ex. 23 at COM-PA1130645); **Tampa, Florida** (where an Adelphia franchise was overbuilt by Time Warner) (Pl. Ex. 35); **Kalamazoo, Michigan** (where Cablevision overbuilt approximately 300 homes served by Adelphia) (Pl. Ex. 40 at COM-PA1835049); **Ann Arundel County, Maryland** (where Millenium Cable and AT&T had overbuilt each other's areas representing 50,000 homes passed) (Pl. Ex. 92 at 294-95; Pl. Ex. 103 at COM-DOJ273974-75); **City of Aventura, Florida** (where a Comcast area was overbuilt by Cablevision and Comcast overbuilt AT&T areas) (Pl. Ex. 120 at COM-PA1082923); **Alameda, California** (5,300 homes overbuilt by Comcast) (Pl. Ex. 124 at **[*65]** COM-PA1267909); **Newman County, Georgia** (18,000 subscribers overbuilt by Charter and Comcast) (Id. at COM-PA1267922); **Oshtemo County, Michigan** (Cablevision overbuilt an Adelphia franchise area) (Pl. Ex. 133 at COM-PA1835049); **Orlando, Florida area** (Brighthouse overbuilt an Adelphia franchise area) (Pl. Ex. 106 at COM-PA00011036); **Powhatan, Virginia** (80,000 homes overbuilt by Adelphia) (Pl. Ex. 112 at COM-PA0374859); and **Dolthan, Alabama** (6,500 homes in a Comcast franchise area overbuilt by Time Warner) (Pl. Ex. 125 at COM-PA1382980).

[*64] record evidence shows that they do so as part of, and in support of, collusive and illegal agreements to allocate cable markets.

C. Analysis

We find that the Class has produced evidence from which a jury could find in its favor on the section 1 claim's requirement that Comcast conspired with competitors to allocate markets. Comcast's assertions that the Counterparties were not its actual competitors - because each operated cable systems in their own respective, non-overlapping franchise area, and never offered services to the same subscribers, at the same time, anywhere in the Philadelphia region - would have some purchase had we determined that the relevant geographic market was the individual franchise area. However, in the class certification proceedings, we specifically rejected **[*66]** the opinion of Comcast expert Dr. Teece that the relevant geographic market should be pegged at the franchise level or, alternatively at the even smaller household level because the Class showed that it could establish by common evidence that the relevant geographic market should be the DMA. [21] Importantly, Comcast has not challenged at the summary judgment stage the Class's position that the relevant geographic market is the DMA.

We find that the Class need not show that Comcast competed with the Counterparties in the same franchise areas for those Counterparties to be deemed its actual competitors. Rather, based upon the proposed market definitions, it is sufficient that each provided MVPD services in the Philadelphia DMA. Were we to agree with Comcast's assertion that parties to an alleged market allocation scheme must have actually competed with **[*67]** one another for the same customers irrespective of market definitions, bizarre results could ensue. Assume, for example, that two firms at opposite ends of the country - who have never grown so large as to be able to expand to the center of the country - agree they will never cross the Mississippi River to directly compete with one another. In a suit against both firms asserting a nationwide geographic market definition, their agreement would satisfy all of the elements of an illegal horizontal market allocation. But each firm could immunize itself from antitrust liability merely by agreeing to the allocation early enough to avoid being deemed direct competitors. Clearly, the teaching of Palmer and Topco prohibits this result. See *Palmer 498 U.S. at 49-50* (noting that "[t]he defendants in Topco had never competed in the same market, but had simply agreed to allocate markets"). Given the relevant product and geographic market definitions presumed by Comcast, it necessarily follows that each Counterparty could be its actual competitor in the market. [22] Accordingly, we conclude that Comcast's contentions that (1) each company operated within its own respective, non-overlapping franchise **[*68]** area, and (2) never offered services to the same subscribers at the same time anywhere within the Philadelphia DMA, cannot eliminate the Class's market allocation claim as a matter of law where the Class has created a genuine issue of material fact that each company offered MVPD services in the Philadelphia DMA prior to the swap transactions.

We find, however, that the Class has failed to meet its summary judgment burden to create a genuine issue of material fact that Comcast or a Counterparty was a potential overbuild competitor. The two variants of potential competition theory apply *section 7* of the Clayton Act to prohibit mergers and acquisitions by **[*69]** one company with another if "the effect of such acquisition may be substantially to lessen competition." *United States v. Marine Bancorporation, 418 U.S. 602, 622, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974)*. [23] The Class's assertion that

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[21] We concluded that "[b]ecause the record evidence shows that consumers throughout the DMA can face similar competitive choices and suffer the same alleged antitrust impact resulting from Comcast's clustering conduct in the Philadelphia DMA, we find that it can be the appropriate geographic market definition." (Class Cert. Mem. at 14-15.)

[22] We reject Comcast's reliance upon *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 174-75, 126 S. Ct. 860, 163 L. Ed. 2d 663 (2006)* and *Feesers, Inc. v. Michael Foods, Inc., 498 F.3d 206, 214 (3d Cir. 2007)*. Volvo Trucks and Feesers were not Sherman Act market allocation cases. Rather they were decisions construing Section 2(a) of the Robinson-Patman Act, *15 U.S.C. § 13(a)*, involving claims of price discrimination by a manufacturer against entities in the market position of a wholesaler. See *Volvo Trucks, 546 U.S. at 171*; *Feesers, 498 F.3d at 208-11*.

[23] As we stated in the class certification proceedings,

> Under the first theory, "perceived potential competition," the Supreme Court held that competition might be diminished if a company that industry participants had thought might actually enter the market on its own, instead simply acquired a

overbuilding has occurred in other markets does not create a genuine factual issue that there was any potential for overbuilding in the Philadelphia DMA among the transaction Counterparties prior to the mergers. Evidence that other MSOs in other parts of the country engaged in overbuilding, and evidence that neighboring MSOs are the most likely overbuilder entrants, is insufficient to establish a genuine issue of material fact on whether (1) the transaction Counterparties here would likely have entered a competitor's franchise area in the near future as a potential overbuilder had they not been acquired by Comcast or (2) that they had any intention to potentially overbuild each others' franchise areas, when the record evidence of those parties' intentions is directly to the contrary. Accordingly, we conclude that the section 1 rule of reason claim may proceed on the Class's theory that Comcast and the Counterparties were "competitors" prior to the Transactions, but not upon its theory **[*70]** that they were potential overbuild competitors. [24]

V. SECTION 2 CLAIM - PREDATORY CONDUCT

The Third Amended Complaint contains two claims under *section 2* of the Sherman Act, **[*72]** [25] monopolization (Count II) and attempted monopolization (Count III) [26]. The Class identifies two types of allegedly predatory conduct to support its *section 2* claims: Comcast's clustering conduct and its conduct toward RCN, a cable overbuilder that attempted to overbuild Comcast franchises in Delaware County, Pennsylvania. (Compl. ¶¶ 83-103.) Comcast argues it is entitled to summary judgment because its clustering strategy had legitimate business justifications, and, accordingly, cannot be deemed to be predatory anticompetitive conduct. It asserts that the Class has failed to meet its summary judgment burden to create a genuine issue of material fact that the transactions creating the cluster, either singly or collectively, lacked a legitimate non-pretextual business purpose. Additionally, it argues that its conduct in relation to RCN was not predatory or exclusionary, and that no jury could find that either (1) Comcast's conduct in licensing Comcast SportNet Philadelphia ("CSN Philadelphia") to RCN, (2) RCN's inability to engage contractors, or (3) Comcast's price discounts to potential RCN subscribers, constituted predatory conduct. [27]

> company already in that market. See *Marine Bancorporation, 418 U.S. at 625* ("[T]he Court has interpreted *§ 7* as encompassing what is commonly known as the 'wings effect'- the probability that the acquiring firm prompted premerger procompetitive effects within the target market by being perceived by the existing firms in that market as likely to enter de novo. . . . The elimination of such present procompetitive effects may render a merger unlawful under *§ 7*."). Under these cases, "perceived potential competition focuses on the premerger effect on prices of the perception that if profits rise, a new company will enter the market and drive down both prices and profits." *Alberta Gas Chemicals Ltd. v. E.I. Du Pont de Nemours & Co., 826 F.2d 1235 (3d Cir. 1987)*.
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> The actual potential competition doctrine has not received a clear stamp of validity **[*71]** from the Supreme Court, but other courts have applied it where the plaintiff can show: (1) that the relevant market is oligopolistic; (2) that absent the acquisition [of the incumbent cable operator], the acquiring company [Comcast] would likely have entered the market in the near future either de novo or through a toehold acquisition; and (3) that such entry by the acquiring company [Comcast] would carry a substantial likelihood of ultimately producing deconcentration of the market or other significant procompetitive effects. *Tenneco, Inc. v. FTC, 689 F.2d 346, 352 (2d Cir. 1982)* (citing *Marine Bancorporation, 418 U.S. at 630, 633)*.

Behrend v. Comcast, 245 F.R.D. 195, 207 (E.D. Pa. 2007).

[24] We also find that the Class, to the extent that it raises the issues, cannot rely upon other forms of competition identified by its expert Dr. Williams, namely benchmark competition, competition for original cable franchises, and competition for bargaining power with programming content providers, which we have previously rejected as unsupported by evidence common to the class.

[25] *Section 2* of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations" is guilty of an offense and subject to penalties. *15 U.S.C. § 2*.

[26] Comcast argues with respect to both claims that the Class has failed to show predatory conduct. Accordingly, our analysis of the two *section 2* claims is identical for the purposes of the Motion.

Rather, it asserts, the summary judgment record **[*73]** demonstrates that RCN's inability to compete in the Philadelphia DMA resulted from its own financial difficulties in raising capital. The Class responds that it has presented ample evidence demonstrating the transactions were anticompetitive and lacked valid business justifications. It also asserts that genuine issues of fact exist regarding Comcast's conduct toward RCN.

The elements of a *section 2* monopolization claim are (1) the possession of monopoly power and (2) the willful acquisition and maintenance of that power as distinguished from growth or development or consequences **[*75]** of a superior product, business acumen, or historical accident. *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc., 159 F.3d 129, 141 (3d Cir. 1998)*. The elements of *section 2* attempted monopolization are (1) that the defendant has a specific intent to monopolize, and (2) that the defendant has engaged in anticompetitive conduct that, taken as a whole, creates (3) a dangerous probability of achieving monopoly power. *West Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 108 (3d Cir. 2010)* (citing *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*. [28] The distinction between the two claims is that "monopolization requires proof of monopoly power, while attempted monopolization requires only proof of a dangerous probability of achieving a monopoly. Courts interpret the latter requirement to imply a showing of market share somewhat less than that required for monopoly power." 2 Kintner, Federal ***Antitrust Law*** § 14.9.

The possession of monopoly power "will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (emphasis deleted); *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007)* ("the acquisition or possession of monopoly power must be accompanied by some anticompetitive conduct on the part of the possessor"); *Morris Comm'ncs Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1295 (11th Cir. 2004)* ("Unlawful monopoly power requires anticompetitive conduct, which is 'conduct without a legitimate business purpose that makes sense only because it eliminates competition.'" (quoting *Gen. Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 804 (8th Cir. 1987)))*; *LePage's Inc. v. 3M, 324 F.3d 141, 153-54 (3rd Cir. 2003)*. **[*77]** Antitrust conduct, also called exclusionary conduct or predatory conduct, "is central to the offenses of both monopolization and attempted monopolization." 2 Kintner, Federal ***Antitrust Law***, § 14.9. The analysis of predatory conduct is the same under both sections. Id.

Courts follow a sequential analysis in examining predatory conduct. First, the burden of proof of demonstrating predatory conduct and anticompetitive effect rests on the plaintiff. *United States v. Microsoft Corp., 253 F.3d 34, 58, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (citing *Monsanto, 465 U.S. at 763*). If a plaintiff successfully demonstrates anticompetitive conduct, the defendant must demonstrate a "procompetitive justification" for its conduct. *Id. at 59* (citing *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 483, 112 S. Ct. 2072, 119 L. Ed. 2d 265*

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[27] In the class certification proceedings, we rejected two other theories presented by the Class to demonstrate predatory conduct. We rejected the Class's assertion that Comcast's anti-RCN lobbying activity could be used as proof of predatory conduct, because it was at odds with the Noerr-Pennington doctrine. **[*74]** (Class Cert. Mem. at 46 (citing *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)* (holding that an individual is immune from antitrust liability for exercising *First Amendment* right to petition the government)).) We also extensively discussed the issue of Comcast's conduct in denying access to its DBS competitors to CSN Philadelphia in the last class certification opinion, which was based on the same record currently before us on summary judgment. We rejected Dr. Williams' and Dr. Singer's opinions tying Comcast's clustering activity in the Philadelphia DMA to reduced DBS penetration rates as susceptible to proof at trial through available evidence common to the class. (Id. at 26-28.) In its summary judgment brief and in its Counterstatement of Facts, the Class concedes that these issues have been rejected and does not reraise them, other than to preserve an objection to the prior rulings.

[28] To determine whether there exists a viable claim of monopolization or attempted monopolization, a court must inquire into the relevant product and geographic market. *Spectrum Sports, Inc., 506 U.S. at 459*. **[*76]** We have already held in the class certification proceeding that the Class can establish through common evidence its definitions that the relevant product market is the provision of multichannel video programming service ("MVPS") and the relevant geographic market is the Philadelphia DMA. For the purposes of its summary judgment motion, Comcast does not challenge these definitions.

(1992)). A "procompetitive justification" is a "nonpretextual claim that [the monopolist's] conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal. . . ." Id., see also LePage's Inc., 324 F.3d at 163 ("'In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare. Thus, pursuit **[*78]** of efficiency and quality control might be legitimate competitive reasons . . . , while the desire to maintain a monopoly market share or thwart the entry of competitors would not.'" (quoting Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994))) (alteration in original); see also 2 Kintner, Federal ***Antitrust Law*** § 14.35 ("practices that harm other firms without harming competition, or that harm rivals because of the defendant's superior efficiency cannot constitute unlawfully exclusionary conduct in the attempt context.") [29]. Once the defendant has met its burden to demonstrate a valid business justification, [30] the burden shifts back to the plaintiff to show that the proffered business justification is pretextual. See Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1212 (9th Cir. 1997). [31]

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[29] Kintner explains,

> In considering exclusionary practices, it is critical to bear in mind that all competition excludes. Every act of innovation, price cutting, new entry or expanded output harms competitors, excluding them from some part of the market, sometimes to the point of destruction. But the antitrust laws actively promote this kind of harm to **[*79]** competitors. . . . [I]t is only when firms engage in practices that are *inefficiently* exclusionary - practices that predictably will lead to lower output and higher prices by reducing competition in the market as a whole - that ***antitrust law*** may intervene to enjoin or penalize the conduct.

2 Kintner, Federal ***Antitrust Law***, § 14.14.

[30] At least one court has held that the question is **not** whether the business justification is sufficient, but merely whether defendant establishes it had one. Bell v. Dow Chem. Co., 847 F.2d 1179, 1186 (5th Cir. 1988) (stating that the Supreme Court's decision in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985) "does not hold that a jury can weigh the sufficiency of a legitimate business justification against the anticompetitive effects of a refusal to deal in or order to find intent by a defendant to monopolize. . . . The fact determination that may be left to a jury is whether the defendant has a legitimate business reason for its refusal, *not* whether that reason is sufficient. The Aspen jury presumably found all of [defendant's] business justifications to be unpersuasive, *not* persuasive but insufficient.").

[31] We note that in Microsoft **[*80]** the United States Court of Appeals for the District of Columbia Circuit offered an alternative route to demonstrating that the conduct was predatory, holding that "if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." Microsoft, 253 F.3d at 59; see also Abbott Labs. v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408, 422 (D. Del. 2006) (stating that Microsoft's rubric allowed alternate means to plaintiff to rebut defendant's justification: as pretextual or, alternatively, by demonstrating that the anticompetitive harm of the conduct outweighs the procompetitive benefit). The Third Circuit has never specifically adopted this alternative. See e.g., United States v. Dentsply Intern., Inc., 399 F.3d 181, 187, 196 (3d Cir. 2005) (acknowledging business justification defense to predatory conduct claim without mentioning balancing) (citing LePage's Inc. 324 F.3d at 152); Broadcom Corp., 501 F.3d at 318 (same). Other post-Microsoft appellate decisions have also been silent on whether this alternative is available. See e.g., Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1295 (11th Cir. 2004) **[*81]** (holding that once the defendant has met its burden to show its valid business justification, the burden shifts to the plaintiff to show that the proffered business justification is pretextual); ACT, Inc. v. Sylvan Learning Sys., Inc., 296 F.3d 657, 670 (8th Cir. 2002) (holding that when a valid business reason exists for the conduct alleged to be predatory or anti-competitive, that conduct cannot support the inference of a section 2 violation; plaintiff's evidence did not create a triable jury question on whether defendant's proffered business reasons were legitimate); see also 3 Areeda and Hovenkamp, ***Antitrust Law***, § 658 (3d ed. 2007) (noting generally that few decisions have discussed the burden shifting issue in any detail).

In their discussion of the section 2 issues, neither party relied upon the alternative balancing test, made any argument that the test is applicable under Third Circuit case law, or attempted to apply the test to the summary judgement record. Moreover, the Class initially advised the Court that it was not relying upon the alternative balancing test. (N.T. 4/2/12 at 3:16-5:3.) However, in a later correspondence, the Class noted that, as part of its argument that **[*82]** Comcast lacked a valid business justification, it had argued in a footnote that a reasonable jury could conclude that the harm caused by Comcast's anticompetitive conduct "far overshadowed" any claimed business justification. (See Pl. Mem. at 72 n.55.)

We find that any reliance upon the alternative balancing test was waived. The Class's footnote was entirely devoted to the pretext issue, not the balancing test. Moreover, arguments "raised in passing (such as, in a footnote), but not squarely argued,

A. Creation of the Philadelphia cluster.

1. Has the Class created a genuine issue of material fact that the creation of the Philadelphia DMA cluster was predatory?

The Class contends that building the Philadelphia cluster was predatory conduct because it was accomplished through the use of the swap agreements to allocate the market between Comcast, AT&T and Time Warner. (Compl. ¶ 83.) In addition to the evidence already discussed, the Class points to Dr. Williams' opinions that the swaps and acquisitions caused large increases in Comcast market share and market concentration. Its market share rose from 23.9% in 1998 to 77.8% in 2Q2002, ending at 69.5% in 4Q2007. (Williams Decl. ¶ 114.) Williams opined that Comcast "would be expected to exercise substantial market or monopoly power, unless barriers to entry were low." (Id. ¶ 117.) However, he opined, there exist substantial barriers to entry into the MVPD market, both wire-based and satellite, including substantial sunk capital cost, strategic **[*84]** behavior by incumbents designed to raise their rivals' costs, such as limiting programming availability, local and state level regulations, and technological limitations. (Id. ¶ 118.) Dr. Williams contends that, among the anticompetitive results from Comcast's acquisition of market power from its clustering the Philadelphia DMA was its ability to deter overbuilding. (Id. ¶ 131; Williams Supp. Decl., Table 5; see also Singer Reply Decl. ¶¶ 42-59.) Because, Dr. Williams opines, the presence of an overbuilder restrains cable prices (see Williams Decl. ¶ 133 and App. IV), the Class contends there is ample evidence from which a reasonable jury could conclude that Comcast's clustering of the Philadelphia DMA decreased overbuilding and led to increased prices. Relying upon the Supreme Court's decision in Grinnell Corp., the Class argues that the swaps transactions are thus sufficient proof of anticompetitive conduct, standing alone, to permit a jury to find for the Class on its *section 2* claims.

In Grinnell, the Court held that acquiring competitors in order to perfect a monopoly is predatory conduct. *384 U.S. at 576* [32]; see also 2 Kintner, Federal ***Antitrust Law*** § 14.13 ("The conduct element **[*85]** of the monopolization offense can be satisfied by a merger (or series of mergers) to monopoly or by inefficient exclusionary conduct. . . . An acquisition or series of acquisitions that threaten to achieve monopoly power may establish the requisite conduct and specific intent for an attempt to monopolize."). Because the Class has presented evidence creating genuine issues of material fact that (1) the swaps resulted in a dominate market share, (2) the anticompetitive results from Comcast's acquisition of market power from its clustering the Philadelphia DMA included its ability to deter overbuilding and (3) the presence of an overbuilder restrains cable prices, the Class may rely upon the transactions themselves and evidence of Comcast's resultant increase in market share as proof of predatory conduct.

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are considered waived." *John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp., 119 F.3d 1070, 1076 n.6 (3d Cir. 1997)* (finding cursory arguments contained in footnote in appellate brief were waived). The Class's correspondence, issued after it had stated on the record that it was not relying upon the test, is insufficient to raise an argument that it did not include in its formal brief. See *Acumed LLC v. Advanced Surgical Servs., Inc., 561 F.3d 199, 223 (3d Cir. 2009)* (holding that a party has sufficient notice before a summary judgment is entered against it if it had reason to believe that the court might reach the matter at issue on the pending summary judgment application and the party had an opportunity **[*83]** to support its position fully); *Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 84 (3d Cir. 1999)* (holding that an issue is waived if it is not raised in a party's initial appellate brief).

[32] The Court stated:

> We have said enough about the great hold that the defendants have on this market. The percentage is so high as to justify the finding of monopoly. And, as the facts already related indicate, this monopoly was achieved in large part by unlawful and exclusionary practices. The restrictive agreements that pre-empted for each company a segment of the market where it was **[*86]** free of competition of the others were one device. Pricing practices that contained competitors were another. The acquisitions by Grinnell of ADT, AFA, and Holmes were still another. Grinnell long faced a problem of competing with ADT. That was one reason it acquired AFA and Holmes. Prior to settlement of its dispute and controversy with ADT, Grinnell prepared to go into the central station service business. By acquiring ADT in 1953, Grinnell eliminated that alternative. Its control of the three other defendants eliminated any possibility of an outbreak of competition that might have occurred when the 1907 agreements terminated. By those acquisitions it perfected the monopoly power to exclude competitors and fix prices.

Grinnell, 384 U.S. at 576.

2. Has Comcast stated a "procompetitive justification" for its conduct?

Comcast argues it is entitled to summary judgment on the *section 2* claim because it had legitimate, procompetitive justifications in creating the Philadelphia cluster, and the Class has failed to create a triable issue negating this claim. Based on the evidence already discussed in conjunction with the arguments on the *per se* claim, Comcast argues that each transaction was **[*87]** undertaken for valid business purposes. It argues that its decision to create a cluster in the Philadelphia DMA was undertaken to achieve greater efficiency, a prototypically valid business purpose.

Comcast asserts that contemporaneous Comcast documents identify the efficiencies and advantages associated with clustering, including opportunities in the areas of general management, new product introductions, marketing, brand building, retail presence, ad sales, government and community relations, local programming, call centers, training, and business communications services. (Def. Mem. at 34-35; Def. Ex. 29, "Clusters/2000 Management Retreat Memo.," at COM-PA0214427-28 (outlining management opportunities created by large clusters, including general management, new product introduction, marketing, ad sales, government/community relations, local programming, call centers and training); Def. Ex. 28 (same).) It adds that testimony confirmed that clustering enabled Comcast to realize marketing efficiencies by increasing its presence across a DMA (thereby enabling its self-advertising to reach a wider audience), and to realize other efficiencies such as consolidating infrastructure, operations, **[*88]** call centers, and management. (Def. Statement of Undisputed Facts ¶¶ 46-47; Def. Ex. 56, Roberts Dep., 116:2-117:16 [33]; Def. Ex. 50, Doyle Dep., 90:3-92:3 (stating that a benefit of clustering was the ability to recruit better people and manage business more efficiently); Def. Ex. 53, Marshall Dep., 32:24-33:22 (stating that a benefit of clustering was better ad sales and economies of scale).) As noted in the discussion of *per se* liability, Comcast asserts that clustering also allowed it to introduce new products such as high-speed internet, telephone, pay per view, video on demand, digital video recorders, digital cable, substantially more channels, and high-definition television. (Def. Statement of Undisputed Facts ¶ 48.) The economies of scale associated with clustering enabled cable providers to compete with satellite companies with a national footprint, and telephone companies possessing vastly larger resources and clusters, who were emerging as competitors in multiple product markets - video, data, and telephone. (Id. ¶ 49; Def. Ex. 54, Pick Dep., 56:1-57:23; Def. Ex. 51, Hindery Dep., 132:11-15; Def. Ex. 56, Roberts Dep., 144:23-146:7.). We find that Comcast has stated procompetitive **[*89]** justifications for its clustering conduct.

3. Has the Class created a genuine issue of material fact that the proffered business justification for clustering is pretextual?

The Class does not dispute that Comcast has identified efficiencies purportedly associated with clustering. (Counterstatement of Facts ¶ 46.) Rather, the Class asserts that Comcast did not present evidence that it conducted any post-transaction studies to see whether its assumptions about efficiencies were correct and there is

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[33] CEO Roberts testified that among the advantages of clustering were

> economies of scale and improved consumer benefits. And I would say that those two categories are what I've been talking about with clustering, that I think in '99 you - depending on the scale, now this total acquisition would have done what I said earlier, make us substantially larger, so we would have qualified for programing discounts.
>
> We would be able to consolidate managers within a market. We'd be able to open up call centers within those markets, that would be open 24 hours a day, instead of kicking over to an answering service at night. When most people watch television, historically, that's how cable service was provided. Now you had a much larger area, and you're able to use new technology, as well as have a bigger scale of operations.
>
> We are able to recruit better executives because it's closer to the caliber of being a TV station general manager. Often considered the best job in media was to run one of the local markets, because you had the entire market in the broadcast industry or the radio industry, or the newspaper industry, or frankly, the phone industry. You **[*90]** were in charge of either a state or a city. So heretofore, we would have, you know, lower paid, smaller area of line of responsibility. So there's a myriad of benefits that happened in that situation.

Def. Ex. 56, Roberts Dep., 116:2-117:16

no evidence in the record creating a genuine issue of material fact that the transactions actually resulted in increased efficiency for Comcast. It argues that a reasonable jury could conclude from Comcast's "lack of interest" in whether its stated justification was true that its claimed efficiency justification was pretextual. (Class Pl. Mem. at 70.)

In contrast to the lack of evidence of actual efficiencies, the Class argues that the evidence creates a genuine issue of material fact that, with each **[*91]** transaction Comcast raised its prices, suggesting that the claim of efficiency is pretextual. (Class Pl. Mem. at 72-73 (citing Pl. Ex. 6, "Analysis of Adelphia New Jersey Rates," at COM-PA0513589 (stating "it appears that Adelphia's rates could rise about $8.53 to be in line with Comcast's rates."); Pl. Ex. 126, Peyton Email of March 30, 2006 (stating with regard to the Adelphia/Time Warner swap transaction that a "factor[] driving the brand transition timing" was "[a] desire to take as many scheduled rate increases as possible under the existing Adelphia or TW system name."); Pl. Ex. 5, "Rating Agency Presentation January 2002," at COM-PA0206424 (noting that operating cash flow per former subscriber of E. W. Scripps, Jones Intercable and Lenfest increased, on average, 30% within one year of Comcast's acquisition of those systems.); Pl. Ex. 130, "Key Messages," (noting after integration of AT&T systems revenues increased by 9.8%, operating cash flow by 22.9%, margins by 8.2 points, and operating cash flow per subscriber by 23.4%; after integration of Adelphia systems revenues increased by 15.3%, operating cash flow by 28%, margins by 12 points, and operating cash flow per subscriber **[*92]** by 23.4%); Pl. Ex. 113, Presentation of Brian Roberts at Salomon Smith Barney 12th Annual Entertainment, Media & Telecommunications Conference, at COM-PA0470175 (stating that "in every other acquisition we've been able to get the Comcast margin to 42 percent within two years"); Pl. Ex. 123, Announcement of Adelphia and Time Warner Transactions, at COM-PA1137177-178 (showing acquired Adelphia systems' operating cash flow margin increasing from 30% to 39% after acquisition, showing history of increases after AT&T and prior Adelphia acquisitions).) When asked about projecting revenues models after completing acquisitions, Robert Pick testified that Comcast "generally assume[d] there [would] be rate increases in the - over the modeling period." (Pl. Ex. 92, Pick Dep., 87:2-4.) David Scott, Comcast's executive vice-president of finance and administration, testified that Comcast's cable headquarters "directionally" advised how much it expected companywide prices to increase in its budgeting model each year, while allowing individual franchises to vary across the country. (Pl. Ex. 96, Scott Dep., 26:22-28:14.)

The Class also asserts that Comcast did not need to allocate markets in order to **[*93]** achieve efficiency; that it could have built its cluster by overbuilding its competitors rather than acquiring them or swapping for their assets. (Pl. Mem. at 75-76.) It argues that a reasonable jury could find that Comcast's decision to pursue efficiency through swaps and acquisitions, rather than through overbuilding, harmed competition, was unnecessarily restrictive, and was thus anticompetitive, even if Comcast was allegedly engaging in those transactions in pursuit of increased efficiency.

Comcast responds that (1) the Class cites no authority for its assertion that a company claiming efficiency must conduct formal studies to establish that its goal was achieved, (2) the Class itself elicited testimony that Comcast had achieved efficiencies, (3) the Class's experts conceded that clustering can lead to efficiencies, (4) the FCC concluded that clustering increased efficiencies, and (5) the Class itself elicited testimony that obvious efficiencies were observed by Comcast after the transactions. [34] It points out that it raised cable prices annually both before and after the transactions, in both legacy and in newly acquired franchises. (Def. Sup. Ex. 93, S. Burke Dep., 44:5-20, 45:5-8. **[*94]** [35]) Thus, it argues that its intention to raise prices after acquiring systems does not establish

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[34] Robert Pick testified in response to a question by Class counsel about whether Comcast studied whether its estimated efficiencies were realized that,

> I'm not aware - I'm not sure or at least I'm not aware of any specific studies that were done to see if they were achieved or not achieved. Some of them obvious were obvious. For instance, I think in the operating efficiencies, we assumed that we could bring margins of the AT&T systems to that level close to or similar to the Comcast system.
>
> And so it's just obvious that you could see during the financial - looking at financial results that if the margins of those things approved - improved at or close to Comcast systems, you would see that we were able to do that.

(Pl. Ex. 92, Pick Dep., 305:12-22.)

pretext. It also emphasizes that it is undisputed that it introduced new services into its acquired territories that were not previously available, like digital cable, DVRs, and telephone and internet service.

We **[*96]** find that the Class has not met its summary judgment burden to create a genuine issue of material fact that Comcast's claim of efficiency as a justification for clustering was a pretext. The Class's evidence that Comcast raised prices does not refute the claim of efficiency. While the Class did not have to present direct evidence establishing pretext to meet its summary judgment burden, it had to present probative evidence that would demonstrate the existence of a triable issue of fact upon which a reasonable jury could disbelieve what Comcast asserts. It has tried to do this by arguing that Comcast could have achieved the same efficiency of clustering by overbuilding its competitors, rather than acquiring them or swapping for their assets, and asserting that Comcast never studied whether it was achieving its goals. We reject these contentions for several reasons.

First, the underlying assumptions - that clustering efficiencies can be similarly created through overbuilding, and that creating a cluster through overbuilding is an equally efficient business model - are unsupported by any evidence. Second, the fact that Comcast could have achieved efficiencies differently is insufficient **[*97]** to show that Comcast's efficiency justifications were a pretext. Third, there is no authority that an antitrust defendant's expectations of efficiency proved accurate. Similarly, the fact that Comcast did not study its efficiencies is also insufficient to show that the efficiency justification was a pretext. Moreover, the evidence in the record supports the fact that clustering in fact leads to efficiencies of scale. [36] Finally, the Class does not dispute that Comcast was able to provide significant new services to its customers as a result of clustering.

Accordingly, we grant summary judgment to Comcast on the Class's *section 2* claim regarding Comcast's clustering **[*98]** conduct. The Class has failed to create a genuine issue of material fact that Comcast's proffered business justification was pretextual.

B. RCN

As noted above, the Class argues that Comcast's conduct toward RCN was predatory in three respects: (1) its conduct blocking RCN's access to cable infrastructure installation contractors, (2) its conduct in licensing CSN Philadelphia to RCN, and (3) its practice of offering price discounts to potential RCN subscribers. We shall examine each claim individually.

1. Access to cable infrastructure installation contractors.

a. Has the Class created a genuine issue of material fact that Comcast's actions blocking RCN's access to cable infrastructure installation contractors were predatory?

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[35] COO Burke testified that

> Basic cable rates in virtually every system in every cable company in every state in the country are raised every **[*95]** year because our programming costs go up every year. And, so, there were basic rate increases I would say in virtually all of the systems in the Philadelphia area every year during the period of time.
>
> . . .
>
> We raise prices every year because our programming increases every year.

(Def. Sup. Ex. 93, S. Burke Dep., 44:5-20, 45:5-8.)

[36] See Def. Ex. 18, Seventh Annual Competition Report, ¶ 166 (clustering "permits cable operators to . . . gain efficiencies related to economies of scale and scope resulting in lower administrative costs, enhanced deployment of new technologies, and encouraging the extension into previously unserved areas"); Def. Ex. 19, FCC 01-389, Eighth Annual Competition Report, ¶ 14 ("By clustering their systems, cable operators may be able to achieve efficiencies that facilitate the provision of cable and other services, such as telephony.").

In June 1998, RCN sought and received certifications to operate Open Video Systems [37] ("OVS") in four counties in the Philadelphia DMA (Delaware, Bucks, Chester, and Montgomery). (Def. Statement of Undisputed Facts ¶ 54.) Of those four counties, RCN chose to enter Delaware County first, breaking ground on its overbuild cable system in the Borough of Folcroft in late 1999. (Id. ¶ 55.) From there, RCN continued its overbuilding throughout Delaware County. In 2000, RCN **[*99]** overbuilt in Folcroft, Ridley Township, Eddystone, Norwood, Sharon Hill, Prospect Park and Collingdale. In 2001 RCN overbuilt in Glenolden, Ridley Park, Upper Darby, Colwyn, Morton, Tinicum Township, Clifton Heights, Darby Township and Darby Borough. In 2002, RCN overbuilt in Rutledge, Milbourne, East Lansdowne and Lansdowne. In 2003, RCN overbuilt in Yeadon. (Id. ¶ 57; Def. Ex. 41, Laura Burke Deposition Exhibit 13.).)

On May 29, 2002, RCN sent a letter to the FCC complaining that "it [was] aware of no less than fifteen (15) contractors in the Philadelphia market - representing virtually all of the viable construction and installation contractors in the area - whom Comcast or, prior to its acquisition by Comcast, Suburban Cable, have prevented or tried to prevent from doing business with RCN." [38] (Def. Ex. 43, RCN 30(b)(6) Dep. Ex. 22 at RCN 0000237.) After Suburban merged into Comcast, **[*100]** those Suburban personnel responsible for the company's contractor non-compete policy "went to work for Comcast, where the practice of intimidating contractors continued." (Id. at RCN 0000238.) Scott Burnside, RCN's Senior Vice President for Regulatory and Governmental Affairs, testified that RCN suffered "delays and setbacks by not having full cooperation from the outside contractors that it would normally expect to have." (Pl. Ex. 83, Burnside Dep., 81:13-16.)

James Cleaver, an installation subcontractor who had worked for Suburban Cable, testified that several subcontractors who had worked for Comcast were barred from further work when Comcast became aware that they were working as subcontractors for his company on the RCN build out. (Pl. Ex. 84, Cleaver Dep., 61:9-77:22.) When Cleaver's company began working for RCN as a subcontractor, he received an email from Chris Patterson of Suburban Cable, which was about to be acquired by Comcast. (Def. Ex.43, RCN 30(b)(6) Dep. Ex. 22, at RCN0000241.) Patterson told **[*101]** Cleaver:

> You suggest that Suburban did not have a problem with you working for other area cable companies and you were right, because they were not in direct competition with Suburban Cable as RCN is. Every mile of rear buss plant that you build gives RCN, our competitor the ability to take customers away from Suburban Cable. Our company and the Cable industry does not share the same perspective that you do in regards to competition.
>
> . . .
>
> You are correct, you are a business man and as we discussed on the phone you need to take the proper business decisions for your company. In my opinion your business decision should have been to stay with Suburban and become a part of our major project. You also know that we will become part of a larger cluster under Comcast ownership which will span the Tri-state area and south through Baltimore and Washington. You need to know that they have a more intense feeling about competing with RCN than Suburban does, and our intensity is pretty strong. Why you choose to work for a smaller company such as RCN in light of things to come are more of a short term decision vs looking at the long term in this area with Comcast. Again, you made a business decision **[*102]** for your company any your employee's [sic] and that is fine. Suburban had to act on a legal document that you signed for Non-compete. This is the only reason why Suburban terminated your contracts, because it was in breach.

(Id.) Cleaver testified on cross examination at his deposition that when he worked for Suburban Cable he had access to the company's design plans and used Suburban's equipment. (Def. Ex. 48 Cleaver Dep. 101:14-25.) He

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[37] An OVS is a "facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community. . . ." *47 C.F.R. § 76.1500(a)*.

[38] Dr. Singer, a class expert, opined that the fifteen area contractors constituted approximately 53% of the available contractors in the Philadelphia area. (Singer Decl. ¶ 124.)

understood that Suburban had concerns because its design plans were confidential and also concerns about equipment being mixed up with the equipment of other companies. (Id. at 101:14-104:7.) He also testified that he currently continues to get work from Comcast, even though he also works for RCN and Verizon. (Id. at 79:13-17.) Finally, Cleaver testified that RCN paid contractors higher rates "because they wanted to lure whoever [sic] they could, and the only way you are going to get them on is to pay the money." (Pl. Ex. 84, Cleaver Dep., 118:2-23.)

Notwithstanding the evidence of RCN's complaint to the FCC and the Burnside and Cleaver testimony, Comcast offers evidence that by April 2001, RCN was able to complete its buildout in Delaware County, achieving **[*103]** a penetration rate of 20 - 21%, which was above its 20% minimum target required to keep its operations viable and generate a return. (Def. Statement of Undisputed Facts ¶ 58; Def. Ex. 55, RCN Rule 30(b)(6) Dep., 62:12-18.) It adds that, when deposed by the Class, RCN did not identify any barriers to entry created by Comcast in the Philadelphia DMA; instead, RCN's 30(b)(6) designee stated that the only barriers to entry RCN faced in entering the Philadelphia DMA were (i) physical access to the poles that were owned by the utilities to build its system and (ii) obtaining a franchise from each municipality to provide the service. (Def. Statement of Undisputed Facts ¶ 59; Def. Ex. 55, RCN 30(b)(6) Dep., 47:17-49:4, 55:11-21.) The Rule 30(b)(6) witness testified that the company had not experienced "any lack of contractors" at the hands of Comcast, and that it was able to retain all the cable construction and installation contractors necessary to build out its cable systems in Delaware County. (Def. Statement of Undisputed Facts ¶ 67-69; Def. Ex. 55, RCN 30(b)(6) Dep., 152:24-153:1; see also Def. Ex. 47, Burnside Dep., 158:25-159:13. [39]) Comcast has also presented evidence that the pool **[*104]** of cable installers and construction contractors available to build out cable systems in Eastern Pennsylvania numbered in the hundreds, including both locally-based contractors and national companies. (Def. Statement of Undisputed Facts ¶ 66; Def. Ex. 48, Deposition of James Cleaver on May 14, 2008 ("Cleaver Dep."), 114:23-117:16; Def. Ex. 40, Cleaver Dep. Ex. 9.) Comcast notes that RCN stated to the FCC that Comcast had exclusive arrangements with only 15 of these contractors. (Def. Ex. 43, RCN 30(b)(6) Dep. Ex. 22 at RCN 0000237.)

Although RCN complained to the FCC that Comcast had tied up fifteen installation contractors with non-compete agreements, the record contains evidence of only two signed contractor non-compete agreements - the one discussed in the Cleaver deposition between Suburban Cable TV Co. (which was later acquired by Comcast) and Installation Technologies, Inc. ("ITI"), dated April 22, 1999 and terminated on November 26, 1999, (Def. Ex. 39, Cleaver Deposition Exhibit 6); and another between Suburban and Lewis Communications dated April 9, 1999. (Def. Statement of Undisputed Facts ¶ 71; Def. Ex. 43, RCN 30(b)(6) Dep. Ex. 22 at RCN000242-45.) Both non-compete agreements were executed before the class period. Those provisions prohibited the contractors from working for anyone besides Comcast during the term of the principal contract in geographic areas where Comcast faced competition. (Def. Ex. 43; Def. Ex. 39.) In the Suburban/ITI contract, the term of the non-compete extended for **[*106]** six months after termination of the contract, i.e., May 2000. (Def. Statement of Undisputed Facts ¶ 73; Def. Ex. 39.) It is undisputed that Comcast never brought an action to enforce this provision and ITI continued to

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[39] After offering direct testimony that RCN had suffered set backs and delays due to Comcast's interference with contractors, on cross-examination at his deposition, RCN executive Scott Burnside confirmed the testimony of the Rule 30(b)(6) witness:

> Q. And you testified about access to contractors. RCN was able to get contractors to build out in Delaware County, right?
>
> . . .
>
> THE WITNESS: To some degree, yes.
>
> BY MR. KORPUS:
>
> Q. To a degree sufficient to build out its system in Delaware County to its specifications, right?
>
> MR. WOODWARD: Objection. Form.
>
> THE WITNESS: To do construction in Delaware County, they were able to get construction people willing to do work in **[*105]** Delaware County.

(Def. Ex. 47, Burnside Dep., 158:25-159:13.). Burnside also testified that some contractors left Comcast to work for RCN because they did not like Comcast's "bullying tactics." (Id. at 160:25-161:11.)

work for RCN after Comcast terminated the contract for cause. (Def. Statement of Undisputed Facts ¶ 74; Counterstatement of Facts ¶ 74.) The Suburban/Lewis non-compete only lasted for the duration of the contract. Moreover, it is undisputed that, when asked by Comcast to honor the agreement, Lewis instead chose to work for RCN. (Def. Statement of Undisputed Facts ¶ 75; Counterstatement of Facts ¶ 75.)

Comcast also presents evidence that RCN's tenuous financial condition, rather than any problems it experienced with the availability of contractors, caused the company to ultimately abandon its efforts to overbuild in the Philadelphia DMA. In December 2000, while its build-out of Delaware County was underway, RCN announced that, in order to conserve cash, the company had abandoned its plans to enter any new markets where it did not already provide video service. This announcement applied nationwide - not just to Philadelphia. (Def. Statement of Undisputed Facts ¶ 80; Def. **[*107]** Ex. 45, RCN 30(b)(6) Dep. Ex. 34.) RCN confirmed in its public filings pursuant to the federal securities law and in statements to the FCC that it had abandoned plans to engage in further overbuilding (in Philadelphia or elsewhere) because it lacked the necessary capital. (Def. Statement of Undisputed Facts ¶ 81-83; Def. Ex. 3, RCN 2001 10-K405, p. 51.; Def. Ex. 42, RCN 30(b)(6) Dep. Ex. 8 (Initial Comments of RCN Corp. in re Annual Assessment of the State of Competition, dated August 3, 2001), p. 7; see also Def. Ex. 47, Burnside Dep., 170:7-171:22.) Consistent with the announced change in its strategy, RCN did not start any new overbuild construction, and instead actually sought to free itself from its build-out obligations in the Philadelphia DMA and elsewhere. RCN did not even build out franchise areas where it already had franchise approvals and therefore the legal obligation to build. (Def. Statement of Undisputed Facts ¶ 84; Def. Ex. 3, RCN 2001 10-K405, p. 20, 52; Def. Ex. 55, RCN 30(b)(6) Dep., 159:9-160:13; Def. Ex. 3, RCN 2001 10-K405, p. 20, 26; Def. Ex. 4, RCN 2002 10-KA, p. 22, 28; Def. Ex. 5 RCN 2003 10-K, p. 32; Def. Ex. 6, RCN 2004 10-K, p. 16; Def. Ex. 7, RCN 2005 **[*108]** 10-K, p. 19.) Among the areas affected by RCN's strategic retrenchment were communities in Bucks County where RCN had franchise approvals and build out obligations. In 2002 and 2003, due to its continuing net losses and ongoing inability to raise capital, RCN reiterated in its public disclosures that it would not be able to honor its build-out requirements in certain communities across the country, including in Eastern Pennsylvania. (Def. Statement of Undisputed Facts ¶ 88; Def. Ex. 3, RCN 2001 10-K405, p 20, 24, 51-52; Def. Ex. 4, RCN 2002 10-KA, p. 22, 26-27; Def. Ex. 5, RCN 2003 10-K, p. F-1, F-26, F-29, F-39; Def. Ex. 55, RCN 30(b)(6) Dep., 164:20-165:6, 167:20-168:24.) In May 2004, RCN filed for bankruptcy. (Def. Statement of Undisputed Facts ¶ 89; Counterstatement of Facts ¶ 89.) Even after emerging from bankruptcy, RCN's financial problems persisted, and its losses continued to mount. It is undisputed that, in May 2005, RCN disclosed that it was continuing its efforts to terminate or renegotiate franchise agreements in communities across the country, including Eastern Pennsylvania, to avoid breaches and related penalties, and announced that it expected to continue to experience **[*109]** net losses "for the foreseeable future." (Def. Statement of Undisputed Facts ¶ 93; Counterstatement of Facts ¶ 93.)

The Class does not dispute that RCN was suffering from financial problems. It contends that RCN, in part, blamed its problems on "the inability to secure, or the uncertainty about whether it will be able to secure, essential programming," (Def. Ex. 42, Initial Comments of RCN Corp to FCC, p. i-ii) and that RCN repeatedly complained to the FCC about Comcast. It contends that RCN's financial problems are evidence of the toll Comcast exacted on its competitor through its anticompetitive conduct in the Philadelphia DMA, i.e, by limiting RCN's access to contractors, as well as its conduct in targeting price discounts to prospective RCN subscribers - which we discuss below - Comcast raised RCN's costs. (See Singer Merits Reply Decl. ¶ 34 ("Comcast's contractor-foreclosure strategy directly raised RCN's costs of supplying MVPD service in the Philadelphia DMA and thereby provided Comcast with an artificial cost advantage vis-a-vis RCN. Dr. Teece's proposed remedy - importing contractors from distant areas - is also an example of raising rivals' costs."); see also Teece Decl. ¶ **[*110]** 176 (finding that "a number of Philadelphia area contractors chose to work solely (or mostly) with RCN," but noting also that "RCN apparently paid contractors more than Comcast in order to incentivize them to work with RCN.").)

Drawing all inferences in favor of the Class as the non-moving party, we find that the Class has succeeded in creating a genuine issue of material fact that Comcast acted with predatory intent regarding RCN's access to cable infrastructure installation contractors. There is a genuine issue of fact with regard to the reasons why RCN encountered problems in its build out in Delaware County. Comcast's evidence showing a larger pool of contractors, that RCN was able to complete its build out in Delaware County with available contractors, that Comcast never enforced non-compete agreements with contractors, and that RCN's problems arose from its lack of capital, does not establish that it is entitled to judgment as a matter of law on the issue. The contrary evidence Comcast presents merely counters the Class's evidence; it does not establish that no jury could find predatory conduct on the part of Comcast if it chose to believe the Class's evidence.

b. Has Comcast stated **[*111]** a "procompetitive justification" for its conduct?

Comcast's stated justification for "tying up" contractors with non-compete clauses is that it utilized non-compete clauses with contractors to protect its proprietary customer information, confidential design plans, and equipment. (Def. Statement of Undisputed Facts ¶ 76; Def. Ex. 46, S. Burke Dep., 167:15-168:21; Def. Ex. 48, Cleaver Dep., 103:18-104:4 (acknowledging that Comcast personnel expressed concerns about confidential design plans and mixing up equipment on the same truck)). Comcast's Steve Burke testified generally that the company was concerned that an installation contractor, who had access to Comcast's customer lists, might also work for DirecTV or RCN:

> we don't like the fact that you have names of our customers and now you are doing business with DirecTV, and the potential for somebody to make a bigger commission by doing business with DirecTV than Comcast, all of a sudden we lose a customer. So I think it's totally appropriate to tell a contractor, you know, we have enough work for 50 people, you work for us, we don't want you working for our competitor. But I don't know in the specific case of RCN whether that was done **[*112]** in Philadelphia.

(Def. Ex. 46, S. Burke Dep. 167:16-168:1.) He added,

> It's not a matter of company policy that if a company does work for anyone else they can't do work for us, but just as a matter of common business sense, if someone - if you have someone who is doing a lot of business with you and a lot of business with one of your competitors and you suspect that that is damaging you because they are taking your names and customers to someone else, boy, if I was running a system in Sarasota, Florida, I would stop it.

(Id. 168:13-22.) We find that Comcast has stated a legitimate procompetitive justification for its conduct with regard to cable infrastructure installation contractors.

c. Has the Class created a genuine issue of material fact that the proffered business justification is pretextual?

We find that the Class has failed to create a genuine issue of material fact that Comcast's stated justification was a pretext for predatory conduct. Indeed, in its summary judgment brief, the Class does not address Comcast's justifications for imposing no-compete terms on cable installers, i.e., the need for cable companies to protect their customer lists, design plans, and equipment. [40] Accordingly, **[*113]** we conclude that the Class has failed to meet its summary judgment burden on the issue of whether Comcast's justifications for requiring no-compete clauses by cable infrastructure installation contractors were pretextual.

2. RCN's access to CSN Philadelphia.

The Class contends that CSN Philadelphia, Comcast's regional sports network, is "must have" programming needed by MVPDs, including RCN, to compete in the Philadelphia DMA. (Pl. Ex. 83, Burnside Dep., 83:14-85:12.) The Third **[*114]** Amended Complaint alleges that Comcast initially refused to provide RCN, and then provided only on a short-term basis, access to Comcast SportsNet Philadelphia, refusing to enter into a stable, multi-year license for the content until only shortly before the Third Amended Complaint was filed. (Compl. ¶¶ 86-90.) The Class asserts that RCN's initial attempt to license CSN Philadelphia was "initially rebuffed," and that Comcast later indicated it would terminate RCN's access to CSN Philadelphia during the time period that it was building out its Delaware County communities. (Counterstatement of Facts ¶ 61; Pl. Ex. 97, RCN 30(b)(6) Dep., 69:16-20; Pl. Ex.

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[40] We note that Dr. Singer addresses the issue in his declaration, opining that "[t]here does not appear to be a compelling justification for [the contractor no-compete] conduct, as one Comcast official noted to another that 'I am not entirely sure what problem a[n] [exclusivity] program would be designed to solve' and that exclusive contracting 'has not bubbled up from the field as an urgent need and so I am not sure what we are trying to fix.'" (Singer Decl. ¶ 112 (quoting COM-PA1456482).) While it is unclear whether Dr. Singer was aware of Comcast's stated justifications when he stated there did not appear to be one, his opinion denying that Comcast had stated any justifications is not supported by the record.

118.) It presents evidence that, during this time frame when RCN was attempting to sign up customers in its new operating areas, Comcast call center workers were directed to tell subscribers cancelling in favor of RCN that RCN will no longer have the right to carry Comcast SportsNet after October 1, 2000. (Pl. Ex. 81, S. Burke Dep., 123:6-19; Pl. Ex. 83, Burnside Dep., 116:22-118:8). While conceding that "Comcast eventually allowed RCN access to the 'must-have' programming on a series of short term, month-to-month contracts," it characterizes **[*115]** this arrangement as "outside the industry norm." (Counterstatement of Facts ¶ 61 (citing Pl. Ex. 135, Letter of April 16, 2001, p. 6.).) [41]

In his report, Dr. Singer opined that Comcast sought to deny RCN access to CSN Philadelphia, and then sought to raise its rival's costs by artificially inflating the price, once the FCC determined that Comcast **[*118]** was required to provide access to its wireline competitors. (Singer Decl. ¶ 97.) Dr. Singer opines that, "[e]ven though Comcast ultimately was compelled to supply RCN with [CSN Philadelphia], the episode reveals Comcast's anticompetitive intent and highlights the competitive implications of such exclusionary conduct in the downstream market." (Singer Decl. ¶ 100.)

Comcast responds that RCN has had access to CSN Philadelphia continuously from before the class period to the present day and that RCN's own corporate designee testified that lack of access to CSN Philadelphia programming did not constitute a barrier to entry for RCN into the Philadelphia DMA. (Def. Statement of Undisputed Facts ¶ 61; Def. Ex. 55, RCN 30(b)(6) Dep., p. 127:17-22; Def. Ex. 47, Burnside Dep., 143:16-144:12.) It adds that RCN had a "most-favored-nation" clause guaranteeing that it would receive CSN Philadelphia on terms no less favorable than those provided to other licensees. (Def. Statement of Undisputed Facts ¶ 63; Def. Ex. 31, 32.) Comcast asserts that it licensed the programming to RCN, its competitor, on exactly the same terms offered to all CSN Philadelphia licensees (including Comcast Cable itself). (Def. **[*119]** Statement of Undisputed Facts ¶ 64; Def. Ex. 49, Deposition of Joseph Donnelly on November 19, 2008 ("Donnelly Dep."), 162:15-19 (stating "I can tell you that the

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[41] We note that the summary judgment record includes testimony from Scott Burnside that Comcast used CSN Philadelphia to create an entry barrier. Burnside, referring to the month-to-month contract period, testified "it gave Comcast some leverage . . . over RCN and where RCN might go into other competitive - other communities in that greater Philadelphia market. (Pl. Ex. 83, Burnside Dep., 104:23-105:2.; but see Def. Ex. 47, Burnside Dep., 114:18-21 (stating "RCN still does have the programming required to be competitive because they are there and competing on a daily basis."); see also Def. Ex. 55, RCN 30(b)(6) Dep., 49:5-15 (stating that obtaining programming is not an entry barrier)).

However, we find that the evidence cited for the "outside the industry norm" proposition, as well as the claim that Comcast told RCN it would terminate its access to CSN Philadelphia, is taken out of context. CSN Philadelphia's CEO Jack Williams informed RCN on May 25, 2000 that, due to changes in the cost of programming, the market, and the needs of Comcast's affiliates, **[*116]** Comcast would not be able "to extend its arrangement with your system **at the price and on the other terms and conditions currently in effect** when your agreement expires this coming October." (Pl. Ex. 118, Letter of May 25, 2000 (emphasis added).) The letter states that this same notice was being given to all CSN Philadelphia affiliates. The Class concedes that RCN received a long-term contract executed in December 2003, and made effective as of October 1, 2001, the termination date of its prior long-term contract. (Pl. Ex. 79.)

The contention that the intervening short-term contracts were "outside the industry norm" is based upon a letter Comcast CEO Brian Roberts sent to Senator Arlen Specter. In describing Comcast's relations with RCN, he stated that RCN "has had, and continues to have, a contractual agreement to carry Comcast SportsNet on its systems in the network's greater Philadelphia service area;" that in "October 2000, *every* Comcast SportsNet affiliate was offered a six-month carriage renewal (through March 2001), after which the carriage agreement would remain in place on a continuous, month-to-month basis; while this month-to-month agreement is in place, either Comcast SportsNet **[*117]** or the affiliate has the right to terminate the agreement on 90 days' notice." (Pl. Ex. 135, Letter of April 16, 2001, p. 6 (emphasis in original).) Roberts told Specter that Comcast did this "to assure affiliates of continuous service while the company reviewed its business plan and structure" and Roberts stated that Comcast advised RCN that, on completion of that review, it would offer "*all* affiliates a standard new contract whose terms and length will be consistent with established industry practices." (Id. (emphasis in original).) The Class reads the statement that the new contract would "be consistent with industry standards" as evidence that the interceding month-to-month arrangement was outside the norm. This characterization ignores the evidence, undisputed by the Class, that the interceding arrangement was imposed on all affiliates and was instituted by Comcast "to assure affiliates of continuous service while the company reviewed its business plan and structure." (Id.)

Comcast SportsNet rates in Philadelphia are the same for everybody. And there are competitors, people who are, like Verizon who get it and pay the same rate as we do, RCN who pays the same rate as we do."); Def. Ex. 60, Deposition of Jack Williams on December 16, 2008 ("Jack Williams Dep."), 45:20-46:2; 69:12-18; Def. Ex. 55, RCN 30(b)(6) Dep. 139:6-12, 141:16-143:20.) The "short-term" agreements, which were the same for all licensees, occurred only during a one-year period when Comcast was conducting an internal review of pricing strategy. (Def. Statement of Undisputed Facts ¶ 65; Def. Ex. 60, Jack Williams Dep., p. 45:8-46:23 (stating "When RCN came on in Philadelphia, we offered a contract that would expire at the same time of all the other contracts. That contract was then extended for a year, as were all of the others.").)

Construing the evidence in the light most favorable to the Class, we find that the Class has failed to create a genuine issue of material fact that Comcast acted with predation toward RCN with regard **[*120]** to its carriage of CSN Philadelphia. While the Class contends that Comcast acted with predation toward RCN because it was overbuilding Comcast's Delaware County franchises, the Class failed to create a genuine issue of material fact that Comcast treated RCN differently from all of its other CSN Philadelphia affiliates during the relevant time frame. Comcast advised each affiliate that its contract would not be renewed on the existing terms; it offered each affiliate short term contracts extending their carriage during the period in which Comcast was reassessing its terms of carriage; and it eventually offered RCN - like every other affiliate - a long term carriage contract back dated to the end of the prior long term contract, with no interruption in service. Information provided by Comcast call center workers to prospective RCN subscribers, that RCN had access to CSN Philadelphia on a short term basis, was truthful and there is no evidence that Comcast offered dissimilar information to inquiries from non-RCN prospective subscribers. The Class offered no evidence to create a genuine issue that Comcast threatened to cancel RCN's carriage or that Comcast acted "outside the industry norm" **[*121]** in placing all of its affiliates on short term carriage contracts while it reassessed its terms of carriage. Accordingly, we find that the Class has failed to create a genuine issue of material fact that Comcast acted with predatory intent in dealing with RCN's carriage of CSN Philadelphia.

3. Targeted price discounts.

Finally, the Class asserted in the Third Amended Complaint that Comcast's policy of offering targeted price discounts to prospective RCN customers to convince them not to switch service was predatory conduct. (Compl. ¶¶ 93-94.) The summary judgment record shows that, beginning in the winter of 2000 when RCN was about to offer service in Folcroft, Delaware County, Comcast offered discounts in the form of the "Comcast Advantage Plan" or "CAP" to customers in Folcroft. CAP offered a price freeze and free premium channels for eighteen months to customers who signed a written agreement not to cancel service during that period. (Def. Statement of Undisputed Facts ¶ 77-78; Counterstatement of Facts ¶ 77.) Customers who switched to another provider or otherwise terminated the contract incurred a termination penalty ranging from $30 to $75 dollars. (Pl. Ex. 2 at COM-PA0982337; **[*122]** Pl. Ex. 81, Dep. of Laura Burke of April 25, 2008 ("L. Burke Dep.") 37:13-38:4.) Comcast did not use written contracts for customers in any other franchise area in the Philadelphia DMA at the time it offered CAP to customers in Folcroft. (Pl. Ex. 81, L. Burke Dep., 42:4-17.) The early termination penalty was also unique to CAP. (Id. at 44:13-17.) Comcast enforced the penalty, collecting the termination fee by including it as a separately itemized line on the customer's monthly cable bill. (Pl. Ex. 81, L. Burke Dep., 92:3-93:11.) Although it began offering CAP in Folcroft, Comcast adjusted and changed the program over time, extending the offer to other areas that RCN entered as an overbuilder. (Id. at 97:4-99:3.)

The purpose of CAP was to keep customers from switching cable providers. (Pl. Ex. 85, Dep. of Frank Dingianni of June 25, 2008 ("Dingianni Dep."), 19:22-24.) Specifically, Comcast

> wanted to hold RCN at bay. . . . There was a certain percentage number that they were trying to hit, that they thought that RCN wouldn't be able to survive. . . . If they held them under 30 percent . . . . The amount of subscribers that RCN could get out of the areas and then maintain profitability. **[*123]** . . . [T]here was a break point where they wouldn't be viable, RCN.

(Id. at 40:8-19, 42:22-24.) In Folcroft, an area "[s]wept by CAP reps in March/April," as of June 2000, Comcast was able to sign up 70% of its subscribers to CAP contracts; for Ridley Township, which was "[s]wept by CAP reps in

May/June," Comcast was able to sign up 77% of its subscribers to CAP contracts. (Pl. Ex. 1, "Marketing Overview".) Dr. Singer opined for the Class that

> Comcast believed that RCN's minimum viable scale was a 50 percent penetration rate. . . . Comcast documents demonstrate that Comcast's CAP program held RCN to 10 percent penetration, and that the CAP program ensured that RCN could not under any circumstances achieve a penetration rate of more than 16 percent. By holding RCN to a penetration rate below this minimum viable scale, Comcast ensured that RCN's business model was doomed to fail. Facing these "unfavorable economics," RCN would incur a loss on every subscriber it successfully wrested from Comcast. Accordingly, Comcast's exclusionary conduct significantly impaired competition from RCN.

(Singer Merits Reply Decl. ¶ 41.) According to Dr. Singer, because of the price freeze in RCN areas and **[*124]** increased prices in non-RCN areas, "Comcast customers in RCN areas received rates that were 18 to 38 percent below the rate paid by Comcast customers in non-RCN areas. The implications of this disparate pricing policy are clear - but for RCN's failure to enter the City of Philadelphia, Comcast's customers in those areas would have enjoyed significantly lower prices." (Singer Decl. ¶ 115.)

Comcast responds that CAP was a purely voluntary program, which subscribers were free to accept or reject. It notes too that the Class's own expert opined that price discounts in response to entry by a new competitor are a consumer benefit of competition. (See Williams Decl., ¶¶ 142-43, Table 6. [42]) Finally, it asserts, and the Class does not dispute, that there is no evidence that the prices charged under CAP were lower than any relevant measure of Comcast's costs. (Def. Statement of Undisputed Facts ¶ 78; Counterstatement of Facts ¶ 78.) It argues that, irrespective of the evidence marshaled by the Class that Comcast specifically targeted CAP to maintain its subscriber base against incursion by RCN, its CAP pricing cannot be deemed predatory absent evidence that Comcast offered cable services below **[*125]** cost to drive RCN out of the market.

We find that the fact that Comcast never charged below cost prices to potential RCN customers does not mandate a summary judgment finding that CAP was not exclusionary conduct. While Comcast is correct that *section 2* claims based upon predatory pricing require evidence that the defendant has cut prices below some measure of its costs in providing the product, **[*126]** see *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-23, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* ("a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs"), the theory upon which the Class proceeds is not that Comcast's pricing policy was predatory. The Class asserts that CAP constituted predatory conduct because it was an exclusionary practice, entered into by a monopolist, to block the entry of a new competitor.

The Class has presented evidence that CAP was an exclusivity arrangement, that its purpose was to prevent RCN from attaining market penetration by locking up customers to an incentivized long term commitment to receiving their MVPD services from Comcast, and included penalty provisions if a customer chose to switch providers. An exclusivity arrangement by monopolists can constitute an exclusionary practice. *LePage's Inc., 324 F.3d at 157* (citing *U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 (1st Cir. 1993)*. [43] An exclusionary practice is

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[42] In the section of his report entitled "Incumbent Cable Operators Reduce Rates when Competitors Enter," Dr. Williams opines

> The evidence illustrates, through individual pricing decisions, how incumbent cable operators responded to new entrants. The econometric analyses reviewed above establish that competition lowers rates, while the evidence shown in the table illustrates how incumbent cable operators compete for subscribers using lower rates and other promotional incentives. Comcast's anticompetitive conduct, which created and increased barriers to entry, reduced the extent of that entry, which would have required Comcast to offer such lower rates and promotions.

(Williams Decl., ¶ 143.) As evidence supporting his opinion, Dr. Williams specifically cites the CAP program in Folcroft. (Id., Table 6.)

[43] In addition to relying upon the decision in LePage's, Inc., the Class cites to *Telecor Communs., Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1139-40 (10th Cir. 2002)* **[*128]** to also support the proposition that conduct by a monopolist to lock up

"'a method by which a firm . . . trades a part of its monopoly profits, at least temporarily, for a larger **[*127]** market share, by making it unprofitable for other sellers to compete with it.'" *Id. at 164* (alteration in original) (quoting Richard A. Posner, ***Antitrust Law***: An Economic Perspective 28 (1976)). In discussing the antitrust impact of an exclusivity arrangement in the form of bundled rebates, the *en banc* court in LePage's, Inc. held that "[w]hen a monopolist's actions are designed to prevent one or more new or potential competitors from gaining a foothold in the market by exclusionary, i.e. predatory, conduct, its success in that goal is not only injurious to the potential competitor but also to competition in general." *Id. at 159*. Most importantly, LePages's, Inc. rejected the proposition advanced by 3M and repeated here by Comcast that "after Brooke Group, no conduct by a monopolist who sells its product above cost — no matter how exclusionary the conduct — can constitute monopolization in violation of *§ 2* of the Sherman Act." *Id. at 147*. *LePage's, Inc.* unequivocally closes the door in this Circuit on an assertion that above cost pricing safe-harbors otherwise exclusionary conduct.

While a new entrant may engage in "promotional" activity, such as offering a discount in exchange for a period of exclusivity, or offering below cost pricing in the short term in order to introduce itself or a new product to the market, "[w]hen a firm has considerable market power in the very product or service being promoted, the promotional pricing defense disappears." 3A Areeda and Hovenkamp, ***Antitrust Law***, § 746 (3d Ed. 2008); see also id. at § 1807 (discount contracts are "problematic" **[*129]** when the defendant is a dominant firm in a position to force "an all-or-nothing choice"). The Class has created a genuine issue of material fact that Comcast, a firm possessing market power, was able to lock up 70% to 77% of the potential customer base available to the new entrant. Because it possessed market power, its decision to target promotional discounts to deter a new entrant may be deemed predatory and an exercise of market power to maintain its monopoly. As Comcast makes no arguments that CAP had otherwise legitimate business justifications, we conclude that the claim must be submitted to a jury. [44]

VI. ANTITRUST [*130] INJURY

We have previously determined that proof of antitrust impact of the *section 1* and *section 2* claims must be limited to the one theory the Class successfully demonstrated could be proved by evidence common to the Class, namely, that Comcast's clustering conduct deterred the entry of overbuilders in the Philadelphia DMA. (Class Cert. Mem. at 45-47; Order of January 13, 2010 at ¶ 11.) Comcast argues that summary judgment should be entered on all claims because the Class has failed to create a trial issue on this sole remaining theory of antitrust injury. [45] Comcast

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customers with long term contracts in anticipation of competition is exclusionary. The case is inapposite. At the referenced pin cite, the United States Court of Appeals for the Tenth Circuit, discusses whether the "state action doctrine" immunized conduct under state ***antitrust law***, declining to reach the question because "it is clear that no state policy expressly permitted Southwestern Bell to attempt to lock up customers contractually long beyond the November 1996 introduction of competition in an effort to stymie that competition." Id. The Court was clearly discussing an inapposite doctrine concerning an inapposite state law issue.

[44] We note that Comcast asks that, in the event we should only find that there is a genuine issue of fact as to whether its conduct toward RCN was predatory, we amend our class certification order to limit the Class to subscribers residing in Delaware County. (See Def. Mem. at 50-51.) Because we conclude that the Class may present to a jury its section 1 rule of reason claim that Comcast's clustering conduct unreasonably restrained trade, as well as its *section 2* monopolization claim based upon the targeted discounts in Delaware County, we find no cause to amend our order.

[45] Individual antitrust injury or antitrust impact, must be established for a plaintiff to have standing under *section 1* or **[*131]** *section 2* of the Sherman Act. *Bell v. Dow Chem. Co., 847 F.2d 1179, 1182 (5th Cir. 1988)* (holding that "Antitrust injury is a component of the standing inquiry, not a separate qualification."). This requirement is inferred from section 4 of the Clayton Act, *15 U.S.C. § 15*, which affords a remedy to any person injured in his business or property "by reason of" an antitrust violation. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*, the Supreme Court described antitrust injury as

> . . . injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

argues that (1) the Class has failed to prove the antitrust impact of clustering on RCN, and (2) Dr. Williams' theories of the general antitrust impact of clustering are purely theoretical and divorced from the factual record. It argues that some amount of empirical evidence is required to show antitrust impact; because the Class cannot present empirical evidence to support Dr. Williams' theory, the fact that the Class has successfully stated a theory should not prevent the grant of summary judgment.

Because we have found the Class has presented evidence from which a jury could find that Comcast had monopoly power derived from its creation of its cluster in the Philadelphia DMA, and acted **[*132]** with predation toward RCN in its targeted discounts to prospective RCN subscribers, it follows that the Class has met its summary judgment burden on the causation issue of antitrust impact. The Class has presented evidence from which a jury could find that Comcast's conduct did deter overbuilding, as well as evidence that RCN stopped overbuilding because of Comcast's conduct. Genuine issues of fact exist on both these issues rendering summary judgment inappropriate.

We also reject Comcast's arguments that the Class cannot show antitrust impact on a theory that clustering deters overbuilding in general. Comcast argues that the Class has failed to meet its summary judgment burden because it has not presented empirical evidence to support Dr. Williams' theory that clustering deterred overbuilding. (Def. Mem. at 57 (citing, among others, *In re Baby Food Antitrust Litig., 166 F.3d 112, 135 (3d Cir. 1999)* (holding that expert's unsupported economic theory and assumptions must be rejected where the opinion was not supported by actual record evidence); *Mass. School of Law v. Am. Bar Ass'n, 107 F.3d 1026, 1040 (3d Cir. 1997)* (holding that economic expert's report was properly disregarded where **[*133]** it was based on general and theoretical observations and was not tied to evidence in the record)). In granting class certification, we found that, although Dr. Williams' other theories of antitrust impact were not capable of proof common to the class, his clustering theory was supported by empirical evidence and was based upon the factual record. (Class Cert. Mem. 29-47.) Dr. Williams had theorized that econometric studies showed that, "all else equal, ownership of a cable system by a large MSO (typically defined as one of the ten largest MSOs) generally results in higher [cable] rates of approximately 5% to 10%." (Williams Decl. ¶ 52.) He concluded that studies showed that an MSO "can increase its profits by clustering its cable systems so that they share their boundaries with one another and share as little total boundary as possible with other cable providers serving adjacent franchise areas. Such contiguous clustering is profit-enhancing for an MSO because it reduces the likelihood or amount of overbuilding into its franchise areas." (Id. ¶ 88.) He identified several anticompetitive consequences arising from the resulting reduction in overbuilding within the MSO's franchise areas, **[*134]** and supported his theories by presenting (1) two economic models of overbuilding (Williams Decl. App'x II at 107-26; Williams Cl. Reply Decl. App'x I at 13-18.), (2) citations to reports issued by the FCC and the General Accounting Office, and (3) at least six scholarly articles. (Class Cert. Mem. 34-38.)

In accepting Dr. Williams' general theory on the anticompetitive impact of clustering, we rejected competing opinions offered by Comcast's experts and concluded that the Class "has successfully shown, through Dr. Williams' model, as well as his citations to empirical studies conducted by governmental agencies and private researchers, that the presence of an overbuilder constrains cable prices." (Class Cert. Mem. at 45-46.) We found that the Class "has also shown that Comcast engaged in conduct designed to deter the entry of overbuilders in the Philadelphia DMA, including denying RCN access to the services of cable installation contractors." (Id. at 46.) While that last portion of our decision has now been shown to be unsupported by the summary judgment record, the Class has presented the governmental and scholarly research supporting the general antitrust impact theory that clustering **[*135]** deters overbuilding, as well as evidence that the CAP discounts were predatory. Accordingly, we find that the Class has met its summary judgment burden of presenting evidence sufficient to create a genuine fact issue on the antitrust impact theory that clustering deters overbuilding.

VII. CONCLUSION

Id. (citing *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969))*; see also *Atl. Richfield, 495 U.S. at 342-44*.

We find that the Class can proceed to trial on Count I of the Third Amended Complaint, the Sherman Act section 1 rule of reason claim, based upon the theory that Comcast's creation of the Philadelphia cluster through its acquisition of competing cable companies and its swapping of cable assets constituted a horizontal allocation of markets. However, *per se* treatment of the section 1 claim is rejected because Comcast has succeeded in showing that the clustering of its cable assets created pro-competitive economic efficiencies and allowed it to offer new products and services to consumers. The portions of Count II, asserting a *section 2* monopolization claim, and Count III, asserting an attempted monopolization claim, which contend that Comcast acted with predation in creating its anti-RCN targeted discounts, may also proceed to trial. We grant summary judgment to Comcast on those portions of **[*136]** Counts II and III contending that (1) Comcast's clustering conduct, (2) its conduct blocking RCN's access to cable infrastructure installation contractors, and (3) its conduct in licensing CSN Philadelphia to RCN, constituted acts of monopolization or attempted monopolization.

An appropriate order will be entered.

BY THE COURT:

/s/ John R. Padova

John R. Padova, J.

ORDER

AND NOW, this 12th day of April 2012, upon consideration of Defendants' Motion for Summary Judgment (Docket Entry 441), all responses and documents filed in connection thereto, oral argument heard by the Court on January 24, 2012, and for the reasons stated in the accompanying Memorandum, **IT IS HEREBY ORDERED** that the Motion is **GRANTED IN PART AND DENIED IN PART** as follows:

1. Defendants' Motion is **GRANTED** insofar as it seeks judgment in Defendants' favor on

   a. Count I of Plaintiffs' Third Amended Complaint, to the extent that it asserts a Sherman Act *section 1* *per se* liability claim;

   b. those portions of Counts II and III of Plaintiffs' Third Amended Complaint asserting that Comcast's (1) clustering conduct, (2) its conduct blocking RCN's access to cable infrastructure installation contractors, and (3) its conduct in licensing **[*137]** CSN Philadelphia to RCN, constituted acts of monopolization or attempted monopolization under Sherman Act *section 2*.

   JUDGMENT IS ENTERED in favor of Defendants and against Plaintiffs on these claims.

2. The Motion is **DENIED** insofar as it seeks judgment in Defendants' favor on

   a. Count I of Plaintiffs' Third Amended Complaint, to the extent that it asserts a Sherman Act section 1rule of reason claim;

   b. those portions of Counts II and III of Plaintiffs' Third Amended Complaint asserting that Comcast's targeted discounts constituted acts of monopolization or attempted monopolization under Sherman Act *section 2*.

BY THE COURT:

/s/ John R. Padova

John R. Padova, J.

[WM Aviation, LLC v. Cessna Aircraft Co.]

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

April 13, 2012, Decided; April 13, 2012, Filed

Case No. 6:11-cv-2005-Orl-18GJK

Reporter
2012 U.S. Dist. LEXIS 207955 *

WM AVIATION, LLC and TRICOR INTERNATIONAL CORPORATION, individually and as assignees of United States Aviation Underwriters, United States Aviation Insurance Group, Liberty Mutual Insurance Company, and Ace American Insurance Company, Plaintiffs, v. CESSNA AIRCRAFT COMPANY, Defendant.

Core Terms

aircraft, repair, jet, economic loss rule, monopolize, parties, deceptive, hydraulic, unfair, commerce, entity, misrepresentation, damages, amend, privity of contract, motion to dismiss, proprietary, antitrust, replaced, negligent misrepresentation, Clayton Act, conspiracy, reservoir, courts, brake

Counsel: **[*1]** For Wm Aviation, Llc, Individually and as Assignee of United States Aviation Underwriters, United States Aviation Insurance Group, Liberty Mutual Insurance Company and ACE American Insurance Company, Tricor International Corporation, Individually and as Assignee of United States Aviation Underwriters, United States Aviation Insurance Group, Liberty Mutual Insurance Company and ACE American Insurance Company, Plaintiffs: Danya J. Pincavage, LEAD ATTORNEY, Wolfe Pincavage LLP, Miami, FL USA; John Scarola, LEAD ATTORNEY, Searcy, Denney, Scarola, Barnhart & Shipley, PA, West Palm Beach, FL USA; Stephen A. Marino, Jr., LEAD ATTORNEY, Ver Ploeg & Marino, PA, Miami, FL USA.

For Cessna Aircraft Company, Defendant: Christopher D. Brown, LEAD ATTORNEY, Bear Legal Solutions, Orlando, FL USA; Henry M. Knoblock, Stephen Fraser Coxhead, LEAD ATTORNEYS, Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, Miami, FL USA; Sherrill May Colombo, LEAD ATTORNEY, Littler Mendelson, PC, Miami, FL USA; William J. Katt, LEAD ATTORNEY, PRO HAC VICE, Wilson, Elser LLP, Milwaukee, WI USA.

Judges: G. KENDALL SHARP, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: G. KENDALL SHARP

Opinion

ORDER

THIS CAUSE comes for consideration on Defendant Cessna **[*2]** Aircraft Company's ("Cessna") Motion to Dismiss (Doc. 8) to which Plaintiffs WM Aviation, LLC and Tricor International Corporation (collectively "Plaintiffs") responded in opposition (Doc. 10). For the following reasons, Cessna's motion is granted in part and denied in part.

I. BACKGROUND

This dispute began after Plaintiffs' Cessna Citation X jet skidded off the runway at John F. Kennedy International Airport on April 3, 2008. (Doc. 1 at 3.) On February 19, 2004, Plaintiffs entered into a contract to purchase the aircraft. (Id. at 2.) On February 2, 2008, Plaintiffs brought the aircraft to Cessna's Citation Service Center in Orlando, Florida to resolve a "hydraulic leak at the left engine pylon." (Id. at 3.) Cessna's mechanics recommended that the hydraulic reservoir be replaced at the aircraft's next service. (Id.) On April 2, 2008, Cessna's mechanics replaced the aircraft's hydraulic reservoir and approved the aircraft for a return to service. (Id.) Plaintiffs allege that Cessna did not inform Plaintiffs that the replacement hydraulic reservoir had been refurbished after being taken out of another aircraft due to a broken fluid level indicator. (Id.) The following day, Plaintiffs' crew attempted to **[*3]** return the aircraft from the Citation Service Center to John F. Kennedy International Airport in New York. (Id.) During the flight, the newly-serviced hydraulic system malfunctioned, causing the aircraft's primary brake system to fail. (Id.) After the aircraft's emergency brake system also failed, the aircraft skidded off the runway, causing extensive damage to its fuselage, left wing, left main landing gear, and other, unspecified components. (Id.)

Plaintiffs allege that they learned a number of facts after the damage to the aircraft occurred. First, Plaintiffs learned that Cessna did not have a method of testing the emergency brakes on Citation series jets. (Id.) Second, Plaintiffs learned that only Cessna is able to repair the sort of damage Plaintiffs' aircraft sustained because Cessna "refuses to share its proprietary data with third-parties." (Id.) Finally, Plaintiffs learned that Cessna "is the only entity that can certify that repairs to a Citation X jet are sufficient to return a repaired aircraft to service." (Id. at 4.)

Plaintiffs allowed Cessna to inspect the aircraft and develop an estimate for repairs, and Cessna developed four repair scenarios and, ultimately, two estimates. (**[*4]** Id.) However, Plaintiffs did not agree with Cessna's proposed repairs, and the aircraft has remained out of service since April 3, 2008. (Id.) Plaintiffs insurers refused to pay for repairs in excess of the amount suggested by Cessna in its estimates, and Plaintiffs sued their insurers to recover the amount of the limit on their policy. (Id.) Plaintiffs settled the case against their insurers who assigned to Plaintiffs the insurer's subrogation rights under the policy. (Id.)

In addition to repair costs, Plaintiffs allege consequential damages for hangar rental fees, insurance premiums paid on the aircraft since the date it was damaged, financing costs, loss in value of the aircraft, business interruption, and the cost of chartering a replacement aircraft since April 3, 2008. (Id. at 5.) Plaintiffs brought this Complaint against Cessna alleging: (1) negligence, (2) products liability, (3) negligent misrepresentation, (4) violation of the Clayton Act, (5) violation of the Florida Deceptive and Unfair Trade Practices Act, and (6) alternative violations of Florida antitrust laws. Cessna now moves to dismiss all counts of Plaintiffs' Complaint.

II. LEGAL STANDARD

Every complaint must contain "a short **[*5]** and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. A complaint may be dismissed for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. In reviewing a 12(b)(6) motion to dismiss, a court must accept the factual allegations in the complaint as true and consider them in the light most favorable to the plaintiff. *Erickson v. Pardus, 551 U.S. 89, 93-94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)*. To survive a motion to dismiss, a plaintiff's complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. This plausibility standard requires a two-step inquiry: first, a court must identify only those pleadings that go beyond conclusory allegations—such pleadings are entitled to an assumption of truth; second, a court must determine if, assuming the veracity of those pleadings, they plausibly state a claim for relief. *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)*.

III. ANALYSIS

As an initial matter, a district court sitting in diversity applies the substantive law of the state in which it sits. See *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)*; *Flintkote Co. v. Dravo Corp., 678 F.2d 942, 945 (11th Cir. 1982)*. Therefore, Florida's substantive law applies to Plaintiffs' state-law claims. "In determining the law of the state, federal courts must follow the decisions of the state's highest court, and in the absence of such decisions on an issue, must **[*6]** adhere to the decisions of the state's intermediate appellate courts unless there is some persuasive indication that the state's highest court would decide the issue otherwise." *Flintkote, 678 F.2d at*

945. However, "where no state court has decided the point in issue may a federal court make an educated guess as to how that state's supreme court would rule." Benante v. Allstate Ins. Co., 477 F.2d 553, 554 (5th Cir. 1973).[1]

A. Tort Claims

Cessna argues that Count I (negligence), Count II (products liability), and Count III (negligent misrepresentation) should be dismissed because each claim is barred by Florida's economic loss rule. The economic loss rule is a judicially created doctrine under which a tort action is prohibited if the parties are in privity of contract and the only damages suffered are economic losses. Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc., 891 So. 2d 532, 536 (Fla. 2004). "The prohibition against tort actions to recover solely economic damages for those in contractual privity is designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort." Id. "[W]hen the parties are in privity, contract principles are generally more appropriate for determining remedies for consequential damages that the parties have, or could have, addressed **[*7]** through their contractual agreement." Id. at 536-37.

The economic loss rule also extends to bar tort claims for economic losses where "a defect in a product . . . causes damage to the product but causes no personal injury or damage to other property." Id. at 536. In this regard, the economic loss rule applies even where the parties are not in privity of contract. Id. at 541.

1. Negligence Claim

In Count I, Plaintiffs allege that, during the services that began on February 2, 2008, Cessna negligently conducted repairs and maintenance on Plaintiffs' Citation X jet, causing the aircraft to slide off of the runway during landing and sustain damage shortly after Cessna completed its services and returned the aircraft to Plaintiffs. (See Doc. 1 at 5-6.) Plaintiffs claim to have suffered damages to the aircraft and consequential damages, namely hangar rental fees, insurance premiums on the unrepaired jet, financing costs, loss in value of the jet, business interruption, and the cost of chartering a replacement aircraft since the date of the incident. (Id. at 6.) Plaintiffs do not allege damage to any property other than their Citation X jet, nor do they allege any personal injury. As discussed above, Plaintiffs and Cessna were in contractual **[*8]** privity with respect to the maintenance and repair services. Therefore, Plaintiffs' negligence claim is squarely within the ambit of Florida's economic loss rule. See Cessna Aircraft Co. v. Avior Technologies, Inc., 990 So. 2d 532, 537 (Fla. 3d DCA 2008) (holding that the economic loss rule barred the plaintiffs claim that the defendant negligently failed to repair plaintiff's jet because the parties were in contractual privity as to service to be performed on the plaintiff's aircraft). Accordingly, Count I must be dismissed.

2. Products Liability Claim

In Count II, Plaintiffs allege that Cessna sold the aircraft to Plaintiffs in a defective and unreasonably dangerous condition because the aircraft's emergency brake system was defective and Cessna does not have any procedure to test the emergency brake system. (Doc. 1 at 6-7.) Because plaintiffs allege that this defect caused damage to the aircraft itself with no accompanying personal injury or damage to other property,[2] this claim is barred by Florida's economic loss rule. Accordingly, Count II must be dismissed.

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[1] The Eleventh Circuit adopted as binding precedent decisions of the Fifth Circuit rendered prior to October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)*(en banc)*.

[2] Despite Plaintiffs' somewhat convoluted argument, the "other property" exception to the economic loss rule plays no part in Plaintiffs' product liability claim. Based on Plaintiffs' complaint, the aircraft was sold, as a single "integrated package," with the allegedly defective emergency brake system. See East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 867, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986). Therefore, the aircraft should be considered a single product with respect to the economic loss rule. See id.; Turbomeca, S.A. v. French Aircraft Agency, 913 So. 2d 714, 717 (Fla. 3d DCA 2005) (citing Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993)) ("Courts have refused to bifurcate products into parts where a component part harms or destroys the finished product.); Jarmco, Inc. v. Polyguard. Inc.. 668 So. 2d 300, 303 (Fla. 4th DCA 1996), *approved*, ***Polyguard, Inc. v. Jarmco, Inc., 684 So. 2d 732 (Fla. 1996)*** ("[T]he 'other' property exception

3. Negligent Misrepresentation Claim

In Count III, Plaintiffs allege that Cessna "falsely represented to the Plaintiffs that [Cessna] properly performed the maintenance on the [a]ircraft's hydraulic **[*9]** system and that it was safe for return to service." (Doc. 1 at 7.) Plaintiffs contend that this claim is not barred by Florida's economic loss rule because an exception to the rule exists for negligent misrepresentation. However, the negligent misrepresentation exception is more nuanced than Plaintiffs suggest. See *Vesta Const. & Design. LLC v. Lotspeich & Assocs, Inc., 974 So. 2d 1176, 1181 (Fla. 5th DCA 2008)*. Negligent misrepresentations that induce a party to enter a contract-that is, a misrepresentation independent of the breach of contract-are not barred by the economic loss rule. *Hotels of Key Largo v. RHI Hotels, Inc., 694 So. 2d 74, 76 (Fla. 3d DCA 1997)*. However, "[m]isrepresentations relating to the breaching party's performance of a contract do not give rise to an independent cause of action in tort, because such misrepresentations are interwoven and indistinct from the heart of the contractual agreement." *Id. at 78*; see also *Vesta Const. & Design, 974 So. 2d at 1182*. Therefore, the economic loss rule bars a negligent misrepresentation claim where the alleged misrepresentation "is inseparable from the essence of the parties' agreement . . . ." *Hotels of Key Largo, 694 So. 2d at 78*.

Specifically, Plaintiffs allege that Cessna negligently misrepresented that it properly performed repairs on Plaintiff's aircraft. (Doc. 1 at 7-8.) Also, Plaintiffs allege that Cessna did not inform Plaintiffs that Cessna replaced the aircraft's hydraulic **[*10]** reservoir with a refurbished reservoir that was removed from another aircraft for failure to correctly indicate its hydraulic fluid level. (Id.) Finally, Plaintiffs allege that Cessna failed to tell Plaintiffs that the aircraft's hydraulic systems had not been "cold tested." (Id.) Each of these alleged misrepresentations relates to Cessna's performance of the contract for service and repair of Plaintiffs' aircraft and is "interwoven and indistinct from the heart of the contractual agreement." *Hotels of Key Largo, 694 So. 2d at 78*. Therefore, Plaintiffs' negligent misrepresentation claim is also barred by Florida's economic loss rule, and Count III must be dismissed.

B. Violation of the Clayton Act

In Count IV, Plaintiffs allege that Cessna violated *Section 3* of the Clayton Act, *15 U.S.C. § 14*, by tying the sale of its Citation X jet to maintenance and repair services for the aircraft. (See Doc. 1 at 9.) *Section 3* of the Clayton Act provides, in relevant part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of *goods, wares, merchandise, machinery, supplies, or other commodities* ... on the condition, agreement, or understanding that the lessee or purchaser thereof shall **[*11]** not use or deal in the *goods, wares, merchandise, machinery, supplies, or other commodities* of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14 (emphasis added). The plain language of *Section 3* strongly implies that it applies only where both the tying product and tied product are tangible goods. It does not apply to contracts for service. *Hodge v. Vill. of Homestead Homeowners Ass'n, 726 F. Supp. 297, 297 (S.D. Fla. 1989)* (citing *Chelson v. Oregonian Publ'n Co., 715 F.2d 1368, 1372 (9th Cir. 1983)* and *Crossland v. Canteen Corp., 711 F.2d 714, 718 n.1 (5th Cir. 1983))*. Even the incidental purchase of goods does not bring "an essentially service-oriented contract" within Section 3's prohibition. *Id. at 298* (citing *Satellite Television v. Cont'l Cablevision, 714 F.2d 351, 358 (4th Cir. 1983)* and *Hudson Valley Asbestos Corp. v. Tougher H. & P. Co., 510 F.2d 1140, 1145 (2d Cir. 1975))*. Because Plaintiffs fail to allege that Cessna unlawfully tied two tangible goods, they fail to state a claim for violation of the Clayton Act. Accordingly, Count IV must be dismissed.

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to the [economic loss rule] must be limited to property that is unrelated and unconnected to the product sold and there is no privity between the owner of the property damaged and the distribution chain for the product causing the damage.").

C. Violations of Florida Antitrust Laws

In Count VI, Plaintiffs allege that Cessna violated *section 542.18, Florida Statues*, or, in the alternative, *section 542.19*, *Florida Statutes. Section 542.32*, Florida Statutes, states that in construing Florida's antitrust laws, "due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes." **[*12]** *Sections 542.18* and *542.19* are "substantially identical" to their federal "counterparts," *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1-2*, respectively. *St. Petersburg Yacht Charters v. Morgan Yacht, 457 So. 2d 1028, 1032 (Fla. 2d DCA 1984)*. Florida courts analyze allege violations of *sections 542.18* and *542.19* according to "the body of ***antitrust law*** developed by the federal courts under the Sherman Act." Id.

1. Conspiracy to Monopolize

Section 542.18, Florida Statutes, states: "Every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful." Plaintiffs allege that Cessna violated *section 542.18* by failing to disclose to Citation X jet purchasers that: (1) Cessna acts as the sole investigating agent at crash sites; (2) Cessna does not disclose its proprietary data regarding the Citation X's fuselage to third parties; (3) no other entity can repair the Citation X's fuselage without Cessna's proprietary data; (4) Cessna is "the only entity with authority to determine the airworthiness of an aircraft" after repair. (Doc. 1 at 12.)

Plaintiffs fail to state a claim for conspiracy because *section 542.18*, like *§ 1* of the Sherman Act, does not reach unilateral conduct—only "unreasonable restraints of trade effected by a 'contract, combination ... or conspiracy' between *separate* entities.'" *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (quoting *Albrecht v. Herald Co., 390 U.S. 145, 149, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968))*; see also *Monsanto v. Spray-Rite Serv. Corp., 465 U.S. 752, 760, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*; *Spanish Broad. Svs. of Florida v. Clear Channel Commc'ns. Inc., 376 F.3d 1065, 1071 (11th Cir. 2004)* (citing *Fisher v. City of Berkeley, 475 U.S. 260, 266, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986)* ("Section One applies only to agreements **[*13]** between two or more businesses; it does not cover unilateral conduct.") "In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit." Copperweld Corp., 467 U.S. at 769. Because Plaintiffs fail to allege that Cessna contracted, combined, or conspired with any other entity to unreasonably restrain trade or commerce, their *section 542.18* claim must be dismissed.

2. Attempt to Monopolize

Section 542.19, Florida Statutes, states: "It is unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce in this state." Plaintiffs allege that Cessna attempted to monopolize the repair, service and maintenance market for Citation X jets, thereby violating *section 542.19*, by refusing to share its proprietary data with third parties, "ensuring that purchasers of Citation X jets must use Cessna to repair, service, and maintain" those jets. (Doc. 1 at 12.) An attempted monopolization claim has three elements: "(1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*.

"*Rule 12(b)(6)* dismissals are **[*14]** particularly disfavored in fact-intensive antitrust cases." *Spanish Broadcasting System, 376 F.3d at 1070* (citing *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A., 711 F.2d 989, 994-95 (11th Cir. 1983))*. This is because an attempted monopolization claim requires "harm to competition that must occur within a 'relevant' . . . market, with a specific set of geographical boundaries and a narrow delineation of the products at issue." *Id. at 1074*. Additionally, "the alleged monopolist must possess enough power or potential power in this 'relevant market' in order to harm competition." Id. (citing *Morris Communication Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1293-94 (11th Cir. 2004))*. Harm to competition is "critical" to an attempted monopolization claim—"conduct that injures individual firms rather than competition in the market as a whole does not violate *[section 542.19*]." *Id. at 1075*.

Under a notice pleading standard, Plaintiffs sufficiently allege facts to support their claim that Cessna violated *section 542.19* by attempting to monopolize the market for repair, service, and maintenance of Citation X jets. Further, Plaintiffs sufficiently allege that competition in general was harmed by Cessna's conduct in that it "forecloses a substantial volume of commerce" in Florida by precluding any third-party from offering repair services on Cessna's Citation X jets. Therefore, Count VI will not be dismissed to the extent it alleges violation of *section 542.19, Florida Statutes.*

D. Violation of ***[*15]*** *the Florida Deceptive and Unfair Trade Practices Act*

FDUTPA provides that an individual may initiate a civil action against a party who has engaged in "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Fla. Stat. § 501.204(1)*. To state a claim under FDUTPA, a plaintiff must allege: (1) a deceptive or unfair practice; (2) causation; and (3) actual damages. *Rollins. Inc. v. Butland, 951 So. 2d 860, 869 (Fla. 2d DCA 2006)*. For FDUTPA purposes, "deception occurs if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *PNR, Inc. v. Beacon Prop. Mgmt., Inc., 842 So. 2d 773, 777 (Fla. 2003)* (internal quotation marks and citations omitted). Further, "[a]n unfair practice is one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Id. (quoting *Samuels v. King Motor Co. of Ft. Lauderdale, 782 So. 2d 489, 499 (Fla. 4th DCA 2001))* (internal quotation marks omitted). However, FDUTPA "only reaches conduct that is unfair or deceptive as judged by controlling case law." *Id. at 777 n.2*.

Plaintiffs base their FDUTPA claim on Cessna's non-disclosure of two facts prior to the sale of the Citation X jet between Plaintiffs and Cessna: (1) "that Cessna is the only entity **[*16]** that could certify that any repairs were sufficient to return the [a]ircraft to service because [Cessna] will not share its proprietary engineering data with third-parties[,]" thereby making Cessna the only entity capable of repairing a Citation X jet, and (2) that Cessna "is the only federally-certified investigator of any crash sites involving [a Citation X jet]." (Doc. 1 at 10-11.) However, Plaintiffs fail to cite any legal authority in their response to Cessna's motion to dismiss to support the proposition that these omissions are unfair or deceptive as judged by controlling Florida case law. Additionally, the Court cannot locate any authority from a Florida court that supports the position that a manufacturer-seller's failure to disclose to a purchaser, prior to sale, that it does not disclose its proprietary engineering data to third parties and that the manufacturer-seller is the only federally-certified investigator of sites of incidents involving the product sold is an unfair or deceptive practice. Because this sort of conduct has not been held to be unfair or deceptive by controlling Florida case law, Plaintiffs fail to state a cause of action under FDUTPA. Therefore, Plaintiffs **[*17]** FDUTPA claim (Count V) must be dismissed.

E. Leave to Amend

Plaintiffs request leave to amend their products liability claim contained in Count II to a claim for gross negligence. After a responsive pleading has been filed, a litigant must obtain leave to amend the complaint, and "the Court should freely give leave when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. However, a court may deny leave to amend the complaint because of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment . . . ." *Forman v. Davis, 371 U.S. 178, 182 (1962)*. As discussed above, Florida's economic loss rule bars all tort claims if the parties are in privity of contract and the only damages suffered are economic losses. *Indem. Ins. Co. of N. Am., 891 So. 2d at 536*. Plaintiffs' prospective gross negligence claim would also be barred by Florida's economic loss rule. Therefore, leave to amend, as requested, would be futile. Accordingly, Plaintiffs' request for leave to amend their complaint is denied.

IV. CONCLUSION

For the foregoing reasons, Cessna's Motion to Dismiss (Doc. 8) is **GRANTED in part and DENIED in part**. Counts I, II, **[*18]** III, IV, and V are **DISMISSED without prejudice**. Count VI is **DISMISSED without prejudice** to the extent Plaintiffs allege violation of *section 542.18, Florida Statutes.* Plaintiffs' request for leave to amend their complaint is **DENIED**.

DONE and **ORDERED** in Orlando, Florida on this 13 day of April, 2012.

/s/ G. Kendall Sharp

G. KENDALL SHARP

SENIOR UNITED STATES DISTRICT JUDGE

Bocobo v. Radiology Consultants of S. Jersey, P.A.

United States Court of Appeals for the Third Circuit

April 13, 2012, Submitted Under Third Circuit LAR 34.1(a); April 17, 2012, Filed

No. 07-3142

Reporter
477 Fed. Appx. 890 *; 2012 U.S. App. LEXIS 7642 **; 2012-1 Trade Cas. (CCH) P77,858; 2012 WL 1302576

GEORGE G. BOCOBO, M.D., Appellant v. RADIOLOGY CONSULTANTS OF SOUTH JERSEY, P.A., a New Jersey Professional Corporation; SOUTH JERSEY HEALTH SYSTEM, INC., a New Jersey Corporation; PAUL CHASE, D.O.; RADIOLOGY AFFILIATES, a business entity jointly, severally, and in the alternative; ALLIANCE RADIOLOGY ASSOCIATES, L.L.C., a business entity, jointly, severally, and in the alternative

Notice: NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.

PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [1]** On Appeal from the United States District Court for the District of New Jersey. (D.C. No. 02-cv-01697). District Judge: Honorable Joseph E. Irenas.

Bocobo v. Radiology Consultants of S. Jersey, P.A., 2005 U.S. Dist. LEXIS 29321 (D.N.J., Nov. 21, 2005)
Bocobo v. Radiology Consultants of S. Jersey, P.A., 305 F. Supp. 2d 422, 2004 U.S. Dist. LEXIS 2733, 2004-1 Trade Cas. (CCH) P74319 (D.N.J., 2004)

Core Terms

radiology, termination, exclusive contract, summary judgment, antitrust, privileges, Defendants', anticompetitive, notice, complaints, practices, damages, Counts, trade libel, consumer, patients, staff, whistle-blowing, tortious interference, civil conspiracy, anti trust law, medical staff, provider, effects, argues, ninety

Counsel: For GEORGE G. BOCOBO, M.D., Plaintiff - Appellant: Gregory D. Saputelli, Esq., Kimberly D. Sutton, Esq., Obermayer, Rebmann, Maxwell & Hippel, Cherry Hill, NJ.

For RADIOLOGY CONSULTANTS OF SOUTH JERSEY, P.A., a New Jersey Professional Corporation, PAUL CHASE, D.O., ALLIANCE RADIOLOGY, a business entity, jointly, severally and in the alternative, Defendants - Appellees: Alan C. Milstein, Esq., Sherman, Silverstein, Kohl, Rose & Podolsky, Moorestown, NJ.

For S JERSEY HEALTH SYS, a New Jersey Corporation, Defendant - Appellee: Brett M. Anders, Esq., Robert M. Pettigrew, Esq., Timothy D. Speedy, Esq., Jackson Lewis, Morristown, NJ; Frank R. Ciesla, Esq., Giordano, Halleran & Ciesla, Red Bank, NJ.

Judges: Before: McKEE, Chief Judge and HARDIMAN, Circuit Judge and JONES *, District Judge.

* The Honorable C. Darnell Jones, District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Opinion by: HARDIMAN

Opinion

[*892] OPINION OF THE COURT

HARDIMAN, *Circuit Judge.*

Almost ten years ago, George Bocobo, M.D., brought a congeries of claims **[**2]** **[*893]** against a hospital, its director of radiology, and two radiology physician groups after they denied him participation in an exclusive contract. He appeals the District Court's summary judgment for Defendants on several of those claims. For the reasons explained below, we will affirm.

I

Dr. Bocobo began performing diagnostic radiology services at South Jersey Health System's (SJHS's) Millvale and Bridgeton divisions in 1985. According to Bocobo, he began "complaining" almost immediately about inadequacies in SJHS's policies and practices. In 1993, Bocobo entered into a Business Relationship Agreement and a Shareholder Agreement with Dr. Paul Chase, who then was SJHS's Radiology Department Director, and Drs. Steven Rothfarb and Craig Taylor to form Radiology Consultants of South Jersey, P.A. (RCSJ). Pursuant to an exclusive contract (Exclusive Contract I), RCSJ served as the sole provider of radiology services for SJHS's Millvale and Bridgeton hospitals from 1993 until 2001. Exclusive Contract I provided:

> Should [RCSJ] terminate its relationship with one or more of [its] Physicians, the status of such . . . Physicians, as members of [SJHS's] Medical Staff, and all accompanying privileges, **[**3]** shall terminate automatically and immediately, and such termination shall not be subject to a due process hearing or review by [SJHS's] Medical Staff or Board of Directors.

Bocobo's employment as a radiologist in the RCSJ group was governed by a separate contract (the Employment Contract), which took effect on October 1, 1993, and was set to terminate on September 30, 1995, if either RCSJ or Bocobo gave ninety days' notice. Paragraph two of the Employment Contract further provided:

> In the absence of [such] notice, this Employment Contract shall continue in force with the right of either party to terminate with ninety (90) days' written notice. Notwithstanding the above, this Agreement shall <u>immediately</u> terminate and [Dr. Bocobo] shall cease to be an Employee of [RCSJ] upon the occurrence of any of the following events: . . . (f) upon the dissolution of [RCSJ]; [or] (g) for cause . . . .
> In the event of termination pursuant to the above, [Dr. Bocobo] agrees to resign from the Medical Staff of Bridgeton and Millvale Hospitals without the right to due process . . . , such resignation to be effective on the date of termination as set forth above.

During his nearly eight-year employment with **[**4]** RCSJ performing radiology at SJHS hospitals, Bocobo was the subject of several complaints. According to SJHS's files and deposition testimony, Bocobo harassed technologists and secretaries, wasted time, behaved hostilely towards coworkers, demanded personal medical treatment in his office, and boasted about his romantic prowess with female staff. In a certification filed with the District Court, Bocobo challenged the written reports as false and misleading "one-sided anecdotal memos" that should not have been secretly kept by SJHS. [1]

Apart from the disputed complaints in SJHS's files, Chase testified that Bocobo sometimes did not respond to emergency calls. SJHS staff claim that he was routinely inaccessible. Others insist they preferred not to work with

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[1] Because Bocobo disputes the veracity of the reports maintained by SJHS in a "secret personal file," we will not consider that evidence at the summary judgment stage.

Bocobo because he made work less efficient and more difficult. Various hospital staff called Bocobo "self-centered," "standoffish," "perseverative, **[*894]** argumentative and unreasonable." On one occasion, a referring physician was so disappointed with Bocobo's handling of his **[**5]** patient that he "request[ed] that Dr. Bocobo not look at any of [his] patients or read any of the films from [his] patients." Bocobo claims that SJHS and Chase ultimately grew dissatisfied with him not based on his purported misconduct, but rather due to his "vocal patient advoca[cy]" regarding legitimate concerns about hospital policies and practices.

Around December 1998, in anticipation of its construction of a regional medical center, SJHS began entertaining plans to select one radiology group to service its three area hospitals: Bridgeton and Millvale, for which RCSJ then served as the exclusive radiology group, and Newcomb, for which Vineland Radiology Association (Vineland) provided exclusive radiology services at the time. An update to Exclusive Contract I between RCSJ and SJHS provided that the contract would end in January 2000 and could be terminated with notice any time after January 1999. Accordingly, beginning in January 2001, SJHS's exclusive contract with RCSJ proceeded on a month-to-month basis. In soliciting proposals for a new exclusive radiology provider, SJHS recommended that Chase and Dr. Ernesto Go, the head of Vineland, jointly bid for the contract. SJHS's President **[**6]** and CEO believed the radiology departments would be less disrupted in the transition to a single site if the existing radiology chiefs collaborated. Chase and Go made a presentation to SJHS on behalf of a planned consolidated group to be called Alliance Radiology. A different group, Booth Radiology, won the exclusive contract, but when Booth unexpectedly declined the contract, SJHS offered it to Alliance. Alliance was officially formed in March 2001, and it contracted with SJHS to become the exclusive provider of radiology services at all three of SJHS's hospitals in Cumberland County (Exclusive Contract II).

Bocobo was excluded from the new group. On April 12, 2001, RCSJ's legal counsel gave Bocobo ninety days' notice that he was being terminated pursuant to paragraph two of the Employment Contract. According to Chase, Bocobo was not invited to join Alliance because he was "cantankerous [and] . . . uncooperative . . . [and] wouldn't conform to decisions . . . made [by] the group." Rothfarb and Taylor likewise testified that Bocobo was excluded because his colleagues at RCSJ "did not wish to associate with him further" and because "he was disruptive, he was not a team player, [and] **[**7]** he had difficult relations with referring physicians, and [did not] accomodat[e] the referring physicians' requests."

At his deposition, Bocobo offered "no opinion as to why" RCSJ terminated him. Nevertheless, he now claims that SJHS played a substantial role in his exclusion from Alliance. Bocobo asserts that Chase's decisions for RCSJ were motivated primarily by his concern for maintaining RCSJ's exclusive contract with SJHS. Bocobo points to testimony by SJHS's Vice President of Medical Affairs, Dr. Joseph Zeccardi, indicating that Zeccardi mentioned to Chase a situation in which Zeccardi previously "had a similar responsibility of dissolving one group and forming another and hav[ing] a member of [the] group that [he] did not . . . want[] to hire." Bocobo claims further that because not inviting him to the Alliance group left only five radiologists, one short of the minimum acceptable number under Exclusive Contract II, Chase obtained SJHS's consent before excluding Bocobo. In support of this claim, Bocobo cites testimony indicating that Chase "spoke to administration" before Alliance was created and that "administration supported Dr. Chase['s **[*895]**] . . . actions and decisions." Bocobo **[**8]** argues that "SJHS authorized Chase to terminate [his] employment and his medical staff privileges, so that SJHS, as a 50% shareholder in RCSJ's outpatient radiology business, could reap [his] interests in RCSJ." To the contrary, both RCSJ's legal counsel and SJHS's President and CEO, who recommended the merger of RCSJ and Vineland, claim they had "no discussion . . . whatsoever" regarding what might happen to Bocobo when Alliance was formed.

Within two weeks of his termination, Bocobo was hired as a radiologist by a University of Pennsylvania hospital that is closer to his Villanova home than to SJHS's Millvale or Bridgeton locations. His starting annual salary ($190,000) was $20,000 less than his salary with RCSJ.

On April 12, 2002, Bocobo filed a twelve-count complaint against RCSJ, Alliance, Chase, and SJHS (collectively, Defendants). [2] In Counts 1 and 2, Bocobo alleged that Defendants violated the Sherman Act, *15 U.S.C. §§ 1* and *2*, and the New Jersey Antitrust Act (NJAA), *N.J. Stat. Ann. § 56:9-1 to -19*. Count 3 alleged that RCSJ, Alliance, and Chase terminated Bocobo's employment in violation of New Jersey's whistleblower statute, the New Jersey Conscientious Employee Protection **[**9]** Act (CEPA), *N.J. Stat. Ann. § 34:19-1 to -14*. Count 4 asserted that SJHS revoked Bocobo's hospital privileges contrary to public policy. Count 5 pleaded that RCSJ, Alliance, and Chase breached their fiduciary duties to Bocobo, and it was later amended to assert a civil conspiracy claim alleging that SJHS assisted and encouraged that breach. Count 6 claimed Defendants breached Bocobo's Employment Contract. [3] Count 8 asserted that Defendants defamed Bocobo and committed trade libel against him. Finally, Count 10 alleged that Defendants tortiously interfered with Bocobo's prospective economic advantages.

On February 25, 2004, the District Court granted Defendants' motion for partial summary judgment and dismissed Bocobo's federal and state antitrust claims (Counts 1 and 2). On November 22, 2005, the Court granted complete summary judgment for SJHS on all remaining claims against it (Counts 4, 5, 6, 8, and 10) and for RCSJ, Alliance, and Chase on Counts 3, 8, and 10. On Counts 5 and 6, the District Court granted RCSJ, Alliance, and Chase only partial summary judgment, dismissing those claims only insofar as they were grounded in Bocobo's loss of medical staff privileges at SJHS. Bocobo then proceeded to a jury trial against RCSJ, Alliance, and Chase on his shareholder-based claims and an alleged breach of a Deferred Compensation Agreement with RCSJ. The jury found in Bocobo's favor and awarded him $300,000. The District Court has resolved all post-judgment motions, and Bocobo's timely appeal of the summary judgment orders is now properly before us. [4]

[*896] II

We exercise plenary review over the District Court's orders. *Groman v. Twp. of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995)*. Summary judgment is appropriate only where, viewing the facts "in the light most favorable to the nonmoving party," *Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*, there is "no genuine dispute as to any material fact," such that he is "entitled to judgment as a matter of law," *Fed. R. Civ. P. 56(a)*. Ultimately, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (citation and internal quotation marks omitted).

A

We begin with Bocobo's antitrust claims under sections one and two of the Sherman Act and the NJAA. [5] With respect to Sherman Act *§ 1*, which prohibits contracts, combinations, and conspiracies that impose unreasonable

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[2] Bocobo's brief does not assert error in the resolution of Counts 7, 9, 11, and 12, or in Counts 13, 14, and 15, which were added in an amended complaint. Additionally, it offers no argument regarding his defamation claim under Count 8. Therefore, he has waived any arguments regarding the resolution of Counts 7, 8 (as to defamation only), 9, and 11 through 15. *See* *United States v. Pelullo, 399 F.3d 197, 222 (3d Cir. 2005)*.

[3] Although it is unclear from Bocobo's complaint whether he intended to include SJHS as a defendant in Count 6, the District Court found the conduct charged in Count 6 **[**10]** "factually interrelated" to other counts in which SJHS was a named defendant and treated SJHS as a Count 6 defendant. We do the same.

[4] The District Court had jurisdiction pursuant to *15 U.S.C. §§ 1*, *2*, and *15*, and *28 U.S.C. §§ 1331* and *1332*. **[**11]** We have jurisdiction under *28 U.S.C. § 1291*.

[5] Substantively, the NJAA is "virtually identical" to the Sherman Act, and the New Jersey legislature "intended the [NJAA] as consistent with federal ***antitrust law***, and expressly provided that it 'be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws.'" *Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 659 A.2d 904, 920 (N.J. Super. Ct. 1995)* (quoting *N.J. Stat. Ann. §*

restraints on trade, *15 U.S.C. § 1*; *W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 99 (3d Cir. 2010)* (citing *Standard Oil Co. v. United States, 221 U.S. 1, 58, 31 S. Ct. 502, 55 L. Ed. 619 (1911))*, Bocobo alleges that Defendants conspired to boycott **[**12]** him in the local radiology market and used illegal tying arrangements to link radiology services to hospital services. He also asserts that SJHS and Chase violated *§ 2* by signing exclusive contracts intended to monopolize the outpatient and hospital radiology markets. *See* *15 U.S.C. § 2* (creating liability for "[e]very person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States"). This, Bocobo says, was designed to free SJHS from competing on quality and led to substandard radiology services.

Bocobo's ability to bring an antitrust claim is dependent on § 4 of the Clayton Act, *15 U.S.C. § 15*, which limits private antitrust suits to those who have been injured by conduct forbidden by the antitrust laws. *Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 875 (3d Cir. 1995)* (citing *15 U.S.C. § 15(a)*). To establish his standing to sue, Bocobo must demonstrate: (1) that he has suffered an "antitrust injury"; and (2) that he is the proper plaintiff to bring the claim. *See, e.g.,* *Alberta Gas Chems., Ltd. v. E.I. DuPont de Nemours & Co., 826 F.2d 1235, 1240 (3d Cir. 1987)*. "An antitrust injury is an 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.'" *W. Penn Allegheny Health, 627 F.3d at 101* (alteration in original) (citation omitted) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. "If antitrust **[**14]** injury is not found, **[*897]** further inquiry is unnecessary." *City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 265 (3d Cir. 1998)*.

The District Court granted summary judgment to Defendants after finding that Bocobo had not demonstrated antitrust injury. Defining the market for radiology jobs as including, "at the very least, southern New Jersey and the Philadelphia area," *Bocobo v. Radiology Consultants of S. Jersey (Bocobo I), 305 F. Supp. 2d 422, 426 (D.N.J. 2004)*, the District Court concluded that Bocobo had presented no evidence that his exclusion from Alliance had negatively impacted that market. Looking to the consumer market for radiology services, the District Court likewise found no indication in the record that Bocobo's exclusion from SJHS's Cumberland County hospitals had affected consumer choice or the price or quality of radiology services.

Bocobo argues that the District Court abandoned the summary judgment standard, made conclusions that are reserved to experts and the jury, and improperly rejected his proposed definitions of the relevant product and geographic markets. We find no such errors in the District Court's reasoning. [6]

Viewing the evidence in his favor, Bocobo has not established a nexus between his purported exclusion from the market for radiology jobs and the anticompetitive effects on that market that would make Defendants' exclusive contracts or alleged boycott illegal under the antitrust laws. *See, e.g.,* *Atl. Richfield Co. v. USA Petrol. Co., 495 U.S. 328, 335-36, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (holding that losses resulting from a competitor's vertical, maximum price-fixing agreements were not "'*antitrust* injury,' since [the] losses d[id] not flow from the aspects of vertical, maximum price fixing that render it illegal"); *Brunswick, 429 U.S. at 489*; *W. Penn Allegheny Health, 627 F.3d at 102* (finding **[**16]** no antitrust injury to a hospital where "Highmark's elimination of [its low-cost insurance plan] violated the antitrust laws, if at all, because it tended to reduce competition in the . . . market for *health insurance*," not medical services (emphasis added)); *Balaklaw v. Lovell, 14 F.3d 793, 799 (2d Cir. 1994)* (upholding summary judgment based on a lack of standing where an anesthesiologist-plaintiff alleging exclusive dealing failed to show that multi-state and national competition for anesthesiologist positions had been hampered).

56:9-18). **[**13]** Accordingly, our analysis of Bocobo's federal antitrust claims in Count 1 applies to his NJAA claims in Count 2, and we resolve both counts together.

[6] Preliminarily, we reject Bocobo's objections **[**15]** to the District Court's act of defining the relevant product and geographic markets rather than preserving that question for the jury. It was proper for the District Court to delimit the market in order to assess antitrust injury at the summary judgment stage. *Cf., e.g.,* *Barton & Pittinos, Inc. v. SmithKline Beecham Corp., 118 F.3d 178, 182 (3d Cir. 1997)* (upholding summary judgment based on a lack of antitrust injury where the district court's decision depended heavily on its definition of the relevant product market).

Bocobo has not shown that he was excluded entirely from the radiology job market; [7] within two weeks of his termination **[*898]** from RCSJ, he obtained a radiology position with a nearby hospital. *Compare, e.g., Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 274 (3d Cir. 1999)* (reversing summary judgment for the defendant where "the injury [Angelico] suffered, when *shut out* of competition for anticompetitive reasons, [was] indeed among those the antitrust laws were designed to prevent" (emphases added)), *with, e.g., Untracht v. Fikri, 454 F. Supp. 2d 289, 309-10 (W.D. Pa. 2006)* (finding no antitrust injury, even where the plaintiff's staff privileges were revoked **[**17]** at several hospitals, because he maintained the option of practicing at at least one area hospital).

Nor has Bocobo demonstrated that Defendants' conduct was anticompetitive. Specifically, he has failed to show that their behavior leading to his exclusion—the change of contractor in a long-standing practice **[**18]** of exclusive contracting for radiology services—is the type that might lessen competition among radiology providers for the right to practice in the eastern Pennsylvania and south New Jersey areas. *See, e.g., B & H Med., LLC v. ABP Admin., Inc., 526 F.3d 257, 266 (6th Cir. 2008)* (finding no antitrust injury where the "record [was] devoid of evidence that *competition as a whole* ha[d] suffered as a result of [an] exclusive [contract] . . . program" (citation and internal quotation marks omitted)); *Balaklaw, 14 F.3d at 799*; *Steuer v. Nat'l Med. Enters., Inc., 672 F. Supp. 1489, 1501-02 (D.S.C. 1987)* (finding no standing where former exclusive contractors brought antitrust conspiracy claims against the hospital and the successor exclusive contractor because "reduced to its essentials, [the] plaintiffs' . . . Complaint rest[ed] not on any showing of lessened competition, but merely on the fact that they [were] disappointed competitors who [were forced to] provide their services elsewhere").

Finally, Bocobo has failed to establish that his displacement stemmed directly from conduct that is illegal because of its anticompetitive effects on the price, output, or quality of radiology services **[**19]** available to consumers, such as illegal tying arrangements or monopoly behavior. *See, e.g., Jefferson Parish, 466 U.S. at 26* (measuring the anticompetitive effects of tying anesthesiology services to hospital care by looking to the consumer market for anesthesiology). *See generally Angelico, 184 F.3d at 274* (noting that the "directness of the injury" bears on antitrust standing). Bocobo argues that Defendants' market position and exclusive contracts allow them to provide substandard radiology services and reduce consumer choice, but there is no indication that Defendants' actions that resulted in Bocobo's ouster from SJHS hospitals or Cumberland County might cause such harms. As the District Court explained, consumers of radiology services rarely shop around for radiologists or learn who interpreted their scans and X-rays. If consumers are likely to be harmed by Defendants' exclusive contracts, those "effects will not be missed by patient-consumers or insurers," who are better positioned than Bocobo to challenge Defendants' practices. *Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 719 (7th Cir. 2006)*.

Viewed in Bocobo's favor, the evidence shows merely that Bocobo **[**20]** was displaced when SJHS granted its exclusive contract to a new company better suited for SJHS's plans to consolidate its hospitals. Losing out in such competition is not an anticompetitive harm. *Cf., e.g., Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 83 (3d Cir. 2010)* ("It is well established **[*899]** that competition among businesses to serve as an exclusive supplier should actually be *encouraged.*"). In the absence of a link between Bocobo's losses and the anticompetitive aspects of exclusive contracts, boycotts, tying arrangements, and monopolies, we agree with the District Court that Bocobo lacks standing to assert his antitrust claims. Therefore, summary judgment was appropriate on Counts 1 and 2.

B

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[7] We find the District Court's definition of the relevant geographic market for radiology jobs proper, given uncontested evidence that: (1) SJHS recruited radiologists from Colorado; (2) Chase was hired from Camden County, New Jersey; and (3) Bocobo himself searched for a new position at least as far as the Philadelphia area. *See, e.g., Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 29, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* (noting that the market for anesthesiologist jobs "is not necessarily the same as the market in which hospitals compete in offering services to patients . . . [and that] it may encompass competition among anesthesiologists for exclusive contracts . . . and might be statewide or merely local"), *abrogated in part on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*; *Balaklaw, 14 F.3d at 799*; *Collins v. Assoc. Pathologists Ltd., 844 F.2d 473, 478-79 (7th Cir. 1988)*.

We next consider Bocobo's claim at Count 3 that RCSJ, Alliance, and Chase violated New Jersey's whistleblower statute by terminating him based on his complaints regarding their radiology policies and practices. [8] *See* CEPA, N.J. Stat. Ann. § 34:19-1 to -8. A CEPA plaintiff must show that

> (1) he . . . reasonably believed that his . . . employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he . . **[**21]** . performed a "whistle-blowing" activity . . . ; (3) an adverse employment action was taken against him . . . ; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.

Dzwonar v. McDevitt, 177 N.J. 451, 828 A.2d 893, 900 (N.J. 2003). The plaintiff need not "set forth facts that, if true, would constitute a violation of [a statute]," *id. at 903*, but he must establish a "substantial nexus between the complained-of conduct and a law or public policy identified by the court or the plaintiff," *id. at 901*; *accord* Caver v. City of Trenton, 420 F.3d 243, 254 (3d Cir. 2005).

The District Court granted summary judgment for Defendants, finding the absence of a genuine issue of material fact regarding the causation element **[**22]** of Bocobo's CEPA claim. Specifically, the Court reasoned that Bocobo had been complaining since 1985 and that no reasonable jury could find that his termination in 2000 was motivated by anything other than his own "difficult personality." Bocobo v. Radiology Consultants of S. Jersey, PA (Bocobo II), No. 02-1697, 2005 U.S. Dist. LEXIS 29321, 2005 WL 3158053, at *4 (D.N.J. Nov. 21, 2005). Bocobo argues that the District Court misapplied the summary judgment standard by implicitly crediting testimony indicating that he was excluded from Alliance merely because hospital staff and RCSJ colleagues disliked working with him. Defendants respond that summary judgment was fully supported by both a lack of causation and Bocobo's failure to identify the specific regulations or laws he complained were being violated. We agree with the District Court that, as is true "in most CEPA cases," Bocobo's claim "turn[s] on the fourth element: evidence of a causal connection" between his termination and his purported whistle-blowing. Donofry v. Autotote Sys., Inc., 350 N.J. Super. 276, 795 A.2d 260, 269 (N.J. Super. Ct. 2001). Because we also agree that no genuine issue of material fact exists as to whether Bocobo's termination resulted from his complaints, **[**23]** rather than his own failings, we will affirm the grant of summary judgment on Bocobo's CEPA claim.

[*900] Bocobo's CEPA claim depends on circumstantial evidence, so we apply the burden-shifting framework of McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *See* Fleming v. Corr. Healthcare Solutions, Inc., 164 N.J. 90, 751 A.2d 1035, 1041 (N.J. 2000). Even assuming that Bocobo has made out a prima facie case of retaliation, he cannot satisfy his burden of discrediting Defendants' legitimate, non-retaliatory explanation for his exclusion from Alliance as implausible, inconsistent, incoherent, or contradictory. *Compare, e.g.,* Blackburn v. UPS, Inc., 179 F.3d 81 (3d Cir. 1999) (upholding summary judgment for UPS where Blackburn raised alarms of potential antitrust violations without any sophisticated knowledge of antitrust and where the record provided him no fodder to undermine UPS's proffered legitimate explanations that it terminated him for his own violations of UPS's anti-nepotism, favoritism, integrity and accountability policies); Campbell v. Abercrombie & Fitch, Co., No. 03-3159, 2005 U.S. Dist. LEXIS 11507, 2005 WL 1387645 (D.N.J. June 9, 2005) (granting summary judgment on a store employee's CEPA claim, despite his allegations **[**24]** that he was fired for voicing concerns about discriminatory hiring practices, because no evidence assailed Abercrombie & Fitch's legitimate, non-retaliatory explanation that the employee had misrepresented himself at other store locations in order to conduct unauthorized undercover investigations), *with, e.g.,* Schlichtig v. Inacom Corp., 271 F. Supp. 2d 597 (D.N.J. 2003) (finding that Inacom's explanation that it fired the plaintiff for conducting unauthorized background checks of other employees, rather than for reporting a coworker's marijuana use to police against Inacom's instructions, was discredited by evidence that, after first learning of the unauthorized background checks, Inacom gave express permission for the plaintiff to conduct further investigations).

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[8] We reject Defendants' argument that Bocobo's CEPA claim is barred by the statute of limitations. In CEPA cases, "the employee's cause of action . . . accrues on the date of actual discharge[,] . . . [which is] the last day for which the employee is paid a regular salary or wage," Alderiso v. Med. Ctr. of Ocean Cnty., Inc., 167 N.J. 191, 770 A.2d 275, 277 (N.J. 2001), and Bocobo brought his suit well within one year of his final day of work, July 13, 2001.

As in *Blackburn* and *Campbell*, the record in Bocobo's case is replete with evidence bolstering Defendants' non-retaliatory explanation for his termination. The record indicates that he caused delays in the operations of the radiology department, refused to cooperate, and generated friction through his idiosyncratic practices and requests. We need not weigh the credibility of the witnesses who offered such testimony—and neither **[**25]** did the District Court—because Bocobo offers no contrary evidence aside from his own self-serving allegations. Rather, he merely posits the alternative view that he was terminated for expressing his disagreements with Defendants' patient care. But that claim is significantly undermined by the fact that RCSJ and Chase took no action in response to his complaints for at least eight years—from the creation of RCSJ in 1993 until its dissolution in 2001. The temporal proximity of a CEPA plaintiff's termination to his alleged whistle-blowing is important circumstantial evidence of the employer's motivation, *see, e.g., Kachmar v. SunGard Data Sys., 109 F.3d 173, 177 (3d Cir. 1997)*, and Bocobo's lengthy employment despite his complaints distinguishes his case from those in which CEPA claims have been countenanced, *see, e.g., Caver, 420 F.3d at 249-52* (alleged retaliation within six months of first complaints); *Schlichtig, 271 F. Supp. 2d at 613* (termination two weeks after complaints). Given the strong evidence supporting Defendants' proffered legitimate, non-retaliatory reason for excluding Bocobo from Alliance and Bocobo's failure to call that justification into question, we readily conclude **[**26]** that no reasonable jury could have found in Bocobo's favor on his CEPA claim. Accordingly, we will affirm the District Court's summary judgment on Count 3.

[*901] C

We now turn to Bocobo's claim of trade libel in Count 8. Under New Jersey law, to prove trade libel a plaintiff must show

> publication of a matter derogatory to the plaintiff's property or business, of a kind designed to prevent others from dealing with him or otherwise to interfere with plaintiff's relations with others. . . . The communication must be made to a third person and must play a material part in inducing others not to deal with plaintiff. . . . [W]hereas the need to demonstrate damages is [sometimes] waived in a defamation suit[,] . . . proof of damages is essential in an action for trade libel.

Patel v. Soriano, 369 N.J. Super. 192, 848 A.2d 803, 834 (N.J. Super. Ct. 2004) (internal citations omitted); *accord Arista Records, Inc. v. Flea World, Inc., 356 F. Supp. 2d 411, 424 (D.N.J. 2005)* (Trade libel requires proof of: "(1) publication, (2) with malice, (3) of false allegations concerning [the plaintiff's] property, product or business, and (4) special damages." (citing *FDIC v. Bathgate, 27 F.3d 850, 870-71 (3d Cir. 1994))*.

Bocobo dedicates **[**27]** only one sentence of his opening brief to his trade libel claim. He argues that the District Court's finding that he could not demonstrate special damages was based on the erroneous conclusion that RCSJ could terminate him without cause under the Employment Contract. [9]

As the Court noted, Bocobo had to "'allege either loss of particular customers by name, or a general diminution of business, and extrinsic facts showing that such special damages were the natural and direct result of the false publication.'" *Bocobo II, 2005 U.S. Dist. LEXIS 29321, 2005 WL 3158053, at *8* (quoting **[**28]** *Mayflower Transit, LLC v. Prince, 314 F. Supp. 2d 362, 378 (D.N.J. 2004))*. We agree with the District Court that his trade libel claim fell short in this respect. His complaint pleaded only general losses, including avoidance by his peers, loss of goodwill and respect, and "substantial money damages, including but not limited, to damages to his personal and business reputation." Bocobo failed to allege any loss of patients, let alone specifically named patients, and he did not show that the difference between his prior salary with RCSJ and his current salary with the University of

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[9] In his reply brief, as in his briefs before the District Court, Bocobo asserts in much greater detail that SJHS and Chase collected "anecdotal allegations" about him in a "secret personal file" and published false and misleading statements to hospital personnel, RCSJ, and Alliance based on "one-sided and incomplete portrayals of events." **(Reply 22.)** Bocobo claims SJHS and Chase knew the stories were false or recklessly disregarded their unreliability. Because Bocobo did not raise this argument in his opening brief, he waived it, *see Pelullo, 399 F.3d at 222*, and we consider only his challenge to the District Court's ruling on special damages.

Pennsylvania, even if construed as specific damages, was a *direct* result of Defendants' purportedly libelous statements. Rather, the only reasonable reading of the record shows that Bocobo's colleagues at RCSJ believed he was "difficult" and did not wish to associate with him further based on their own extensive personal interactions with him and his work-related deficiencies, such as inaccessibility and combativeness. Therefore, we will uphold summary judgment for SJHS and Chase on Count 8.

D

Bocobo's remaining claims at Counts 4, 5, 6, and 10 can be disposed of summarily.

1

At Count 4, Bocobo alleged a violation **[**29]** of public policy under *Nanavati v.* ***[*902]*** *Burdette Tomlin Memorial Hospital, 107 N.J. 240, 526 A.2d 697 (N.J. 1987)*. Although *Nanavati* stands for the proposition that a hospital must afford a physician due process before revoking his privileges, the case is inapposite here because, from SJHS's perspective, Bocobo's privileges were terminated not because of any belief as to his medical competence or personality, but rather by operation of contract once he ceased practicing radiology for SJHS's exclusive provider. *See* *Bloom v. Clara Maass Med. Ctr., 295 N.J. Super. 594, 685 A.2d 966, 973 (N.J. Super. Ct. 1996)* (holding that the "decision to award an exclusive contract for the provision of radiological services, which le[ads] to the revocation of [a doctor's] staff privileges, constitute[s] a reasonable management decision" under *Nanavati*); *Courtney v. Shore Mem'l Hosp., 245 N.J. Super. 138, 584 A.2d 817, 819 (N.J. Super. Ct. 1990)* ("*Nanavati* deals with disharmony-personality difficulties which are largely subjective . . . . An objective violation of a specific rule or regulation is quite different.") (holding that revocation of the plaintiff's privileges when he let his medical malpractice insurance lapse did not have to satisfy *Nanavati*).

2

At Count **[**30]** 5, Bocobo alleged civil conspiracy against SJHS. This claim fails for two independent reasons. First, we readily agree with the District Court's conclusion that, under the plain language of the Employment Contract, after September 30, 1995, either party could terminate Bocobo's employment upon ninety days' notice, with or without cause. The additional clause providing for immediate termination without notice "for cause" did not alter RCSJ's ability under the preceding clause to terminate Bocobo merely upon ninety days' notice. Because Bocobo's termination was permitted under his contract, any collaboration among Defendants to terminate Bocobo lacked the "unlawful purpose or . . . lawful purpose achieved by unlawful means" or the "wrongful act" required for Bocobo's civil conspiracy and aiding and abetting claims under Count 5. *See, e.g.,* *Morganroth & Morganroth v. Norris, McLaughlin & Marcus, 331 F.3d 406, 414-15 (3d Cir. 2003)* (setting forth the elements of civil conspiracy and aiding and abetting). Second, we agree with the District Court that Bocobo failed to adduce sufficient evidence suggesting that SJHS participated in or encouraged his ouster from RCSJ and exclusion from Alliance. **[**31]** Evidence that Chase had discussions with the SJHS administration prior to terminating Bocobo—even including Zeccardi's testimony that he told Chase of an instance in which a newly formed physicians' group eliminated a prior partner—does not establish that SJHS recommended that Bocobo be removed from the radiology group. Indeed, the only direct testimony presented on the subject consists of SJHS's CEO's and RCSJ's legal counsel's flat denials that they ever discussed Bocobo "whatsoever" in preparation for Exclusive Contract II between SJHS and Alliance.

3

At Count 6, Bocobo alleged breach of contract by all Defendants. This claim fails against RCSJ and Chase because, as we explained above, Bocobo's Employment Contract permitted termination without cause so long as he received ninety-days' notice. As to SJHS, Exclusive Contract I contemplated that Bocobo's privileges would be revoked automatically the moment he was no longer employed by RCSJ, so SJHS committed no breach by denying Bocobo hospital privileges.

4

Finally, at Count 10, Bocobo alleged tortious interference against SJHS, **[*903]** RCSJ, and Chase. Pitting Defendants against each other, he claims that SJHS interfered with his prospective **[**32]** contractual relationship with RCSJ and Chase, and vice versa. But SJHS could not have committed tortious interference because after September 30, 1995, the Employment Contract gave Bocobo no "reasonable expectation of economic benefit or advantage" in his position with RCSJ, which is an essential element of a tortious interference claim. *See, e.g., Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 186 (3d Cir. 1992)* (citing *Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 563 A.2d 31, 37 (N.J. 1989))*; *Printing Mart-Morristown, 563 A.2d at 37* ("A complaint based on tortious interference must allege facts that show some protectable right—a prospective economic or contractual relationship."). Nor could RCSJ have interfered with Bocobo's prospective contractual relationship with SJHS. It merely fired him pursuant to the Employment Contract, which could not constitute a "wrongful, intentional interference." *See Fineman, 980 F.2d at 186*; *accord* *Printing Mart-Morristown, 563 A.2d at 39*. Moreover, after September 30, 1995, when he became terminable from RCSJ without cause, Bocobo lacked a reasonable expectancy in his SJHS privileges, which were dependent on his RCSJ employment.

5

In sum, **[**33]** because Bocobo's termination from RCSJ, exclusion from Alliance, and loss of staff privileges at SJHS were all permissible under the governing contracts, and because the revocation of his privileges was automatic upon his termination from RCSJ, summary judgment was appropriate for all Defendants on Bocobo's claims for wrongful termination (Count 4), civil conspiracy and aiding and abetting (Count 5), breach of contract (Count 6), and tortious interference (Count 10).

III

For the foregoing reasons, we will affirm the District Court's summary judgment on all counts and against all Defendants.

In re High-Tech Emple. Antitrust Litig.

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

April 18, 2012, Decided; April 18, 2012, Filed

Master Docket No. 11-CV-02509-LHK

Reporter
856 F. Supp. 2d 1103 *; 2012 U.S. Dist. LEXIS 55302 **; 2012-1 Trade Cas. (CCH) P77,866; 2012 WL 1353057

IN RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: ALL ACTIONS

Subsequent History: Motion granted by, in part, Motion denied by, in part *In re High-Tech Emple. Antitrust Litig., 2013 U.S. Dist. LEXIS 6606 (N.D. Cal., Jan. 15, 2013)*

Related proceeding at *Garrison v. Oracle Corp., 2015 U.S. Dist. LEXIS 31301 (N.D. Cal., Mar. 13, 2015)*

Related proceeding at *Ryan v. Microsoft Corp., 2015 U.S. Dist. LEXIS 47753 (N.D. Cal., Apr. 10, 2015)*

Related proceeding at *Apple Inc. v. Superior Court, 2017 Cal. App. LEXIS 1099 (Cal. App. 6th Dist., Dec. 11, 2017)*

Prior History: *United States v. Lucasfilm, Inc., 2011 U.S. Dist. LEXIS 70171 (D.D.C., June 3, 2011)*

Core Terms

cold, conspiracy, Plaintiffs', Defendants', motion to dismiss, employees, bilateral agreement, allegations, overarching, Cartwright Act, negotiated, mobility, antitrust, bilateral, restitution, suppress, senior executive, conspire, federal enclaves, antitrust claim, skilled labor, Sherman Act, salaries, federal enclave doctrine, reasonable inference, alleged conspiracy, eliminating, pairings, parties, injunctive

LexisNexis® Headnotes

Evidence > Judicial Notice > Adjudicative Facts > Judicial Records

HN1[] **Adjudicative Facts, Judicial Records**

A court may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.

Evidence > Judicial Notice > Adjudicative Facts > Public Records

HN2[] **Adjudicative Facts, Public Records**

A court may take judicial notice of the existence of matters of public record, such as a prior order or decision, but not the truth of the facts cited therein.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

A court may consider documents referenced in, but not attached to, a complaint without converting a motion to dismiss for failure to state a claim into one seeking summary judgment.

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

HN4[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim. Dismissal under *Rule 12(b)(6)* may be based on either (1) the lack of a cognizable legal theory, or (2) the absence of sufficient facts alleged under a cognizable legal theory. While detailed factual allegations are not required, a complaint must include sufficient facts to state a claim to relief that is plausible on its face. A claim has facial plausibility when a plaintiff pleads factual content that allows a court to draw the reasonable inference that a defendant is liable for the misconduct alleged. The factual allegations must be enough to raise a right to relief above the speculative level.

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

HN5[] **Motions to Dismiss, Failure to State Claim**

For purposes of ruling on a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim, a court accepts all allegations of material fact as true and construes the pleadings in the light most favorable to the plaintiffs. The court need not, however, accept as true pleadings that are no more than legal conclusions or the formulaic recitation of the elements of a cause of action. Mere conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim. However, when there are well-pleaded factual allegations, the court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Antitrust & Trade Law > Sherman Act > Claims

HN6[] **Sherman Act, Claims**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, prohibits every contract, combination, or conspiracy in restraint of trade. To state a claim under *§ 1*, a plaintiff must allege that (1) there was an agreement, conspiracy, or combination between two or more entities; (2) the agreement was an unreasonable restraint of trade under either a per se or rule of reason analysis; and (3) the restraint affected interstate commerce. The plaintiff must plead enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement. An allegation of parallel conduct and a bare assertion of conspiracy will not suffice.

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

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

HN7[] **Private Actions, Prioritizing Resources & Organization for Intellectual Property Act**

Section 4 of the Clayton Act creates a private right of action under the Sherman Act for a plaintiff who has been injured in his business or property by reason of anything forbidden in the antitrust laws. *15 U.S.C.S. § 15(a)*. Thus, an antitrust plaintiff must have suffered antitrust injury, that is, injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > Sherman Act > Claims

HN8[] **Sherman Act, Claims**

In order to plausibly state an antitrust claim under *Section 1* of the Sherman Act, *15 U.S.C.S. § 1*, plaintiffs must allege something more than parallel conduct and a conclusory allegation of agreement at some unidentified point. When allegations of parallel conduct are set out in order to make a *§ 1* claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. To establish a conspiracy, the conspirators must have a unity of purpose or a common design and understanding. A co-conspirator need not know of the existence or identity of the other members of the conspiracy or the full extent of the conspiracy. In antitrust conspiracy cases, the plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

Antitrust & Trade Law > Sherman Act > Claims

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

HN9[] **Sherman Act, Claims**

There is no requirement that the market definition elements of an antitrust claim be pled with specificity. An antitrust complaint therefore survives a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect. The existence of a relevant market is typically a factual inquiry for the jury. The complaint may be dismissed on this ground only if the market definition is facially unsustainable.

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN10[] **Standing, Elements**

The requirements for U.S. Const. art. III standing are: (1) injury in fact; (2) causal connection; (3) redressability.

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

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

HN11[] **Private Actions, Sherman Act**

In general, antitrust injury requires a plaintiff to have suffered its injury in the market where competition is being restrained. However, it is not the status as a consumer or competitor that confers antitrust standing, but the relationship between a defendant's alleged unlawful conduct and the resulting harm to the plaintiff. Where an employee is the direct and intended object of an employer's anticompetitive conduct, that employee has standing to sue for antitrust injury.

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

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

HN12[] **State Regulation, Claims**

California's Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, does not prohibit specific activities but instead broadly proscribes any unfair competition, which means any unlawful, unfair, or fraudulent business act or practice. The UCL provides for restitutionary, injunctive, and declaratory relief. *Cal. Bus. & Prof. Code § 17203*. Damages and disgorgement are unavailable under the UCL.

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

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

HN13[] **State Regulation, Claims**

Under California's Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, the concept of restoration or restitution is not limited only to the return of money or property that was once in the possession of a plaintiff. Instead, restitution is broad enough to allow the plaintiff to recover money or property in which he or she has a vested interest. For example, a plaintiff has a vested interest in unpaid wages and therefore may state a restitution claim under the UCL to recover such lost money or property. However, a mere expectation interest is not a vested interest for purposes of stating a claim for restitution under the UCL.

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

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

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

HN14[] **State Regulation, Claims**

Earned wages that are due and payable pursuant to *Cal. Lab. Code § 200 et seq.* are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice. Restitutionary awards encompass quantifiable sums one person owes to another.

Constitutional Law > Congressional Duties & Powers > District of Columbia & Federal Property

HN15[] **Congressional Duties & Powers, District of Columbia & Federal Property**

Any state law enacted after a property becomes a federal enclave cannot be enforced on the enclave unless Congress specifically authorizes its enforcement on the federal enclave.

Constitutional Law > Congressional Duties & Powers > District of Columbia & Federal Property

HN16[] **Congressional Duties & Powers, District of Columbia & Federal Property**

The federal enclave doctrine only applies when the locus in which the claim arose is the federal enclave itself. In federal enclave cases, the jurisdiction of the federal court depends upon the locus in which the claim arose. That a defendant is located on a federal enclave, therefore, does not automatically bar all state law claims brought against it. Rather, the federal enclave doctrine bars only those claims which arose on a federal enclave.

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

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

HN17[] **State Regulation, Claims**

To state a claim under California's Cartwright Act, *Cal. Bus. & Prof. Code § 16720, et seq.*, plaintiffs must allege: (1) the formation and operation of a conspiracy; (2) illegal acts done pursuant thereto; and (3) damage proximately caused by such acts.

Counsel: [1]** For Siddharth Hariharan, individually and on behalf of all others similarly situated, Michael Devine, Mark Fichtner, Daniel Stover, Plaintiffs: Anne Brackett Shaver, Brendan Patrick Glackin, Dean Michael Harvey, Eric B. Fastiff, Joseph Richard Saveri, Katherine M Lehe, Lieff, Cabraser, Heimann & Bernstein LLP, San Francisco, CA; Eric L. Cramer, PRO HAC VICE, Sarah Rebecca Schalman-Bergen, PRO HAC VICE, Shanon Jude Carson, PRO HAC VICE, Berger & Montague, P.C., Philadelphia, PA; John D. Radice, Linda Phyllis Nussbaum, PRO HAC VICE, Grant & Eisenhofer P.A., New York, NY; Joshua P. Davis, University of San Francisco School of Law, San Francisco, CA.

For Adobe Systems Inc., Defendant: Craig Andrew Waldman, David Craig Kiernan, Robert Allan Mittelstaedt, Jones Day, San Francisco, CA.

For Apple Inc., Defendant: Christina Joanne Brown, Flora F Vigo, Michael Frederick Tubach, O'Melveny & Myers, San Francisco, CA; George Riley, PRO HAC VICE, O'Melveny Myers LLP, San Francisco, CA.

For Google Inc., Defendant: Donald M. Falk, Edward D. Johnson, Lee H. Rubin, Mayer Brown LLP, Palo Alto, CA.

For Intel Corp., Defendant: Donn P. Pickett, Frank Hinman, Zachary J. Alinder, Bingham McCutchen, LLP, San Francisco, **[**2]** CA.

For Intuit Inc., Defendant: Catherine Tara Zeng, Jones Day, Palo Alto, CA; Craig Ellsworth Stewart, Robert Allan Mittelstaedt, Jones Day, San Francisco, CA.

For Lucasfilm Ltd., Defendant: Cody Shawn Harris, Daniel Edward Purcell, Eugene Morris Paige, John Watkins Keker, Paula Lenore Blizzard, Keker and Van Nest LLP, San Francisco, CA.

For Pixar, Defendant: Robert T. Haslam, III, LEAD ATTORNEY, Emily Johnson Henn, Covington & Burling LLP, Redwood Shores, CA; Deborah A. Garza, PRO HAC VICE, Covington and Burling LLP, Washington, DC; Jonathan A D Herczeg, PRO HAC VICE, Convington Burling LLP, Washington, DC.

Judges: LUCY H. KOH, United States District Judge.

Opinion by: LUCY H. KOH

Opinion

[*1107] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' JOINT MOTION TO DISMISS; DENYING LUCASFILM LTD.'S MOTION TO DISMISS

Before the Court are Defendants' Joint Motion to Dismiss the Consolidated **[*1108]** Amended Complaint ("Joint Mot."), ECF No. 79, and Defendant Lucasfilm Ltd.'s Motion to Dismiss ("Lucasfilm Mot."), ECF No. 83. The Court held a hearing on the motions on January 26, 2012. Having considered the parties' submissions, arguments, and the relevant law, the Court GRANTS IN PART and DENIES IN PART Defendants' joint motion to dismiss, **[**3]** and DENIES Lucasfilm's motion to dismiss.

I. BACKGROUND

This is a consolidated class action brought by employees alleging antitrust claims against their employers, all of whom are high-tech companies with a principal place of business in the San Francisco-Silicon Valley area of California. Plaintiffs challenge an alleged conspiracy among Defendants to fix and suppress employee compensation and to restrict employee mobility.

The Court recites the factual allegations as pled in the Consolidated Amended Complaint ("CAC"), ECF No. 65, and as indicated in judicially noticed documents. The Court then recounts the procedural background.

A. Factual Background

Unless otherwise noted, the following allegations are taken from the CAC and presumed to be true for purposes of ruling on Defendants' motions to dismiss. *See* *Marder v. Lopez, 450 F.3d 445, 447 n.1 (9th Cir. 2006)*. The Court also takes judicial notice of documents from a related Department of Justice ("DOJ") investigation and civil lawsuit that are referenced in the CAC or attached as exhibits to the Declaration of Christina J. Brown ("Brown Decl."), ECF No. 79-1, and the Declaration of Dean M. Harvey (Harvey Decl."), ECF No. 93. ***HN1***[] A court "may **[**4]** take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992)*. ***HN2***[] A court may also take judicial notice of the existence of matters of public record, such as a prior order or decision, but not the truth of the facts cited therein. *See* *Lee v. City of L.A., 250 F.3d 668, 689-90 (9th Cir. 2001)*. ***HN3***[] The Court may consider documents referenced in, but not attached to a complaint without converting a motion to dismiss into one seeking summary judgment. *See* *Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007)*.

1. The Parties

Defendants include the following high-tech companies with principal places of business located in the following cities in California: Adobe Systems Inc. ("Adobe"), San Jose; Apple Inc. ("Apple"), Cupertino; Google Inc. ("Google"), Mountain View; Intel Corp. ("Intel"), Santa Clara; Intuit Inc. ("Intuit"), Santa Clara; Lucasfilm Ltd. ("Lucasfilm"), San Francisco; and Pixar, Emeryville. CAC ¶¶ 16-20.

Plaintiffs Michael Devine, Mark Fichtner, Siddharth Hariharan, Brandon Marshall, **[**5]** and Daniel Stover (collectively "Named Plaintiffs"), all worked as software engineers for some of the Defendants. *Id.* ¶¶ 21-27. Mr. Devine worked for Adobe in the State of Washington from October 2006, through July 7, 2008. *Id.* ¶ 16. Mr. Fichtner worked for Intel in Arizona from May 2008 through May 2011. *Id.* ¶ 17. Mr. Hariharan worked for Lucasfilm in California from January 8, 2007, through August 15, 2008. *Id.* ¶ 18. Mr. Marshall worked for Adobe in California from July 2006 through December 2006. *Id.* ¶ 19. Finally, Mr. Stover worked for Intuit in California from July 2006 through December 2010. *Id.* ¶ 20.

[*1109] Named Plaintiffs purport to represent the following nationwide class of similarly situated individuals:

> All natural persons employed by Defendants in the United States on a salaried basis during the period from January 1, 2005 through January 1, 2010 (the "Class Period"). Excluded from the Class are: retail employees; corporate officers, members of the boards of directors, and senior executives of Defendants who entered into the illicit agreements alleged herein; and any and all judges and justices, and chambers' staff, assigned to hear or adjudicate any aspect of this litigation.

Id. **[**6]** ¶ 30.

2. DOJ Investigation

Many of the factual allegations in the CAC come directly from two civil complaints filed by the DOJ in the United States District Court for the District of Columbia (the "D.C. District Court"). *See* Joint Mot. 5-6. Plaintiffs reference these documents in the CAC, and both Defendants and Plaintiffs have attached documents from the DOJ lawsuit to their briefing. *See* Harvey Decl. Exs. A-B; Brown Decl. Exs. A-F.

From 2009 through 2010, the Antitrust Division of the DOJ conducted an investigation into Defendants' employment and recruitment practices. CAC ¶¶ 3, 111. After receiving documents produced by Defendants and interviewing witnesses, the DOJ concluded that Defendants reached "facially anticompetitive" agreements that "eliminated a significant form of competition . . . to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities." DOJ Complaint against Adobe, et al. ("DOJ Adobe Compl."), Harvey Decl. Ex. A, at ¶¶ 2, 14; DOJ Complaint against Lucasfilm ("DOJ Lucasfilm Compl."), Harvey Decl. Ex. D, at ¶¶ 2, 15, 22; CAC ¶ 112. The DOJ also determined that the agreements "were not **[**7]** ancillary to any legitimate collaboration," "were much broader than reasonably necessary for the formation or implementation of any collaborative effort," and "disrupted the normal price-setting mechanisms that apply in the labor setting." DOJ Adobe Compl. ¶ 16; DOJ Lucasfilm Compl. ¶ 17; CAC ¶ 112. The DOJ concluded that Defendants entered into agreements that were naked restraints of trade that were *per se* unlawful under the antitrust laws. DOJ Adobe Compl. ¶ 35; DOJ Lucasfilm Compl. ¶ 3; CAC ¶ 112.

On September 24, 2010, the DOJ filed a complaint against Adobe, Apple, Google, Intel, Intuit, and Pixar regarding Defendants' agreements. DOJ Final J. against Adobe, et al. ("DOJ Adobe J."), Brown Decl. Ex. A, at 2; CAC ¶ 114. On December 14, 2010, the DOJ filed another complaint against Lucasfilm and Pixar regarding Defendants' agreements. DOJ Final J. against Lucasfilm ("DOJ Lucasfilm J.") Order at 1, *United States v. Lucasfilm, Inc., No. 10-02220-RBW, 2011 U.S. Dist. LEXIS 70171, 2011 WL 2636850 at *1 (D.D.C. June 3, 2011)*; [1] CAC ¶ 114. In both cases, the DOJ filed stipulated proposed final judgments in which Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar agreed that the DOJ's complaints "state[] a claim **[**8]** upon which relief may be granted" under federal ***antitrust law***. DOJ Proposed Final J. against Lucasfilm ("DOJ Proposed Lucasfilm J."), Brown Decl. Ex. B, at 2; CAC **[*1110]** ¶ 114. [2] Although Defendants did not admit any wrongdoing or violation of law, Defendants agreed to

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[1] The D.C. District Court Order suggests that the DOJ's complaint against Lucasfilm was filed on December 21, 2010, whereas the CAC states that it was filed on December 14, 2010. The difference is immaterial here, but the Court takes the date as pled in the CAC to be true for purposes of these motions.

[2] Plaintiffs ask this Court to apply the doctrine of judicial **[**9]** estoppel to prevent Defendants from taking a position on this motion that is inconsistent with the position they took before the D.C. District Court that the same allegations "stated a claim upon which relief may be granted." Opp'n to Joint Mot. 6 n.2 (citing *New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001))*. The Court declines to apply the judicial estoppel doctrine here. Defendants' apparent concession that the DOJ stated a claim under *Section 1* of the Sherman Act is not clearly inconsistent with Defendants' position here that Plaintiffs fail to state a claim under *Section 4* of the Clayton Act. *Section 1* of the Sherman Act governs a claim to relief

be "enjoined from attempting to enter into, maintaining or enforcing any agreement with any other person or in any way refrain from, requesting that any person in any way refrain from, or pressuring any person in any way to refrain from soliciting, cold calling, recruiting, or otherwise competing for employees of the other person." DOJ Adobe J. at 5; DOJ Proposed Lucasfilm J. at 4; CAC ¶ 115. The D.C. District Court entered the stipulated proposed final judgments on March 17, 2011, and June 2, 2011, respectively. DOJ Adobe J. at 12, DOJ Lucasfilm J. at 1; CAC ¶ 115. [3]

3. Alleged Conspiracy[4]

Plaintiffs allege that Defendants engaged in a conspiracy to eliminate competition between them for skilled labor, with the intent and effect of suppressing the compensation and mobility of Defendants' employees. CAC ¶ 55.

According to Plaintiffs, the conspiracy consisted of an interconnected web of express bilateral agreements, each with the active involvement and participation of a company under the control of the late Steven P. Jobs ("Mr. Jobs") and/or a company whose board shared at least one member of Apple's board of directors. *Id.* Defendants' senior executives actively participated in negotiating, executing, monitoring compliance with, and policing violations of the bilateral agreements. *Id.* **[**11]** ¶¶ 56, 65, 74, 79, 84, 85, 91, 98, 102, 104, 107. Defendants' senior executives also actively concealed each bilateral agreement, and Defendants' employees were not informed of, nor did they agree to, the terms of any of the agreements. *Id.* ¶¶ 64, 77, 82, 89, 100, 105.

From 2005 to 2007, each pair of Defendants in a bilateral agreement entered into nearly identical "Do Not Cold Call" agreements, whereby each company placed the names of the other company's employees on a "Do Not Cold Call" list and instructed recruiters not to cold call the employees of the other company. *See id.* ¶¶ 67, 78, 83, 90, 101. [5] In a properly functioning and **[*1111]** lawfully competitive labor market, each Defendant would compete for employees by "cold calling," that is, soliciting current employees of one or more other Defendants. *Id.* ¶ 41. Cold calling includes communicating directly in any manner (including orally, in writing, telephonically, or electronically) with another company's employee who has not otherwise applied for a job opening. *Id.* The use of cold calling among competitors commonly increases total compensation and mobility of all Defendants' employees. *Id.* ¶ 50.

Each bilateral agreement in this case applied to all employees of a given pair of Defendants; was not limited by geography, job function, product group, or time period; and was not related to a collaboration between that pair of Defendants. *Id.* ¶¶ 63, 76, 81, 88, 100, 105. The bilateral relationships between pairs of Defendants are described in more detail below.

Pixar and Lucasfilm. In January 2005, while Mr. Jobs was CEO of Pixar, senior executives of Pixar and Lucasfilm entered into express, written agreements to eliminate competition between them for skilled labor. *Id.* ¶¶ 58, 62. Pixar drafted the terms of the agreements in Emeryville, California and sent those terms to Lucasfilm. *Id.* ¶ 62. Pixar and Lucasfilm entered into agreements: (1) not to cold call each other's employees; (2) to notify the other company

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by the government. Section 4 of the Clayton Act governs a claim to relief by an individual and has the additional requirement of antitrust injury, which is inapplicable to the government's Section 1 claim.

[3] As with the discrepancy in the date of the filing of the DOJ's complaint against Lucasfilm, as described in footnote 1, the D.C. District Court Order suggests that the final judgment against Lucasfilm was filed on June 3, 2011, whereas the CAC states that it was filed on June 2, 2011. The difference is immaterial here, but the Court **[**10]** takes the date as pled in the CAC to be true for purposes of this motion.

[4] Plaintiffs included additional factual allegations supporting a conspiracy, allegedly uncovered in discovery, in their section of the Joint Case Management Statement. ECF No. 109. Although the Court does not opine on the eventual admissibility of this evidence, the Court presently gives no weight to these additional factual allegations as they are not properly before the Court on these motions.

[5] As discussed below, Pixar and Lucasfilm **[**12]** entered into other agreements in addition to entering into a "Do Not Cold Call" agreement.

when making an offer to an employee of the other company, even if that employee had applied for the prospective position on his own initiative in the absence of cold calling; and (3) not to engage in "bidding wars," i.e., counteroffer above the initial offer, if either company made an **[**13]** offer to the employee of the other company. *Id.* ¶¶ 59-61.

In 2007, Pixar twice contacted Lucasfilm regarding suspected violations of the agreement, and Lucasfilm responded by changing its conduct to conform to the agreement. *Id.* ¶ 65.

Apple and Adobe. In May 2005, while Mr. Jobs was CEO of Apple (concurrently serving as CEO of Pixar), Apple, and Adobe entered into an express "Do Not Cold Call" agreement, similar to the first agreement between Pixar and Lucasfilm. *Id.* ¶¶ 72, 73. Apple and Adobe reached the agreement through direct and explicit communications between their senior executives, who actively managed and enforced the agreement through further direct communications. *Id.* ¶ 74.

Apple and Google. In 2006, while Arthur D. Levinson ("Mr. Levinson") sat on the boards of both Apple and Google, these two companies entered into an express "Do Not Cold Call" agreement identical to the "Do Not Cold Call" agreement between Apple and Adobe. *Id.* ¶ 79.

In February and March 2007, Apple contacted Google to complain about suspected violations of the agreement. In response, Google conducted an internal investigation and reported its findings back to Apple. *Id.* ¶ 84.

Apple and Pixar. In April 2007, **[**14]** Apple entered into an agreement with Pixar that was identical to Apple's earlier "Do Not Cold Call" agreements with Adobe and Google. *Id.* ¶ 85. At this time, Mr. Jobs, as the single largest shareholder of the Walt Disney Company ("Disney"), continued to exert substantial control over Pixar. *Id.* ¶ 87. Disney had acquired Pixar in 2006, and Mr. Jobs thereafter sat on Disney's board of directors and continued to oversee Pixar's animation business. *Id.* ¶ 15.

Google and Intuit. In June 2007, Google entered into an express "Do Not Cold Call" agreement with Intuit that was identical **[*1112]** to Google's earlier agreement with Apple, and identical to the earlier agreements between Apple and Adobe, and between Apple and Pixar. *Id.* ¶ 103. At this time, Google CEO Eric Schmidt ("Mr. Schmidt") sat on Apple's board of directors, along with Mr. Levinson, who continued to sit on the boards of both Apple and Google. *Id.*

Google and Intel. In September 2007, Google entered into an express "Do Not Cold Call" agreement with Intel that was identical to Google's earlier agreements with Apple and Intuit, and identical to Apple's earlier agreements with Adobe and Pixar. *Id.* ¶ 98. At this time, Google CEO Mr. Schmidt **[**15]** continued to sit on Apple's board of directors, along with Mr. Levinson, who continued to sit on the boards of both Apple and Google. *Id.* ¶ 97.

Plaintiffs allege that each member of the Class was harmed by each and every agreement described above, which together made up "an overarching conspiracy" to decrease competition for skilled labor, reduce employee mobility, and suppress compensation. *Id.* ¶¶ 108-110. Each Defendant is alleged to have entered into this conspiracy with knowledge of the other Defendants' participation in the conspiracy, and with the intent of suppressing Plaintiffs' compensation and mobility through eliminating competition for skilled labor. *Id.* ¶¶ 55, 108. The elimination of competition and suppression of compensation and mobility had a cumulative effect on all Class members. *Id.* ¶ 110.

Plaintiffs allege that in August 2007, Mr. Jobs contacted the CEO of Palm Inc. ("Palm"), Edward T. Colligan ("Mr. Colligan"), to propose that Apple and Palm also agree to refrain from cold calling and hiring each other's employees. *Id.* ¶¶ 92, 94. Mr. Jobs said to Mr. Colligan, "We must do whatever we can" to stop cold calling each other's employees and other competitive recruiting **[**16]** efforts between the companies. *Id.* ¶ 94. Mr. Jobs also threatened litigation to intimidate Palm into entering into a "Do Not Cold Call" agreement. *Id.* Mr. Colligan declined Mr. Jobs's proposal, telling him, "Your proposal that we agree that neither company will hire the other's employees, regardless of the individual's desires, is not only wrong, it is likely illegal." *Id.* ¶ 95.

4. Claims

Plaintiffs' CAC contains four claims for relief under the following statutes: (1) Section 1 of the Sherman Act, 15 U.S.C. § 1; (2) California's Cartwright Act, *Cal. Bus. & Prof. Code §§ 16720, et seq.*; (3) *Cal. Bus. & Prof. Code § 16600* [6]; and (4) California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code §§ 17200, et seq.* *Id.* ¶¶ 119-152. Plaintiffs seek damages, restitution, costs, attorneys' fees, and prejudgment and post-judgment interest. *Id.* ¶¶ 153-164. [7]

B. Procedural Background

The original complaints in the five actions underlying this consolidated action were filed in California state court. *Hariharan v. Adobe Sys. Inc.*, Case No. 11574066 (Alameda Super. Ct. filed May 4, 2011); *Marshall v. Adobe Sys. Inc.*, Case No. 11-CV-204052 (Santa Clara Super. Ct. filed June 28, 2011); *Devine v. Adobe Sys.* ***[*1113]*** *Inc.*, Case No. 11-CV-204053 (Santa Clara Super. Ct. filed June 28, 2011); *Fichtner v. Adobe Sys. Inc.*, Case No. 11-CV-204187 (Santa Clara Super. Ct. filed June 30, 2011); *Stover v. Adobe Sys. Inc.*, Case No. 11-CV-25090 (Santa Clara Super. Ct. filed July 14, 2011). [8] Defendants subsequently removed the five state court actions to the United States District Court for the Northern District of California. *Hariharan v. Adobe Sys. Inc.*, Case No. 11-CV-2509-JCS (removed May 23, 2011); *Marshall v. Adobe Sys. Inc.*, Case No. 11-CV-3538-HRL (removed July 19, 2011); *Devine v. Adobe Sys. Inc.*, Case No. 11-3539-HRL (removed July 19, 2011); *Fichtner v. Adobe Sys. Inc.*, Case No. 11-CV-3540-PSG (removed July 19, 2011); *Stover v. Adobe* ***[**18]*** *Sys. Inc.*, Case No. 11-CV-3541-PSG (removed July 19, 2011).

On June 1, 2011, the lead case, *Hariharan v. Adobe Systems Inc.*, was reassigned from Magistrate Judge Spero to Judge Armstrong. ECF No. 24. On July 19, 2011, Intuit filed a motion to relate the five underlying actions, ECF No. 41, which Judge Armstrong granted on July 27, 2011, ECF No. 52. On August 2, 2011, Plaintiff Siddharth Hariharan moved to transfer the five underlying actions to the San Jose Division, ECF No. 56, which Judge Armstrong granted on August 4, 2011, ECF No. 58.

On August 5, 2011, the underlying actions were reassigned to the undersigned judge. The Court consolidated the five underlying actions on September 12, 2011, ECF No. 64, and Plaintiffs filed the CAC on September 13, 2011. ECF No. 65.

On October 26, 2011, the Court held a Case Management Conference, where the Court granted in part and denied in part Defendants' joint motion to stay discovery, ECF No. 80. *See* ECF No. 88. The Court ordered that Defendants **[**19]** respond to Plaintiffs' Document Request Nos. 1-7 and produce responsive, non-privileged documents already produced to the DOJ. *See id.* Pursuant to the Court's instructions at the Case Management Conference, Plaintiffs withdrew their prayer for injunctive relief, ECF No. 89, and voluntarily dismissed a related case, *Lieff, Cabraser, Heimann & Bernstein, LLP v. U.S. Dep't of Justice, Antitrust Div.*, Case No. 11-CV-5105-HRL (N.D. Cal. Oct. 18, 2011), ECF No. 90.

Defendants filed the instant joint motion to dismiss on October 13, 2011, ECF No. 79, and, with leave of the Court, Lucasfilm filed its separate motion to dismiss on October 17, 2011, ECF No. 83. Plaintiffs opposed both of these motions on November 4, 2011. ECF Nos. 91, 92. Defendants filed their joint reply on December 2, 2011, ECF No. 97, and Lucasfilm filed its reply that same day, ECF No. 96.

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[6] After the hearing, Plaintiffs withdrew their claim under ***Cal. Bus. & Prof. Code § 16600***. ECF No. 111. Accordingly, Defendants' joint motion to dismiss as to this claim is DENIED as MOOT.

[7] The CAC originally contained a prayer for injunctive relief, *see* CAC 126, 135, 143, and declaratory relief, *see id.* 143, 152, 154, 155, 157, 158. However, **[**17]** Plaintiffs have since withdrawn their prayer for injunctive relief, *see* ECF No. 89, and declaratory relief, *see* ECF No. 111.

[8] While the name of each Superior Court case listed only Adobe Systems Inc. as the defendant, the Superior Court complaints also named as defendants Apple, Google, Intel, Intuit, Lucasfilm, Pixar, and Does 1-200.

II. Legal Standard

HN4[] A motion to dismiss pursuant to *Rule 12(b)(6)* for failure to state a claim upon which relief can be granted "tests the legal sufficiency of a claim." *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. Dismissal under *Rule 12(b)(6)* may be based on either (1) the "lack of a cognizable legal theory," or (2) "the absence **[**20]** of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. While "'detailed factual allegations'" are not required, a complaint must include sufficient facts to "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173* ***[*1114]*** *L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly, 550 U.S. at 544*.

HN5[] For purposes of ruling on a *Rule 12(b)(6)* motion to dismiss, the Court accepts all allegations of material fact as true and construes the pleadings in the light most favorable to the plaintiffs. *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. The Court need not, however, accept as true pleadings that are no more than legal conclusions or the "'formulaic recitation of the elements' of a cause of action." *Iqbal, 129 S. Ct. at 1949* (quoting **[**21]** *Twombly, 550 U.S. at 555*). Mere "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996)*; *accord Iqbal, 129 S. Ct. at 1949-50*. However, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal, 129 S. Ct. at 1940-41*.

III. ANALYSIS

The Court addresses Defendants' joint motion to dismiss before turning to Lucasfilm's motion to dismiss.

A. Defendants' Joint Motion to Dismiss

Defendants jointly move to dismiss the CAC on the grounds that it fails to state an antitrust claim under federal and California law because: (1) the CAC fails to allege evidentiary facts to support the claim of an "overarching conspiracy" among all Defendants to suppress their employees' wages; (2) such a conspiracy is implausible on its face; and (3) the CAC fails to plead antitrust injury. Defendants also argue that Plaintiffs' claims under the UCL fail for the same reasons as Plaintiffs' antitrust claims. Finally, Defendants argue that Plaintiffs lack standing **[**22]** to assert claims for injunctive or declaratory relief because Plaintiffs are former employees with no stated intention of working for any Defendant, and the alleged conduct has already been enjoined by the DOJ. The Court need not reach this last argument, however, because it was rendered moot by Plaintiffs' withdrawal of their prayer for declaratory and injunctive relief. ECF Nos. 89, 111.

1. Antitrust Claims Under the Sherman Act and California's Cartwright Act

The parties appear to agree that Plaintiffs' federal and state antitrust claims rise and fall together. "Indeed, the analysis under California's ***antitrust law*** mirrors the analysis under federal law because the Cartwright Act was modeled after the Sherman Act." *Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*; *see also Nova Designs, Inc. v. Scuba Retailers Ass'n, 202 F.3d 1088, 1091 (9th Cir. 2000)*. Thus, if Plaintiffs plead a valid Sherman Act claim, they likewise plead a valid Cartwright Act claim.

a. Legal Standard

HN6[] Section 1 of the Sherman Act, *15 U.S.C. § 1*, prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade." To state a claim under *Section 1*, a plaintiff must allege **[**23]** that "(1) there was an agreement, conspiracy, or **[*1115]** combination between two or more entities; (2) the agreement was an unreasonable restraint of trade under either a per se or rule of reason analysis; [9] and (3) the restraint affected interstate commerce." [10] *Am. Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781, 784 (9th Cir. 1996)*; *see also Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001)*. The Supreme Court has stated that a plaintiff must plead "'enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement . . . . [A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice.'" *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)* (quoting *Twombly, 550 U.S. at 556-57*).

HN7[] *Section 4* of the Clayton Act creates a private right of action under the Sherman Act for a plaintiff who has been "injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15(a)*. Thus, an antitrust plaintiff must have suffered antitrust injury, that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1055 (9th Cir. 1999)*.

b. [25] Failure to State a Claim**

Defendants argue that Plaintiffs fail to allege sufficient facts to establish an "overarching conspiracy." Specifically, Defendants argue that: (1) Plaintiffs fail to plead the "who, what, where, and when" describing the alleged conspiracy, and (2) Plaintiffs have not alleged the requisite knowledge and intent to show a conspiracy. Joint Mot. 2 (citing *Kendall, 518 F.3d 1042*). Defendants also contend that an "overarching conspiracy" consisting of six bilateral agreements is implausible on its face, primarily because each Defendant remained free to cold call most of the other Defendants' employees. *Id.* at 3. Finally, Defendants argue that Plaintiffs have failed to plead antitrust injury. The Court addresses these arguments in turn.

i. Who, What, to Whom, Where, and When

Defendants argue that Plaintiffs fail to plead the "who, what, where, and when" of the alleged overarching conspiracy. Defendants urge the Court to ignore Plaintiffs' "labels and conclusions" and mere "formulaic recitation[s] of the elements of a cause of action." Joint Mot. 9 (citing *Iqbal, 129 S. Ct. at 1949*). While it is true, as Defendants note, that Plaintiffs refer to the "overarching conspiracy," **[**26]** CAC ¶¶ 55, 108, as an "interconnected web of agreements," **[*1116]** *id.* ¶¶ 1, 55, 108, these labels are not the only facts that Plaintiffs have alleged here.

Defendants rely primarily on *Kendall* to support their argument that Plaintiffs have failed to allege sufficient facts supporting an overarching conspiracy. *Kendall*, however, is distinguishable. Even after conducting depositions, the plaintiffs in *Kendall* did "not allege *any* facts to support their theory that the [defendants] conspired or agreed with each other . . . to restrain trade." *Kendall, 518 F.3d at 1048* (emphasis added). The Ninth Circuit held that the

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[9] Defendants' briefing does not contest that the individual bilateral agreements are horizontal agreements between competitors in restraint of trade, which are either *per se* unlawful, *Am. Ad Mgmt., 92 F.3d at 786*, or at **[**24]** least, as alleged here, prima facie anticompetitive under the rule of reason analysis. *See* *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 2012 U.S. App. LEXIS 6441, 2012 WL 1071257, at *3 (9th Cir. Mar. 30, 2012)*. As an initial matter, the parties agree that the Court need not decide, at this stage, whether the rule of reason or *per se* analysis applies to this case. Reply 9; Tr. 29:15-17. Thus, whether Defendants had a procompetitive justification for their bilateral agreements, a consideration that is relevant only under a rule of reason analysis, is properly decided in later stages of litigation. *See* *Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*.

[10] The third factor, whether the alleged restraint affected interstate commerce, is not in dispute.

plaintiffs' allegations of mere parallel conduct, without more, were insufficient to plead a *Section 1* violation. *Id. at 1049*. The Ninth Circuit also held that, to survive a motion to dismiss, a *Section 1* claim should "answer the basic questions: who, did what, to whom (or with whom), where, and when?" *Id. at 1048*.

Plaintiffs here have alleged much more than mere parallel conduct, despite not having any discovery before filing the CAC. Unlike the plaintiffs' complaint in *Kendall*, Plaintiffs' CAC details the actors, effect, victims, location, and timing of the six bilateral agreements **[**27]** between Defendants.

Who. Plaintiffs allege that the agreements were negotiated, executed, and, in most cases, enforced by Defendants' "senior executives." CAC ¶¶ 62, 64, 65, 74, 77, 79, 84, 85, 91, 98, 102, 107. The Ninth Circuit has expressed concern that "[a] bare allegation of a conspiracy is almost impossible to defend against, particularly where the defendants are large institutions with hundreds of employees entering into contracts and agreements." *Kendall, 518 F.3d at 1047*. This concern, however, is inapplicable here, where Plaintiffs allege that, at all relevant times, at least one of three individuals had significant influence over at least one party to each of the six bilateral agreements: Apple CEO and Pixar CEO Mr. Jobs; Apple and Google board member Mr. Levinson; and Google CEO and Apple board member Mr. Schmidt. CAC ¶¶ 55, 57, 58, 72, 79, 87, 97, 103, 108. Specifically, Mr. Jobs exerted significant influence over companies involved in four of the bilateral "Do Not Cold Call" agreements: Pixar-Lucasfilm; Apple-Pixar; Apple-Google; and Apple-Adobe. *Id.* ¶¶ 58, 72, 79, 85, 87. Mr. Schmidt, CEO of Google, sat on Apple's board of directors when Google entered into agreements **[**28]** with Intel and Inuit. *Id.* ¶ 97. Mr. Levinson sat on the boards of both Apple and Google when the two companies entered into their bilateral agreement; when Google entered into agreements with Intel and with Intuit; and when Apple entered into an agreement with Pixar. *Id.* ¶¶ 79, 97, 103.

Moreover, the identical nature of the six bilateral agreements may support the inference that these individuals played a role in shaping these agreements. For example, it strains credulity that Apple and Adobe reached an agreement in May 2005 that was identical to the "Do Not Cold Call" agreement Pixar entered into with Lucasfilm in January 2005, *id.* ¶¶ 58, 72, without some communication or coordination between these two sets of Defendants. The only apparent link between the Apple-Adobe agreement and the Pixar-Lucasfilm agreement is Mr. Jobs, who controlled Apple, *id.*, and who oversaw Pixar. *Id.* ¶ 87. Plaintiffs allege that all of the bilateral agreements were reached in secrecy. *Id.* ¶¶ **[**29]** 56-91. Thus, the identical nature of the six secret bilateral agreements further supports the plausible inference that the agreements were negotiated, reached, and policed at the highest levels of the Defendant companies.

Furthermore, Plaintiffs provide an example of Mr. Jobs personally negotiating a **[*1117]** potential "Do Not Cold Call" agreement directly with the CEO of Palm, Mr. Colligan. *Id.* ¶¶ 92-96. Plaintiffs quote Mr. Jobs as allegedly telling Mr. Colligan, "'We must do whatever we can' to stop cold calling each other's employees and other competitive recruiting efforts between the companies." *Id.* ¶ 94. Based on Mr. Jobs's attempt to negotiate a "Do Not Cold Call" agreement directly with Palm's CEO, it is reasonable to infer that such agreements were negotiated directly CEO to CEO.

Finally, because the bilateral agreements were not limited by geography, job function, product group, or time period, and were not related to a collaboration between defendants. *Id.* ¶¶ 63, 76, 81, 88, 100, 105, it is reasonable to infer that such significant wide-ranging, company-wide, and worldwide policies would have been approved at the highest levels.

The Court finds that at the pleading stage, Plaintiffs **[**30]** have sufficiently pled who negotiated and entered into the bilateral "Do Not Cold Call" agreements.

What, to Whom, Where, and When. Plaintiffs also allege that the agreements removed cold calling as an upward pressure on Plaintiffs' salaries, resulting in artificially lower salaries. CAC ¶¶ 70, 72, 79, 85, 98. As discussed in greater detail in Section III.A.1.b.ii, *infra*, Plaintiffs describe a plausible scenario as to how, in light of basic economic principles, these agreements formed an overarching conspiracy that resulted in artificially lower salaries. Plaintiffs also set forth how the nearly identical agreements, of identical scope, were entered into in various cities and counties in California, *id.* ¶¶ 62, 75, 80, 86, 99, between 2005 and 2007. *Id.* ¶¶ 58, 73, 79, 85, 98, 103. Plaintiffs allege how these agreements were the subject of a DOJ investigation in which the DOJ found the agreements to be "*per se* unlawful" and in which Defendants agreed that the DOJ stated a federal antitrust claim. *Id.* ¶¶ 112, 114. Indeed, Defendants note that "virtually all of the facts alleged in the Complaint relate to six bilateral agreements among Defendants," apparently conceding that Plaintiffs have **[**31]** pled sufficient facts to establish the existence of these bilateral agreements. Joint Mot. 9.

Unlike the plaintiffs in *Kendall*, Plaintiffs here have "answer[ed] the basic questions: who, did what, to whom (or with whom), where, and when?" *Kendall, 518 F.3d at 1047*. Moreover, Plaintiffs have alleged facts beyond mere parallel conduct that "tend[] to exclude the possibility of independent action." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* (holding that "evidence that tends to exclude the possibility of independent action . . . create[s] a jury issue"); *see also Harkins Amusement Enters., Inc. v. Gen. Cinema Corp., 850 F.2d 477, 484 (9th Cir. 1988)* ("concerted action may be inferred from circumstantial evidence of the defendant's conduct and course of dealings") (internal citation omitted); *In re Text Messaging Antitrust Litig., 630 F.3d 622, 627-29 (7th Cir. 2010) cert. denied*, *131 S. Ct. 2165, 179 L. Ed. 2d 937 (2011)* (holding that where a "complaint allege[d] a mixture of parallel behaviors, details of industry structure, and industry practices, that facilitate collusion," this "constitute[d] supporting evidence of collusion," and "provide[d] a sufficiently plausible case of price **[**32]** fixing to warrant allowing the plaintiffs to proceed to discovery").

Accordingly, failure to plead the "who, what, to whom, where, and when" is not a basis to dismiss Plaintiffs' *Section 1* claims here. *Cf. In re Cathode Ray Tube (CRT) Antitrust Litig., 738 F. Supp. 2d 1011, 1018 (N.D. Cal. 2010)* (Conti, J.) (distinguishing *Kendall* on the ground that the CRT "complaints **[*1118]** allege[d] a governmental investigation, hundreds of meetings between 1995 and 2007, and detailed allegations concerning the structure and typical pattern of those meetings").

ii. Knowledge and Intent

Defendants argue that Plaintiffs have failed to show "some meeting of the minds." Specifically, Defendants argue that the mere fact of overlapping board members is not evidence of a conspiracy and that multiple bilateral agreements do not make up an overarching conspiracy. Joint Mot. 11-12. The Court is not persuaded.

HN8[] In order to plausibly state a *Section 1* claim, Plaintiffs must allege something more than parallel conduct and a conclusory allegation of agreement at some unidentified point. "[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion **[**33]** of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly, 127 S. Ct. at 1966*. To establish a conspiracy, the conspirators must have a unity of purpose or a common design and understanding. *Am. Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*. A co-conspirator need not know of the existence or identity of the other members of the conspiracy or the full extent of the conspiracy. *Beltz Travel Serv. Inc. v. Int'l Air Transp. Ass'n, 620 F.2d 1360, 1366-67 (9th Cir. 1980)* ("Participation by each conspirator in every detail in the execution of the conspiracy is unnecessary to establish liability, for each conspirator may be performing different tasks to bring about the desired result."); *cf. Blumenthal v. United States, 332 U.S. 539, 557, 68 S. Ct. 248, 92 L. Ed. 154 (1947)* (stating the same proposition in the criminal context). In antitrust conspiracy cases, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each . . . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only **[**34]** by looking at it as a whole . . . ." *Continental Ore Corp. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*.

Plaintiffs allege that Defendants had the means, the motive, and the opportunity to implement a conspiracy to restrain competition for employees. Plaintiffs allege that Defendants' senior executives negotiated, executed, monitored, and policed a series of identical "Do Not Cold Call" agreements in an effort to eliminate competition for skilled labor. CAC ¶¶ 1, 56, 74, 79, 85, 98, 104. Furthermore, Plaintiffs allege that, at all relevant times, at least one of three individuals had significant influence over at least one party to each of the six bilateral agreements: Apple and Pixar CEO Mr. Jobs, Apple and Google board member Mr. Levinson, and Google CEO and Apple board member Mr. Schmidt. *Id.* ¶¶ 55, 57, 58, 72, 79, 87, 97, 103, 108.

Defendants cite *Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1561 (10th Cir. 1984)*, for the proposition that service on multiple boards is "not evidence of a conspiracy." Joint Mot. 12. However, *Jicarilla* does not stand for this proposition. To the contrary, the *Jicarilla* Court acknowledged that overlapping board membership **[**35]** "may indicate an opportunity to conspire . . . ." *Jicarilla, 728 F.2d at 1561*. This is precisely the reason for which Plaintiffs allege overlapping board membership here: to indicate an opportunity to conspire.

Specifically, Mr. Levinson sat on the boards of both Apple and Google when the **[*1119]** two companies entered into their bilateral agreement; when Google entered into an agreement with Intel and Intuit; and when Apple entered into an agreement with Pixar. *Id.* ¶¶ 79, 97, 103. Mr. Schmidt, CEO of Google, sat on Apple's board of directors when Google entered into agreements with Intel and Inuit, *id.* ¶ 97. Mr. Levinson's and Mr. Schmidt's positions on the boards of companies entering into virtually identical, yet secret, bilateral "Do Not Cold Call" agreements provided an opportunity for Defendants to share knowledge and to conspire. Thus, their overlapping board membership lends plausibility to Plaintiffs' allegations that each Defendant entered into this conspiracy "with knowledge of the other Defendants' participation in the conspiracy, and with the intent of . . . reduc[ing] employee compensation and mobility through eliminating competition for skilled labor." *Id.* ¶ 55; *see also id.* ¶ **[**36]** 108. These bilateral "Do Not Cold Call" agreements were negotiated by senior executives and represented the "policies" of several hi-tech companies. *Id.* ¶ 116. Thus, it is reasonable to infer that such significant policies would have to be approved at the highest levels. The Court agrees with Plaintiffs, Opp'n to Joint Mot. 10, that it is plausible to infer that the overlapping board membership here provided an opportunity to conspire and an opportunity for transfer of the requisite knowledge and intent regarding the bilateral agreements.

The plausibility of these inferences increases when the Court considers that Mr. Jobs also exerted significant influence over companies involved in four of the bilateral "Do Not Cold Call" agreements: Pixar-Lucasfilm; Apple-Pixar; Apple-Google; and Apple-Adobe. Plaintiffs provide an example of Mr. Jobs personally negotiating the same kind of "Do Not Cold Call" agreement directly with the CEO of Palm. *Id.* ¶¶ 92-96. Notwithstanding the fact that this example involved a non-Defendant, Mr. Jobs's alleged personal involvement lends further plausibility to Plaintiffs' allegations that the agreements at issue here were executed, policed, and enforced by senior **[**37]** executives. Furthermore, Plaintiffs quote Mr. Jobs as allegedly telling Palm's CEO, Mr. Colligan, "'We must do whatever we can' to stop cold calling each other's employees and other competitive recruiting efforts between the companies." *Id.* ¶ 94. From this quote it is reasonable to infer that Mr. Jobs had the intent to reduce competition for skilled labor and was aware that "Do Not Cold Call" agreements were effective means of doing so. Given that Mr. Jobs, as CEO of Apple, had contact with Messrs. Levinson and Schmidt, who were members of Apple's Board, it is also reasonable to infer that the overlapping board membership provided an opportunity for Mr. Jobs to expand the conspiracy. Thus, Plaintiffs have alleged sufficient facts plausibly suggesting "a unity of purpose[,] a common design and understanding, or a meeting of minds in an unlawful arrangement." *Monsanto, 465 U.S. at 764* (internal citation omitted).

Defendants also argue that six bilateral "Do Not Cold Call" agreements do not add up to an overarching conspiracy. Defendants rely principally on *In re Iowa Ready-Mix Concrete Antitrust Litigation, 768 F. Supp. 2d 961 (N.D. Iowa 2011)*, to support this argument. In addition to **[**38]** not being binding on this Court, *Iowa Ready-Mix Concrete* is distinguishable. There, the plaintiffs sought to rely on bilateral agreements — which were the basis for three of the defendants' guilty pleas to criminal antitrust violations — to show one conspiracy among all defendants. *Id. at 972*. The plaintiffs' complaint alleged that the defendants "did those things which they combined and conspired to do, including, **[*1120]** among other things, discussing, forming and implementing agreements to raise and maintain at artificially high levels the prices for Ready-Mix Concrete," an allegation that, without more, was not only "conclusory," but also "tautolog[ical]." *Id. at 974-75*. In dismissing the complaint, the court noted that the plaintiffs failed to allege: (1) "parallel conduct," *id. at 974*; (2) a "larger picture from which inferences of a wider conspiracy can be drawn from guilty pleas to separate bilateral conspiracies," *id. at 975*; (3) "any facts that could tie together the specific, discrete incidents of admitted misconduct and the overarching all-defendant four-plus year conspiracy . . . ," *id. at 972*; and (4) "that the defendants ever systematically interacted with each other, much less **[**39]** that they had some mechanism to operate the alleged conspiracy, allocate its profits, and police its participants," *id.* The plaintiffs' complaint had the additional defect of failing to allege when, where, and from whom plaintiffs purchased the allegedly price-fixed product. *Id. at 964*.

As discussed above, Plaintiffs here have alleged a "larger picture" of senior executives from closely connected high-tech companies in Northern California contemporaneously negotiating and enforcing six bilateral "Do Not Cold Call" agreements. The fact that all six identical bilateral agreements were reached in secrecy among seven Defendants in a span of two years suggests that these agreements resulted from collusion, and not from coincidence. Unlike the plaintiffs in *Iowa Ready-Mix Concrete*, therefore, Plaintiffs here have alleged facts plausibly suggesting "a unity of purpose[,] a common design and understanding, or a meeting of minds in an unlawful arrangement." *Monsanto, 465 U.S. at 764* (internal citation omitted). Whether Plaintiffs can adduce sufficient evidence in discovery to *prove* an overarching conspiracy is a question that is not before the Court today. At the pleading stage, Plaintiffs have **[**40]** alleged sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S. Ct. at 1949*. Accordingly, failure to plead sufficient evidentiary facts supporting an overarching conspiracy is not a ground for dismissal of Plaintiffs' antitrust claims.

iii. Plausibility of the Conspiracy Theory

Defendants also argue that Plaintiffs' theory of an overarching conspiracy is implausible. Joint Mot. 14 (citing *William O. Gilley Enters., Inc. v. Atl. Richfield Co., 588 F.3d 659, 662 (9th Cir. 2009 ("Gilley"))*. While it is true that the facts alleged must be "'plausible' in light of basic economic principles," *Gilley, 588 F.3d at 662*, Plaintiffs' allegations meet this plausibility standard here.

As Defendants note, the bilateral "Do Not Cold Call" agreements alleged in Plaintiffs' CAC do not cover all possible pairings between Defendants—that is, while Adobe cannot cold call Apple employees or vice versa, nothing in the CAC indicates that Adobe could not cold-call Adobe, Intuit, Google, Lucasfilm, and Pixar. Joint. Mot. 15. In fact, of the 21 possible pairings between the 7 Defendants, only 6 pairings have a bilateral **[**41]** "Do Not Cold Call" agreement, leaving competition open among the remaining 15 pairings. *Id.* Defendants argue that the economics of this situation evidence the lack of an overarching conspiracy, as a rational conspiracy would seek to eliminate these additional price pressures in order to make the existing bilateral constraints effective. *Id.* Relatedly, Defendants argue that Plaintiffs' alleged conspiracy is implausible because Plaintiffs have failed to allege that Defendants have market power over a relevant **[*1121]** market. *Id.* at 16. For the reasons below, neither of these arguments prevails.

First, the Court does not agree with Defendants that Plaintiffs' allegations of an overarching conspiracy are implausible on their face. While Defendants accurately point out that only 6 bilateral "Do Not Cold Call" agreements have been alleged, Plaintiffs nonetheless adequately allege that the "compensation effects of cold calling are not limited to the particular individuals who receive cold calls, or to the particular individuals who would have received cold calls but for the anticompetitive agreements alleged herein. Instead, the effects of . . . eliminating cold calling . . . commonly impact all salaried **[**42]** employees of the participating companies." *Id.* ¶ 50. Plaintiffs allege that "Plaintiffs and each member of the Class were harmed by each and every agreement herein alleged. The elimination of competition and suppression of compensation and mobility had cumulative effect on all Class members." *Id.* ¶ 110. For example, "an individual who was an employee of Lucasfilm received lower compensation and faced unlawful obstacles to mobility as a result of not only the illicit agreements with Pixar, but also as a result of Pixar's agreement with Apple." *Id.*

Defendants do not attack Plaintiffs' allegations of the cumulative harm of the bilateral agreements beyond calling the allegations "conclusory." Joint Mot. 17. The Court disagrees with Defendants' characterization. Far from asserting mere conclusions of law, Plaintiffs' CAC details how cold calling normally works in the labor market for skilled employees in the high-tech industry and how eliminating cold calling would reduce such employees' compensation and mobility. CAC ¶¶ 41-54. Plaintiffs provide specific examples of various ways in which cold calling significantly impacts employee compensation. First, Plaintiffs allege that when an employee **[**43]** of Company A receives a cold call from rival Company B, the current employee may either move to Company B, or use Company B's offer as leverage to negotiate increased compensation from Company A. *Id.* ¶ 46. Second, when a current employee of Company A receives a cold call from rival Company B, that information is likely to spread through informal employee communication channels, empowering other Company A employees to use that information in their own compensation negotiations. *Id.* ¶ 47. Third, when rival Company B cold calls a Company A employee, Company B is likely to glean information about Company A's compensation practices. As a result, in a normal, competitive labor market, Company B is likely to match or exceed the compensation package offered by its rivals. This iterative process tends to lead to increased compensation levels across the industry, as companies vie for rivals' employees. *Id.* ¶ 48. Finally, when Company A knows that its employees may be cold called by rival Company B, Company A is more likely to forfend prospective poaching of its employees by preemptively increasing the compensation of its current employees. *Id.* ¶ 49.

While these allegations concerning the labor **[**44]** market effects of cold calling remain to be proven, the Court presumes these factual allegations to be true for purposes of ruling on a motion to dismiss. In light of Plaintiffs' specific allegations concerning the industry-wide procompetitive effects of cold calling recruiting practices, it is plausible to infer that even a single bilateral agreement would have the ripple effect of depressing the mobility and compensation of employees of companies that are not direct parties to the agreement. Plaintiffs' allegations of six parallel bilateral agreements render the inference of an anticompetitive ripple effect that much more plausible. **[*1122]** Accordingly, the Court finds that Plaintiffs have sufficiently pled facts alleging the economic plausibility of the conspiracy.

Defendants' second argument, which challenges the plausibility of Plaintiffs' conspiracy theory based on Plaintiffs' failure to allege a relevant market and that Defendants have power within that market, also fails. ***HN9***[] "There is no requirement that [the market definition] elements of the antitrust claim be pled with specificity." *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008)*. "An antitrust complaint **[**45]** therefore survives a *Rule 12(b)(6)* motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect." *Id.* The existence of a "relevant market" is typically a factual inquiry for the jury. *Id.* A complaint may be dismissed on this ground only if the market definition is "facially unsustainable." *Id.*

Here, Plaintiffs allege that Defendants are high-tech companies in the market for skilled labor, where cold calling plays an important role in determining salaries and labor mobility. CAC ¶¶ 41-54. Plaintiffs further allege that the labor market for skilled high-tech labor is national. *Id.* ¶¶ 30, 39. Finally, Plaintiffs allege that "Defendants succeeded in lowering the compensation and mobility of their employees below what would have prevailed in a lawful and properly functioning labor market." *Id.* ¶ 108. Thus, the Court accepts as true, as the Court must on a motion to dismiss, Plaintiffs' allegation that Defendants succeeded in distorting the market through their agreements. Accordingly, it is reasonable to infer that Defendants had the market power to do so. *Cf. Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1001 (9th Cir. 2008)* **[**46]** ("Evidence of restricted output and supracompetitive prices is direct evidence of market power." (quoting *Forsyth v. Humana, Inc., 114 F.3d 1467, 1475 (9th Cir. 1997))*.

Moreover, the Court need not engage in a market analysis until the Court decides whether to apply a *per se* or rule of reason analysis. *See F.T.C. v. Ind. Fed'n of Dentists, 476 U.S. 447, 462, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*; *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. Defendants' argument relies on the false assumption that the Court should apply a rule of reason analysis, but as the parties agree, Joint Mot. 9; Tr. 29:15-17, the Court need not decide now whether *per se* or rule of reason analysis applies. Indeed, that decision is more appropriate on a motion for summary judgment. *See Pecover v. Elecs. Arts Inc., 633 F. Supp. 2d 976, 983 (N.D. Cal. 2009)* (deferring market analysis under rule of reason, under Cartwright Act, until after deciding motion to dismiss); *In re Beer Distrib. Antitrust Litig., 188 F.R.D. 557, 564 (N.D. Cal. 1999)* (Williams, J.). Plaintiffs have successfully pled a *per se* violation of the Sherman Act for purposes of surviving a 12(b)(6) motion, *see* CAC ¶¶ 2, 32(b), 125, 134, 155; Opp'n to Joint **[**47]** Mot. 1, and therefore no market analysis is required at this time. *See United States v. Socony-Vacuum Oil, 310 U.S. 150, 224 n.59, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)* (noting that a *per se* *Section 1* violation does not require evidence of market power or the ability to affect prices); *Datagate, Inc. v. Hewlett-Packard Co., 60 F.3d 1421, 1425 (9th Cir.*

1995) ("The foundational principle of *per se* antitrust liability is that some acts are considered so inherently anticompetitive that no examination of their impact on the market as a whole is required."); *In re WellPoint, Inc. Out-of-Network UCR Rates Litig.,* **[*1123]** *No. MDL 09-2074-PSG, 2011 U.S. Dist. LEXIS 89512, 2011 WL 3555610, at *14 (C.D. Cal. Aug. 11, 2011)*.

For all these reasons, Plaintiffs' antitrust claims cannot be dismissed on the basis of implausibility.

iv. Antitrust Injury[11]

Defendants argue that Plaintiffs have not alleged antitrust injury. Joint Mot. 16. The Court disagrees.

HN11[] In general, "[a]ntitrust injury requires the plaintiff to have suffered its injury in the market where competition is being restrained." *Am. Ad Mgmt., 190 F.3d at 1057*. However, "it is not the status as a consumer or competitor that confers antitrust standing, but the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff." *Id. at 1058*. The Ninth Circuit has held that, where, as here, an employee is the direct and intended object of an employer's anticompetitive conduct, that employee has standing to sue for antitrust injury. *Ostrofe v. H.S. Crocker Co., Inc., 740 F.2d 739, 742-43 (9th Cir. 1984)*; *accord* *Eichorn v. AT & T Corp., 248 F.3d 131, 140-41 (3d Cir. 2001)*; *Roman v. Cessna Aircraft Co., 55 F.3d 542 (10th Cir. 1995)*.

Plaintiffs **[**49]** have asserted that their salary and mobility were suppressed by Defendants' agreements not to cold call, and that the alleged agreements were entered into to suppress competition for skilled labor. CAC ¶¶ 108-10. Plaintiffs have specifically alleged that they were injured by Defendants' alleged anticompetitive conduct, *id.* ¶¶ 16-20, 70, 108, 110; have explained the means by which Defendants allegedly caused this injury, *id.* ¶¶ 41-55, 108; and have suggested how this injury should be quantified, *id.* ¶ 32(h). In alleging that Defendants conspired to fix salaries at artificially low levels, Plaintiffs have alleged "an example of the type of injury the antitrust laws are meant to protect against." *Doe v. Ariz. Hosp. & Healthcare Ass'n, No. CV07-1292-PHX-SRB, 2009 U.S. Dist. LEXIS 42871, 2009 WL 1423378, at *4 (D. Ariz. Mar. 19, 2009)* (citing *Am. Ad Mgmt., 190 F.3d at 1054*). Plaintiffs have further alleged that Defendants' attempts to suppress competition had the intended "effect of fixing the compensation of [Plaintiffs] at artificially low levels." CAC ¶ 108. Plaintiffs have thus also alleged that their injury is a direct result of Defendants' conduct. *Ariz. Hosp., 2009 U.S. Dist. LEXIS 42871, 2009 WL 1423378, at *4*.

Thus, Plaintiffs have adequately **[**50]** pled antitrust injury. [12] Accordingly, Defendants' motion to dismiss Plaintiffs' Sherman Act claim and Cartwright Act claim is DENIED.

2. *Cal. Bus. & Prof. Code § 16600*

Plaintiffs have voluntarily dismissed their claim under *Cal. Bus. & Prof. Code § 16600*. **[*1124]** *See* ECF No. 111. Defendants' Joint Motion to Dismiss this claim is therefore DENIED as MOOT.

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[11] Defendants focus their arguments on antitrust injury, but appear cursorily to attack Plaintiffs' Article III standing. Joint Mot. 9. **HN10**[] Plaintiffs meet the requirements for Article III standing: (1) injury in fact; (2) causal connection; (3) redressability. *Takhar v. Kessler, 76 F.3d 995, 999-1000 (9th Cir. 1996)* (internal quotations omitted). Plaintiffs allege that their salaries were artificially reduced as a result **[**48]** of Defendants' alleged anticompetitive conduct and that their injury can be redressed through the payment of damages should Plaintiffs establish liability. As Plaintiffs were directly affected by the alleged agreement to eliminate competition, they have antitrust standing as well. *AGC v. Cal. State Council of Carpenters, 459 U.S. 519, 545, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*.

[12] Defendants repeat their argument that Plaintiffs have failed to allege a relevant market and control of that market, *see* Section III.A.1.b.iii, *supra*, to argue that Plaintiffs have also failed to allege antitrust injury. *See* Joint Mot. 18-19. As discussed above, the Court declines to require a market analysis at the motion to dismiss stage.

3. UCL

Plaintiffs also allege that Defendants' actions violate ***HN12***[] California's UCL, which does not prohibit specific activities but instead broadly proscribes "any unfair competition, which means 'any unlawful, unfair or fraudulent business act or practice.'" *In re Pomona Valley Med. Group, Inc., 476 F.3d 665, 674 (9th Cir. 2007)* (quoting *Cal. Bus. & Prof. Code §§ 17200, et seq.*); *see also* *Boschma v. Home Loan Ctr., Inc., 198 Cal. App. 4th 230, 251-52, 129 Cal. Rptr. 3d 874 (2011)*.

The UCL provides for restitutionary, injunctive, and **[**51]** declaratory relief. *See* *Cal. Bus. & Prof. Code § 17203* (authorizing injunctive and restitutionary relief); *AICCO, Inc. v. Ins. Co. of N. Am., 90 Cal. App. 4th 579, 590, 109 Cal. Rptr. 2d 359 (2001)* (authorizing declaratory relief). Damages and disgorgement are unavailable under the UCL. *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1152, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*. As discussed above, Plaintiffs withdrew their prayers for injunctive and declaratory relief. Thus, the only relief Plaintiffs seek under the UCL is restitution. However, because, as explained below, Plaintiffs are not entitled to restitution, Plaintiffs' UCL claim is DISMISSED.

Plaintiffs' alleged injury is in the form of elimination of competition and suppression of compensation and mobility. CAC ¶ 110. In their claim under the UCL, Plaintiffs pray that Defendants be required to "disgorge their illegal gains for the purpose of making full restitution to all injured class members." *Id.* ¶ 150.

HN13[] Under the UCL, "'the concept of restoration or restitution . . . is not limited only to the return of money or property that was once in the possession of that person. Instead, restitution is broad enough to allow a plaintiff to recover money or property in which **[**52]** he or she has a vested interest.'" *Lozano v. AT&T Wireless Servs. Inc., 504 F.3d 718, 733-34 (9th Cir. 2007)* (quoting *Juarez v. Arcadia Fin., Ltd., 152 Cal. App. 4th 889, 61 Cal. Rptr. 3d 382 (2007))*. For example, a plaintiff has a vested interest in unpaid wages and therefore may state a restitution claim under the UCL to recover such lost money or property. *See* *Cortez v. Purolator Air Filtration Prods. Co., 23 Cal. 4th 163, 177-78, 96 Cal. Rptr. 2d 518, 999 P.2d 706 (2000)*. The California Supreme Court has made clear, however, that a mere "expectation interest" is not a "vested interest" for purposes of stating a claim for restitution under the UCL. *See* *Pineda v. Bank of Am., 50 Cal. 4th 1389, 1401-02, 117 Cal. Rptr. 3d 377, 241 P.3d 870 (2010)*.

The Court finds that the speculative higher compensation Plaintiffs may have gotten in the absence of the alleged conspiracy, unlike unpaid wages, is not a vested interest. In *Cortez*, the California Supreme Court held that ***HN14***[] "earned wages that are due and payable pursuant to *section 200 et seq. of the Labor Code* of the Labor Code are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice." *23 Cal. 4th at 178*. "[R]estitutionary **[**53]** awards encompass quantifiable sums one person owes to another." *Id.* The Court agrees with Defendants that the salaries Plaintiffs may have been able to negotiate in the absence of the alleged conspiracy is an "attenuated expectancy" — akin to "lost business opportunity" or lost revenue — which cannot serve as the basis for restitution. *Korea Supply, 29* ***[*1125]*** *Cal. 4th at 1150-51*. Plaintiffs are notably silent in response to Defendants' arguments that Plaintiffs are not entitled to restitutionary relief. Plaintiffs request for disgorgement is also foreclosed, because this remedy is available "only to the extent that it constitutes restitution." *Id. at 1145*. Any profits Defendants made through the alleged conspiracy at the expense of Plaintiffs' wages are likewise attenuated expectancies. Accordingly, Plaintiffs are entitled neither to restitution nor to disgorgement.

Thus, because "the only relief the UCL provides is unavailable here, [Plaintiffs'] UCL claim fails." *Doe v. Starbucks, Inc., No. SACV 08-0582 AG (CWx), 2009 U.S. Dist. LEXIS 118878, 2009 WL 5183773, at *15 (C.D. Cal. Dec. 18, 2009)*. Accordingly, Defendants' joint motion to dismiss Plaintiffs' UCL claim is GRANTED. [13]

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[13] The Court notes that even if Plaintiffs' **[**54]** UCL claim were to survive a motion to dismiss, the UCL claim would likely face an insurmountable hurdle at the class certification stage given that the Ninth Circuit has foreclosed the certification of nationwide classes under the UCL. *See* *Mazza v. Am. Honda Motor Co., Inc., 666 F.3d 581, 585 (9th Cir. 2012)*.

B. Lucasfilm's Motion to Dismiss

In addition to joining the other Defendants' joint motion to dismiss, Lucasfilm brings its own motion to dismiss premised on the federal enclave doctrine.

Pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, Lucasfilm seeks to dismiss Plaintiffs' Cartwright Act claim. Lucasfilm argues that Plaintiffs' Cartwright Act claim fails as a matter of law because, under the federal enclave doctrine, the Act does not apply to conduct on the Presidio, where Lucasfilm has been located since July 2005. Lucasfilm Mot. 3. All other Defendants join Lucasfilm's motion on the ground that some of the events of the alleged overarching conspiracy occurred on the Presidio. Joint Mot. 1 n.1. The Court disagrees with Defendants.

The parties appear to agree that since July 2005, Lucasfilm has been located on the Presidio of San Francisco — a federal enclave that was ceded **[**55]** to the United States government by the state of California in 1897. Lucasfilm Mot. 1. The parties also agree that ***HN15***[] any state law enacted after a property becomes a federal enclave cannot be enforced on the enclave unless Congress specifically authorizes its enforcement on the federal enclave. Plaintiffs' only remaining state law claim is under the Cartwright Act. The parties apparently agree that, because the Cartwright Act was enacted after 1897, and Congress has not authorized its enforcement on the Presidio, the Cartwright Act does not apply to the Presidio. The parties disagree, however, on the nexus required between the Cartwright Act claim and the Presidio for the federal enclave doctrine to bar Plaintiffs' Cartwright Act claim here.

Defendants argue that the federal enclave doctrine applies as long as some of the alleged events occurred on the federal enclave. Plaintiffs, on the other hand, argue that ***HN16***[] the federal enclave doctrine only applies when the locus in which the claim arose is the federal enclave itself. The Court agrees with Plaintiffs. The Ninth Circuit has held that in federal enclave cases, "the jurisdiction of the federal court depends upon . . . the locus in which **[**56]** the claim arose." *Alvares v. Erickson, 514 F.2d 156, 160 (9th Cir. 1975)*. [14] That Lucasfilm **[*1126]** is now located on the Presidio, therefore, does not automatically bar *all* state law claims brought against it. Rather, the federal enclave doctrine bars only those claims which arose "on a federal enclave." *Totah v. Bies, No. 10-CV-05956-CW, 2011 U.S. Dist. LEXIS 39940, 2011 WL 1324471, at *2 (N.D. Cal. Apr. 6, 2011)*. Thus, the Court looks to whether the locus in which Plaintiffs' Cartwright Act claim arose is the Presidio.

HN17[] To state a claim under the Cartwright Act, Plaintiffs must allege, "(1) the formation and operation of the conspiracy; (2) illegal acts done pursuant thereto; and (3) damage proximately caused by such acts." *Kolling v. Dow Jones & Co., 137 Cal. App. 3d 709, 718, 187 Cal. Rptr. 797 (1982)*. Plaintiffs allege that Lucasfilm and Pixar formed a conspiracy by entering into a bilateral agreement "no later than January 2005." CAC ¶ 128. Though Plaintiffs allege that this conspiracy would later expand to include numerous other players, Plaintiffs have successfully alleged that the conspiracy had already formed and was operating by January 2005, six months before Lucasfilm moved to the Presidio. Plaintiffs also allege that the negotiation, execution, and enforcement of this bilateral agreement — the first of the six such agreements in the overarching conspiracy — took place in Emeryville, CA. *Id.* ¶¶ 62, 65-70. Thus, the locus **[**58]** of the first two Cartwright Act elements was not the Presidio.

The Court recognizes that the federal enclave doctrine may extinguish the Cartwright Act claims of a putative subclass of Plaintiffs, and may not extinguish the Cartwright Act claims of another putative subclass of Plaintiffs. For

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[14] To the extent *Corley v. Long-Lewis, Inc., 688 F. Supp. 2d 1315, 1336 (N.D. Ala. 2010)*, conflicts by suggesting that the federal enclave doctrine applies as long as "some of the events alleged . . . occurred on a federal enclave," the Court instead follows the Ninth Circuit, which has held to the contrary. While it is true, as Lucasfilm notes, Lucasfilm Reply 2, that Judge Wilken applied the federal enclave doctrine to bar plaintiff's defamation claim in *Totah* even though the defamatory statement was uttered and republished outside of the Presidio, *Totah* is not an example of a sister court adopting *Corley*'s "some of the events" standard. Judge Wilken stated that "the substance and consummation of the **[**57]** tort [of libel] occurs when and where the third person receives, reads, and comprehends the libelous matter," and held that federal enclave jurisdiction applied because the allegedly libelous statements at issue in that case had been received on a federal enclave. *Totah, 2011 U.S. Dist. LEXIS 39940, 2011 WL 1324471, at *2*.

example, the named Plaintiff who suffered the earliest injury, Mr. Marshall, began work at Adobe in July 2006, over a year after Adobe had entered into its bilateral "Do Not Cold Call" agreement with Apple. *Id.* ¶¶ 73. Although Mr. Marshall's injury did not arise until a year after Lucasfilm had moved to a federal enclave, Adobe is not located on the Presidio, and nothing in the CAC suggests that Mr. Marshall was injured on the Presidio. Thus, regardless of the fact that Lucasfilm had already moved to the Presidio by the time of Mr. Marshall's alleged injury in 2006, all three elements of Mr. Marshall's Cartwright Act claim arose outside the Presidio. Accordingly, the locus in which Mr. Marshall's Cartwright Act claim arose was not the Presidio, and the federal enclave doctrine does not extinguish Mr. Marshall's Cartwright Act claim.

Defendants' federal enclave defense is more appropriately addressed **[**59]** when the Court considers class certification, and is not ground to dismiss Plaintiffs' CAC. Accordingly, Lucasfilm's motion to dismiss is DENIED.

IV. CONCLUSION

For the reasons set forth above, the Court rules as follows on Defendants' joint **[*1127]** motion to dismiss and Lucasfilm's motion to dismiss:

1. Defendants' joint motion to dismiss is DENIED as to Plaintiffs' *Section 1* Sherman Act claim.

2. Defendants' joint motion to dismiss is DENIED as to Plaintiffs' Cartwright Act claim.

3. Defendants' joint motion to dismiss is DENIED, as moot, as to Plaintiffs' *Cal. Bus. & Prof. Code § 16600* claim.

4. Defendants' joint motion to dismiss is GRANTED as to Plaintiffs' UCL claim.

5. Defendants' joint motion to dismiss is DENIED, as moot, as to Plaintiffs' prayer for injunctive and declaratory relief.

6. Lucasfilm's motion to dismiss is DENIED.

IT IS SO ORDERED.

Dated: April 18, 2012

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge

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Nass-Romero v. Visa U.S.A. Inc.

Court of Appeals of New Mexico

April 18, 2012, Filed

Docket No. 30,540

Reporter

2012-NMCA-058 *; 279 P.3d 772 **; 2012 N.M. App. LEXIS 31 ***; 2012 WL 2330264

LISA NASS-ROMERO, on behalf of herself and all others similarly situated, Plaintiff-Appellant, v. VISA U.S.A. INC. and MASTERCARD INTERNATIONAL INCORPORATED, Defendants-Appellees.

Subsequent History: Released for Publication June 19, 2012.

Prior History: **[***1]** APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY. Sarah M. Singleton, District Judge.

In re Visa Check/MasterMoney Antitrust Litig., 2011 U.S. Dist. LEXIS 122680 (E.D.N.Y., Oct. 24, 2011)

Core Terms

consumers, merchants, antitrust, debit card, damages, Defendants', quotation, marks, antitrust violation, anti trust law, overcharge, indirect, injuries, cases, district court, allegations, duplicative, foreseeable, purchaser, factors, courts, remote, retail, debit, suits

LexisNexis® Headnotes

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

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

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

A motion to dismiss is infrequently granted because its purpose is to test the law of the claim, not the facts that support it. In reviewing a district court's decision to dismiss for failure to state a claim, the appellate court accepts as true all well-pleaded factual allegations in the complaint and resolves all doubts in favor of the complaint's sufficiency. A N.M. R. Ann. 1-012(B)(6) motion is only proper when it appears that plaintiff can neither recover nor obtain relief under any state of facts provable under the claim. A district court's decision to dismiss a case for failure to state a claim under Rule 1-012(B)(6) is reviewed de novo. Whether a party has standing to litigate a particular issue is a question of law, which the appellate court reviews de novo.

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

HN2[] Motions to Dismiss, Failure to State Claim

Dismissals under N.M. R. Ann. 1-012(B)(6) are proper when the claim asserted is legally deficient. A plaintiff's standing is a jurisdictional prerequisite to an action.

Antitrust & Trade Law > Sherman Act > Claims

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

HN3[] Sherman Act, Claims

Antitrust legislation barring monopolistic restraint of trade began with the federal Sherman Antitrust Act (Sherman Act), enacted by Congress in 1890, *15 U.S.C.S. §§ 1 through 7 (2004)*. One year later, in 1891, the New Mexico Territorial Legislature enacted the New Mexico Antitrust Act (NMAA) that is based on the Sherman Act, *N.M. Stat. Ann. §§ 57-1-1 through -19*. In 1914, Congress enacted a follow-up statute, the Clayton Act, to bolster the original act's enforcement mechanisms, *15 U.S.C.S. § 15(a)*. The NMAA contains a similar provision and allows recovery to any person threatened with injury or injured in his business or property by a violation of the NMAA, *N.M. Stat. Ann. § 57-1-3*.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Antitrust & Trade Law, Sherman Act

The New Mexico Antitrust Act (NMAA) shall be construed in harmony with judicial interpretations of the federal antitrust laws. This construction shall be made to achieve uniform application of the state and federal laws prohibiting restraints of trade and monopolistic practices, *N.M. Stat. Ann. § 57-1-15*. According to the New Mexico Supreme Court, the underlying purposes behind both the federal and state laws are the same, to establish a public policy of first magnitude; that is, promoting the national interest in a competitive economy. The state and federal antitrust statutes should be read in harmony: It is therefore the duty of the courts to ensure that New Mexico ***antitrust law*** does not deviate substantially from federal interpretations of ***antitrust law***. New Mexico courts therefore look to federal ***antitrust law*** to determine the meaning of provisions of the NMAA.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Civil Procedure > ... > Justiciability > Standing > Personal Stake

HN5[] Standing, Injury in Fact

New Mexico has adopted a three-part test to address standing in general: To acquire standing to litigate a particular issue, a party must demonstrate (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. Even where a party demonstrates these three elements, standing may be denied if the interest the complainant seeks to protect is not within the zone of interests protected or regulated by the statute or constitutional provision the party is relying upon. The concepts of injury and zone of interest are thus intertwined.

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

HN6[] Standing, Sherman Act

An antitrust violation may be expected to cause ripples of harm to flow through the nation's economy; but despite the broad wording of *15 U.S.C.S. § 4* there is a point beyond which the wrongdoer should not be held liable. It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property. It is plain, therefore, that the question whether the plaintiff may recover for the injury it allegedly suffered by reason of the defendants' coercion against certain third parties cannot be answered simply by reference to the broad language of *15 U.S.C.S. § 4*.

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

HN7[] **Standing, Sherman Act**

There are five factors to consider in analyzing the issue of standing: (1) whether the plaintiffs were participants in the allegedly restrained market; (2) the directness of the plaintiff's alleged harm; (3) whether there is a better potential plaintiff; (4) whether the plaintiff's theory of damages is speculative; and (5) the complexity of apportioning damages and the risk of duplicative liability.

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

HN8[] **Private Actions, Sherman Act**

The United States Supreme Court has emphasized the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other. The Court feared that such damage calculations would often require additional long and complicated proceedings involving massive evidence and complicated theories.

Counsel: Youtz & Valdez, P.C., Shane C. Youtz, Albuquerque, NM; Cuneo Gilbert & LaDuca, LLP, Jonathan W. Cuneo, Washington, D.C.; Cuneo Gilbert & LaDuca, LLP, Daniel Cohen, Alexandria, VA; Law Offices of Gordon Ball, Gordon Ball, Knoxville, TN; Hagens Berman LLP, George Samson, Seattle, WA for Appellant.

Jones, Snead, Wertheim & Wentworth, P.A., Jerry Todd Wertheim, Santa Fe, NM; Paul, Weiss, Rifkind, Wharton & Garrison LLP, Kenneth A. Gallo, Washington, D.C.; Gary R. Carney, New York, NY for Appellee MasterCard International Incorporated.

Rodey, Dickason, Sloan, Akin & Robb, P.A., Leslie McCarthy Apodaca, Albuquerque, NM; Arnold & Porter LLP, Robert C. Mason, New York, NY for Appellee Visa U.S.A. Inc.

Judges: CELIA FOY CASTILLO, Chief Judge. WE CONCUR: CYNTHIA A. FRY, Judge, RODERICK T. KENNEDY, Judge.

Opinion by: CELIA FOY CASTILLO

Opinion

[774]** **CASTILLO, Chief Judge.**

[*1] Plaintiff Nass-Romero, seeking to represent a class of New Mexico consumers, brought suit against two credit card companies alleging common law claims, violations of the New Mexico **[***2]** Antitrust Act (NMAA), *NMSA 1978, Sections 57-1-1 through -15* (1891, as amended through 1987), and violations of the New Mexico Unfair

Practices Act (UPA), NMSA 1978, Sections 57-12-1 through -26 (1967, as amended through 2009). The district court dismissed the complaint. Plaintiff appeals the dismissal of only those claims under the NMAA. We affirm.

[**775] I. BACKGROUND

[*2] We begin by providing a short history of the events leading to the filing of this complaint. In 1996, merchants and retail trade associations sued Visa U.S.A. Inc., and MasterCard International Incorporated (Visa, MasterCard, or, together, Defendants) alleging that Defendants violated federal antitrust laws by forcing merchants who accepted their credit cards in the regular course of business to also accept the companies' debit cards. *See* In re Visa Check/MasterMoney Antitrust Litig., 192 F.R.D. 68, 73 (E.D.N.Y. 2000), *aff'd*, 280 F.3d 124 (2d Circ. 2001). The merchants claimed that such a "tying" arrangement was an attempt to monopolize the debit card market, forcing the merchants to pay debit card fees that were higher than those provided by other debit networks. *See id.* A class of more than four million merchants was certified **[***3]** in 2000. *See* id. at 73. In 2003, the parties settled, and Visa and MasterCard agreed to pay more than $3 billion into a settlement fund. *See* In re Visa Check/MasterMoney Antitrust Litig., 297 F. Supp. 2d 503, 506-07 (E.D.N.Y. 2003). The settlement was approved by the court, *see* id. at 512, and affirmed at the appellate level. *See* Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 124 (2d Cir. 2005).

[*3] On the heels of that massive lawsuit and settlement, consumers in eighteen other states and the District of Columbia filed class-action suits against Defendants alleging violations of the individual states' antitrust laws and, in some cases, violations of the states' consumer protection laws. The consumers claimed that the tying arrangements that resulted in higher debit processing fees for merchants forced those merchants to pass the cost along to all consumers in the form of higher prices for all retail goods subsequently sold. Courts dismissed the consumer cases in fourteen states and in the District of Columbia. [1] In two states, Florida and Nevada, consumers voluntarily dismissed their complaints. In West Virginia, the state attorney general brought a *parens patriae* action on behalf **[***4]** of the state's consumers, and the attorney general decided to settle the case after the district court denied Defendants' motion for summary judgment. *See W. Va. v. Visa U.S.A., Inc.*, Civil Action No. 30-C-551 (Memorandum Order Denying Defendants' Motion for Summary Judgment, Oct. 14, 2005); Darrell V. McGraw, Jr., *2009 Annual Report: The West Virginia Attorney General's Report on the Activities of the Consumer Protection and Antitrust Divisions*, 62-63, http://www.wvago.gov/pdf/annualreports/2009_report.pdf.

[*4] In New Mexico, Plaintiff filed a 186-paragraph complaint with essentially the same allegations as claimed in the suits filed by the merchants in the federal action and by other state consumers—that the anti-competitive behavior of Visa and MasterCard regarding their debit card fee-processing system forced merchants **[***6]** to pass on costs to consumers. Specifically, Plaintiff claims she bought retail goods from "one or more [m]erchants located in New Mexico who were forced by Visa and/or MasterCard to accept their customers' *Visa Check* and/or *MasterMoney* debit cards when those debit cards were presented by them for payment as a condition of being able to accept Visa and/or **[**776]** MasterCard credit cards." She also alleges that Visa and MasterCard's debit card

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[1] *See* Consiglio-Tseffos v. Visa U.S.A., Inc., 2004 WL 3030043 (Ariz. Super. Ct., Dec. 8, 2004); *In re Credit/Debit Card Tying Cases*, 2004 WL 2475287 (Cal. Super. Ct., Oct. 14, 2004); *Goldberg v. Visa U.S.A., Inc.*, 2007 WL 2011732 (D.C. Super. Ct., March 2, 2007); Peterson v. Visa U.S.A., Inc., 2005 D.C. Super. LEXIS 17, 2005 WL 1403761 (D.C. Super. Ct., April 22, 2005); Southard v. Visa U.S.A. Inc., 734 N.W.2d 192 (Iowa 2007); *Moore v. Visa U.S.A., Inc.*, 2004 WL 3030032 (Kan. Dist. Ct., Nov. 15, 2004); Knowles v. Visa U.S.A. Inc., 2004 Me. Super. LEXIS 227, 2004 WL 2475284 (Me. Super. Ct., Oct. 20, 2004); *Stark v. Visa U.S.A., Inc.*, 2004 WL 1879003 (Mich. Cir. Ct., July 23, 2004); **[***5]** *Smith v. Visa U.S.A., Inc.*, 2005 WL 1936336 (Minn. Dist. Ct., July 12, 2005); Gutzwiller v. Visa U.S.A., Inc., 2004 WL 2114991 (Minn. Dist. Ct., Sept. 15, 2004); *Tackitt v. Visa U.S.A., Inc.*, 2004 WL 2475281 (Neb. Dist. Ct., Oct. 19, 2004); Kanne v. Visa U.S.A. Inc., 272 Neb. 489, 723 N.W.2d 293 (Neb. 2006); ***Ho v. Visa U.S.A., Inc., 16 A.D.3d 256, 793 N.Y.S.2d 8 (N.Y. App. Div. 2005)***; Crouch v. Crompton Corp., 2004 NCBC LEXIS 6, 2004 WL 2414027 (N.C. Super. Ct., Oct. 26, 2004); Beckler v. Visa U.S.A., Inc., 2004 WL 2475100 (N.D. Dist. Ct., Sept. 21, 2004); *Cornelison v. Visa U.S.A., Inc.*, No. 03-1350 (S.D. Cir. Ct., Sept. 29, 2004); Bennett v. Visa U.S.A. Inc., 198 S.W.3d 747 (Tenn. Ct. App. 2006); Fucile v. Visa U.S.A. Inc., 2004 Vt. Super. LEXIS 42, 2004 WL 3030037 (Vt. Super. Ct., Dec. 27, 2004); *Strang v. Visa U.S.A., Inc.*, 2005 WL 1403769 (Wis. Cir. Ct., Feb. 8, 2005).

transaction fees are significantly higher than the fees charged by providers of debit services and that the alleged debit card scheme imposes a hidden sales tax on every retail transaction affecting hundreds of thousands of consumers in New Mexico, regardless of whether a credit or debit transaction took place during a given purchase. Plaintiff also seeks class certification on behalf of "tens of thousands" of New Mexico consumers who have made purchases of any number of goods from merchants who accepted Visa and MasterCard's credit and debit cards as a form of payment.

[*5] Six years into the proceedings, the district court granted Defendants' motion to dismiss. It ruled that Plaintiff did not have standing to bring a claim under either the NMAA or the UPA **[***7]** and that Plaintiff failed to state a claim under the UPA. The district court dismissed the common law claims of unjust enrichment and of money had and received, finding that Defendants realized no benefit in the alleged scheme. In this appeal, Plaintiff limits her challenge to the dismissal of her claims under the NMAA. Specifically she argues that the district court erred (1) in determining that Plaintiff's injuries were too remote to provide standing to bring suit under the NMAA; and (2) in failing to find that Plaintiff was within the target area of the actions of Visa and MasterCard.

II. DISCUSSION

A. Standard of Review

[*6] ***HN1***[] A motion to dismiss "is infrequently granted because its purpose is to test the law of the claim, not the facts that support it." *Envtl. Improvement Div. v. Aguayo, 1983- NMSC 027, 99 N.M. 497, 499, 660 P.2d 587, 589 (1983)*. In reviewing a district court's decision to dismiss for failure to state a claim, "we accept as true all well-pleaded factual allegations in the complaint and resolve all doubts in favor of the complaint's sufficiency." *N.M. Pub. Schs. Ins. Auth. v. Arthur J. Gallagher & Co., 2008 NMSC 67, ¶ 11, 145 N.M. 316, 198 P.3d 342*. "A Rule [1-0]12([B])(6) [NMRA] motion **[***8]** is *only* proper when it appears that plaintiff can neither recover nor obtain relief under any state of facts provable under the claim." *Valdez v. State, 2002 NMSC 28, ¶ 4, 132 N.M. 667, 54 P.3d 71* (internal quotation marks and citation omitted). "A district court's decision to dismiss a case for failure to state a claim under Rule 1-012(B)(6) is reviewed de novo." *Valdez*, 2002 NMSC 28, ¶ 4. "Whether a party has standing to litigate a particular issue is a question of law, which we review de novo." *City of Sunland Park v. Santa Teresa Servs. Co., 2003 NMCA 106, ¶ 39, 134 N.M. 243, 75 P.3d 843*.

B. Plaintiff Lacks Standing to Bring a Claim Under the NMAA

[*7] We turn first to Plaintiff's assertion of error in the district court's dismissal of the action for lack of standing.***HN2***[] "Dismissals under Rule 1-012(B)(6) are proper when the claim asserted is legally deficient." *Delfino v. Griffo, 2011 NMSC 15, ¶ 9, 150 N.M. 97, 257 P.3d 917*. A plaintiff's standing is a "jurisdictional prerequisite to an action." *ACLU of N.M. v. City of Albuquerque, 2008 NMSC 45, ¶ 9 n.1, 144 N.M. 471, 188 P.3d 1222* (internal quotation marks and citation omitted).

[*8] To evaluate whether Plaintiff has standing sufficient to assert **[***9]** a claim here, we look at the text of the NMAA. ***HN3***[] Antitrust legislation barring monopolistic restraint of trade began with the federal Sherman Antitrust Act (Sherman Act), enacted by Congress in 1890. *See 15 U.S.C. §§ 1 through 7 (2004)*. One year later, in 1891, the New Mexico Territorial Legislature enacted the NMAA that is based on the Sherman Act. *See §§ 57-1-1 through -19*. In 1914, Congress enacted a follow-up statute, the Clayton Act, to bolster the original act's enforcement mechanisms. *See 15 U.S.C. § 15(a)*. The NMAA contains a similar provision and allows recovery to "any person threatened with injury or injured in his business or property" by a violation of the *NMAA. Section 57-1-3*.

[*9] Our determination regarding standing involves a question of statutory interpretation that in turn involves an understanding **[**777]** of the interplay between federal and state ***antitrust law***. ***HN4***[] The NMAA "shall be construed in harmony with judicial interpretations of the federal antitrust laws. This construction shall be made to achieve uniform application of the state and federal laws prohibiting restraints of trade and monopolistic practices." *Section 57-1-15*. According to our Supreme Court, "[t]he underlying **[***10]** purposes behind both the federal and state [l]aws are the same, to establish a public policy of first magnitude; that is, promoting the national interest in a competitive economy." *United Nuclear Corp. v. Gen. Atomic Co., 1979- NMSC 036, 93 N.M. 105, 125, 597 P.2d 290, 310 (1979)* (internal quotation marks and citation omitted). Recently, the Court reaffirmed that the state and federal antitrust statutes should be read in harmony: "It is therefore the duty of the courts to ensure that New Mexico ***antitrust law*** does not deviate substantially from federal interpretations of ***antitrust law***." *Romero v. Philip Morris Inc., 2010 NMSC 35, ¶ 18, 148 N.M. 713, 242 P.3d 280*. New Mexico courts therefore look to federal ***antitrust law*** to determine the meaning of provisions of the NMAA. *See* *State v. Ray Bell Oil Co., 1983- NMCA 068, 101 N.M. 368, 370, 683 P.2d 50, 52 (Ct. App. 1983)*.

[*10] With this as a background, we now turn to Plaintiff's challenge to the district court's finding that she lacked standing under the NMAA. ***HN5***[] New Mexico has adopted a three-part test to address standing in general: "To acquire standing to litigate a particular issue, a party must demonstrate (1) an injury in fact, (2) a causal relationship between the injury **[***11]** and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *City of Sunland Park, 2003 NMCA 106, ¶ 40* (internal quotation marks and citations omitted). Plaintiff here asks us to break the standing question into several parts—the above three-step analysis as well as a discussion of whether consumers were in the "target area" of Defendants' actions or whether the harm to Plaintiff that flowed from Defendants' actions was "foreseeable" enough to create standing in Plaintiff. We decline Plaintiff's invitation because her suggested tangents are subsumed into the basic analysis of standing. "Even where a party demonstrates these three elements, standing may be denied if the interest the complainant seeks to protect is not within the 'zone of interests' protected or regulated by the statute or constitutional provision the party is relying upon. The concepts of injury and zone of interest are thus intertwined." *Id.* In support of her position, Plaintiff cites *Key v. Chrysler Motors Corp., 1996 NMSC 38, 121 N.M. 764, 768, 918 P.2d 350, 354*, for the proposition that a claimant must show "that the interest sought to be protected by the complainant **[***12]** is arguably within the zone of interests to be protected or regulated by the statute[,]" and she contends that she meets this test. *Id.* (internal quotation marks and citation omitted). We first observe that this is not an antitrust case. And while we agree that the cited statement is contained in *Key*, there is more. *Key* goes on to state that in order to assess a plaintiff's standing "we must look to the Legislature's intent as expressed in the [applicable] Act or other relevant authority." *Id.* Here, the Legislature has clearly spoken, requiring that the *NMAA* be interpreted in harmony with federal law.

[*11] Plaintiff also argues that she should have standing because the economic effect on her and other consumers was foreseeable. This argument has been considered elsewhere and, like those other courts, we decline to adopt such a standard for antitrust cases. *See* *Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir. 1973)* ("Antitrust violations admittedly create foreseeable ripples of injury to individual stockholders, consumers[,] and employees, but the law has not allowed all of these standing to sue for treble damages."); *Southard, 734 N.W.2d at 197* (stating in a parallel case **[***13]** against Visa and MasterCard that "[t]he remoteness doctrine is not based upon a factual inquiry to determine whether the damages claimed were foreseeable or whether they were a proximate cause; rather, it is a legal doctrine incorporating public policy considerations" (internal quotation marks and citation omitted)); *Fucile, 2004 Vt. Super. LEXIS 42, 2004 WL 3030037, at *4* (stating in a parallel case against Visa and MasterCard that "[t]he defendants could not be expected to foresee an antitrust violation affecting **[**778]** merchants to result in increased cost of goods throughout the entire consumer base and to so injure that consumer base as to result in liability to every consumer in the country"). Instead, we follow the direction of the NMAA itself, rely on the general guidance regarding standing found in *Key*, and conduct a standing analysis for the NMAA that is in harmony with federal court interpretations of antitrust jurisprudence. *See* *City of Sunland Park, 2003 NMCA 106, ¶ 41* ("Cases in New Mexico are clear that injury—whether actual or threatened—is not enough by itself to confer standing. To be accorded standing on a particular issue the party must show that the statute or constitutional **[***14]** provision relied on reaches or provides protection against the injury.").

[*12] Having rejected the alternative approaches put forth by Plaintiff, we proceed to evaluate whether Plaintiff has standing based on the provisions of the NMAA and on federal antitrust jurisprudence. Both parties agree that the relevant precedent guiding a standing analysis in federal antitrust litigation is *Associated General Contractors v. California State Council of Carpenters (AGC), 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. There, the

United States Supreme Court suggested that the loose concepts of "zone of interest" and "foreseeability" are not adequate to confer standing.

> ***HN6***[] An antitrust violation may be expected to cause ripples of harm to flow through the [n]ation's economy; but despite the broad wording of [*15 U.S.C.] § 4* there is a point beyond which the wrongdoer should not be held liable. It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.
>
> It is plain, therefore, that the question whether the [plaintiff] may recover for the injury **[***15]** it allegedly suffered by reason of the defendants' coercion against certain third parties cannot be answered simply by reference to the broad language of [*15 U.S.C.] § 4*.

Id. at 534-35 (internal quotation marks and citations omitted).

[*13] In *AGC*, the Court was concerned with "keeping the scope of complex antitrust trials within judicially manageable limits." *Id. at 543*. In this regard, the *AGC* Court ***HN7***[] set out five factors to consider in analyzing the issue of standing: (1) whether the plaintiffs were participants in the allegedly restrained market; (2) the directness of the plaintiff's alleged harm; (3) whether there is a better potential plaintiff; (4) whether the plaintiff's theory of damages is speculative; and (5) the complexity of apportioning damages and the risk of duplicative liability. *Id. at 538-45*. We now turn to each of the factors and evaluate them based on Plaintiff's allegations.

1. Market Participation

[*14] The market at issue is the debit processing service of Visa and MasterCard that involves Defendants, their member banks, and the merchants who honor their cards. Plaintiff is neither a consumer nor a competitor in the market allegedly being restrained by Defendants and does not **[***16]** appear in that chain of distribution; thus, she cannot be identified as a consumer of the service provided by Visa and MasterCard. Plaintiff, instead, is a consumer of goods sold by merchants who happen to be part of the affected market. Other jurisdictions agree. *See, e.g., Kanne, 723 N.W.2d at 298* (concluding that the consumer-plaintiffs were "not competitors in the allegedly affected market, which is the business of providing debit network processing services to merchants . . . [n]or . . . consumers of those services"); *Southard, 734 N.W.2d at 199* (characterizing consumer plaintiffs as "neither consumers of the defendants' products nor competitors of the defendants").

2. Directness of Harm

[*15] Here, Plaintiff alleges that Defendants' tying arrangements led to "exorbitant fees . . . passed on to . . . Plaintiff and [c]lass members in the form of artificially higher and advanced prices." Plaintiff's allegations do not show that she was directly harmed by the actions of Visa and MasterCard; **[**779]** nor do they show that she was indirectly harmed through the chain of distribution of the debit card services. The alleged harm caused by Defendants' tying scheme takes an abrupt left turn after reaching **[***17]** the merchants and branches off into supposed higher prices for all goods throughout New Mexico, mutating into a different form of harm to consumers. Plaintiff's injury is better characterized as remote or derivative. *See Southard, 734 N.W.2d at 199* ("Clearly, the injuries alleged by the plaintiffs are not even indirect, as the plaintiffs are not in the chain of distribution. Their injuries are better described as derivative."); *Ho, 793 N.Y.S.2d at 9* ("Those injuries are too remote and derivative to countenance such a cause of action.").

3. A Better Plaintiff

[*16] In the case before us, Plaintiff is a consumer who is not directly affected by the alleged tying arrangement. The better plaintiffs to challenge Defendants' business practices have already come forward. They are the merchants themselves, led by Wal-mart, who first brought suit in 1996 and who settled with Visa and MasterCard in 2003, setting up a $3.1 billion fund to make whole the merchants affected by debit card transaction fees. Preventing Plaintiff here from bringing a claim under the NMAA will not "leave a significant antitrust violation undetected or unremedied." *AGC, 459 U.S. at 542*; *see* *Ho, 793 N.Y.S.2d at 9* (finding that Visa **[***18]** and MasterCard "have been subjected to judicial remediation for their wrongs, and any recovery here would be duplicative").

4. Speculative Damages

[*17] We now evaluate the nature of Plaintiff's alleged damages. Plaintiff asserts that her damages are based on the overcharges she paid on every retail item she bought from every merchant in New Mexico that accepted Visa and MasterCard credit and debit cards over the course of several years. By way of example, Plaintiff would ask a court to find that paying, say, $1.99 for a dozen eggs rather than $1.89 during a random shopping trip to a particular grocer was the indirect result of the excessive debit card transaction fees paid by the grocer to the member banks of Visa and MasterCard. Plaintiff would be alleging that for this particular purchase, and for the millions of small purchases made by "tens of thousands" of New Mexicans at dozens or perhaps hundreds of retail outfits throughout the state, the merchant chose not to absorb the debit card transaction fee but rather passed that cost on to the consumer. Such a calculation would ignore the countless considerations that go into the set price of any given product at any given store on any given **[***19]** day. *See* *Kanne, 723 N.W.2d at 299* (stating that "the claimed price increases over a period of years could have resulted from myriad independent reasons unrelated to the alleged violation" (internal quotation marks and citation omitted)). Because the alleged damages could have been produced by numerous independent factors, Plaintiff's damage claim is speculative.

5. Complexity of Apportioning Damages; Risk of Duplicative Liability

[*18] ***HN8***[] The United States Supreme Court has emphasized "the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *AGC, 459 U.S. at 543-44*. The Court feared that such damage calculations "would often require additional long and complicated proceedings involving massive evidence and complicated theories." *Id. at 544* (internal quotation marks and citation omitted). As the Maine Superior Court stated in a parallel case against Defendants,

> [t]o determine what portion of any overcharge was passed on by any given merchant, with respect to which products, and to which consumers is a task of monumental uncertainty and complexity. Depending on their other costs, their competitive position **[***20]** in the market, their profit margins, and the specific products they sold, some merchants could have absorbed a substantial portion of any overcharge instead of passing it on.

[780]** *Knowles, 2004 Me. Super. LEXIS 227, 2004 WL 2475284, at *6*. "For any given consumer, the issue is even more complicated and speculative because the inquiry would involve what items that particular consumer purchased, what that consumer paid for each item, and what percentage of overcharge, if any, was contained in that price." *Id.*; *see* Kellen S. Dwyer, *With the* Illinois Brick *Wall Down, What's Left? Determining Antitrust Standing Under State Law*, *3 J. Bus. Entrepreneurship & L. 255, 279* (2010) (hereinafter Dwyer) ("Showing the pass-on would require an estimation of the elasticity of demand for almost every product sold in the state. Even if that feat were possible, it is hard to imagine how the funds could be apportioned."). In addition, the risk of duplicative liability is apparent. Defendants settled with merchants nine years ago for more than $3 billion and thus were made to pay for the alleged antitrust violations. Under Plaintiff's theory of the case, merchants who benefitted from the settlement could conceivably **[***21]** have turned around and lowered the prices of their goods, thus providing consumers with relief from any previously passed-along costs emanating from the debit card transaction fees. Apportioning damages would be a complex task, and there is a risk of duplicative damages.

[*19] The *AGC* factors do not fall in Plaintiff's favor. Taking the factors in sum, we conclude that Plaintiff's claim fails the test and fails to prove she has standing to bring a claim under the NMAA.

[*20] As an alternative, Plaintiff argues that *AGC* should not apply to her claim at all because the facts of *AGC* can be distinguished from the facts of her case. Plaintiff points out that she is a consumer facing overcharges, whereas the plaintiff labor union in *AGC* was not a consumer and was not subject to overcharges. However, the Court in *AGC* made it clear that its five-factor analysis applied to the broad spectrum of antitrust claims, including those involving consumers. *See* *459 U.S. at 538* (stating that "the Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market"). And the **[***22]** author of *AGC*, Justice Stevens, more recently reiterated the broad application of that five-factor analysis. *See* *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 416, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (Stevens, Souter & Thomas, JJ., concurring) (applying the *AGC* factors and reasoning that "we have eschewed a literal reading of [*15 U.S.C.] § 4*, particularly in cases in which there is only an indirect relationship between the defendant's alleged misconduct and the plaintiff's asserted injury"); *see also* *Hawaii v. Standard Oil Co., 405 U.S. 251, 264 n.14, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)* ("The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."). We conclude that *AGC*is applicable to the case before us even though its facts are distinguishable.

[*21] Plaintiff further argues, though, that the NMAA offers a broader basis for consumers to bring an antitrust action and that it diverges from federal law by allowing suits to be brought by those "indirectly" harmed by monopolistic behavior. *Section 57-1-3*. **[***23]** The NMAA was modified in 1979 to counteract the U.S. Supreme Court's decision in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, which had barred antitrust suits by "indirect" purchasers in a distribution scheme. New Mexico, as did other states, responded by clarifying its statute to allow suits by those claiming to have been harmed indirectly. Plaintiff thus suggests that the revised NMAA deserves an expansive reading that finds a broad legislative intent to protect consumers.

[*22] First, as stated above, we reject Plaintiff's claim that she is an indirect purchaser in the distribution scheme at hand; rather, her claim is distinct from and derivative of a distribution network for debit card services that involves Defendants, their member banks, and merchants. Further, Plaintiff misreads the Supreme Court's opinion in *Illinois Brick* and conflates its statutory analysis with an analysis of standing. The *Illinois Brick* Court was focused not on standing **[**781]** but rather on a straight interpretation of the statute amid the Court's concerns about allowing multiple treble damages liability throughout a given chain of distribution of goods. *Id. at 736-37*. The Court **[***24]** was careful to distinguish between the issue presented—the question of whether the federal antitrust act allows an indirect purchaser to bring suit—and the broader issue of standing: "[W]e do not address the standing issue, except to note . . . that the question of which persons have been injured by an illegal overcharge . . . *is analytically distinct* from the question of which persons have sustained injuries too remote to give them standing to sue for damages under [*15 U.S.C.] § 4*." *Illinois Brick, 431 U.S. at 728 n.7* (emphasis added). Even the *Illinois Brick* dissent by Justice Brennan acknowledged that "there is a point beyond which the wrongdoer should not be held liable." *Id. at 760* (Brennan, Marshall, & Blackmun, JJ., dissenting). The dissent continued: "Courts have therefore developed various tests of antitrust 'standing' . . . to define that point." *Id.* The full Court, in a subsequent case, reiterated that standing requirements and questions of "which persons have sustained injuries that are too remote" remain "[a]nalytically distinct" from *Illinois Brick*'s bar against indirect purchasers. *Blue Shield v. McCready, 457 U.S. 465, 476, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)* (emphasis, **[***25]** internal quotation marks, and citation omitted). Thus, "[b]ecause *Illinois Brick* did not alter the Court's antitrust standing jurisprudence, *Illinois Brick*'s repeal should imply nothing about standing." *Dwyer, supra, at 263* (emphasis added).

[*23] Plaintiff can point to only one other jurisdiction that has ruled in favor of consumers in a similar case against Defendants: *W. Virginia*, Civil Action No. 30-C-551. This is an unpublished decision in which the court prefaces its discussion by stating that it was not conducting a full analysis of the issue of standing. *Id.* Further, the West Virginia district court's discussion of *Illinois Brick* repealer statutes suffers from lack of nuance and falls short of a full assessment of standing in such cases. Thus, it stands alone as an unreliable outlier against every other jurisdiction that has denied standing to similarly situated plaintiffs bringing derivative actions against Visa and MasterCard.

See, e.g., Kanne, 723 N.W.2d at 299-300; *Knowles, 2004 Me. Super. LEXIS 227, 2004 WL 2475284 at *3*; *Stark*, 2004 WL 1879003 at *3-4. The Minnesota Supreme Court, in a follow-up case to its consumer suits against Defendants, observed that "*Illinois Brick* addressed **[***26]** the scope of antitrust injury, not standing, under the Clayton Act." *Lorix v. Crompton Corp., 736 N.W.2d 619, 629 (Minn. 2007)*. The court concluded: "Whatever the precise prudential limits on Minnesota antitrust standing, we do not believe that the legislature intended to create 'consumer standing' by allowing every person in the state to sue for an antitrust violation simply by virtue of his or her status as a consumer." *Id. at 632*. We similarly conclude that Plaintiff lacks standing to bring a claim against Visa and MasterCard under the NMAA for the alleged tying scheme that forced merchants to accept Defendants' debit cards at inflated transaction-fee rates.

III. CONCLUSION

[*24] For the foregoing reasons, we affirm the decision of the district court.

[*25] IT IS SO ORDERED.

CELIA FOY CASTILLO, Chief Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

RODERICK T. KENNEDY, Judge

Hoilien v. OneWest Bank, FSB

United States District Court for the District of Hawaii

April 19, 2012, Decided; April 20, 2012, Filed

CV. NO. 11-00357 DAE-RLP

Reporter
2012 U.S. Dist. LEXIS 55870 *; 2012 WL 1379318

LAC HOILIEN, Plaintiff, vs. ONEWEST BANK, FSB, A FEDERAL SAVINGS BANK FKA INDYMAC BANK, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., STEWART TITLE GUARANTY CO., INC., RICHMOND TITLE SERVICES, INC., and DOES 1 through 20 inclusive, Defendants.

Subsequent History: Costs and fees proceeding at, Magistrate's recommendation at *Hoilien v. OneWest Bank, FSB, 2013 U.S. Dist. LEXIS 112015 (D. Haw., July 18, 2013)*

Core Terms

alleges, Mortgage, antitrust, Violations, motion to dismiss, foreclosure, cause of action, securitization, Defendants', conversion, monopolization, borrower, asserts, circumstances, lender, notice, anti trust law, debt collector, Conveyances, rescission, injunctive relief, disclosures, damages, parties, subject property, relevant market, leave to amend, fraudulent, Lending, amended complaint

Counsel: **[*1]** For Lac Hoilien, Plaintiff: Richard E Lehrfeld, LEAD ATTORNEY, PRO HAC VICE, Sacramento, CA; Thomas C. Beck, LEAD ATTORNEY, Kula, HI.

For ONEWEST Bank, FSB, a Federal Savings Bank FKA Indymac Bank, Mortgage Electronic Registration Systems, Inc., Defendants: David B. Rosen, LEAD ATTORNEY, The Law Office of David B. Rosen, ALC, Honolulu, HI.

Judges: David Alan Ezra, United States District Judge.

Opinion by: David Alan Ezra

Opinion

ORDER: (1) GRANTING DEFENDANTS' MOTION TO DISMISS AND (2) GRANTING PLAINTIFF LEAVE TO AMEND

On April 18, 2012, the Court heard Defendants' Motion to Dismiss. Richard E. Lehrfeld, Esq., appeared at the hearing on behalf of Plaintiff Lac Hoilien ("Plaintiff"); David B. Rosen, Esq., appeared at the hearing on behalf of Defendants OneWest Bank, FSB ("OneWest") and Mortgage Electronic Registration Systems, Inc. ("MERS") (collectively, "Moving Defendants"). After reviewing the motion and the supporting and opposing memoranda, the Court GRANTS Moving Defendants' Motion to Dismiss. (Doc. # 26.)

BACKGROUND

According to the First Amended Complaint ("FAC") and documents of which the Court takes judicial notice, on or about March 9, 2007, Plaintiff Lac Hoilien ("Plaintiff") entered into a loan transaction **[*2]** for $520,000 with IndyMac Bank, F.S.B. ("IndyMac"), which was secured by a mortgage encumbering real property located at 95 Wilikona Place, Wailuku, HI 96793 (the "Subject Property"). [1] ("RJN," Doc. # 29, Ex. C; see also "FAC," Doc. # 24 ¶¶9-10.) The Mortgage was recorded in the State of Hawaii Bureau of Conveyances ("Bureau" or "Bureau of Conveyances") on April 13, 2007. [2] (RJN, Ex. C.) IndyMac is listed on the Mortgage as the lender, and MERS is listed as the mortgagee "acting solely as a nominee for Lender and Lender's successors and assigns." (Id.) Plaintiff alleges that she had the sole ownership interest in the Subject Property when an IndyMac representative offered to loan her money to pay off her "then existing loan of approximately $200,000.00 and provide her an additional sum of approximately $300,000.00." (FAC ¶7.) Plaintiff alleges that IndyMac told her that after it "paid off [her existing loan] she would receive the balance" of the $520,000 loan through an escrow account with Defendants Stewart Title Guaranty Co., Inc. ("Stewart"), and Richmond Title Services, Inc ("Richmond"), but that she never received the money. (Id. ¶ 9.)

MERS assigned the Mortgage to OneWest by an Assignment of Mortgage recorded in the Bureau of Conveyances ("Bureau") on January 11, 2010. (RJN, Ex. D.) On January 11, 2010, OneWest, as mortgagee, recorded in the Bureau a Notice of Mortgagee's Intention to Foreclose Under Power of Sale. (Id., Ex. E.) On March 24, 2010, OneWest recorded in the Bureau a Mortgagee's Affidavit of Foreclosure Under Power of Sale. (Id., Ex. F.) On July 12, 2010, a Quitclaim Deed naming OneWest as grantee was recorded in the Bureau. (Id., Ex. G.)

On July 27, 2010, OneWest commenced an ejectment action in the District Court of the Second Circuit of Hawaii ("Maui District Court"). (Id., Ex. H.) On January 13, 2011, the Maui District Court entered a Judgment for Possession and a Writ of Possession in favor of OneWest. [3] (Id., Exs. I-J.) According to Defendants, on February 9, 2011, Plaintiff appealed the ejectment action, which is currently **[*5]** pending in the Intermediate Court of Appeals of the State of Hawaii. (See Doc. # 26 at 6.)

On June 6, 2011, Plaintiff, proceeding pro se, filed a Complaint in this Court against Defendants OneWest and MERS. (Doc. # 1.) On November 20, 2011, Plaintiff, represented by counsel, filed the present First Amended Complaint against Defendants OneWest, MERS, Stewart, and Richmond. (Doc. # 24.) The FAC asserts the following claims:

•Count I: Injunctive Relief (FAC ¶¶ 44-52);

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[1] The Court notes that Plaintiff, while represented **[*3]** by counsel, previously filed a complaint in this Court regarding the same subject property, but voluntarily dismissed her suit on June 4, 2010. See Hoilien v. OneWest Bank, No. 10-00121, Doc. # 11. Plaintiff has also filed three other suits in this Court against mortgage lenders regarding other properties. See *Hoilien v. Bank of Am., No. 10-00761, 2011 U.S. Dist. LEXIS 89155, 2011 WL 3494523 (D. Haw. Aug. 10, 2011)*; *Hoilien v. Bank of Am., No. 10-00760, 2011 U.S. Dist. LEXIS 67662, 2011 WL 251831 (D. Haw. June 23, 2011)*; *Hoilien v. Bank of Am., No. 10-00712, 2011 U.S. Dist. LEXIS 27863, 2011 WL 976699 (D. Haw. Mar. 17, 2011)*.

[2] Defendants have submitted copies of the Mortgage, Assignment of Mortgage, Notice of Mortgagee's Intention to Foreclose Under Power of Sale, Mortgagee's Affidavit of Foreclosure Under Power of Sale, and Mortgagee's Quitclaim Deed Pursuant to Power of Sale as exhibits to their Request for Judicial Notice. (Doc. # 29, Exs. C-G.) The Court takes judicial notice of those documents, which are public documents recorded in the Bureau of Conveyances. See ***United States v. 14.02 Acres of Land More or Less in Fresno Cnty., 547 F.3d 943, 955 (9th Cir. 2008)*** (citing *Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)* ("Although, as a general rule, a **[*4]** district court may not consider materials not originally included in the pleadings in deciding a Rule 12 motion, *Fed. R. Civ. P. 12(d)*, it 'may take judicial notice of matters of public record' and consider them without converting a Rule 12 motion into one for summary judgment.")).

[3] Moving Defendants requested that the Court take judicial notice of their Verified Complaint for Ejectment and the Maui District Court orders. Pursuant to *Rule 201 of the Federal Rules of Evidence*, the court may take judicial notice of papers filed in state court and of state court orders. See *Porter v. Ollison, 620 F.3d 952, 955 n.1 (9th Cir. 2010)*; ***Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998)***. The state court documents are relevant to the present matter. Therefore, the Court grants the request for judicial notice.

• Count II: Wrongful Sale of Subject Property (id. ¶¶ 53-54);

• Count III: Fraudulent Concealment-Tolling of Statute (id. ¶¶ 55-56);

• Count IV: Unfair or Deceptive **[*6]** Acts or Practices (id. ¶¶ 57-68);

• Count V: Truth in Lending Act Violations: Loan Rescission and Recoupment (id. ¶¶ 69-85);

• Count VI: Truth in Lending Act Violations: Loan Damages (id. ¶¶ 86-88);

• Count VII: Real Estate Settlement Procedures Act "RESPA" Violations (id. ¶¶ 89-91);

• Count VIII: Fraud (id. ¶¶ 92-100);

• Count IX: Sherman Anti-Trust Act Violations (id. ¶¶ 101-113);

• Count X: Hawaii Anti-Trust/Anti-Monopoly Acts Violations (id. ¶¶ 114-117);

• Count XI: Failure to Act in Good Faith (id. ¶¶ 118-123);

• Count XII: Unjust Enrichment (id. ¶¶ 124-129);

• Count XIII: Mistake (id. ¶¶ 130-131);

• Count XIV: Hawaii Bureau of Conveyance Regulations Violations (id. ¶¶ 132-138);

• Count XV: Improper Restrictions Resulting from Securitization Leaves Note and Mortgage Unenforceable (id. ¶¶ 139-146);

• Count XVI: Wrongful Conversion of Note - Mortgagor Never Consented to Securitization (id. ¶¶ 147-152);

• Count XVII: Breach of Contract (id. ¶¶ 153-158);

• Count XVIII: Conversion (id. ¶¶ 159-162).

On December 23, 2011, Defendants OneWest and MERS filed the instant Motion to Dismiss First Amended Complaint. ("Mot.," Doc. # 26.) On February 13, 2012, Defendants entered a Notice of No Opposition Having **[*7]** Been Filed to their Motion to Dismiss after Plaintiff failed to submit an opposition by February 6, 2012, the filing deadline. (Doc. # 35.) On February 17, 2012, Plaintiff's counsel informed this Court that counsel's wife, who also acted as his sole legal assistant, had been in a car accident on February 6, 2012, and that consequently, counsel was unable to timely file an Opposition. In light of counsel's personal circumstances, the Court continued the hearing and gave Plaintiff until March 28, 2012 to file an Opposition.

On March 28, 2012, Plaintiff filed her Opposition to the Motion. ("Opp'n," Doc. # 38.) In the Opposition, Plaintiff's counsel explained that the FAC had been erroneously entwined with a filing from another case, "and the wrong Amended Complaint was filed in this case." (Id. at 4.) Plaintiff's counsel further explained that it was not until February 27, 2012 that he "was made aware by the Court that his pleadings were incorrect." (Id.) Plaintiff attached the "correct" FAC to the Opposition, requesting that the Court "allow and consider the pleading to be superseded by the attached FAC." (Id. at 5.)

The Court declines Plaintiff's request. A request for leave to amend **[*8]** should have been brought by a separation motion, not in an opposition to Defendants' motion to dismiss. *Federal Rule of Civil Procedure 15(a)(1)* allows a party to amend its pleading once as a matter of course within: (a) 21 days after serving it, or (B) 21 days after service of a responsive pleading or 21 days after service of a motion under *Rule 12(b)*, *(e)*, or *(f)*, whichever is earlier. However, where, as here, a party has already amended its pleading once as a matter of course, any subsequent amendment is permitted "only with the opposing party's written consent or the court's leave." *Fed. R.*

Civ. P. 15(a)(2). Since Plaintiff has neither properly requested nor received leave from the Court to amend her Complaint, the FAC remains the operative complaint.

On March 4, 2012, Defendants submitted a Reply in further support of their Motion to Dismiss. (Doc. # 39.)

STANDARD OF REVIEW

I. *Federal Rule of Civil Procedure 12(b)(6)*

Pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* ("Rule"), a motion to dismiss will be granted where the plaintiff fails to state a claim upon which relief can be granted. Review is limited to the contents of the complaint. See *Clegg v. Cult Awareness Network, 18 F.3d 752, 754 (9th Cir. 1994)*. **[*9]** A complaint may be dismissed as a matter of law for one of two reasons: "(1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal claim." *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984)* (citation omitted). "A trial court may dismiss a claim sua sponte under *[Rule] 12(b)(6)*. Such a dismissal may be made without notice where the claimant cannot possibly win relief." *Omar v. Sea-Land Serv., Inc., 813 F.2d 986, 991 (9th Cir. 1987)*. Allegations of fact in the complaint must be taken as true and construed in the light most favorable to the plaintiff. See *Livid Holdings Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005)*.

A complaint need not include detailed facts to survive a *Rule 12(b)(6)* motion to dismiss. See *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In providing grounds for relief, however, a plaintiff must do more than recite the formulaic elements of a cause of action. See *id. at 556-57*; see also *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988)* ("[C]onclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim.") (citation omitted). **[*10]** "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (internal quotations and citations omitted). Thus, "bare assertions amounting to nothing more than a formulaic recitation of the elements" of a claim "are not entitled to an assumption of truth." *Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009)* ("[T]he non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.") (internal quotations and citations omitted).

A court looks at whether the facts in the complaint sufficiently state a "plausible" ground for relief. See *Twombly, 550 U.S. at 570*. A plaintiff must include enough facts to raise a reasonable expectation that discovery will reveal evidence and may not just provide a speculation of a right to relief. *Id. at 586*. When a complaint fails to adequately state a claim, such deficiency should be "exposed at the point of minimum expenditure of time and money by **[*11]** the parties and the court." *Id. at 558* (citation omitted). If a court dismisses the complaint or portions thereof, it must consider whether to grant leave to amend. *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)* (finding that leave to amend should be granted "if it appears at all possible that the plaintiff can correct the defect") (internal quotations and citations omitted).

II. Federal Rule of Civil Procedure 8

Federal Rule of Civil Procedure 8 mandates that a complaint include a "short and plain statement of the claim," *Fed. R. Civ. P. 8(a)(2)*, and that each allegation "be simple, concise, and direct." *Fed. R. Civ. P. 8(d)(1)*. A complaint that is so confusing that its "'true substance, if any, is well disguised'" may be dismissed for failure to satisfy *Rule 8*. *Hearns v. San Bernardino Police Dep't, 530 F.3d 1124, 1131 (9th Cir. 2008)* (quoting *Gillibeau v. City of Richmond, 417 F.2d 426, 431 (9th Cir. 1969))*; see also *McHenry v. Renne, 84 F.3d 1172, 1180 (9th Cir. 1996)* ("Something labeled a complaint but written ..., prolix in evidentiary detail, yet without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs, fails to perform the essential functions **[*12]** of a complaint."); *Nevijel v. N. Coast Life Ins. Co., 651 F.2d 671, 673 (9th Cir. 1981)* ("A complaint which fails to comply with [*Rule 8*] may be dismissed with prejudice[.]").

Put slightly differently, a complaint may be dismissed for failure to comply with Rule 8 where it fails to provide the defendants fair notice of the wrongs they have allegedly committed. See McHenry, 84 F.3d at 1178-80 (affirming dismissal of complaint where "one cannot determine from the complaint who is being sued, for what relief, and on what theory, with enough detail to guide discovery"); cf. Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1105 n. 4 (9th Cir. 2008) (finding dismissal under Rule 8 was in error where "the complaint provide[d] fair notice of the wrongs allegedly committed by defendants and [did] not qualify as overly verbose, confusing, or rambling"). Rule 8 requires more than "the-defendant-unlawfully-harmed-me accusation[s]" and "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." Iqbal, 129 S. Ct. at 1949 (citations and quotations omitted). "The propriety of dismissal for failure to comply with Rule 8 does not **[*13]** depend on whether the complaint is wholly without merit." McHenry, 84 F.3d at 1179.

The court may "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Iqbal, 129 S. Ct. at 1950. Legal conclusions must be supported by factual allegations. Id. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id.

III. Federal Rule of Civil Procedure 9(b)

Federal Rule of Civil Procedure 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Under Ninth Circuit law, "Rule 9(b) requires particularized allegations of the circumstances constituting fraud." In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1547-48 (9th Cir. 1994) (en banc), superseded on other grounds by 15 U.S.C. § 78u-4.

In their pleadings, plaintiffs must include the time, place, and nature of the alleged fraud; "mere conclusory allegations of fraud are insufficient" to satisfy this requirement. Id. at 1548 (quoting Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989)). **[*14]** "[T]he circumstances constituting the alleged fraud [must] 'be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009) (quoting Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)); see also Moore, 885 F.2d at 540 (finding that Rule 9(b) requires a plaintiff to attribute particular fraudulent statements or acts to individual defendants). However, "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b); see also In re GlenFed, Inc. Sec. Litig., 42 F.3d at 1547 ("We conclude that plaintiffs may aver scienter . . . simply by saying that scienter existed."); Walling v. Beverly Enter., 476 F.2d 393, 397 (9th Cir. 1973) (finding that Rule 9(b) "only requires the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations" (citations omitted)).

A motion to dismiss for failure to plead with particularity is the functional equivalent of a motion to dismiss under Rule 12(b)(6) **[*15]** for failure to state a claim. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107 (9th Cir. 2003). In considering a motion to dismiss, the court is not deciding the issue of "whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974) overruled on other grounds by Davis v. Scherer, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984).

DISCUSSION

Moving Defendants contend that the FAC is based on conclusory and unsupported allegations and therefore should be dismissed for failure to comply with Federal Rule of Civil Procedure 12(b)(6). [4] This Court agrees.

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[4] The Court notes that Plaintiff's FAC is a boilerplate complaint alleging many of the same causes of action that she has alleged in previous actions against mortgage lenders and that have been alleged in numerous actions by other pro se plaintiffs before this Court. This Court has dismissed these complaints for failure to state a claim, explaining in detail the complaints' deficiencies.

I. Role of MERS

It appears that Plaintiff's allegations are based in part on her misconception of MERS' role in the mortgage lending process. For example, Plaintiff alleges that IndyMac or OneWest "sold and/or transferred the Note and Mortgage to, or through 'MERS' without proper endorsement or assignments during the life of the loan, resulting in said Defendants not having the right and interest to foreclose upon the subject property." (FAC ¶ 33.) Plaintiff further alleges that "none of said Defendants [IndyMac, OneWest, or MERS] have Plaintiff's original Note and as a consequence, they have no authority to enforce the provisions of the Mortgage and Note against Plaintiff, or Plaintiff's property." (Id. ¶ 34.)

As a preliminary matter, the Court notes that MERS acted solely as a nominee for the Lenders. (See RJN, Ex. C.) Moreover, MERS assigned its interest in the Mortgage to OneWest prior to One West's initiation of foreclosure proceedings on January 10, 2010. (See id., Exs. D, E.) As such, MERS did not have any role in the foreclosure process, which was conducted solely by OneWest. (See id., Ex. F.) Therefore, Plaintiff's **[*17]** assertions that MERS attempted to enforce provisions of the Mortgage or Note are wholly without merit.

Further, insofar as Plaintiff's claims are based on allegations that MERS' involvement invalidly split the Note and Mortgage, the Court concludes that these contentions are not tenable in light of the Ninth Circuit's decision in Cervantes v. Countrywide Home Loans, which expressly rejected the "note-splitting" theory and upheld the MERS system. See *656 F.3d 1034, 1044 (9th Cir. 2011)* ("Even if we were to accept the plaintiffs' premises that MERS is a sham beneficiary and the note is split from the deed, we would reject the plaintiffs' conclusion that, as a necessary consequence, no party has the power to foreclose."); see also *Velasco v. Sec. Nat'l Mortg. Co., 823 F. Supp. 2d 1061, 2011 U.S. Dist. LEXIS 118956, 2011 WL 4899935, at *11 (D. Haw. Oct. 14, 2011)* ("[A]ny argument that MERS lacked the authority to assign its right to foreclose and sell the property based on its status as 'nominee' cannot stand in light of Cervantes."); *Johnson v. Homecomings Fin., 2011 U.S. Dist. LEXIS 106216, 2011 WL 4373975, at *7 (S.D. Cal. Sept. 20, 2011)* (rejecting the note-splitting theory as a "discredited theory."). [5]

Accordingly, Plaintiff's allegations that the foreclosure was improper solely because of MERS' involvement are not viable.

II. Count I: Injunctive Relief

Plaintiff seeks an injunction to enjoin OneWest from selling, transferring, or "denying Plaintiff possession" of the Subject **[*19]** Property during the pendency of the action. (FAC ¶ 45.)

As an initial matter, to the extent that Plaintiff seeks a preliminary injunction, she may not do so in a complaint. Pursuant to *Local Rule 10.2*, an "application for a temporary restraining order or preliminary injunction shall be made in a document separate from the complaint."

See, e.g., *Vertido v. GMAC Mortg. Corp., 2012 U.S. Dist. LEXIS 5117, 2012 WL 139212 (D. Haw. Jan. 17, 2012)*; *Hoilien v. Bank of Am., 2011 U.S. Dist. LEXIS 89155, 2011 WL 3494523 (D. Haw. Aug. 10, 2011)*; *Hoilien v. Bank of Am., 2011 U.S. Dist. LEXIS 67662, 2011 WL 2518731 (D. Haw. June 23, 2011)*; **[*16]** *Phillips v. Bank of Am., 2011 U.S. Dist. LEXIS 6745, 2011 WL 240813 (D. Haw. Jan. 21, 2011)*.

[5] In addition to the Ninth Circuit's instruction **[*18]** on MERS, this Court has previously instructed Plaintiff on the insufficiency of bald assertions about MERS. For example, in a 2011 order in another case filed by Plaintiff against mortgage lenders, this Court noted:

> Plaintiff appears to be alleging that MERS may not foreclose, or has improperly foreclosed, because it is not a holder of the note. As it stands, however, Plaintiff's Count XII makes little sense because standing is a requirement for a plaintiff in order to proceed in a lawsuit, not one that a defendant must establish. Further, Plaintiff's statement that MERS has no legal standing to foreclose is a conclusory allegation insufficient to state a claim upon which relief may be granted.

*Hoilien v. Bank of Am., 2011 U.S. Dist. LEXIS 89155, 2011 WL 3494523, at *11 (D. Haw. Aug. 10, 2011)*; see also *Hoilien v. Bank of Am., 2011 U.S. Dist. LEXIS 67662, 2011 WL 251831, at *13 (D. Haw. June 23, 2011)*; *Hoilien v. Bank of Am., 2011 U.S. Dist. LEXIS 27863, 2011 WL 976699, at *14 (D. Haw. Mar. 17, 2011)*.

Moreover, the Court follows the well-settled rule that a claim for injunctive relief cannot stand as an independent cause of action. See, e.g., *Long v. JP Morgan Chase Bank, N.A., ___ F. Supp. 2d ___, 2012 U.S. Dist. LEXIS 8458, 2012 WL 220791, at * 10 (D. Haw. Jan. 25, 2012)* (explaining that "injunctive relief standing alone is not a cause of action"); *Jensen v. Quality Loan Serv. Corp., 702 F. Supp. 2d 1183, 1201 (E.D. Cal. 2010)* ("A request for injunctive relief by itself does not state a cause of action ....A pleading can . . . request injunctive relief in connection with a substantive claim, but a separately pled claim or cause of action for injunctive relief is inappropriate.") (internal quotations and citations omitted); *Plan Pros, Inc. v. Zych, 2009 U.S. Dist. LEXIS 28780, 2009 WL 928867, at *2 (D. Neb. Mar. 31, 2009)* (stating that "no independent cause of action for injunction exists"); *Motley v. Homecomings Fin., LLC, 557 F. Supp. 2d 1005, 1014 (D. Minn. 2008)* **[*20]** (same); see also *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1051 (9th Cir. 2008)*. Injunctive relief may be available if Plaintiff prevails—or satisfies requirements for such relief under *Rule 65 of the Federal Rules of Civil Procedure*—on an independent cause of action. The Court therefore **DISMISSES** Count I.

III. Count II: Wrongful Sale of Subject Property

Count II alleges that Defendants "wrongfully and without legal right" conducted a non-judicial foreclosure of the Subject Property. (FAC ¶ 54.) As a preliminary matter, it is unclear to the Court specifically what cause of action Plaintiff is asserting in this Count. Plaintiff fails to cite any relevant statute or law pursuant to which Defendants' alleged behavior is prohibited. Neither Defendants nor the Court are required to speculate as to which law Plaintiff is suing under or how Defendants violated such law. Vague allegations containing mere labels and conclusions are insufficient to survive a motion to dismiss. See *Twombly, 550 U.S. at 555*. On these grounds alone, Plaintiff's claim for wrongful sale fails.

Additionally, Plaintiff has alleged no facts to support her allegation that the sale was wrongful. Plaintiffs have not identified **[*21]** any procedural errors in the foreclosure process itself that would make the foreclosure "wrongful." See *Doran v. Wells Fargo Bank, 2011 U.S. Dist. LEXIS 126418, 2011 WL 5239738, at *9 (D. Haw. Oct. 31, 2011)* (indicating that a "wrongful foreclosure" claim failed under Hawaii law because the notice of foreclosure was procedurally proper under HRS Ch. 667). Moreover, although Hawaii has not specifically recognized a common law wrongful foreclosure cause of action, "[s]ubstantive wrongful foreclosure claims [in other jurisdictions] typically are available after foreclosure and are premised on allegations that the borrower was not in default, or on procedural issues that resulted in damages to the borrower." *Cervantes, 656 F.3d at 1043 (9th Cir. 2011)*. Plaintiff does not claim that she was not in default on the Mortgage, nor does she identify any procedural issues that resulted in damages to her. She merely alleges that Defendants initiated and conducted a non-judicial foreclosure of Plaintiff's property, and sold the property to themselves at the foreclosure sale. (FAC ¶ 54.) This is not wrongful in light of the fact that OneWest had a legal right under the Mortgage to enforce its foreclosure rights in the event of **[*22]** default. [6] (See Doc. # 29, Ex. C.) Accordingly, the Court **DISMISSES** Count II.

IV. Count IV: Unfair or Deceptive Acts or Practices

Plaintiff claims that IndyMac, OneWest, and MERS violated *Hawaii Revised Statutes ("H.R.S.") section 480-2(a)* by engaging in unfair or deceptive acts or practices ("UDAP"). [7] (FAC ¶¶ 61, 64, 68.) *Section 480-2(a)* prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce[.]" Plaintiff makes six allegations that comprise the basis of her UDAP claim: (1) "[t]argeting financially unsophisticated and otherwise vulnerable consumers for inappropriate crew products"; (2) "[f]ailing to adequately disclose the true costs and risks of the subject loan and its inappropriateness for Plaintiff"; (3) "[m]aking a refinance loan that resulted in little net economic benefit to Plaintiff with the primary objective **[*23]** of general fees"; (4) "[m]aking the loan based on the value of the collateral, without regard to Plaintiff [sic] ability to repay the loan"; (5)

[6] The Mortgage explicitly provides, "Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with power of sale, the following described property ...." (emphasis added) (Doc. # 29, Ex. C, at 2.)

[7] Plaintiff also asserts a violation of *§ 481A-3(a)*, but this statute is inapplicable to mortgage transactions. See *Cavaco v. Mortg. Elec. Registration Sys., 2011 U.S. Dist. LEXIS 44484, 2011 WL 1565979, at *7 n.1 (D. Haw. Apr. 25, 2011)*.

[f]ailing to provide Plaintiff with a timely Good Faith Estimate "GFE" and a fully executed Truth I [sic] Lending Disclosure Statement"; and (6) "[a]ttempting to deprive Plaintiff of her legal right to cancel the loan." (Id. ¶ 61.)

As an initial matter, *12 C.F.R. § 560.2(b)* preempts state claims predicated on TILA violations, including failures to make required disclosures. *Kajitani v. Downey Sav. & Loan Assoc., F.A., 647 F. Supp. 2d 1208, 1220 (D. Haw. 2008)*. Consequently, to the extent that Plaintiff's UDAP is based on an alleged failure to provide TILA disclosure documents, those claims are preempted by federal law.

Next, Plaintiff's UDAP claim is subject to a four-year statute of limitations, which starts to run at the time of a cause of action's accrual. *Haw. Rev. Stat. § 480-24(a)*. Plaintiff's first five allegations in this Count **[*24]** occurred either prior to or at the time of the loan consummation. Because the loan was consummated on March 9, 2007, and because Plaintiff did not file her complaint until June 6, 2011, these claims are time-barred.

Finally, Plaintiff's sixth allegation does not satisfy the pleading requirements set forth in *Rule 8*. Plaintiff asserts that Defendants attempted to deprive Plaintiff of her legal right to cancel the loan but the allegations do not make clear what actions Defendants engaged in that allegedly deprived Plaintiff this right. [8] Because Plaintiff does not provide sufficient factual detail to support this conclusory allegation, Plaintiff has failed to state a valid UDAP claim. See *Iqbal, 129 S. Ct. at 1949*.

Accordingly, the Court **DISMISSES** Count IV.

V. Count V: Truth in Lending Act Violations: Loan Rescission and Recoupment

Plaintiff asserts that because IndyMac failed to provide her with disclosure documents required by TILA, Plaintiff is entitled to **[*25]** rescission, reasonable attorney's fees and costs, and recoupment. (FAC ¶¶ 74, 77-84.)

TILA provides a borrower with the right to rescind a loan transaction "until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section . . . , whichever is later ...." *15 U.S.C. § 1635(a)*. However, this right to rescind expires "three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor...." Id. *§ 1635(f)*. Because *§ 1635(f)* is an absolute statute of repose, it is not subject to equitable tolling. See *Caraang v. PNC Mortg., 795 F. Supp. 2d 1098, 1113 (D. Haw. 2011)*.

Here, Plaintiff entered into the loan transaction on March 9, 2007, but did not file her original complaint until over four years later, on June 6, 2011. Consequently, her rescission claim is time-barred.

Plaintiff tries to overcome the three-year absolute bar to bringing a TILA rescission claim by asserting **[*26]** a right to recoupment pursuant to *§ 1640(a)* and *(e)*. (FAC ¶ 84.) This claim fails for two reasons. First, *§ 1640* only provides for a recoupment defense, not a cause of action. See *Henderson v. GMAC Mortg. Corp., 347 Fed. Appx. 299, 302 (9th Cir. 2009)* (citing *Beach v. Ocwen Fed. Bank, 523 U.S. 410, 415, 118 S. Ct. 1408, 140 L. Ed. 2d 566 (1998))* (explaining that because the borrowers initiated the action, they could not succeed under a theory of recoupment). [9] Second, rescission in the nature of recoupment is subject to the same three-year statute of repose as a claim for rescission. See *Beach v. Ocwen Fed. Bank, 523 U.S. 410, 418-19, 118 S. Ct. 1408, 140 L. Ed. 2d 566 (1998)* ("[TILA] permits no federal right to rescind, defensively or otherwise, after the 3-years period of *§ 1635(f)* has run.").

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[8] As the Court previously explained, Plaintiff cannot base her claim on either occurrences that happened prior to June 6, 2007, or TILA violations, including Defendants' alleged failure to provide her with a Notice of Right to Cancel.

[9] Although not published, Henderson was issued after January 1, 2007, and may be cited pursuant to ***Federal Rule of Appellate Procedure 32.1(a)*** and *Ninth Circuit Rule 36-3(b)*.

Accordingly, the Court **DISMISSES** Count V on the ground that these claims are time barred.

VI. Counts III and VI: Fraudulent Concealment-Tolling of Statute; Truth in Lending Act Violations: Loan Damages[10]

Plaintiff claims that she is entitled to damages pursuant to *15 U.S.C. §§ 1635(g)* and *1640* for Defendants' alleged failure to allow rescission and failure to comply with TILA's requirements. (FAC ¶¶ 87-88.)

Section 1635(g) allows a court to provide relief for violations relating to the right to rescind. As explained above, however, Plaintiff's rescission claim is time-barred. She therefore cannot state a valid claim under *§ 1635(g)*. *Section 1640(a)(1)* provides a cause of action for damages from breaches of TILA. *Section 1640*, however, is governed by the one-year statute of limitations of *§ 1640(e)*. Plaintiff asserts that because of the fraudulent misrepresentation and concealment of the terms of Plaintiff's loan and mortgage, the statute of limitations on Plaintiff's TILA claim should be equitably **[*28]** tolled. (FAC ¶¶ 55-56.)

As a general matter, "[e]quitable tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain vital information bearing on the existence of his claim." *Santa Maria v. Pac. Bell, 202 F.3d 1170, 1178 (9th Cir. 2000)*. For TILA damages claims, equitable tolling may apply to suspend the limitations period "until the borrower discovers or had reasonable opportunity to discover the fraud or nondisclosures that form the basis of the TILA action." *King v. California, 784 F.2d 910, 915 (9th Cir. 1986)*. However, equitable tolling does not apply if a plaintiff does not allege facts demonstrating that discovery of the purported TILA violation would not have been possible with reasonable diligence. *Hubbard v. Fid. Fed. Bank, 91 F.3d 75, 79 (9th Cir. 1996)* (holding that equitable tolling did not apply where "nothing prevented [the plaintiff] from comparing the loan contract, Fidelity's initial disclosures, and TILA's statutory and regulatory requirements."); see also *Garcia v. Wachovia Mortg. Corp., 676 F. Supp. 2d 895, 906 (C.D. Cal. 2009)* (construing Hubbard as establishing that "the mere existence of TILA violations and lack of disclosure does not **[*29]** itself equitably toll the statute of limitations"). Further, where the basis for equitable tolling is fraudulent concealment, the circumstances constituting fraud must be pled with particularity pursuant to *Rule 9(b)*. See *389 Orange St. Partners v. Arnold, 179 F.3d 656, 662 (9th Cir. 1999)*.

Here, although Plaintiff has alleged that IndyMac failed to provide required TILA disclosures, Plaintiff has not asserted any facts to support the conclusion that, despite her best diligence, Plaintiff could not have discovered the alleged TILA violations. As such, Plaintiff has not alleged a basis for tolling the limitations period set forth in the *§ 1640(e)*.

For the reasons set forth above, the Court **DISMISSES** Counts III and VI.

VII. Count VII: Real Estate Settlement Procedures Act (RESPA) Violations

Plaintiff alleges that she did not receive a Good Faith Estimate in violation of RESPA requirements. (FAC ¶ 90.) However, no private right of action exists under RESPA for such a violation. *Araki v. One West Bank FSB, 2010 U.S. Dist. LEXIS 140797, 2010 WL 5625969, at *8 (D. Haw. Sept. 8, 2010)* (citing *Collins v. FMHA-USDA, 105 F.3d 1366, 1367 (11th Cir. 1997)* ("[T]here is no private civil action for a violation of *12 U.S.C. § 2604(c)*, **[*30]** or any regulations relating to it.")); see also *Palestini v. Homecomings Fin., LLC, 2010 U.S. Dist. LEXIS 72985, 2010 WL 3339459, at *4 (S.D. Cal. Aug. 23, 2010)* ("[T]here is no private right of action under [*§§ 2603-04*] for Defendants' alleged failure to provide accurate disclosures, good faith estimates, or settlement statements."); *Pressman v. Meridian Mortg. Co., 334 F. Supp. 2d 1236, 1242 n.4 (D. Haw. 2004)*. Accordingly, the Court **DISMISSES** Count VII.

VIII. Count VIII: Fraud

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[10] Count III of Plaintiff's FAC alleges "Fraudulent Concealment—Tolling of Statute." Equitable **[*27]** tolling, however, is not an independent cause of action; it is a doctrine that serves to toll a statute of limitations that would otherwise bar a plaintiff from bringing a cause of action. See *King v. California, 784 F.2d 910, 915 (9th Cir. 1986)*. Thus, the Court reads Plaintiff's third Count requesting tolling of TILA's statute of limitations in conjunction with Plaintiff's claim for TILA damages.

As the basis for her fraud claim against IndyMac, Plaintiff asserts that IndyMac falsely evaluated Plaintiff's income and falsely represented the true costs and risks of the loan, and "the nature and extent of the documents." [11] (FAC ¶¶ 93-95.)

Plaintiff's allegations of fraud do not meet *Rule 9(b)*'s heightened pleading standards, which require a pleading to "identify the who, what, when, where and how of the misconduct charged, as well as what is false or misleading about [the purportedly fraudulent] statement, and why it is false." *Cafasso v. Gen. Dynamics C4 Sys., 637 F.3d 1047, 1055 (9th Cir. 2011)* (internal quotation marks omitted). In her FAC, Plaintiff does not identify what the allegedly false or misleading representations were, when and where they were made, who made these representations, or why they were false or misleading. Plaintiff offers only vague allegations of false evaluations or representations and has therefore failed to allege with sufficient particularity the elements of a claim for fraud. *In re GlenFed, 42 F.3d at 1548*.

Accordingly, the Court **DISMISSES** Count VIII.

IX. Antitrust Violations

a. Count IX: Sherman Anti-Trust Act Violations

Count IX alleges a violation of the Sherman Antitrust **[*32]** Act, *15 U.S.C. § 2*. (FAC ¶ 112.) Plaintiff alleges that Defendants "engaged in predatory conduct and anti-competitive conduct in an attempt to monopolize the mortgage lending and servicing market." (Id. ¶ 102.) Further, Plaintiff alleges that Defendants "worked to create the collapse of the mortgage market, which in turn created an economic collapse unprecedented since the Great Depression." (Id. ¶ 110.) Plaintiff seeks monetary relief for this alleged violation, presumably pursuant to Section 4 of the Clayton Antitrust Act, *15 U.S.C. § 15*.

Section 2 of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." Id. *§ 2*. Monopolization and attempted monopolization are the two traditional claims asserted under *Section 2*. To state a claim for monopolization, the plaintiff must sufficiently allege: "'(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, **[*33]** or historic accident.'" *John Doe 1 v. Abbott Labs., 571 F.3d 930, 933 n.3 (9th Cir. 2009)* (quoting *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992))*.

To state a claim for attempted monopolization, the plaintiff must allege: "'(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.'" *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 893 (9th Cir. 2008)* (quoting *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*.

An antitrust plaintiff must also demonstrate that the injury in question is "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Indeed, the antitrust laws "were enacted for 'the protection of competition, not competitors.'" *Id. at 488* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1961))*.

A plaintiff seeking damages pursuant to Section 4 of the Clayton Act must show causal antitrust injury, and, to obtain injunctive relief pursuant to *Section 16* of the Clayton Act, a plaintiff must allege threatened antitrust injury.

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[11] Although Plaintiff's allegations of fraud are not against the Moving Defendants, the Court addresses this issue sua sponte because Plaintiff alleges that the Moving Defendants "are subject to the Mortgage and Note violations of all of its predecessors and said violations serve to bar said Defendants from taking any action against Plaintiff and/or the 'property'...." (FAC ¶ 37.) Plaintiff further alleges that the Moving Defendants "knew or should have known" of IndyMac's alleged violations. (FAC **[*31]** ¶ 38.) These bare assertions are not entitled to an assumption of truth. See *Iqbal, 129 S. Ct. at 1951*. Moreover, the underlying fraud allegations against IndyMac do not state a claim for relief.

Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 109-13, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986). **[*34]** The purpose of the antitrust injury requirement is to "ensure[ ] that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief." Atlantic Richfield Co. v. USA Petroleum, Inc., 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990). As such, "[t]o show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior [because] it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition." Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995) (citing Atlantic Richfield, 495 U.S. at 334); see also *Cascade, 515 F.3d at 902* ("'Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.'") (quoting Brunswick, 429 U.S. at 489).

In **[*35]** addition to antitrust injury, antitrust plaintiffs must also properly allege a relevant market. See Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1044 (9th Cir. 2008) (finding that to state a claim under either Section 1 or Section 2 of the Sherman Act, the plaintiff must sufficiently allege a relevant market). The Ninth Circuit recently reaffirmed that a complaint may be dismissed under Rule 12(b)(6) if its relevant market definition is "facially unsustainable." Id. at 1045 (citing Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436-37 (3d Cir. 1997)). The relevant market includes both the product market and the geographic market. Brown Shoe, 370 U.S. at 324; Newcal Indus., 513 F.3d at 1045 n.4. As to the product market, it must "encompass the product at issue as well as all economic substitutes for the product." Newcal Indus., 513 F.3d at 1045 (citing Brown Shoe, 370 U.S. at 325). It must therefore include "the group of sellers or producers who have the 'actual or potential ability to deprive each other of significant levels of business.'" Forsyth v. Humana, Inc., 114 F.3d 1467, 1476 (9th Cir. 1997) (quoting Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989)); **[*36]** see also Brown Shoe, 370 U.S. at 325 ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."). "In limited settings, however, the relevant product market may be narrowed beyond the boundaries of physical interchangeability and cross-price elasticity to account for identifiable submarkets or product clusters." Thurman Indus., 875 F.2d at 1374 (citation omitted). To establish the existence of a legally cognizable submarket, "the plaintiff must be able to show (but need not necessarily establish in the complaint) that the alleged submarket is economically distinct from the general product market." Newcal Indus., 513 F.3d at 1045; see also Brown Shoe, 370 U.S. at 325 (listing several "practical indicia" of an economically distinct submarket).

Here, Plaintiff asserts that the relevant market is the "mortgage lending and servicing market" (FAC ¶ 113) but the complaint is utterly devoid of any explanation or elaboration to support this contention. For example, the FAC does not contain any allegations concerning economic substitutes for the proposed product market, **[*37]** and it is entirely unclear to the Court why Plaintiff defined the relevant market in the way that they did. Moreover, the FAC fails to specify a relevant geographic market. As such, Plaintiff's relevant market definition is "facially unsustainable." Newcal, 513 F.3d at 1044.

In addition, Plaintiff alleges no facts to indicate that Defendants engaged in any sort of predatory or anticompetitive conduct. The Court cannot glean from Plaintiff's purely conclusory allegations that Defendants engaged in the type of conduct that the Sherman Act aims to prevent. In fact, Plaintiff's allegations in this count sound more in fraud. For example, Plaintiff alleges that Defendants "knew the scheme would cause a liquidity crisis that would devastate Plaintiff's home value ....Defendants did not care because their plan was based on insider training [sic]" (FAC ¶ 106) and "[t]his massive fraudulent scheme was a disaster both foreseen by Defendants and waiting to happen" (id. ¶ 108). Such vague and sweeping assertions are woefully insufficient to state a claim for monopolization or attempted monopolization in violation of the Sherman Act.

The Supreme Court acknowledged, in a case involving an alleged Sherman **[*38]** Antitrust Act violation, that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." Associated Gen. Contractors of Cal., Inc. v. Cal. State Counsel of Carpenters, 459 U.S. 519, 528 n. 17, 103 S. Ct. 897, 74 L. Ed. 2d 723; see also Twombly, 550 U.S. at 558 ("[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . , but quite another to forget that proceeding to antitrust discovery can be expensive."); *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1046-47 (9th Cir. 2008)* (concluding that the Supreme Court clarified antitrust pleading requirements in Twombly "because discovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case") (citing *Twombly, 550 U.S. at 558-59*). Because Plaintiff has provided nothing more than conclusory allegations in support of her antitrust claim, this claim must be dismissed.

b. Count X: Hawaii Anti-Trust Act and Monopolization Act

Plaintiff attempts to state a claim pursuant to the Hawaii Antitrust Act (*Haw. Rev. Stat. § 480-13*), **[*39]** and the Hawaii Monopolization Act (*Haw. Rev. Stat. § 480-9*) by relying exclusively on the allegations set forth in Count IX for her alleged Sherman Act claim. (FAC ¶ 115.)

The close relationship between federal ***antitrust law*** and Hawaii ***antitrust law*** has been well-established. See, e.g., *Robert's Hawaii Sch. Bus v. Laupahoehoe Transp. Co., Inc., 91 Haw. 224, 982 P.2d 853, 881 n.29 (Haw. 1999)* (noting the similarities between *Section 2* of the Sherman Antitrust Act and *Haw. Rev. Stat. § 480-9*). Indeed, the "[l]egislative history of Hawaii's ***antitrust law*** clearly indicates that the state laws are to be interpreted and construed in harmony with analogous federal antitrust laws." *Island Tobacco Co., Ltd. v. R. J. Reynolds Indus., Inc., 513 F. Supp. 726, 738 (D. Haw. 1981)*. As with federal courts applying federal ***antitrust law***, Hawaii courts require plaintiffs in antitrust proceedings to plead the "nature of the competition" to "ensure that the injury results from a competition-reducing aspect of the defendant's behavior." *Davis v. Four Seasons Hotel Ltd., 122 Haw. 423, 228 P.3d 303, 325 (Haw. 2010)* (citing and relying on federal law).

As with Plaintiff's Sherman Act claim, Plaintiff's state antitrust claim is entirely **[*40]** conclusory and fails to set forth sufficient factual allegations to withstand a motion to dismiss. Broad assertions of state ***antitrust law*** violations of the type presented here simply do not give Defendants an opportunity to properly defend themselves. See *Iqbal, 129 S. Ct. at 1949* ("A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do."); see also *Pickern v. Pier 1 Imports (U.S.), Inc., 457 F.3d 963, 968 (9th Cir. 2006)* ("*Federal Rule of Civil Procedure 8(a)(2)* requires that the allegations in the complaint give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.") (internal quotation and citation omitted). Accordingly, the Court **DISMISSES** Count X.

X. Count XI: Failure to Act in Good Faith

Plaintiff next alleges that IndyMac and/or DOE Defendants "owed Plaintiff a fiduciary duty to deal with her in good faith and in a fair manner" and that IndyMac and/or DOE Defendants breached that duty by failing to deal with Plaintiff in good faith and in a fair manner. [12] (FAC ¶¶ 119-20.)

It is well-established that absent "special circumstances," lenders generally owe no fiduciary duties to their borrowers. See, e.g., *Isagawa v. Homestreet Bank, 769 F. Supp. 2d 1225, 1237 (D. Haw. 2011)*; *Bank of Am. Corp. v. Superior Court, 198 Cal. App. 4th 862, 130 Cal. Rptr. 3d 504, 510 n.7 (Cal. Ct. App. 2011)* ("Absent special circumstances, a loan transaction is at arm's length and there is no fiduciary relationship between the borrower and lender."); *Jones v. Thompson, 338 S.W.3d 573, 583 (Tex. App. 2010)*("[N]o fiduciary relationship exists between a lender and a borrower."); *Miller v. U.S. Bank of Wash., N.A., 865 P.2d 536, 543, 72 Wn. App. 416 (Wash. App. 1994)* ("The general rule . . . is that a lender is not a fiduciary of its borrower."); *Huntington Mortg. Co. v. DeBrota, 703 N.E.2d 160, 167 (Ind. App. 1998)* ("A lender does not owe a fiduciary duty to a borrower absent some special circumstances."); *Ellipso, Inc. v. Mann, 541 F. Supp. 2d 365, 373 (D.D.C. 2008)* ("[T]he relationship between a debtor and a creditor is ordinarily a contractual relationship . . . and is not fiduciary in nature."); *BHC Interim Funding, L.P. v. Finantra Capital, Inc., 283 F. Supp. 2d 968, 989 (S.D.N.Y. 2003)* **[*42]** ("[T]he relationship between a lender and borrower is not fiduciary in nature.").

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[12] Even though this claim is not alleged directly against Moving Defendants, the Court reviews this issue sua **[*41]** sponte insofar as Plaintiff attempts to impute liability for these alleged violations on the Moving Defendants.

Plaintiff does not allege any facts to support a finding that there exists "special circumstances" that would trigger a fiduciary duty here. Merely stating that Defendants "owed Plaintiff a fiduciary duty to deal with her in good faith and in a fair manner" is conclusory and insufficient to establish a fiduciary duty on the part of the lender. Based on the facts alleged in the Complaint, this Court has no reason to believe that Plaintiff's relationship with IndyMac or the Doe Defendants was anything other than an ordinary, arm's-length, lender-borrower relationship. *Iqbal, 129 S. Ct. at 1949*. Accordingly, the Court **DISMISSES** Count XI.

XI. Count XII: Unjust Enrichment

Plaintiff alleges that she is entitled to restitution and attorney's fees because IndyMac and/or DOE Defendants were unjustly enriched by "charging a higher interest rate, fees, rebates, kickbacks, profits and gains from any resale of mortgages and notes using Plaintiff's identity, credit score, appraisal and reputation without consent, right, justification or excuse" and "through the receipt of payment from third parties ...." [13] (FAC **[*43]** ¶¶ 126-29.)

The two elements of an unjust enrichment claim are that: (1) Plaintiff has conferred a benefit upon Defendant, and (2) retention of that benefit would be unjust. *Porter v. Hu, 116 Haw. 42, 169 P.3d 994, 1007 (Haw. App. 2007)*. Unjust enrichment is available only where there is "an absence of an adequate remedy at law." Id. Thus, as a general rule, "[a]n action for unjust enrichment cannot lie in the face of an express contract." *Id. at 1006*; see also *AAA Haw., LLC v. Haw. Ins. Consultants, Ltd., 2008 U.S. Dist. LEXIS 92300, 2008 WL 4907976, at *3 (D. Haw. Nov. 12, 2008)* ("It is also well settled in federal courts that equitable remedies are not available when an express contract exists between the parties concerning the same subject matter.").

Plaintiff does not allege any facts demonstrating that she conferred a benefit on IndyMac or any other Defendant. Furthermore, an express contract exists between IndyMac and Plaintiff, governing the rights and obligations of the parties under the loan transaction. (FAC ¶ 9.) Plaintiff therefore **[*44]** cannot bring a claim for unjust enrichment. The Court therefore **DISMISSES** Count XII.

XII. Count XIII: Mistake

Plaintiff alleges that if Defendants' actions were not fraudulent, then "the underlying transaction was entered into based upon mutual mistake ...." (FAC ¶ 131.) Based on this purported wrongdoing, Plaintiff seeks actual damages, including all costs paid to obtain the loan. (Id.)

As with Plaintiff's fraud claim in Count VIII, Plaintiff's allegations of mistake are insufficient to meet the rigorous requirements under *Rule 9*. See *Fed. R. Civ. P. 9(b)* (requiring a party to state with particularity the circumstances constituting fraud or mistake). Plaintiff's conclusory allegation that the parties entered into the loan based upon mutual mistake is not sufficient to survive a motion to dismiss. Plaintiff utterly fails to assert any "particularized allegations of the circumstances" constituting mistake, such as the time, place, and nature of the alleged actions, and how each Defendant participated in the mistake. See *In re GlenFed, Inc. Sec. Litig., 42 F.3d at 1547-48*. Since Plaintiff has failed to state a claim based on mistake, the Court **DISMISSES** Count XIII.

XIII. Count XIV: Hawaii **[*45]** Bureau of Conveyance Regulations/FDCPA Violations

Count XIV alleges a violation of both (1) Hawaii Bureau of Conveyance Regulations, and (2) the Federal Fair Debt Collection Procedures Act ("FDCPA"), *15 U.S.C. § 1692(e)*.

a. Hawaii Bureau of Conveyances Regulations Violations

Plaintiff alleges that IndyMac's foreclosure of Plaintiff's real property violated Hawaii law, which allegedly provides that "before an entity would be entitled to receive a distribution from the sale of real property, their interest therein must have been recorded." (FAC ¶ 133.) To the extent that Plaintiff attempts to allege a violation of Hawaii state statutes governing the Bureau of Conveyances, Plaintiff fails to state a claim.

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[13] As with the previous Count, the Court reaches this issue sua sponte insofar as Plaintiff's theory of liability against the Moving Defendants is predicated on IndyMac's purported wrongdoings.

As a preliminary matter, the Court notes that Plaintiff fails to cite any provision of Hawaii law, statutory or otherwise, to support this allegation. As previously noted, neither Defendants nor the Court are required to speculate as to what law Plaintiff is suing under or how Defendants violated such law.

Moreover, the Court has not found any provision of Hawaii law that requires an entity to record its interest in a property before receiving a distribution from the sale. Indeed, recordation **[*46]** of a conveyance is only relevant for the purpose of providing notice to subsequent bona fide purchasers of the property. (See *Haw. Rev. Stat. § 502-8*.)[14] Because Plaintiff is not a subsequent bona fide purchaser of the Subject Property, this provision does not apply.

Accordingly, the Court finds that Plaintiff fails to state a claim for a violation of Hawaii state law with respect to recordation of a conveyance.

b. Federal Debt Collections Practices Act

Although not titled as such, Count XIV appears to also allege a claim for violation of the FDCPA. Plaintiff alleges that IndyMac's

> act of pursuing a non-judicial foreclosure action without the requisite legal title, while falsely stating that it had such title, and while lacking the right to engage in trust business in Hawaii, constitutes a false, deceptive or misleading representations or means in connection with the collection of a debt, in violation of the Federal **[*47]** Fair Debt Collection Procedures [sic] Act ....

(FAC ¶ 134.)

The FDCPA was enacted to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." *15 U.S.C. § 1692(e)*. To be liable for a violation of the FDCPA, the defendant must, as a threshold requirement, be a "debt collector" within the meaning of the FDCPA. *Heintz v. Jenkins, 514 U.S. 291, 294, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995)*. The FDCPA defines a "debt collector" as:

> [A]ny person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another .... The term does not include—
>
> > (A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor ....

15 U.S.C. § 1692a(6).

Plaintiff alleges that Defendants are "debt collectors" because "they regularly use instrumentalities of interstate commerce, **[*48]** and the mails, in attempting to collect, directly, or indirectly, debts owed or due or asserted to be owed or due to another ...." (FAC ¶ 135.) This conclusory assertion merely restates the definition of "debt collector" provided in the FDCPA. Plaintiff alleges no facts to suggest that Defendants are in fact "debt collectors" as contemplated by the FDCPA. This proposition is not self-evident as many district courts across the country have held that mortgage servicing companies are not debt collectors liable under the FDCPA. See e.g., *Williams v. Countrywide Home Loans, Inc., 504 F. Supp. 2d 176, 190 (S.D. Tex. 2007)* ("[L]enders and mortgage companies are not 'debt collectors' within the meaning of the FDCPA."); *Hulse v. Ocwen Fed Bank FSB, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002)* (noting that the "activity of foreclosing on [a] property pursuant to a deed of trust is not the collection of a debt within the meaning of the" FDCPA). Indeed, one important factor in determining whether a "mortgage servicing company" is a "debt collector" is whether "the debt was [ ] in default at the time it was assigned." *Caraang, 795 F. Supp. 2d at 1123* (quoting *Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir.*

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[14] The provision provides, "Every such conveyance not so recorded is void as against any subsequent purchaser, lessee, or mortgagee, in good faith and for a valuable consideration, not having actual notice of the conveyance of the same real estate ...." (*Haw. Rev. Stat. § 502-8*.)

1985)). **[*49]** Because the FAC alleges no facts to suggest that any of the Defendants are "debt collectors," this claim fails. Accordingly. the Court **DISMISSES** Count XIV.

XIV. Improper Securitization of the Loan

Counts XV and XVI both appear to arise from the securitization of Plaintiff's loan.

a. Count XV: Improper Restrictions Making Note and Mortgage Unenforceable

Count XV alleges that the securitization of the Mortgage via Defendants' "Pooling Arrangement" imposed "improper restrictions . . . leav[ing] the Note and Mortgage unenforceable." (FAC ¶¶ 141, 145.) Plaintiff alleges that she "was neither informed of, nor asked to consent to the securitization of the Mortgage" and that "[s]uch consent is required for changes pursuant to the terms of the original Mortgage." (Id. ¶ 146.) Plaintiff lists a variety of restrictions that the securitization process allegedly imposed on the Mortgage. [15]

Insofar as Count XV appears to allege wrongful securitization, the Court finds that Plaintiff fails to state a claim. This Court and others in the Ninth Circuit have consistently rejected similar claims as having no statutory or common law basis. See *Menashe v. Bank of N.Y., 850 F. Supp. 2d 1120, 2012 U.S. Dist. LEXIS 13945, 2012 WL 397437, at *18 (D. Haw. Feb. 6, 2012)* (noting that "numerous courts in this Circuit have likewise rejected that securitization of a mortgage loan provides the mortgagor a cause of action.").

Indeed, Plaintiff does not provide the Court with any legal authority for her claim, nor does Plaintiff point to any provision of the Note or Mortgage that prevents the lender from securitizing the loan or requires Plaintiff's consent prior to securitization. To the contrary, the Note expressly provides, "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower." (RJN, Ex. C ¶ 20 (emphasis added.)) Because Plaintiff does not allege facts indicating that Defendants' securitization of **[*51]** the loan was improper, Plaintiff fails to state a claim. Accordingly, the Court **DISMISSES** Count XV.

b. Count XVI: "Wrongful Conversion of Note — Mortgagor Never Consented to Securitization"

The allegations in Count XVI are similar to those set forth in Count XV. Plaintiff alleges, "[t]he securitization is a conversion of the Mortgage rendering it null, void and unenforceable. The consent required for changes to the Mortgage does not entail the right to convert the Mortgage into a security." (FAC ¶ 147.) Further, Count XVI alleges that "[t]he conversion of the Mortgage to Mortgage backed securities improperly attempts to divide the Note from the Mortgage to make the Note a separately enforceable interest." (Id. ¶ 151.)

Under Hawaii law, the elements of conversion are: "(1) [a] taking from the owner without his consent; (2) an unwarranted assumption of ownership; (3) an illegal use or abuse of the chattel; and (4) a wrongful detention after demand." *Pourny v. Maui Police Dep't., Cnty. of Maui, 127 F. Supp. 2d 1129, 1146 (D. Haw. 2000)* (citation omitted).

As discussed above, Defendants have an express contractual right to sell the Note or any portion thereof without prior notice to the Borrower. **[*52]** (See RJN, Ex. C ¶ 20.) Since Plaintiff's consent was not necessary, Plaintiff cannot satisfy the first element of conversion. Moreover, insofar as Plaintiff attempts to allege conversion based on Defendants' allegedly improper division of the Note from the Mortgage (see FAC ¶ 151), the Court notes that the Ninth Circuit has expressly rejected this "note-splitting" theory, as discussed above.

For these reasons, the Court **DISMISSES** Count XVI.

XVI. Count XVII: Breach of Contract

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[15] These restrictions allegedly include "[i]mposing restrictions to modification required to avoid double taxation and make collection of payments by the trust and payment to the investors a single pass through taxable event," "[i]mposing restrictions upon the number of Mortgages in the pool which may be modified," **[*50]** and "[p]roviding a procedure for foreclosure but no procedure to modify the loan as an alternate dispute resolution." (FAC ¶ 144.)

Plaintiff alleges that under the terms of her loan agreement with IndyMac, IndyMac agreed to loan Plaintiff $520,000. (FAC ¶ 9.) IndyMac was to pay off Plaintiff's prior mortgage and then pay Plaintiff the remainder through an escrow account with Stewart and Richmond. (Id. ¶¶ 7, 9.) Plaintiff contends that IndyMac, Stewart, and Richmond are liable for breaching the loan agreement by not giving Plaintiff a copy of the executed agreement and associated documents and by not tendering the money to Plaintiff. (Id. ¶ 157.)

To allege a breach of contract, "the complaint must, at minimum, cite the contractual provision allegedly violated. Generalized allegations of a contractual breach are not sufficient." *Otani v. State Farm Fire & Cas. Co., 927 F. Supp. 1330, 1335 (D. Haw. 1996)*; **[*53]** see *Menashe, __ F. Supp. 2d __, 2012 U.S. Dist. LEXIS 13945, 2012 WL 397437, at *14* ("[A] breach of contract claim requires a plaintiff to identify (1) the contract at issue; (2) the parties to the contract; (3) whether Plaintiff performed under the contract; (4) the particular provision of the contract allegedly violated by the Defendant; (5) when and how the Defendant allegedly breached the contract; and (6) how Plaintiff was injured.").

Plaintiff has not alleged any facts to support a breach of contract claim against OneWest or MERS. Indeed, Plaintiff has not even alleged the existence of a contract between her and either of the Moving Defendants, let alone establish a breach of any such agreement. The only contract identified in the complaint is between her and IndyMac. Since the Moving Defendants were not parties to any contract with Plaintiff, the Court **DISMISSES** Count XVII as to those Defendants.

XVII: Count XVIII: Conversion

Plaintiff asserts that IndyMac, OneWest, Stewart, and Richmond are liable for conversion of loan funds that Plaintiff allegedly never received. (FAC ¶¶ 160-61.) As outlined above, the elements of a conversion claim are: "(1) A taking from the owner without his consent; (2) an unwarranted **[*54]** assumption of ownership; (3) an illegal use or abuse of the chattel; and (4) a wrongful detention after demand." *Tsuru v. Bayer, 25 Haw. 693, 1920 WL 830, at * 2 (Haw. 1920)*; see also *Restatement (Second) of Torts § 222A*; *Pourny, 127 F. Supp. 2d at 1146*. Since conversion is an intentional tort, proof of "a constructive or actual intent to injure" is required to establish liability. See *Brooks v. Dana Nance & Co., 113 Haw. 406, 153 P.3d 1091, 1100 (2007)* (citing *Iddings v. Mee-Lee, 82 Haw. 1, 919 P.2d 263, 271 (1996)* ("[T]he commission of an intentional tort includes a constructive or actual intent to injure.")).

With regard to Plaintiff's claim that OneWest is liable for conversion, Plaintiff does not allege any of the requisite elements of conversion. Plaintiff does not allege that OneWest is a party to the loan transaction, that OneWest allegedly assumed ownership of and subsequently illegally used or abused Plaintiff's money, or that OneWest retained Plaintiff's money after Plaintiff requested its return. Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss as to Count XVIII.

XVIII: Leave to Amend

Pursuant to *Rule 15(a)(2)*, courts should "freely give leave [to amend] when justice so requires." "[R]equests **[*55]** for leave should be granted with extreme liberality." *Moss, 572 F.3d at 972*. "Dismissal without leave to amend is improper unless it is clear . . . that the complaint could not be saved by an amendment." Id. In determining whether to grant leave to amend, courts consider factors including: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment [or] futility of amendment.'" *Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1007 (9th Cir. 2009)* (quoting *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962))*. "Further, '[t]he district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint.'" *Cafasso, 637 F.3d at 1058* (quoting *Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989))*.

The Court grants Plaintiff leave to file a second amended complaint by no later than May 4, 2012. However, Plaintiff is not granted leave to amend Counts I, V, and VII because those claims cannot be cured by further amendment. See *Zucco Partners, 552 F.3d at 1007*. Additionally, **[*56]** Plaintiff may not add any new parties, new legal theories, or other new claims in her amended complaint. Failure to timely file an amended pleading and to cure the pleading deficiencies identified above will result in dismissal of this action with prejudice. The Court cautions Plaintiff that this will be Plaintiff's final opportunity to amend. Plaintiff is advised that any amended complaint must clearly identify the specific causes of action alleged and the factual allegations upon which those claims are based.

Further, the Court orders counsel for both parties to meet and confer to address those matters as discussed at the hearing.

CONCLUSION

For the reasons stated above, the Court **GRANTS** Moving Defendants' Motion to Dismiss, **DISMISSES** Counts I, V, and VII, and **DISMISSES** all remaining claims **WITHOUT PREJUDICE.**

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, April 19, 2012

/s/ David Alan Ezra

David Alan Ezra

United States District Judge

In re Optical Disk Drive Antitrust Litig.

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

April 19, 2012, Decided; April 19, 2012, Filed

CASE NO. 3:10-md-2143 RS

Reporter

2012 U.S. Dist. LEXIS 55300 *; 2012-1 Trade Cas. (CCH) P77,876; 2012 WL 1366718

IN RE OPTICAL DISK DRIVE ANTITRUST LITIGATION

Subsequent History: Later proceeding at *In re Optical Disk Drive Antitrust Litig., 2012 U.S. Dist. LEXIS 189048 (N.D. Cal., Dec. 13, 2012)*

Prior History: *In re Optical Disk Drive Antitrust Litig., 2011 U.S. Dist. LEXIS 101763 (N.D. Cal., Aug. 3, 2011)*

Core Terms

Purchasers, conspiracy, Indirect, manufactured, products, allegations, complaints, prices, entities, alleged conspiracy, price-fixing, plaintiffs', affiliates, antitrust, subsidiaries, videogame, consoles, amended complaint, pleading stage, consolidated, Defendants', camcorders, prior dismissal, third party, co-conspirator

Counsel: **[*1]** For CMP Consulting Services, Inc., Plaintiff: Christopher T. Heffelfinger, Berman DeValerio, Palm Beach Gardens, FL; Joseph Richard Saveri, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA; Kevin Bruce Love, Hanzman Criden & Love, P.A., South Miami, FL; Laurence D. King, Linda M. Fong, Kaplan Fox & Kilsheimer LLP, San Francisco, CA; Michael E. Criden, Criden & Love P.A., South Miami, FL; Steven Noel Williams, Cotchett Pitre & McCarthy LLP, Burlingame, CA.

For KI, Inc., Plaintiff: Jonathan Whitcomb, Siserio Martin O'Connor & Castiglioni LLP, Stamford, CT; Joseph Richard Saveri, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA; Laurence D. King, Linda M. Fong, Kaplan Fox & Kilsheimer LLP, San Francisco, CA; Robert N. Kaplan, Kaplan Fox & Kilsheimer LLP, New York, NY.

For Lieff, Cabraser, Heimann & Bernstein, LLP, Plaintiff: Sarah Robin London, Lieff Cabraser Heimann & Bernstein LLP, San Francisco, Ca.

For Rokas Beresniovas, Plaintiff: Rosemary M. Rivas, Finkelstein Thompson LLP, San Francisco, CA.

For Patrick Keyes, Plaintiff: Christopher T. Heffelfinger, Berman DeValerio, Palm Beach Gardens, FL; Joseph Richard Saveri, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, **[*2]** CA.

For Prisco Electronic Company, Inc., Plaintiff: Aron K. Liang, Joseph W. Cotchett, Steven Noel Williams, Cotchett Pitre & McCarthy LLP, Burlingame, CA; Cadio R. Zirpoli, Guido Saveri, Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Joseph M. Alioto, Sr., Theresa Driscoll Moore, Alioto Law Firm, San Francisco, CA; Joseph Richard Saveri, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA; Niki B. Okcu, Cotchett Pitre & McCarthy, LLP, Burlingame, CA.

For Heather Tremblay, Plaintiff: Lee Albert, Murray Frank LLP, New York, NY; Sylvia M. Sokol, Moscone Emblidge & Sater LLP, San Francisco, CA.

For Christopher Johnson, Plaintiff: Elizabeth Cheryl Pritzker, LEAD ATTORNEY, Girard Gibbs LLP, San Francisco, CA.

For Matthew Slavin, Plaintiff: Arthur Nash Bailey, Jr., Christopher L. Lebsock, Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Christopher T. Heffelfinger, Berman DeValerio, Palm Beach Gardens, FL; Eugene A. Spector, Jeffrey Lawrence Spector, William G. Caldes, Spector, Roseman, Kodroff & Willis, P.C., Philadelphia, PA; Joseph Richard Saveri, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA; Michael D. Hausfeld, Hausfeld LLP, Washington, **[*3]** DC; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE.

For Warren S. Herman, Plaintiff: Christopher T. Heffelfinger, Berman DeValerio, Palm Beach Gardens, FL; Joseph Richard Saveri, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA; Lawrence Walner, PRO HAC VICE, The Walner Law Firm, Ltd., Chicago, IL; Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA.

For David Carney, Jr., Plaintiff: Aaron M. Sheanin, LEAD ATTORNEY, Elizabeth Cheryl Pritzker, Girard Gibbs LLP, San Francisco, CA.

For L.E. Hoover Co., Plaintiff: Elizabeth R. Odette, W. Joseph Bruckner, LEAD ATTORNEYS, Lockridge Grindal Nauen P.L.L.P, Minneapolis, MN; Clinton Paul Walker, Damrell Nelson Schrimp Pallios Pache, Modesto, CA.

For JLK Systems Group, Inc., Plaintiff: Allan Steyer, Donald Scott Macrae, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Arthur Nash Bailey, Jr., Christopher L. Lebsock, Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Bruce Lee Simon, Pearson Simon Warshaw & Penny, LLP, San Francisco, CA; Christopher T. Heffelfinger, Berman DeValerio, Palm Beach Gardens, FL; Douglas A. Millen, PRO HAC VICE, Freed Kanner London & Millen LLC, Bannockburn, IL; **[*4]** Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Joseph Richard Saveri, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA; Michael D. Hausfeld, Hausfeld LLP, Washington, DC; Patrick Howard, Simon Bahne Paris, Saltz Mongeluzzi Barrett and Bendesky, Philadelphia, PA; Robert W Biederman, Steyer Lowenthal, et al., San Francisco, CA; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE; Steven Noel Williams, Cotchett Pitre & McCarthy LLP, Burlingame, CA.

For Univisions-Crimson Holding Inc., Plaintiff: Christopher T. Heffelfinger, Daniel Bushell, Marc Jeffrey Greenspon, Berman DeValerio, Palm Beach Gardens, FL; Joseph Richard Saveri, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA; Joseph J. Tabacco, Jr., Matthew W Ruan, Todd Anthony Seaver, Berman DeValerio, San Francisco, CA; Manuel Juan Dominguez, Cohen Milstein Sellers & Toll, Palm Beach Gardens, FL.

For Diana Saed, Plaintiff: Michael M. Goldberg, LEAD ATTORNEY, Glancy Binkow & Goldberg LLP, Los Angeles, CA; Susan Gilah Kupfer, Glancy Binkow & Goldberg LLP, San Francisco, CA.

For Amber Nikkel, on behalf of herself and all others similarly situated, Plaintiff: Adam J. Levitt, Michael D Yanovsky, Wolf Haldenstein **[*5]** Adler Freeman Herz LLC, Chicago, IL; Christopher T. Heffelfinger, Berman DeValerio, Palm Beach Gardens, FL; Francis M. Gregorek, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, CA; Mary Jane Edelstein Fait, Wolf Haldenstein Adler Freeman Herz LLP, Chicago, IL.

For Ann Carney, Plaintiff: Craig C. Corbitt, Francis Onofrei Scarpulla, Qianwei Fu, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA.

For Don Cheung, Plaintiff: Amy Harrington, Law Office of Amy Harrington, San Francisco, CA; Julio J Ramos, Law Offices of Julio J. Ramos, San Francisco, CA.

For Tina Corse, Plaintiff: John Dmitry Bogdanov, Cooper & Kirkham, P.C., San Francisco, CA.

For Alec Berezin, Plaintiff: Brendan Patrick Glackin, Eric B. Fastiff, LEAD ATTORNEYS, Lieff, Cabraser, Heimann & Bernstein LLP, San Francisco, CA; Joseph Richard Saveri, LEAD ATTORNEY, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA; Joel Cary Meredith, Meredith & Associates, Philadelphia, PA; Steven J. Greenfogel, Lite DePalma Greenberg, LLC, Philadelphia, PA.

For The Stereo Shop, Plaintiff: Brendan Patrick Glackin, Eric B. Fastiff, LEAD ATTORNEYS, Lieff, Cabraser, Heimann & Bernstein LLP, San Francisco, CA; Joseph Richard Saveri, **[*6]** LEAD ATTORNEY, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA; Christopher T. Heffelfinger, Berman DeValerio, Palm Beach Gardens, FL; Daniel E. Gustafson, PRO HAC VICE, Jason Kilene, Gustafson Gluek PLLC, Minneapolis, MN.

For Bay Area Systems, LLC, Plaintiff: Brad Yamauchi, Derek G. Howard, Jack Wing Lee, Minami Tamaki LLP, San Francisco, CA.

For Larson Group, Plaintiff: Elizabeth Cheryl Pritzker, LEAD ATTORNEY, Girard Gibbs LLP, San Francisco, CA.

For Aaron Wagner, Plaintiff: George W. Sampson, Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Jeff D Friedman, Shana E. Scarlett, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Robert William Finnerty, Girardi Keese, Los Angeles, CA.

For Mr. Cullen Byrne, Plaintiff: William Henry Parish, LEAD ATTORNEY, Parish & Small, Stockton, CA.

For Freud Reia, Brent Pickett, Charles Zakin, Ben Flaccus, Plaintiffs: Terry Gross, Gross Belsky Alonso LLP, San Francisco, CA.

For Alireza Tabatabai, Plaintiff: Robert M. Partain, LEAD ATTORNEY, O'Donnell & Associates, Los Angeles, CA.

For Mary Jane Garland, Plaintiff: Casey Ann Hatton, Law Offices of Casey Hatton, Berkeley, CA; James Lewis Wilkes, Wilkes & McHugh, Tampa, **[*7]** FL; Timothy Charles McHugh, Wilkes & McHugh, Long Beach, CA.

For Beth O'Donnell, Plaintiff: Brian Joseph Barry, Esq., LEAD ATTORNEY, Law Offices of Brian Barry, Los Angeles, CA; Jennifer Sarnelli, LEAD ATTORNEY, Gardy & Notis, LLP, Englewood Cliffs, NJ.

For Vanessa Stark, Jerred Cook, Alex Afanasyev, Scott Druschke, Plaintiffs: Jennifer Sarnelli, LEAD ATTORNEY, Gardy & Notis, LLP, Englewood Cliffs, NJ.

For Gregory Sinigiani, Aimee Brock, William Craig Stephenson, Raymond F. Barbush, Sidney Plitnik, Cynthia Saia, Goeffrey Korwan, Patrick Piper, Frank Warner, Christopher Smith, Plaintiffs: Mario N. Alioto, LEAD ATTORNEY, Lauren Clare Russell, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Sherman Kassof, LEAD ATTORNEY, Law Offices of Sherman Kassof, Lafayette, CA; Joseph Mario Patane, Law Office of Joseph M. Patane, San Francisco, CA.

For EMW, Inc., Plaintiff: Lingel Hart Winters, Law Offices of Lingel H. Winters, San Francisco, CA.

For Aaron Deshaw, Plaintiff: Ernest Warren, LEAD ATTORNEY, Walker & Warren, Portland, OR.

For David Knight, Debra Knight, Plaintiffs: Mark A. Friel, Stoll Stoll Berne Lokting Shlachter PC, Portland, OR.

For James P. Ito-Adler, Plaintiff: Charles E. Tompkins, **[*8]** LEAD ATTORNEY, Shapiro Haber & Urmy LLP, Boston, MA.

For Sony Corporation, Sony Optiarc, Inc., Defendants: John F. Cove, Jr., LEAD ATTORNEY, Alexis Jane Loeb, Beko Osiris Ra Reblitz-Richardson, Steven Christopher Holtzman, Boies Schiller & Flexner LLP, Oakland, CA.

For Sony Optiarc America, Inc., Defendant: Alexis Jane Loeb, Beko Osiris Ra Reblitz-Richardson, John F. Cove, Jr., Steven Christopher Holtzman, Boies Schiller & Flexner LLP, Oakland, CA.

For Hitachi, Ltd., Defendant: Craig P. Seebald, Jason A. Levine, Vinson & Elkins LLP, Washington, DC; Matthew J. Jacobs, Vinson & Elkins LLP, Palo Alto, CA.

For LG Electronics, Inc., Defendant: Christopher B. Hockett, Sandra D West, Davis Polk Wardwell, Menlo Park, CA; Samuel R. Miller, Sidley Austin LLP, San Francisco, CA.

For Hitachi-LG Data Storage, Inc., Defendant: Thad Alan Davis, LEAD ATTORNEY, Ropes & Gray LLP, East Palo Alto, CA; Jane E. Willis, Ropes & Gray LLP, Boston, MA; Mark Samuel Popofsky, Ropes & Gray LLP, Washington, DC.

For Toshiba Corporation, Defendant: Casandra Leann Thomson, LEAD ATTORNEY, Latham & Watkins, Los Angeles, CA; Daniel Murray Wall, LEAD ATTORNEY, Brendan Andrew McShane, Latham & Watkins LLP, San Francisco, CA; **[*9]** Deana Louise Cairo, LEAD ATTORNEY, DLA Piper LLP (US), Washington, DC; Belinda S. Lee, Latham & Watkins, San Francisco, CA.

For Samsung Electronics Co., Ltd., Defendant: Ian T Simmons, LEAD ATTORNEY, Haidee L. Schwartz, O'Melveny & Myers LLP, Washington, DC.

For Toshiba Samsung Storage Technology Corporation, Defendant: Casandra Leann Thomson, LEAD ATTORNEY, Latham & Watkins, Los Angeles, CA; Daniel Murray Wall, LEAD ATTORNEY, Brendan Andrew McShane, Latham & Watkins LLP, San Francisco, CA; Belinda S. Lee, Latham & Watkins, San Francisco, CA.

For Koninklijke Philips Electronics N.V., Defendant: Evan Werbel, PRO HAC VICE, James G. Kress, John M. Taladay, William Lavery, PRO HAC VICE, Baker Botts LLP, Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA.

For Lite-On It Corporation, Philips & Lite-On Digital Solutions Corporation, Defendants: Evan Werbel, PRO HAC VICE, James G. Kress, John M. Taladay, William Lavery, PRO HAC VICE, Baker Botts LLP, Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA.

For Philips & Lite-On Digital Solutions USA, Inc., Defendant: Evan Werbel, PRO HAC VICE, James G. Kress, John M. Taladay, William Lavery, PRO HAC VICE, Baker **[*10]** Botts LLP, Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA.

For Teac Corporation, Defendant: David H. Bamberger, LEAD ATTORNEY, DLA Piper LLP, Washington, DC; Erin Gail Frazor, DLA Piper LLP (US), San Francisco, CA; Paolo Morante, DLA Piper LLP (US), New York, NY.

For Teac America, Inc., Defendant: David H. Bamberger, Deana Louise Cairo, DLA Piper LLP, Washington, DC; Erin Gail Frazor, DLA Piper LLP (US), San Francisco, CA; Paolo Morante, DLA Piper LLP (US), New York, NY.

For Hitachi-LG Data Storage, Korea, Inc., Defendant: Michelle L. Visser, Ropes & Gray LLP, Boston, MA; Thad Alan Davis, Ropes & Gray LLP, East Palo Alto, CA.

For NEC Corporation, Defendant: Paul R. Griffin, Robert Benard Pringle, Winston & Strawn LLP, San Francisco, CA; Sean D. Meenan, Winston and Strawn, San Francisco, CA.

For Toshiba Samsung Storage Technology Corp. Korea, Defendant: Belinda S. Lee, Latham & Watkins, San Francisco, CA; Brendan Andrew McShane, Latham & Watkins LLP, San Francisco, CA.

For Quanta Storage Inc, Defendant: Bruce G. Chapman, LEAD ATTORNEY, Minda R. Schechter, Connolly Bove Lodge and Hutz LLP, Los Angeles, CA; Zhun Lu, PRO HAC VICE, Connolly Bove Lodge and Hutz LLP, Wilmington, **[*11]** DE.

For BenQ Corporation, BenQ America Corp., Sony Computer Entertainment America, Inc., Defendants: Joel Barry Kleinman, LEAD ATTORNEY, Washington, DC; Lisa Marie Kaas, Dickstein Shapiro LLP, Washington, DC.

For LG Electronics USA, Inc., Defendant: Christopher B. Hockett, Davis Polk & Wardwell, Menlo Park, CA; Sandra D West, Davis Polk Wardwell, Menlo Park, CA.

For Samsung Electronics America, Inc., Defendant: Ian T Simmons, LEAD ATTORNEY, O'Melveny & Myers LLP, Washington, DC.

For Toshiba America Information Systems, Inc., Defendant: Belinda S. Lee, LEAD ATTORNEY, Latham & Watkins, San Francisco, CA; Brendan Andrew McShane, LEAD ATTORNEY, Latham & Watkins LLP, San Francisco, CA.

For Quanta Storage America, Inc., Defendant: Bruce G. Chapman, Minda R. Schechter, Connolly Bove Lodge and Hutz LLP, Los Angeles, CA; Zhun Lu, PRO HAC VICE, Connolly Bove Lodge and Hutz LLP, Wilmington, DE.

For Panasonic Corporation, Defendant: A. Paul Victor, David L. Greenspan, Jeffrey L. Kessler, LEAD ATTORNEYS, Susannah P. Torpey, Dewey & LeBoeuf LLP, New York, NY; Matthew C Oxman, Dewey Leboeuf LLP, New York, NY.

For Panasonic Corporation of America, Defendant: David L. Greenspan, James F. Lerner, Dewey & LeBoeuf **[*12]** LLP, New York, NY.

For Sony Electronics, Inc., Defendant: John F. Cove, Jr., LEAD ATTORNEY, Alexis Jane Loeb, Boies Schiller & Flexner LLP, Oakland, CA.

For Panasonic Corporation of North America, Defendant: A. Paul Victor, David L. Greenspan, Jeffrey L. Kessler, LEAD ATTORNEYS, James F. Lerner, Susannah P. Torpey, Dewey & LeBoeuf LLP, New York, NY; Matthew C

Oxman, Dewey Leboeuf LLP, New York, NY; Matthew McDonnell Walsh, Dewey and LeBoeuf LLP, Los Angeles, CA.

For Gregory Starrett, Interested Party: Jeffrey B. Gittleman, LEAD ATTORNEY, Barrack Rodos & Bacine, Philadelphia, PA; Christopher T. Heffelfinger, Berman DeValerio, Palm Beach Gardens, FL; Joshua D. Snyder, Boni & Zack LLC, Bala Cynwyd, PA; Kimberly Ann Kralowec.

For U.S. Department of J Antitrust Division, Intervenor: Sidney A. Majalya, LEAD ATTORNEY, Lara Meredith Kroop, USDOJ - Antitrust Division, San Francisco, CA; Manish Kumar, Antitrust Division, Deparment of Justice, San Francisco, CA.

Judges: RICHARD SEEBORG, UNITED STATES DISTRICT JUDGE.

Opinion by: RICHARD SEEBORG

Opinion

ORDER DENYING MOTIONS TO DISMISS

I. INTRODUCTION

The original "master" consolidated complaints in this Multi-District Litigation alleged a conspiracy beginning in 2006 among defendants **[*13]** to fix the prices of "Optical Disc Drives" ("ODDs") and "Optical Disc Drive Products" ("ODD Products"). The complaints were dismissed, with leave to amend, on grounds that plaintiffs had not set out a plausible factual basis for inferring the existence of a conspiracy of the scope and nature alleged. As the amended complaints have alleged a substantially narrower, and more plausible, conspiracy, and are otherwise adequately pleaded, the present motions to dismiss will be denied.

II. BACKGROUND

As described more fully in the order dismissing the first consolidated complaints, two groups of plaintiffs bring price fixing claims against defendants involved in the manufacturing and/or sales of ODDs—either as standalone products or which are incorporated into electronic devices such as computers and videogame consoles. One group of plaintiffs seek to represent a class of "Direct Purchasers"—individuals or entities who acquired ODDs directly from named defendants, and who, as such, arguably have standing to bring damage claims under federal ***antitrust law***. *See* *Illinois Brick Co. v. Illinois, 431 U.S. 720, 745-46, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*; *Del. Valley Surgical Supply Inc. v. Johnson & Johnson, 523 F.3d 1116, 1120-21 (9th Cir. 2008)* **[*14]** ("a bright line rule emerged from *Illinois Brick:* only direct purchasers have standing under § 4 of the Clayton Act to seek damages for antitrust violations.") A separate complaint is brought on behalf of "Indirect Purchasers," individuals and entities who did not purchase directly from the named defendants, and whose primary claims are therefore brought under the laws of various states that do not follow the *Illinois Brick* rule.

The Direct Purchasers' first consolidated complaint alleged a conspiracy to fix prices of both ODDs *and* what it defined as "ODD Products." While the Indirect Purchasers' first consolidated complaint defined the terms slightly differently, and included some language suggesting an intent only to claim a conspiracy to fix ODD prices, read as a whole, it likewise alleged a conspiracy that extended to price fixing of both ODDs and ODD Products. One of the primary reasons the first consolidated complaints were dismissed was the absence of facts to support the plausibility of such a wide-ranging conspiracy among not only the named defendants but also numerous unnamed entities that manufacture and sell products containing ODDs. [1]

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[1] Additionally, as noted in the prior **[*15]** dismissal order, under the conspiracy theory then-articulated, entities such as HP and Dell who purchased ODDs from named defendants in allegedly rigged auctions and incorporated those ODDs into products sold to the public, would somehow have been both knowing co-conspirators and unwitting victims of the price-fixing.

The Second Consolidated Direct Purchaser Class Action Complaint ("DP SAC") and the Indirect Purchasers' Corrected Second Amended Class Action Complaint ("IP SAC") each make clear that plaintiffs are now alleging only a conspiracy to fix prices of ODDs, not the prices of products that contain them. [2] There remain some troubling issues, particularly in the DP SAC, with respect to how the products have been defined. For example, it is unclear why the Direct Purchasers continue to distinguish between ODDs and what they now call "ODD Devices." Direct Purchasers have (in their briefing and at oral argument) specifically *excluded* from the definition of the latter term computers, videogame consoles, and camcorders and have expressly alleged that the cost of the ODD typically constitutes the major portion of the cost of an "ODD Device." If, as seems likely, Direct Purchasers intend **[*16]** their claims extend to ODDs manufactured by defendants and preinstalled in computers, videogame consoles, and camcorders sold by defendants or their affiliates (despite the fact that the ODDs might *not* constitute the major portion of the cost of such devices), defining "ODD Devices" separately would appear to serve little purpose. A number of other uncertainties exist as to whether the definitions in the two complaints are entirely consistent with the various ways in which ODDs are actually sold, and whether the two groups of plaintiffs have correctly distinguished between what should be characterized as "direct" and "indirect" purchases. [3]

Those issues will require further clarification at the class certification stage, and may necessitate some modification to the class definitions from what is presently alleged in the complaints. At the pleading stage, however, such details do not substantially undermine the plausibility of the basic claims, and are not fatal. [4] Critically, both complaints have now made clear that the conspiracy was limited to the named defendants, and perhaps a few unnamed co-conspirators, but did not extend generally to the vast number of entities involved in the manufacturing and selling of products containing ODDs obtained from those defendants. Apart from these amendments that effectively narrow the scope of the claimed conspiracy, both the DP SAC and IP SAC lay out factual allegations that largely parallel those described in the prior dismissal order. **[*18]** Significant additions have been made in only three basic categories: (1) the complaints now allege a series of over two dozen instances of "bid-rigging" involving procurements of ODDs by Dell and HP, and one involving Microsoft, whereas the prior complaints specifically identified only three such events; (2) plaintiffs have articulated a more specific theory as to how the pattern of bid rigging reflects an overall effort to stabilize ODD prices, and; (3) the amendments include allegations of additional communications between various entities.

Furthermore, after the amended complaints were filed, indictments issued and guilty pleas were entered by certain defendants in connection with the Department of Justice investigation referenced in the prior and amended complaints. Plaintiffs have moved to strike materials relating to those indictments submitted by defendants to support their argument that there was no single overarching conspiracy of the nature alleged by plaintiffs. While plaintiffs' motion is well-taken as a technical matter as to what may properly be considered on a motion to dismiss, it is also effectively moot **[*20]** because, as explained in the hearing, the inferences defendants seek to draw from the materials are not tenable. As the criminal cases have been related to this action, the Court is aware of the indictments and guilty pleas. Even though those matters do not appear on the face of the complaints, they are

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[2] The Indirect Purchasers, in particular, do contend that the *effect* of the alleged ODD price fixing was to raise the prices they paid for products containing them, but not that there was a conspiracy to fix the prices of those products per se.

[3] For example, the Indirect Purchasers assert claims regarding "ODDs designed to be attached externally to devices such as computers." Putting aside standalone ODD player/recorders designed primarily for audio or visual entertainment purposes that may include additional features and circuitry, such devices typically **[*17]** consist of little other than the ODD, a case, USB connection circuitry and cabling. As such, it seems unlikely that they are typically, if ever, manufactured and sold by entities unrelated to the manufacturers of the ODDs. If so, it is unclear why such products would be part of the Indirect Purchasers' case, rather than that of the Direct Purchasers.

[4] In a related issue, the IP SAC does *not* **[*19]** name the Sony entity that manufactures and sells the PlayStation as a defendant. Presumably Indirect Purchasers contend that entity was not involved in the conspiracy, and that they can therefore recover for any effect that price-fixing of ODDs had on the price of PlayStations. Direct Purchasers, however, have named that Sony entity as a defendant, and apparently contend that their class includes PlayStation purchasers, under the theory that the first transaction outside the conspiracy is a direct purchase. While this presents a conflict between the two complaints, it does not support dismissal of either.

subject to judicial notice. They serve to tip the DOJ investigation from a "non-factor," as it was described in the prior order, to an item of relevance as to the plausibility of plaintiffs' conspiracy claims, albeit well short of dispositive on the breadth of the claimed conspiracy.

III. LEGAL STANDARD

Under *Federal Rule of Civil Procedure 12(b)(6)*, a district court must dismiss a complaint that fails to state a claim upon which relief may be granted. To survive a *Rule 12(b)(6)* motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. While courts do not require "heightened **[*21]** fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly, 550 U.S. at 544, 555*.

In deciding whether the plaintiff has stated a claim upon which relief may be granted, the Court must assume that plaintiff's allegations are true and must draw all reasonable inferences in plaintiff's favor. *See* *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir.1987)*. However, the Court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*. [5]

IV. DISCUSSION

A. Plausibility

The overarching thrust of defendants' attack on the sufficiency of the averments of the amended complaints to state a plausible **[*22]** claim is that plaintiffs have only shored up potential antitrust violations specifically related to bid-rigging, but have added nothing of substance to support a claim of any broader agreement among all the named defendants to fix ODD prices generally across the class period. Defendants fail to assign sufficient import, however, to the changes that have *narrowed* the scope of the alleged conspiracy, thereby rendering the claims substantially more plausible.

As the prior dismissal order stated, plaintiffs' original allegations, particularly those in the Indirect Purchasers' complaint, were enough to suggest that a conspiracy to fix ODD prices was "at least conceivable." August 3, 2011 Order at 14:17-18; 16:21-17:1. Dismissal was required because not only was the notion of a conspiracy involving untold numbers of third parties who make and sell devices containing ODDs beyond fanciful, the affirmative allegations that at least some of those third parties were *victims* of the conspiracy stood in flat contradiction to any such claim. *See* August 3, 2011 Order at 12:9-14 ("At least in the specific instance of ODD devices manufactured and sold by Dell and HP, plaintiffs have alleged that those **[*23]** third party sellers were unwitting dupes of the illegal activity, not co-conspirators. The most reasonable inference is that most, if not all, of the other sellers of ODD devices who are not directly affiliated with defendants likewise were victims of any agreement to fix ODD prices, not participants in a conspiracy to fix prices of the ODD devices they sold.")

The amended complaints have addressed that problem. Both sets of plaintiffs make clear that they are only contending the prices of ODDs were fixed. The DP SAC specifically alleges that Dell and HP are members of the putative class, as would be any other similarly situated entities that bought ODDs from defendants to incorporate

[5] Subsequent to the hearing, the parties have submitted several statements of recent decisions they contend bear on the issues in this action. In at least one instance, such a statement was simply filed, in others, they were accompanied by requests for leave to submit them, as is required by *Civil Local Rule 7-3(d)*. All the statements of recent decision will be deemed properly filed.

into products made and sold by those entities. [6] The alleged conspiracy, while still large, now entails a discrete number of entities, many of which are interrelated.

The prior order cautioned that it "likely" would not be enough for plaintiffs merely to limit the **[*24]** scope of the conspiracy to price-fixing of ODDs. Indeed, plaintiffs have done more, particularly in alleging with specificity a more sustained series of bid rigging and tying it (albeit with some allegations more conclusory or argumentative than factual) to an overall theory explaining the various ways in which the alleged conspiracy was carried out. While defendants have pointed to certain gaps, arguable inconsistencies, and potentially differing inferences that could be drawn across the whole spectrum of allegations plaintiffs have offered, viewed holistically, there is no doubt that the amended complaints more strongly support the plausibility of a conspiracy, even apart from the fact that it is far narrower.

As *Twombly* cautioned, "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage . . . a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *550 U.S. at 556* (citations and footnote omitted). The net effect of the amendments is that both the Direct and Indirect Plaintiffs have, in *Twombly's* terms, "nudged **[*25]** their claims across the line from conceivable to plausible." *See id. at 570*.

B. *Illinois Brick*

As noted above, *Illinois Brick* created a "bright line rule" that only plaintiffs who purchased products directly from alleged price-fixers have standing to pursue damages claims under federal law. The prior dismissal order concluded that, under the conspiracy then alleged, the Direct Purchasers could not in fact be deemed to be direct purchasers of "ODD Products" that had been manufactured and sold by third parties not part of any conspiracy. [7] In addressing the Direct Purchasers' argument that their claims could go forward under *Royal Printing Co. v. Kimberly Clark Corp., 621 F.2d 323, 326 (9th Cir. 1980)* to the extent they had alleged purchases from divisions or subsidiaries of a co-conspirator, the prior order also observed that *Royal Printing* only provides an exception to the bar on claims by *indirect* purchasers; it does not transform indirect purchasers into direct purchasers. The order suggested that for plaintiffs to pursue such claims, counsel for the two groups would have to determine whether it was preferable for them to go forward as a subset of the so-called Direct Purchasers' complaint, **[*26]** or as part of the Indirect Purchasers' claims.

As observed above, the definitions in the DP SAC are not entirely clear, and there is some uncertainty as to the scope of the putative class and the products involved. Seizing on that ambiguity, defendants argue that the Direct Purchasers are impermissibly attempting to evade the *Illinois Brick* rule, and that they still have not alleged facts plausibly showing they are actually direct purchasers, particularly with respect to what they now label as "ODD Devices." Because the Direct Purchasers have unambiguously disclaimed any intent to include products manufactured by non-defendants, their inartful allegations do not present a fatal defect.

While further delineation of product categories and marketing channels may at some point become necessary, at this juncture the DP SAC implicates three basic types of ODD purchases. First, the putative class includes those who purchased ODDs that were not incorporated into any other device. The most obvious examples are entities **[*27]** such as HP and Dell that purchased ODDs designed to be installed internally into computers or other devices. Such devices are also available to consumers to be used as replacements or upgrades in existing computers or other products, thereby extending the putative class to individuals (or non-manufacturing entities) that made such purchases as well. Additionally, so called "external" ODDs, consisting of little more than an internal ODD in a case, are available to consumers. There is no apparent basis to treat such devices, when manufactured and sold by defendants, any differently than "internal" ODDs that are sold prior to installation in another product. [8]

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[6] Defendants question whether it is realistic that Dell and HP ultimately will participate as class members in this action. While that may present certification issues, it does not undermine the plausibility of the claims at the pleading stage.

[7] To the extent plaintiffs contended that *all* manufacturers and sellers of ODD products were part of the purported conspiracy, they failed to allege facts making such a claim plausible.

With respect to all of these "ODD-only" sales, there is no tenable argument that the putative class members in the DP SAC are not true "direct purchasers" or that *Illinois Brick* stands as a bar to their claims. [9]

A second category of ODDs implicated by the DP SAC is what it (perhaps improvidently) defines as "ODD Devices." As alleged, these are "stand-alone players that typically plug into a television or other audiovisual device . . . that are manufactured by any of the named Defendants or their affiliates or subsidiaries." [10] The Direct Purchasers have explicitly excluded computers, videogame consoles, and camcorders from that definition. [11] While presumably any number of unrelated third parties also manufacture and sell "stand-alone" players using ODDs they buy from defendants, the Direct Purchasers have avoided that aspect of their prior *Illinois Brick* problem by excluding those devices from their claims.

As defendants point out, however, where an ODD manufactured by one defendant is incorporated into a larger product, even if by an affiliate, subsidiary, or co-conspirator of the manufacturing entity, *Royal Printing* and the prior dismissal order suggest that any claim is better characterized as *indirect*, rather than direct. This issue, though, is one of nomenclature rather than substance. *Royal Printing* itself did not involve separate complaints by groups of plaintiffs characterized as direct or indirect. Indeed, by stating that certain claims could not go forward because they involved purchases that were "*truly* indirect," *621 F.2d at 328* (emphasis added), the decision implies that it would not be entirely wrong to characterize claims permitted under its reasoning as equivalent to those involving "direct" **[*30]** purchases.

Moreover, the prior order expressly left to plaintiffs the decision as to whether these claims should be pursued as part of the Direct Purchasers' complaint or that of the Indirect Purchasers. While it would have been preferable for plaintiffs to have clarified that a consensus was reached to include these claims in the DP SAC rather than the IP SAC, there is no legal reason to bar them from going forward in the same complaint as the other more clearly "direct" claims.

The final category of ODDs within the scope of the DP SAC comprises those sold preinstalled in computers, videogame consoles, or camcorders manufactured and sold by defendants, their affiliates, or subsidiaries. [12] Conceptually, such products are no different than what the DP SAC denominates as "ODD Devices," except that in the case of computers, videogame consoles, and camcorders it is unlikely that the ODD constitutes the major portion of the cost of the device. At the pleading stage at least, that distinction is insufficient to bar the claims from going forward. As *Royal Printing* explained, the *Illinois Brick* rule is grounded in two concerns. First, at least where a product passes through the hands of a "middleman" **[*31]** unconnected to a price-fixing manufacturer, there would exist "intolerable complexities of proof and economics" as to how much, if any, of the inflated cost was passed on to

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[8] As noted, however, the indirect purchasers may be contending that such external ODDs are encompassed in their complaint. Unless there are third party entities that purchase "internal" ODDs, put them in a case and resell them, this issue may need to be resolved at a later stage, and in any event, further clarity will be **[*28]** required.

[9] Defendants complain that the allegations regarding the *named* plaintiffs' purchases are too vague to determine what kinds of products they purchased. Whether the named plaintiffs can serve as adequate class representatives upon refinement of the class definitions remains to be seen, but it would be premature to parse and dismiss some portion of the claims for lack of standing at this stage.

[10] To the extent this definition might be construed as encompassing "external" ODDs that are **[*29]** designed for use with computers and are essentially just "internal" ODDs in cases, such devices are better classed in the preceding category, as discussed above.

[11] Defendants argue that the DP SAC does not contain any such clear exclusion. To the extent the pleading itself is ambiguous, plaintiffs will be held to the representations made in their briefing and at the hearing.

[12] Again, the definitions of the products and descriptions of the claims are sufficiently unclear that it is arguable that plaintiffs have omitted any claim related to ODDs preinstalled in computers, videogame consoles, and camcorders manufactured by defendants from *both* the DP SAC and the IP SAC. Read liberally, however, it is apparent that the DP SAC should be construed as intending to assert such a claim.

the indirect purchaser, as opposed to being absorbed by the middleman. *Royal Printing, 621 F.2d at 325* (citing *Illinois Brick, 431 U.S. at 731-32, 737-45)*. Second, "allowing indirect purchasers to sue remote price-fixers would open the door to multiple liability for defendants." *Id.*

Here, it is unclear to what the degree the first concern of the *Illinois Brick* court is even implicated, as subsidiaries and affiliates in conspiracy with and/or controlled by alleged price-fixers presumably would pass on all of the inflated cost. *See* *Illinois Brick, 431 U.S. at 736 n.16* (suggesting potential exception where "the direct **[*32]** purchaser is owned or controlled by its customer.") Moreover, as *Royal Printing* observed, "blind application" of the *Illinois Brick* rule should be avoided where it "would eliminate the threat of private enforcement." *621 F.2d at 326 n.7*. Where a price-fixing manufacturer sells through a subsidiary, affiliate, and/or co-conspirator, not only is there little risk of multiple liability (since the "middleman" in such instances is unlikely to sue) it would undermine the private enforcement mechanisms of the ***antitrust law*** to preclude the only party with an interest in pursuing the claim from proceeding. *See* *id. at 327* ("Because, as we have already shown, as a practical matter the direct purchasers here will never sue, barring Royal Printing's suit would close off every avenue for private enforcement of the antitrust laws in such cases. This would be intolerable.").

Accordingly, without prejudging what issues of proof might arise in connection with establishing a "pass on" of any price-fixing, the Direct Purchasers are entitled to pursue claims arising from purchases of preinstalled ODDs in computers, videogame consoles, and camcorders, manufactured and sold by defendants, their affiliates, **[*33]** or subsidiaries. Whether such purchases are better characterized as "direct" or "indirect" is immaterial, for the same reasons discussed above in connection with the claims regarding "ODD Devices."

Defendants' remaining arguments regarding *Illinois Brick* and similar issues they contend are implicated under *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("*AGC*"), rest on the premise that plaintiffs must establish a conspiracy to fix prices of products containing ODDs, not just of the ODDs themselves, if they wish to pursue claims arising from purchases of those products. Plaintiffs' previous attempt to allege such a conspiracy, of course, was rejected as implausible. They need not resurrect that theory to proceed. Plaintiffs may face formidable problems of proof in showing, for example, that a defendant sold its own computers containing ODDs at inflated prices, even assuming they succeed in showing that same defendant was simultaneously engaged in a price-fixing conspiracy that stabilized the prices of ODDs it was selling to other OEM manufacturers. Any such potential hurdles, however, do not warrant dismissal at the pleading **[*34]** stage.

C. Statute of Limitations

Defendants raised no statute of limitations argument as to the prior complaints, but have done so now. If accepted, defendants' arguments would at most cut off some portion of plaintiffs' claims, at varying points in times based on when each defendant was first named in one of the underlying complaints in this action.

Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff. *Zenith Radio Corporation v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77*. "In the context of a continuing conspiracy to violate the antitrust laws . . . this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act. *Id.* The statute is subject to tolling by fraudulent concealment, which is the plaintiff's burden to plead and prove. *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc., 858 F.2d 499, 505 (1988)*.

While Defendants contend that plaintiffs' allegations in support of fraudulent concealment are unduly conclusory, **[*35]** they have not shown them to be so deficient as to warrant dismissal at this juncture. Additionally, even assuming plaintiffs may be unable to prove a basis for fraudulent concealment, defendants have not shown exactly what effect that would have on the claims, given the context of an alleged continuing conspiracy, and the differing cutoff dates for various defendants. Issuing a naked statement that plaintiffs claims are barred prior to various specific dates would serve little purpose at this stage of the proceedings, in the absence of more clarity as to what, if any, effect that would have on the scope of the recoverable damages or other matters.

D. Particular Defendants

Several groups of related defendants have each filed separate motions to dismiss arguing, in essence, that even assuming the complaints state viable claims as to other entities more clearly involved in the alleged conspiracy, they lack sufficient factual averments to tie the moving defendants to any wrongful conduct. [13] As observed in the prior dismissal order, while detailed "defendant by defendant" allegations are not required, a complaint "must allege that each individual defendant joined the conspiracy and played **[*36]** some role in it because, at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join it." *In re TFT-LCD (Flat Panel) Antitrust Litigation, supra, 586 F.Supp.2d at 1117* (quoting *In re Elec. Carbon Prods. Antitrust Litig., 333 F.Supp.2d 303, 311-12 (D.N.J. 2004)*.

Here, as to those defendants who are alleged to have formed and participated in the joint ventures at the heart of the claimed conspiracy, the complaints plainly are sufficient to meet this standard. While such defendants may ultimately be able to show that they are not responsible **[*37]** for the conduct of the joint ventures under any legal theory, or for otherwise directly participating in any conspiracy, dismissal at the pleading stage is not appropriate.

Those defendants who were not constituents of any of the relevant joint ventures present a closer call, and in some instances the allegations tying them to the alleged conspiracy are especially thin. Nevertheless, review of the complaints reveals no defendant as to which allegations of fact are so wholly lacking that dismissal would be warranted. Accordingly, the separate motions to dismiss must be denied.

E. Injunctive Relief in the IP SAC

Defendants contend that the Indirect Purchasers' claim for injunctive relief fails for lack of a sufficient threat of imminent or continuing harm. "[A]n antitrust plaintiff seeking injunctive relief need only show a *threatened* injury, not an actual one." *Lucas Auto. Engineering v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1235 (9th Cir. 1998)* (emphasis in original). Given the nature of the conspiracy alleged, the IP SAC's allegations are sufficient to support a claim for injunctive relief.

F. State Law Claims

Defendants challenge the adequacy of the IP SAC claims under the laws **[*38]** of eight specific states and the District of Columbia. While the details of the argument varies from jurisdiction to jurisdiction, defendants' basic contention is that the Indirect Plaintiffs have not pleaded an adequate nexus to, or effect on commerce in, the District of Columbia, New York, Michigan, Mississippi, North Carolina, South Dakota, Tennessee, Wisconsin, and West Virginia. Defendants have not persuasively shown that an alleged conspiracy based outside these jurisdictions is insufficient to give rise to liability under the local laws. Plaintiffs' allegations are adequate, at least at the pleading stage, to show the requisite impact on commerce from the claimed conspiracy in each of those nine jurisdictions.

Defendants' additional challenge to the claim under *New York Gen. Business Law § 349* would unduly limit the scope of that statute to fraudulent misrepresentation. The allegations of the IP SAC are sufficient. *See* ("Antitrust-type claims have been recognized under *§ 349(a)*."). *In re Graphics Processing Units Antitrust Lit., 527 F.Supp.2d 1011, 1030 (N.D. Cal. 2007)*.

Contending that a *Rule 9* heightened pleading standard applies to claims under Florida and Missouri consumer **[*39]** protection statutes, defendants further argue the IP SAC fails to meet that standard. While it is unclear whether heightened pleading requirements apply to claims not grounded in fraud, the detailed facts plaintiffs have pleaded are sufficient.

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[13] The separate motion filed by defendants Quanta Storage Inc. and Quanta Storage America Inc. is an exception because it focuses on an argument that plaintiffs lack Article III standing for failure to plead sufficient facts to establish cognizable injury. Although framed in different terms, the contentions advanced by the Quanta entities are effectively a subset of the issues raised in the joint motions, in that they contend any price-fixing in connection with the Dell and HP auctions does not support an inference that the prices of other ODDs were affected. This argument fails in light of the analysis above.

Finally, plaintiffs' claims under South Carolina law are not subject to dismissal notwithstanding a limitation on class actions in the state statute. *See* *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 130 S.Ct. 1431, 1437-38, 176 L. Ed. 2d 311 (2010)* (holding that *Rule 23* applies in Federal Court diversity actions). Defendants' attempts to distinguish *Shady Grove* are not persuasive. Accordingly, the motion to dismiss the state law claims must be denied. [14]

V. CONCLUSION

The motions to dismiss are denied. Defendants shall file answers within 45 days of the date of this order. **[*40]** The parties shall appear for a Case Management Conference on Friday, June 29, 2012 at 10:00 a.m. This order disposes of Docket Nos. 434, 436, 438, 441, 442, 445, 446, 449, 458, 460, 463, and 471.

IT IS SO ORDERED.

Dated: 4/19/12

/s/ Richard Seeborg

RICHARD SEEBORG

UNITED STATES DISTRICT JUDGE

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[14] The Indirect Purchasers concede their claims under New Hampshire and Utah antitrust laws are limited to the time periods beginning January 1, 2008, and May 1, 2006, respectively. For that reason it would be equally appropriate to characterize that one aspect of the motion as having been granted. Regardless how the disposition is characterized, plaintiffs will be held to their concession.

PNY Techs., Inc. v. SanDisk Corp.

United States District Court for the Northern District of California

April 20, 2012, Decided; April 20, 2012, Filed

Case No.: C-11-04689 YGR

Reporter

2012 U.S. Dist. LEXIS 55965 *; 103 U.S.P.Q.2D (BNA) 1109 **; 2012 WL 1380271

PNY TECHNOLOGIES, INC., Plaintiff, vs. SANDISK CORPORATION, Defendant.

Subsequent History: Motion denied by *PNY Techs. v. Sandisk Corp., 2012 U.S. Dist. LEXIS 148167 (N.D. Cal., Oct. 12, 2012)*

Motion denied by *PNY Techs. Inc. v. Sandisk Corp., 2013 U.S. Dist. LEXIS 182138 (N.D. Cal., Dec. 31, 2013)*

Motion granted by *PNY Techs., Inc. v. Sandisk Corp., 2014 U.S. Dist. LEXIS 9858 (N.D. Cal., Jan. 27, 2014)*

Motion denied by, Without prejudice *PNY Techs. v. Sandisk Corp., 2014 U.S. Dist. LEXIS 22403 (N.D. Cal., Feb. 20, 2014)*

Dismissed without prejudice by *PNY Techs., Inc. v. Sandisk Corp., 2014 U.S. Dist. LEXIS 58108 (N.D. Cal., Apr. 25, 2014)*

Count dismissed at *PNY Techs., Inc. v. SanDisk Corp., 2014 U.S. Dist. LEXIS 90649 (N.D. Cal., July 2, 2014)*

Core Terms

flash, memory, patent, alleges, technology, license, products, markets, royalty, monopolization, competitors, downstream, manufacture, prices, antitrust, market power, Sherman Act, barriers, monopoly, monopoly power, licensee, relevant market, anticompetitive, anticompetitive conduct, anti trust law, market share, conspiracy, grant-back, sales, alleged facts

Counsel: **[*1]** For PNY Technologies, Inc., Plaintiff: Allyson M Franco, Farella Braun Martel LLP, San Francisco, CA; Ira M Gottlieb, PRO HAC VICE, Jonathan Short, PRO HAC VICE, Mark H. Anania, PRO HAC VICE, Richard Hernandez, PRO HAC VICE, Scott Christie, PRO HAC VICE, McCarter and English, LLP, Newark, NJ; John L. Cooper, Roderick Manley Thompson, Farella Braun & Martel LLP, San Francisco, CA.

For Sandisk Corporation, Defendant: David W. Hansen, LEAD ATTORNEY, Allen Ruby, Skadden Arps Slate Meagher & Flom, LLP, Palo Alto, CA; Derek Care, PRO HAC VICE, Richard S. Taffet, PRO HAC VICE, Bingham McCutchen, New York, NY; James A. Keyte, PRO HAC VICE, New York, NY.

Judges: YVONNE GONZALES ROGERS, UNITED STATES DISTRICT COURT JUDGE.

Opinion by: YVONNE GONZALES ROGERS

Opinion

[1110] ORDER GRANTING SANDISK CORPORATION'S MOTION TO DISMISS WITH LEAVE TO AMEND**

Plaintiff PNY Technologies, Inc. ("PNY") filed suit against Defendant SanDisk Corporation ("SanDisk") alleging antitrust violations stemming from SanDisk's extensive patent portfolio in the flash memory technology upstream market. In summary, PNY alleges that SanDisk is misusing the market power inherent in its patent portfolio to demand multi-tiered licensing and royalties in the downstream **[*2]** markets which then suppresses price competition in the United States. PNY's Complaint alleges Monopolization and Attempted Monopolization under *Section 2* of the Sherman Act, *15 U.S.C. § 2*, (First and Second Counts); Conspiracy under Section 1 of the Sherman Act, *15 U.S.C. § 1*, between SanDisk and certain of its licensees (Third Count); and state law claims for intentional interference (Fourth Count) and unfair competition under *California Business & Professions Code §§ 17200 et seq*. (Fifth Count). PNY seeks a **[**1111]** declaratory judgment, damages, restitution and injunctive relief.

SanDisk moves to dismiss all five claims for failure to state a claim pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. In particular, SanDisk argues that the Complaint is not specific enough to meet federal pleading standards in antitrust cases.

Having carefully considered the papers and the pleadings submitted, and the argument of counsel, for the reasons set forth below, the Court hereby **GRANTS** the Motion to Dismiss **WITH LEAVE TO AMEND.**

I. Background

A. THE MARKETS

PNY's Complaint, Dkt. No. 1, alleges as follows: PNY and SanDisk are competitors in the flash memory market. *Id.* ¶ 1. Flash memory is **[*3]** a type of removable data storage device for computer memory. *Id.* ¶¶ 22-23. The technology is used in consumer products such as Universal Serial Bus drives ("USB flash drives"), Compact Flash cards, and solid-state drives. *Id.* ¶ 23. Consumers throughout the United States use these products which are considered one of the most important forms of data storage in the marketplace. *Id.* ¶ 27. In 2010 alone, over one billion dollars of flash memory products were sold in the United States. *Id.*

A flash memory product is comprised of three parts: one, a "device," commonly referred to as a memory chip [1]; two, a "controller," which acts as the interface between the flash memory device and the computer; and three, a flash memory "system," which combines the component parts into a "systems product," such as a USB flash drive, which is the end product sold to the consumer. *Id.* ¶¶ 24-26. The distribution chain that results in the eventual sale of flash memory systems products (such as USB flash drives) has four segments: first, developers and licensors of the flash memory technology needed to manufacture flash memory devices, systems, and products; second, device manufacturers; third, aggregators that **[*4]** purchase component parts and assemble systems products; and fourth, purchasers of "finished" systems products (called resellers) for resale. *Id.* ¶¶ 29-31, 71. The flash memory device is by far the largest part of the overall cost of any flash memory system or product. *Id.* ¶ 28.

Some companies, such as SanDisk, are vertically-integrated, producing flash memory devices, systems, and products both for their own use (*e.g.*, SanDisk-branded products that are ultimately sold to consumers), and for sale to aggregators and resellers. *Id.* ¶¶ 30, 33, 71. In 2010, SanDisk-branded flash memory products accounted for more than 40% of all retail sales of flash memory products in the United States. *Id.* ¶ 42. Other companies manufacture only flash memory devices. *Id.* ¶ 29. PNY is an aggregator, which means that it does not manufacture its own flash memory devices, but instead purchases the devices from manufacturers and assembles those devices with other component parts to create a flash memory systems product. *Id.* ¶¶ 31-33. Aggregators can take

[1] The parties use the terms "device" and "chip" interchangeably in their papers. The Court will use the term "device" in this Order.

advantage of an oversupply **[*5]** of flash memory devices and produce lower-cost flash memory systems products. *Id.* ¶ 33.

B. SANDISK'S PRESENCE IN THE FLASH MEMORY MARKET

According to the Complaint, SanDisk claims to own more than 1,400 United States patents related to flash memory technology that cover 100% of the flash memory technologies that are or can be used to manufacture or assemble flash memory devices, flash memory systems, or flash memory products for sale in the United States. *Id.* ¶ 36. PNY alleges there are no closely suitable substitute technologies to which a manufacturer or aggregator of flash memory devices, systems, or products can switch to avoid using SanDisk's flash memory patented technology. *Id.* ¶ 40. Additionally, PNY alleges that SanDisk has taken the position that any firm manufacturing, assembling, or selling flash memory devices, flash memory systems, or flash memory products in the United States is using one or more of SanDisk's patents and must pay a royalty to SanDisk or face litigation. *Id.* ¶¶ 36, 42-43, 50-51, 55-83.

PNY alleges that there are significant barriers to entering the flash memory market. Specifically, PNY alleges that developing a new portable technology for storing and transferring **[*6]** data that would function as a suitable substitute for flash memory technology could cost billions of dollars. *Id.* ¶¶ 44-45, 49. And these high costs would prevent new competition from entering the technology market for at least two years. *Id.* ¶¶ 44, 52. **[**1112]**

C. SANDISK'S ALLEGED ANTICOMPETITIVE LICENSE AND LICENSING PROGRAM

PNY alleges that SanDisk uses the specter of expensive and endless patent infringement litigation to coerce its competitors into signing (under the guise of a settlement) its uniform, non-negotiable license, which gives SanDisk control over the pricing of flash memory technology and products sold to its competitors and, ultimately, to consumers. *Id.* ¶¶ 1-2, 4-6, 42-43, 50-51, 55-62, 69-70, 75-76, 80, 85-86, 88, 97, 99, 100-05. According to the Complaint, SanDisk's license violates the antitrust laws because it requires licensees to: (1) pay multiple royalties on the same product as it is sold downstream, once when the flash memory device is sold by one of SanDisk's flash memory device manufacturer licensees, and again (after SanDisk's patent rights have been exhausted) after the flash memory device is incorporated into a "system" or "product" and sold by an aggregator **[*7]** such as PNY, *id.* ¶¶ 4, 42-43, 50-51, 77-80, 91-99, 116; (2) pay a royalty on worldwide sales (including sales in countries where SanDisk does not have any patent rights), *id.* ¶¶ 4, 8, 84-89, 116; (3) license an omnibus, unspecified patent portfolio (rather than specific individual patents), *id.* ¶¶ 4, 84-89, 116; and (4) grant-back to SanDisk a worldwide, royalty-free cross-license to all future flash memory-related technological innovations within the scope of the portfolio developed by the licensee, inhibiting efforts to design around SanDisk's patents and stifling licensees' incentives to innovate, *id.* ¶¶ 3-4, 8, 38, 90, 104, 116, 121, 133. Additionally, the royalty structure of SanDisk's licensing agreement allegedly is anticompetitive because it ensures that SanDisk's competitors: (a) purchase products from SanDisk at prices set by SanDisk; (b) purchase products from a supplier licensed by SanDisk and pay a royalty on patented technology to SanDisk, in addition to the royalty already paid by the licensed supplier; (c) purchase the products from an unlicensed supplier and pay SanDisk a very high royalty; or (d) manufacture the product and pay SanDisk the same very high royalty on **[*8]** sales. *Id.* ¶ 143. The cost of the royalty is passed on to consumers in the form of increased retail prices. *Id.* ¶ 88.

D. SANDISK'S ALLEGEDLY PREDATORY BEHAVIOR

In January 2008, PNY entered into such a licensing agreement with SanDisk in order to settle two patent infringement lawsuits, "under the threat of continuing patent litigation." *Id.* ¶ 1. PNY was "willing to enter the license because at that time, 95% of [its] flash memory related purchases were of . . . finished end-user products . . . sold by Toshiba and Samsung." *Id.* ¶ 71. "[T]he license was expected to have minimal impact on PNY's business" because at that time, PNY functioned primarily as a reseller of Toshiba and Samsung flash memory products and the license would not require PNY to pay any royalties on these purchases, and entering into the license would settle SanDisk's patent infringement lawsuit against PNY. *Id.* "But as the markets changed and the availability of lower cost flash memory devices and systems from other manufacturers grew, PNY changed its purchasing mix to de-emphasize the purchase of flash memory systems products, and instead focus on purchasing the component parts" for assembly and resale. *Id.* ¶ 72. In **[*9]** addition to the changing market conditions, PNY claims to have altered its purchasing behavior because Toshiba and Samsung's pricing of finished products (a market in which PNY functioned only as a reseller) "was no longer competitive." *Id.* ¶ 73.

PNY alleges that SanDisk, Toshiba, Samsung and other vertically-integrated manufacturers conspired to increase or hold steady the prices of the flash memory system products so that resellers, like PNY, would purchase the component parts and assemble the flash memory systems products themselves, and pay a royalty to PNY. *Id.* ¶ 74. PNY also alleges that SanDisk's conspiracy with the other vertically-integrated manufacturers (like Toshiba and Samsung), with whom SanDisk also has licenses, has forced low-cost aggregators like PNY to pay duplicate and inflated royalties to SanDisk when they purchase flash memory devices, systems, or products from SanDisk or one of its vertically-integrated licensees. *Id.* ¶¶ 2, 6, 42, 50, 74-80, 93-95, 98, 140-45. Through these licenses, PNY alleges SanDisk ensures that it controls the prices at which flash memory technology and products are sold and SanDisk precludes its competitors from selling low-cost flash memory **[*10]** products.

PNY also alleges that SanDisk's licensing scheme has caused competitors to exit one of these markets, though it does not specify which market. For example, PNY believes that SanDisk entered into a licensing agreement with one of SanDisk's larger competitors, Buffalo, "that requires Buffalo to exit one or more of the Relevant Markets." *Id*. ¶ 82. In addition, PNY alleges that "[s]everal **[**1113]** competitors, including Buffalo, have exited or significantly reduced their presence in one or more of the Relevant Markets as a result of SanDisk's anticompetitive licensing scheme." *Id.* ¶ 103.

PNY alleges that SanDisk's licensing and royalty scheme harms competition in the United States markets for flash memory by keeping the prices for flash memory artificially high and under SanDisk's control. PNY further alleges that SanDisk's exclusionary licensing and royalty scheme operates to preserve and enhance SanDisk's existing monopoly power in all flash memory-related markets or threatens to monopolize additional downstream product markets in violation of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. § 1 et seq.*, and California business tort law.

II. LEGAL STANDARD

To survive a motion to dismiss pursuant **[*11]** to *Federal Rule of Civil Procedure 12(b)(6)*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. In the antitrust context, "a court must determine whether an antitrust claim is 'plausible' in light of basic economic principles." *William O. Gilley Enters., Inc. v. Atl. Richfield Co., 588 F.3d 659, 662 (9th Cir. 2009)* (citing *Twombly, supra, 550 U.S. at 556*). Although the court must construe all allegations of material fact in the light most favorable to the plaintiff, "a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, supra, 550 U.S. at 555* (alteration in original). If the allegations in the complaint fail to give rise to a plausible claim for relief, "'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Id. at 558* (citations omitted). *Twombly* was itself an antitrust **[*12]** case and the Supreme Court's caution to proceed in these cases only upon a complaint with specific allegations is particularly apt.

III. DISCUSSION

A. TENSION BETWEEN PATENT RIGHTS AND ANTITRUST CLAIMS

Courts continue to define at what point conduct stemming from the legitimate exercise of patent rights is transformed into an antitrust claim and/or a defense based on the patent misuse doctrine. [2] It has long been held that a "patentee has the exclusive right to manufacture, use and sell his invention." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 136, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)* (*citing* *Bement & Sons v. Nat'l Harrow Co., 186 U.S. 70, 88-89, 22 S. Ct. 747, 46 L. Ed. 1058, 1902 Dec. Comm'r Pat. 666 (1902))*. The Supreme Court continued: "The heart of his legal monopoly is the right to invoke the State's power to prevent others from utilizing his discovery without his consent. The law also recognizes that he may assign to another his patent, in whole or in part, and may license others to practice his invention." *Id.* (internal citations omitted).

Although the patent **[*13]** laws grant the inventor a limited monopoly over the patented invention, "the ultimate goal of the patent system is to bring new designs and technologies into the public domain through disclosure." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 151, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989)*; *see also,* *Quanta Computer, Inc. v. LG Elecs., Inc., 553 U.S. 617, 626, 128 S. Ct. 2109, 170 L. Ed. 2d 996 (2008)* ("the primary purpose of our patent laws is not the creation of private fortunes for the owners of patents but is 'to promote the progress of science and useful arts'") (quoting *Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 511, 37 S. Ct. 416, 61 L. Ed. 871, 1917 Dec. Comm'r Pat. 391 (1917))*. [3] Thus, the patent laws strike a balance: the inventor is rewarded with a limited patent monopoly, which enables the inventor to reap the financial rewards of the invention, in return for full disclosure of the patented invention and its dedication to the public domain on expiration of the patent. *Scott Paper Co. v. Marcalus Mfg. Co., 326 U.S. 249, 66 S. Ct. 101, 90 L. Ed. 47, 1946 Dec. Comm'r Pat. 616 (1945)* *rehearing denied 326 U.S. 811, 66 S. Ct. 263, 90 L. Ed. 495*. The "patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly," *Brulotte v. Thys Co., 379 U.S. 29, 33, 85 S. Ct. 176, 13 L. Ed. 2d 99 (1964)*; and, subject to the general law, refuse to **[*14]** license an invention altogether. *Image Technical* ***[**1114]*** *Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1218 (9th Cir. 1997)* (noting that it could find "no reported case in which a court ha[s] imposed antitrust liability for a unilateral refusal to sell or license a patent"). However, once the patent owner has sold or licensed the invention, "it may fairly be said that the patentee has received his reward for the use of the patent." *United States v. Masonite Corp., 316 U.S. 265, 278, 62 S. Ct. 1070, 86 L. Ed. 1461, 1942 Dec. Comm'r Pat. 777 (1942)*.

Courts have established limits which the patentee must not exceed in employing the leverage of his patent to control or limit the operations of the licensee. A patent owner may not "extend the monopoly of his patent to derive a benefit not attributable to use of the patent's teachings." *Zenith Radio Corp., supra, 395 U.S. at 136*.

Under **[*15]** the doctrine of patent exhaustion, the initial "authorized sale of an article that substantially embodies a patent exhausts the patent holder's rights" under the patent. *Quanta Computer, Inc., supra, 553 U.S. at 638*. After a patent right is exhausted, it is no longer enforceable by the patentee. *Id. at 626*. Accordingly, a patent holder may not collect a "double royalty," that is, collect a royalty from both a licensee and a purchaser of the licensee's product under the same patent for the same patented product without violating the patent exhaustion doctrine. *PSC Inc. v. Symbol Techs., Inc., 26 F. Supp. 2d 505, 510 (W.D.N.Y. 1998)*. However, patent exhaustion is not a cause of action, but an affirmative defense to a patent infringement lawsuit that "prohibits patent holders from selling a patented article and then 'invoking patent law to control the postsale use of the article.'" *ExcelStor Tech., Inc. v Papst Licensing GMBH & Co. KG, 541 F.3d 1373,1376 (Fed. Cir. 2008)* (quoting *Quanta Computer, Inc., supra, 553 U.S. at 638*).

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[2] See discussion of historical context in Geoffrey D. Oliver, *Princo v. International Trade Commission:* ***Antitrust Law*** *and the Patent Misuse Doctrine Part Company*, 25 ANTITRUST 62, 63 (2011).

[3] The Patent Clause of the Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *U.S. Const. art. I, § 8, cl. 8*. The means adopted by Congress of promoting the progress of science is by granting the inventor a limited patent monopoly.

While the patent system serves to encourage innovation, the antitrust laws serve to foster competition. *See* *Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1362 (Fed. Cir. 1999)* **[*16]** (citing *Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 866-67 (Fed. Cir. 1985)*. Thus, the statutory rights extended by intellectual property laws do not confer upon the patent owner a privilege or immunity to violate the antitrust laws. *Id.*; *Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1576 (Fed Cir. 1990)* (patent does not shield patent owner from the antitrust laws). But the Supreme Court has cautioned that even if patent misuse exists, "it does not necessarily follow that the misuse embodies the ingredients of a violation of either *§ 1* or *§ 2* of the Sherman Act." *Zenith Radio Corp., supra, 395 U.S. at 140*. The intersection between these two competing concepts continues to develop.

The tension between these concepts is particularly important here, as the gravamen of Plaintiff's Complaint arises from a change in market conditions and Plaintiff's current dissatisfaction with the licenses entered into in January 2008. However, because Plaintiff has styled these allegations of patent misuse as violations of ***antitrust law***, they must be analyzed as such under the *Twombly* standard. [4]

B. [*18] SHERMAN ACT *§ 2* CLAIMS: MONOPOLIZATION AND ATTEMPTED MONOPOLIZATION

Section 2 of the Sherman Act makes it unlawful to monopolize, attempt to monopolize, or combine or conspire to monopolize. [5] PNY brings claims for both Monopolization (Count **[**1115]** I) and Attempted Monopolization (Count II) in *each* of the flash memory-related markets.

To state a cause of action for the offense of monopoly under *Section 2* of the Sherman Act, a plaintiff must plead two elements: (1) possession of monopoly power in the relevant market; and (2) willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*.

If a defendant does not possess monopoly power, a Sherman Act *Section 2* claim may be maintained for attempted monopolization if (1) there **[*19]** is "a dangerous probability" that the defendant may be able to achieve monopoly power and (2) the defendant is engaged in predatory or anticompetitive conduct with (3) "a specific intent to monopolize." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*; *Cost Mgmt. Servs., Inc. v. Wash. Natural Gas Co., 99 F.3d 937, 949 (9th Cir. 1996)* (the elements for attempted

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[4] PNY urges the Court to look at the overall scheme alleged in the Complaint to determine whether **[*17]** it has stated a claim for antitrust violation. Pl.'s Opp'n 14 (citing *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)* (courts should not "tightly compartmentaliz[e] the various factual components and wip[e] the slate clean after scrutiny of each"). While the slate need not be "wiped clean" after scrutiny of a particular theory, each legal theory must be examined for its sufficiency separately. In *City of Groton v. Conn. Light & Power Co., 662 F.2d 921, 928-29 (2d Cir. 1981)* (quoted in *Intergraph Corp., supra, 195 F.3d at 1367*) , the Second Circuit explained:

> [W]e reject the notion that if there is a fraction of validity to each of the basic claims and the sum of the fraction is one or more, the plaintiffs have proved a violation of *section 1* or *2* of the Sherman Act. The proper inquiry is whether, qualitatively, there is a "synergistic effect."

While the ultimate determination of an antitrust violation rests on the "overall combined effect" of the alleged acts, *see* *City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1376 (9th Cir. 1992)*, "there can be no synergistic result" if none of the acts alleged is an antitrust violation. *Cal. Computer Prods. v. Int'l Bus. Machs., Corp., 613 F.2d 727 (9th Cir. 1979)*.

[5] *15 U.S.C. § 2*. Monopolizing trade a felony; penalty

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .

monopolization are "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct to accomplish monopolization; (3) dangerous probability of success; and (4) causal antitrust injury").

Additionally, because PNY seeks relief under Sections 4 and 16 of the Clayton Act, *15 U.S.C. §§ 15*, *26*, [6] it must allege that it has suffered (*Section 4*) or faces the threat of (*Section 16*) antitrust injury of "'the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 113, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*.

The first step in the analysis is to define the relevant market or markets. No dispute appears to exist that the relevant markets are (a) the upstream market consisting of the flash memory technology itself and (b) the downstream markets flowing therefrom consisting of flash memory devices, systems, and products. Further, all relevant markets are based only in the United States. Accordingly, the Court will discuss the remaining elements in turn. The Court further notes, at this juncture, that because PNY does little to separate the facts alleged for the conduct relative to each market, the discussion of each element, to the extent necessary, will be analyzed with each specific market in mind.

1. Nature of SanDisk's Market Power in the Relevant Markets

All *Section 2* Sherman Act claims require that the plaintiff adequately plead either monopoly power or "a dangerous probability" that **[*21]** the defendant may be able to achieve monopoly power. *Newcal Indus. v. Ion Office Solution, 513 F.3d 1038, 1044 n.3 (9th Cir. 2008)*. The Supreme Court defines monopoly power as the "power to control prices or exclude competition." *See* *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 393, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. For purposes of a motion to dismiss, a plaintiff may plead this market power through allegations concerning (i) direct evidence showing the effects of the anticompetitive behavior or (ii) indirect evidence of market power. "If the plaintiff puts forth evidence of restricted output and supracompetitive prices, that is direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power." *Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)* (summary judgment). To demonstrate market power indirectly, or circumstantially, a plaintiff must define the relevant market, and show that (i) the defendant owns a dominant share of that market and (ii) there are significant barriers to entry and existing competitors lack the capacity to increase their output in the short run. *Id. at 1439* (the "barriers **[*22]** to entry" test looks at not only whether "there are significant barriers to entry [but also whether] . . . existing competitors lack the capacity to increase their output in the short run").

a) Upstream Market: flash memory technology

i. Market share

PNY alleges that SanDisk is a monopolist in the flash memory technology market because SanDisk purports to own 100% of the United States patents in flash memory technology. Complaint ¶ 36. Courts generally require a 65% market share to establish a prima facie showing of market power. *Image Technical Servs., supra, 125 F.3d at 1206* (evidence supported jury verdict finding defendant **[**1116]** controlled monopoly share of parts market where jury instruction required 65% market share in order to find that defendant monopoly power).

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[6] Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything **[*20]** forbidden in the antitrust laws may sue therefor." *15 U.S.C. § 15*. Section 16 of the Clayton Act provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*.

Thus, although ownership of a patent does not necessarily confer market power, *see* *Illinois Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*, the allegation that SanDisk owns 100% of the technology patents is sufficient to plead a dominant share of the market.

ii. Barriers to entry

PNY combines its allegation of 100% ownership of United States patents with other allegations, showing not just a dominant market share, but **[*23]** the ability to control prices and the existence of entry barriers. Specifically, PNY alleges: "there are no closely suitable technologies to which a manufacturer of flash memory systems products could switch in the event of a price increase for the patents SanDisk claims cover all forms of flash memory technology." Complaint ¶ 40. In other words, if SanDisk owns all the flash memory technology patents, it has the ability to set the price to license its patents. Additionally, PNY alleges that the flash memory technology market is characterized by high entry barriers, which would prevent new competition from entering the market. *Id.* ¶¶ 44-46, 52, 118, 130. To support this factual conclusion PNY further alleges that new competitors would require two years of time and billions of dollars in capital investment to develop the technology to compete in this upstream market. *Id.*

SanDisk does not dispute the significant investment to develop flash memory technology, but instead argues that PNY fails to allege any facts of market power or exclusionary conduct beyond that inherent in SanDisk's patents. SanDisk's Motion to Dismiss, Dkt. No. 29, ("Mot. to Dismiss") 13. SanDisk notes that PNY alleges **[*24]** that "alternative designs [of flash memory systems products] exist that do not infringe some or all of SanDisk's patents." *Id.* (citing Complaint ¶ 83). Thus, according to SanDisk, both the availability of competing technologies and the existence of other flash memory technology patent holders negate any inference that SanDisk is a monopolist in the upstream flash memory technology market. *Id.*

Based upon the specificity of the allegations in the Complaint, which support at least the inference of SanDisk's total dominance of the upstream market, the Court finds that PNY has sufficiently pled this element of a *Section 2* Sherman Act violation for monopolization of the upstream flash memory technology market. Consequently, the corresponding element under a claim for attempted monopolization is satisfied as an alternative theory.

b) Downstream Markets: flash memory devices, systems, and products

With respect to the downstream markets consisting of (i) devices, (ii) systems, and (iii) products, PNY alleges that SanDisk has a "monopolistic grip" over these markets and brings *Section 2* Sherman Act claim under theories of both monopolization and attempted monopolization. Complaint ¶¶ 42, 50.

PNY **[*25]** alleges that SanDisk possesses the power to control prices and exclude competition in the downstream markets and, thus, argues that it has alleged direct proof that SanDisk is a monopolist in all the downstream markets. [7] The conclusory allegations, which mirror the requisite elements, are based on the allegation that SanDisk uses its licenses to extract a royalty on the same patented technology on all downstream market sales, which has the effect of controlling prices. Pl.'s Opp'n 16-17 (citing Complaint ¶¶ 2, 4-6, 38, 74, 76, 80, 88, 97, 99, 101-02, 104, 117, 121, 128-29, 133, 142-43, 151). It is unclear from the Complaint or PNY's opposition brief how collecting royalties demonstrates the ability to set prices. Perhaps there is an effect, but whether the effect is specific to PNY or to the market generally is an important distinction. Without more, these allegations do not support the claim that SanDisk has the power *to control* prices and thus, PNY has not alleged facts to show market power directly. *See* *United States v. Syufy Enters., 903 F.2d 659, 670 (9th Cir. 1990)* (defendant lacked power to control prices where evidence showed he did not possess power to set prices).

[7] PNY's **[*26]** reasoning is somewhat circular: "SanDisk's anticompetitive licensing scheme has given it the power to control prices and exclude competition, as evidenced by SanDisk's actual exercise of control over prices and the actual exclusion of competition in the Relevant Markets." Complaint 117.

PNY further suggests that it has plausibly alleged that SanDisk has the power to exclude competition based on the allegation that SanDisk entered into contracts with "several competitors, including Buffalo, a large manufacturer of electronic devices," which required them "to exit one or more of the Relevant Markets." *See* Complaint ¶¶ 82, 103. **[**1117]** PNY fails to specify which market the competitors allegedly exited. Moreover, PNY needs to support this conclusion with facts that show SanDisk has the "power to exclude competition from the relevant market generally, not just to exclude a particular competitor." *L.A. Land Co. v. Brunswick Corp., 6 F.3d 1422, 1426-27 (9th Cir. 1993)*. The allegation that SanDisk contracted with a small number [8] of competitors to exit "one or more of the Relevant Markets" does not support the conclusion that SanDisk has sufficient power to exclude all competition *generally* from any **[*27]** of the downstream markets. *See id.* Further, unlike the specific claims of exclusionary conduct and suppression of competition in *Continental Ore, supra*, PNY has identified only one specific instance of a competitor leaving the market. *See* *370 U.S. at 694* (alleging defendants' monopolistic and restrictive practices caused producers and distributors of iron ore, including plaintiffs, to be eliminated from market).

The facts alleged do not show directly that SanDisk has market power in any of the downstream markets. Accordingly, the Court next will analyze whether PNY alleges sufficient facts concerning market share and barriers to entry in any of the downstream markets to show indirectly that SanDisk has monopoly power or a dangerous probability thereof.

i. Market share

> In terms of market share, PNY alleges that SanDisk has at least a 40% market share of retail sales of flash memory products, such as USB flash drives. *Id.* ¶¶ 36, 42. PNY admits **[*28]** that it does not know SanDisk's market share in the two other downstream markets, but alleges that SanDisk exerts direct control over those downstream markets through its uncompetitive licenses.

As stated above, generally, courts require a 65% market share to establish a prima facie showing of monopolistic market power. *See* *Image Technical Servs., supra, 125 F.3d at 1206*. PNY's Complaint in its current form at best articulates only a 40% share in the retail market for products. With respect to the other two downstream markets, the allegations regarding this element are wholly lacking. Accordingly, PNY has failed to plead sufficient facts supporting an allegation of monopoly power in these downstream markets either directly or circumstantially.

The next question is whether PNY has sufficiently alleged the first element regarding market power to state a claim for attempted monopolization. PNY must plead facts sufficient to allege that "a dangerous possibility" exists that SanDisk may be able to achieve monopoly power. In *Rebel Oil, supra*, the Ninth Circuit found a market share of 44% to be sufficient in an attempt case, although it cautioned against a purely mathematical analysis. *51 F.3d at 1438 & n.10* **[*29]** .

However, PNY admits that it has does not know the extent of SanDisk's share *at all* for the downstream markets for (i) flash memory devices or (ii) flash memory systems. Without any quantitative or qualitative allegations of market share, PNY may not pursue claims for attempted monopolization of the flash memory devices or systems market.

By contrast, PNY does allege that SanDisk possesses a 40% share of the retail market for flash memory products. A 40% share of the retail market is a sufficient share of the market for an attempt case provided there are barriers to entering the market.

ii. Barriers to entry

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[8] The Court assumes that PNY uses the term "several" in its ordinary meaning: a small number; more than two or three but not very many. OXFORD ENGLISH DICTIONARY ONLINE, *http://www.oed.com/viewdictionaryentry/Entry/176914* (last visited Apr. 17, 2012).

> To establish, as PNY alleges, that SanDisk has a "monopolistic grip" over the downstream markets, PNY also must allege facts that show there are significant barriers to entry and that existing competitors lack the capacity to increase their output in the short run. *Rebel Oil, supra, 51 F.3d at 1439*. There are no factual allegations that could support the conclusion that there are barriers to entry in any of the downstream markets. As an initial matter, PNY's allegations of barriers to entry into the downstream market focus on barriers existing in the upstream market. PNY alleges **[*30]** that significant barriers exist because it would require two years of time and billions of dollars in capital investment to develop new *technology.* Complaint ¶¶ 44-45, 52. However, the flash memory technology market, which PNY defines as "the technology needed to manufacture, import, and sell flash memory devices, systems, and products," *id.* ¶ 35, is not the relevant market to analyze barriers to entering the downstream markets. PNY does not allege facts of such barriers to entering into any of the downstream markets.

In addition, the facts alleged do not show that existing competitors lack the capacity to increase output in the short run; actually, the facts alleged in the Complaint show the opposite. **[**1118]** According to the Complaint, after SanDisk and other vertically-integrated firms conspired to increase prices in the flash memory systems products market to a supracompetitive level, PNY and other companies increased output in the flash memory systems products market. *Id.* ¶¶ 72-75. Thus, the evidentiary facts, which are pled - that existing competitors increased output in the short run in response to a price increase - contradict PNY's conclusion that existing competitors do not have the **[*31]** capacity to increase output in the short run.

Based upon the foregoing, the Court finds that PNY has not sufficiently pled that SanDisk has a monopoly in any of the downstream markets or that there is "a dangerous probability" that SanDisk may be able to achieve monopoly power in any of the downstream markets. Thus, PNY fails to state a claim for monopolization or attempted monopolization of the downstream markets for flash memory devices, systems, and products.

2. Allegations of Anti-Competitive Conduct

a) Legal Framework

> For a claim of monopoly, the second and final element to be pled "is the use of that monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 482-83, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (quoting *United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 92 L. Ed. 1236 (1948))*. If SanDisk uses its license "as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated *§ 2*." *Id.* (citing *Grinnell Corp., supra, 384 U.S. at 570-71*; *United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945)*; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600-605, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. Thus, **[*32]** mere possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct done with the intent to maintain or acquire a monopoly.

Similarly, for a claim of attempted monopolization, a plaintiff must allege facts to demonstrate that the defendant is engaged in predatory or anticompetitive conduct with "a specific intent to monopolize." *Spectrum Sports, Inc., supra, 506 U.S. at 456*. Or, as further explained by the Ninth Circuit, the plaintiff must allege "predatory or anticompetitive conduct to accomplish monopolization" with the "specific intent to control prices or destroy competition." *Cost Mgmt. Servs., Inc., supra, 99 F.3d at 949*. Therefore, the relevant inquiry for a *Section 2* claim of attempted monopolization is whether the defendant has engaged in improper conduct that has or is likely to have the effect of controlling prices or excluding competition, thus, creating or maintaining market power. *See* *PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 108 (2d Cir. 2002)*.

b) Factual Allegations

> PNY alleges that SanDisk has either extended or sought to extend its patent monopolies related to flash memory technology, devices, systems, and **[*33]** products beyond their lawful grants through (1) anticompetitive terms in its uniform, nonnegotiable license (double royalty, worldwide royalty-free cross license on future innovations, payment of royalties on worldwide sales, and portfolio licensing of patents); and (2) execution of its coercive licensing scheme against all of its low-price competitors in the United States markets for flash memory technology, devices, systems, and products. Complaint ¶¶ 1-6, 8, 38, 42-43, 50-51, 55-62, 69-70, 75-80, 84-99, 100-05, 116, 121, 133.

An overarching inadequacy with PNY's Complaint is its failure to distinguish factual allegations regarding the alleged antitrust violations without distinguishing between and among the various markets and causes of action. The Complaint admits that SanDisk's monopoly in the flash memory technology market is a consequence of the patent laws. The Complaint is devoid of any allegations of "willful acquisition" of this monopoly. Further, while PNY alleges "anticompetitive conduct" generally, it fails to relate that conduct to the maintenance of SanDisk's legally obtained monopoly of the patented technology. Accordingly, at its most basic level, PNY fails to state **[*34]** a *Section 2* claim for monopolization in the flash memory technology market. [9]

[1119]** *iii. Conduct Relative to the Licenses*

> First, PNY alleges that SanDisk's licensing agreements violate the patent exhaustion doctrine because SanDisk collects a royalty on the sale of a flash memory device twice: first when the device is sold by the manufacturer and PNY charges a second royalty on the sale of the same device after the device is incorporated into a flash memory system or product. Pl.'s Opp'n 10-11; Complaint **[*35]** ¶ 79. To the extent PNY believes SanDisk is charging a double royalty on its patents, PNY needs to set out its claim more clearly to state a Sherman Act claim. The Complaint alleges that any firm manufacturing, assembling or selling flash memory devices, systems or products is practicing one of SanDisk's patents and thus must pay SanDisk a royalty. *See id.* ¶ 36. The Complaint also alleges that the patent portfolio consists of 1,400 patents. *Id.* This suggests that SanDisk is not collecting a "double royalty," but rather enforcing its rights under the patent laws by collecting a separate royalty for a different set of patent rights. Accordingly, PNY has failed to allege anticompetitive conduct.

Second, SanDisk's license allegedly requires licensees to "grant-back" a "cross-license" that covers any new technological innovations developed by the licensee on flash memory-related technology within the scope of the patent portfolio license, thereby stifling the incentive to innovate. *Id.* ¶ 90. According to the Complaint, "requiring licensees to share their future technological innovations with SanDisk on a worldwide royalty-free basis" is anticompetitive because "even if a licensee develops **[*36]** or obtains access to an alternative technology that it could use to practice fewer or none of SanDisk's patents, the licensee would still be required to pay a royalty to SanDisk on any sales of the new product and SanDisk would have the right to use the new technology on a worldwide royalty-free basis." Complaint ¶¶ 4(d), 90. PNY alleges that this "grant-back" provision in SanDisk's license is part of SanDisk's unlawful scheme to maintain its market power and suppress competition.

There is nothing inherently illegal or anticompetitive about a grant-back provision in a patent license. *Transparent-Wrap Mach. Corp. v. Stokes & Smith Co., 329 U.S. 637, 647, 67 S. Ct. 610, 91 L. Ed. 563, 1948 Dec. Comm'r Pat. 662 (1947)* (finding no antitrust behavior and holding grant-back provision "is not per se illegal and unenforceable," but noting the possibility of abusing this practice). With respect to this claim, the mere transfer of a valid patent "has no antitrust significance," but merely shifts a lawful monopoly to different hands." *See Brunswick Corp. v. Riegel*

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[9] PNY alleges in its Complaint that Kingston's Counterclaim in *SanDisk Corp. v. Kingston Tech. Co.*, 10-cv-00243 (W.D. Wis.) survived a motion to dismiss. In its opposition, it adds that "PNY's allegations are nearly identical to the claims that were the subject of a trial in the Western District of Wisconsin." Pl.'s Opp'n 1-2. The Counterclaim in *Kingston* (which was filed under seal) does not nudge PNY's claims in this case across the line from possible to plausible. Moreover, the Court notes that in the *Kingston*, after a full trial on the merits, the Judge's findings of fact do not support many of PNY's allegations about SanDisk's market power or the barriers to entry into the downstream markets.

Textile Corp., 752 F.2d 261, 266 (7th Cir. 1984). To show that a grant-back provision is unlawful, PNY must allege facts that demonstrate a restraint on competition that violates the antitrust **[*37]** laws. *See* Cutter Laboratories v. Lyophile-Cryochem Corp., 179 F.2d 80, 92 (9th Cir. 1949) (citing United States v. Line Material Co., 333 U.S. 287, 68 S. Ct. 550, 92 L. Ed. 701 (1948); Morton Salt Co. v. Suppiger Co., 314 U.S. 488, 62 S. Ct. 402, 86 L. Ed. 363, 1942 Dec. Comm'r Pat. 733 (1942); and Hartford-Empire Co. v. United States, 323 U.S. 386, 65 S. Ct. 373, 89 L. Ed. 322, 1945 Dec. Comm'r Pat. 607 (1945)).

While it is possible that, as PNY alleges, the grant-back provision is part of an overall scheme by SanDisk to maintain control of a patent monopoly in the flash memory technology market, PNY does not allege facts to show that the grant-back provision is anticompetitive. Instead, PNY alleges the conclusion that the license provision violates the antitrust laws but no facts to support such a conclusion. Indeed, though PNY alleges that the grant-back provision lessens the incentive to innovate, PNY stops short of alleging that this licensing provision actually *has* stifled innovation. *See* Complaint ¶¶ 3, 90. [10] To state a Section 2 Sherman Act claim based upon the grant-back provision, PNY will need to do more than allege the ultimate conclusion of anticompetitive behavior; it will need to allege facts, which if proven, would establish anticompetitive conduct.

Third, PNY alleges that the license is anticompetitive because it requires a licensee to pay for a broad and unspecified patent portfolio, rather than specific, individual patents; and to pay royalties on worldwide sales, which would include sales in geographic markets that are not covered by its patents. *Id.* ¶¶ 84-86. [11] The fact that PNY entered into a **[**1120]** form license over which SanDisk was able to negotiate more favorable terms does not constitute anticompetitive conduct for antitrust purposes. Spectrum Sports, Inc., supra, 506 U.S. at 458 ("The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."). PNY must allege facts — not conclusions — that would tend to demonstrate anticompetitive conduct that has the effect of maintaining, or a dangerous probability of creating, a monopoly.

For the reasons set forth above, PNY has not sufficiently alleged the anticompetitive behavior required to state a Section 2 Sherman Act claim for monopolization or attempted monopolization.

3. Antitrust Injury

To bring a private action for violation of the antitrust laws, PNY must allege that it has suffered or faces the threat of antitrust injury of "'the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 113, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)). **[*40]** Thus, it is not enough to allege that the complained of acts are linked to anticompetitive conduct, "unless [the injury] is attributable to an anti-competitive aspect of the practice under scrutiny." Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990). SanDisk argues that PNY does not allege causal antitrust injury because the alleged injury flows from the financial terms of the parties' license agreement, to which PNY willingly and voluntarily agreed, rather than any claimed competition-reducing conduct by SanDisk. Mot. to Dismiss 6-8. PNY counters that its alleged injury flows directly from the oppressive SanDisk license itself, and the fact that PNY submitted to SanDisk's market power and coercion when it signed SanDisk's license does not immunize the terms of that license from

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[10] At best, PNY alleges patent misuse through this licensing **[*38]** provision. Complaint 90. While this may suffice as an equitable defense to a patent infringement lawsuit, it stops well short of establishing a Sherman Act violation.

[11] SanDisk cites court cases upholding, as procompetitive, licensing agreements, much like its contract with PNY, requiring royalty payments on sales **[*39]** of products not covered by the licensor's patents where the parties' contract contained a clause stating that this method for calculating royalties was a convenient means to calculate royalties. Mot. to Dismiss 7-9. Because all of the cases cited were decided on with the benefit of a full evidentiary record, either following trial or on summary judgment, it is not clear whether, as a matter of law, because the parties' contract contains such a convenience of the parties license recital, PNY is precluded from alleging that the method for calculating royalties is anticompetitive.

> the antitrust laws. Pl.'s Opp'n 7. Although in one paragraph PNY indicates that it entered into the contract willingly, elsewhere it alleges SanDisk used coercion to force the terms of the contract upon PNY.

The "injury" alleged here arises out of the payment of royalties to practice SanDisk's patents. SanDisk argues that this is not antitrust injury because all of PNY's alleged harm flows from **[*41]** the terms of the contract into which it voluntarily entered. Because PNY has not adequately pled that it entered into the unfavorable license with SanDisk as a result of anticompetitive conduct, [12] or how exactly it has suffered antitrust injury based upon the terms of the contract, it cannot rely upon its performance of the terms of that contract to establish causal antitrust injury.

Based on the foregoing analysis, the Court hereby **GRANTS** the Motion to Dismiss as to PNY's *Section 2* Sherman Act claims, Counts I and II **WITH LEAVE TO AMEND.**

C. SHERMAN ACT § 1 CONSPIRACY CLAIM: COMBINATION IN RESTRAINT OF TRADE[13]

Liability under Section 1 of the Sherman Act, *15 U.S.C. § 1*, requires a "contract, combination . . ., or conspiracy, in restraint of trade or commerce." *Twombly, supra, 550 U.S. at 548*. To state a claim under *Section 1* of the Sherman Act, the claimant must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce; (3) which actually injures competition. *Id.* "[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality" for purposes of *Section 1*. *Id. at 557*. To plead an "agreement between antitrust co-conspirators, **[**1121]** the complaint must allege facts such as a 'specific time, place, or person involved in the alleged conspiracies' to give a defendant seeking to respond **[*43]** to allegations of a conspiracy an idea of where to begin." *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042 (9th Cir. 2008)* (quoting *Twombly, supra, 550 U.S. at 565 n.10*).

PNY has failed to allege any evidentiary facts of a conspiracy. Rather, it alleges "[u]pon information and belief, SanDisk and certain manufacturers of flash memory technology products licensed by SanDisk, including Toshiba, Samsung, and others have entered into continuing and ongoing contracts, combinations, agreements, and/or conspiracies to unreasonably restrain trade and commerce in the Relevant Markets." *Id.* ¶ 140. This "conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality" for purposes of *Section 1*. *Twombly, supra, 550 U.S. at 557*. Accordingly, PNY fails to plead evidentiary facts to state a cause of action for a Section 1 conspiracy. [14]

Based on the foregoing analysis, the Court hereby **GRANTS** the Motion to Dismiss as to PNY's Section 1 Sherman Act claim, Count III, **WITH LEAVE TO AMEND.**

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[12] PNY alleges that it entered into the agreement to put an end to a patent infringement lawsuit PNY brought against it, but it does not suggest that the lawsuit was a "sham litigation" or "bad faith prosecution." *See Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986 (9th Cir. 1979)* (prosecution of patent enforcement actions are presumed to be in good faith, but if prosecuted in bad faith, it may violate antitrust laws).

[13] *15 U.S.C. § 1*. Trusts, *etc.*, in restraint of trade illegal; penalty

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade **[*42]** or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . .

[14] PNY argues in its opposition that through discovery it expects to get more information about the contracts. Pl.'s Opp'n 20. Unfortunately, PNY cannot save its Section 1 claim based on the expectation that through discovery it might find a factual basis for its conspiracy claim. In *Twombly, supra*, the Supreme Court cautioned **[*44]** "a district court must retain the power to insist on some specificity in pleading before allowing a potentially massive factual controversy to proceed." *550 U.S. at 558*. Based on the present state of the pleadings, PNY may not obtain this discovery.

D. Count IV — Intentional Interference with Business Relationships

The elements for a cause of action for intentional interference with contractual relations and for intentional interference with prospective economic advantage essentially are: (1) a contract or other economic relationship between plaintiff and a third party; (2) the defendant's knowledge of the contract or relationship; (3) defendant's intentional acts designed to induce a breach or disrupt the contract or relationship; (4) actual breach or disruption; and (5) damage. *Quelimane Co. v. Stewart Title Guaranty Co., 19 Cal. 4th 26, 55, 77 Cal. Rptr. 2d 709, 960 P.2d 513 (Cal. 1998)*; *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (Cal. 2003)*. PNY provides no facts from one can discern the relationships with which SanDisk has interfered (or at least **[*45]** more specific than every contractual relationship PNY has ever or will ever enter into). PNY's alleges: "PNY has existing and valuable business relationships, as well as reasonable expectations of further and future relationships, with manufacturers, retailers, and purchasers relating to flash memory technology," that "SanDisk was aware of these prospective business and actual contractual relationships and engaged in intentional and wrongful conduct designed or calculated to disrupt and interfere with those relationships" and that "SanDisk's conduct in interfering with such prospective business and actual contractual relations is intentional, malicious, and without justification." Complaint ¶¶ 149-151. These are not "facts." They are legal conclusions.

The parties dispute whether PNY needs to identify the particular third-party with whom Plaintiff has a relationship. The contractual party "must be identified in some manner." *Ramona Manor Convalescent Hosp. v. Care Enters., 177 Cal. App. 3d 1120, 1133, 225 Cal. Rptr. 120 (Cal. Ct. App. 1986)*. Here, PNY provides no facts from which the Court can discern impacted relationships. Without any details of the relationships with which SanDisk allegedly interfered, **[*46]** SanDisk cannot be expected to frame an answer to these allegations. Accordingly, PNY has failed to state a claim for either intentional interference with contractual relations or intentional interference with prospective economic advantage.

Based on the foregoing analysis, the Court hereby **Grants** the Motion to Dismiss as to PNY's claim for intentional interference with contractual relations and for intentional interference with prospective economic advantage, Count IV, **With Leave to Amend.**

E. Count V — Unfair Competition in Violation of *California Business & Professions Code §§ 17200 et seq.*

California's UCL statute prohibits "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. Prof. Code. § 17200*; *Cel-Tech Comm., Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (Cal. 1999)*. PNY purports to plead claims under the unlawful and unfair prongs of the UCL. Complaint ¶¶ 158-59. With respect to PNY's allegations under the unlawful prong of the UCL, PNY simply borrows from its federal antitrust claims, claiming that the alleged federal antitrust violations are the "unlawful" conduct which the UCL **[**1122]** claim is directed to. *Id.* ¶ 159. If the antitrust claims were adequately **[*47]** plead, this would establish the unlawful prong. But because PNY has failed to adequately plead its antitrust claims, its unlawful-prong UCL claim necessarily fails as well. *See* *Ingels v. Westwood One Broadcasting Servs., Inc., 129 Cal. App. 4th 1050, 1060, 28 Cal. Rptr. 3d 933 (Cal. Ct. App. 2005)* ("'If the [underlying] claim is dismissed, then there is no 'unlawful' act upon which to base [] the derivative Unfair Competition claim'") (second alteration in original); *Scripps Clinic v. Sup. Ct., 108 Cal. App. 4th 917, 934-39, 134 Cal. Rptr. 2d 101 (Cal. Ct. App. 2003)*; *see also* *Krantz v. BT Visual Images, 89 Cal. App. 4th 164, 107 Cal. Rptr. 2d 209 (Cal. Ct. App. 2001)* (the viability of an unlawful UCL claim stands or falls with the underlying claim).

Likewise, PNY's unfair-prong UCL claim also is deficient. Where, as here, a competitor alleges a violation of the UCL's unfair-prong, "unfair" "means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, supra, 20 Cal. 4th at 186-87*; Complaint ¶ 1 ("PNY and SanDisk are competitors."). **[*48]** Because PNY has not adequately pled its federal antitrust claims, and because its UCL claims are not materially different than its federal antitrust claims, it follows then, that PNY's claim under the unlawful and unfair prongs of the UCL fails as well. [15]

Based on the foregoing analysis, the Court hereby **GRANTS** the Motion to Dismiss as to PNY's claim for Unfair Competition in Violation of *Cal. Bus. Prof. Code §§ 17200 et seq.*, Count V, **WITH LEAVE TO AMEND.**

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss is **GRANTED WITH LEAVE TO AMEND.** Plaintiff shall file an amended complaint within 28 days from the date this Order is filed. Defendant shall file its response to the amended complaint within 28 days of service.

This Order Terminates Docket Number 29.

IT IS SO ORDERED.

April 20, 2012

/s/ Yvonne Gonzales Rogers

YVONNE GONZALES ROGERS

UNITED STATES DISTRICT COURT JUDGE

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[15] In its opposition, PNY indicates that the claim for intentional interference could satisfy the unfair prong. Because this is not pled as a basis for the UCL claim, and also because the claim for intentional interference fails to state a claim, this argument cannot prevent dismissal.

In re Processed Egg Prods. Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

April 24, 2012, Decided; April 24, 2012, Filed

MDL No. 2002; 08-md-02002

Reporter

2012 U.S. Dist. LEXIS 57846 *; 2012-1 Trade Cas. (CCH) P77,874; 2012 WL 1443625

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION. THIS DOCUMENT APPLIES TO: ALL INDIRECT PURCHASER PLAINTIFF ACTIONS

Subsequent History: Settled by, Motion granted by *In re Processed Egg Prods. Antitrust Litig., 2012 U.S. Dist. LEXIS 98301 (E.D. Pa., July 16, 2012)*

Prior History: *In re Processed Egg Prods. Antitrust Litig., 2012 U.S. Dist. LEXIS 48321 (E.D. Pa., Apr. 4, 2012)*

Core Terms

allegations, Egg, conspiracy, Entities, motion to dismiss, antitrust, participated, joined, Sherman Act, consumer protection, unjust enrichment, anti trust law, trade group, alleged conspiracy, meetings, Motions, state claims, producers, guidelines, principles, attended, factual allegations, Defendants', reduction, disposal, terms

Counsel: **[*1]** For IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION, IN RE: IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION.

For SANDRA A. JESKIE, Special Master: SANDRA A. JESKIE, LEAD ATTORNEY, DUANE, MORRIS LLP, PHILADELPHIA, PA.

Judges: GENE E.K. PRATTER, United States District Judge.

Opinion by: GENE E.K. PRATTER

Opinion

MEMORANDUM

GENE E.K. PRATTER, J.

I. Introduction

Nine Defendant egg producers and trade groups raise specific arguments for dismissal of the Indirect Purchaser Plaintiffs' Second Amended Consolidated Class Action Complaint (hereinafter, the "IPSAC") as to the individual movants, contending, *inter alia*, that the pleading fails to allege facts plausibly suggesting that they specifically were parties to an alleged federal antitrust conspiracy. [1] On these grounds, Defendants respectively assert that all claims brought against them—a Sherman Act Section 1 claim, and 46 state antitrust, consumer protection, and unjust enrichment claims arising under the laws of 22 state jurisdictions [2]—should be dismissed pursuant to *Federal Rule of Civil Procedure 12(b)(6)*.

These motions, however, do not provide occasion for Defendants to entirely fly the coop of this case. The Court grants in part the four motions of Daybreak Foods, Inc., Hillandale-Gettysburg L.P., Hillandale Farms Inc., and Hillandale Farms East, Inc. (collectively, the "Hillandale Entities"), United Egg Association ("UEA"), and Land O'Lakes, Inc. as to the Sherman Act Section 1 claim and denies in part the remainder of their motions as to the state claims. The Court denies the other three motions brought by Defendants Michael Foods, Inc., Rose Acre Farms, Inc., and Ohio Fresh Eggs, LLC. [3] The Court's basis for these rulings is laid out in this Memorandum.

II. Background, Factual Allegations, and Legal Standards

The background of this litigation and the core factual allegations contained in the IPSAC are set forth at length in the Court's *March 19, 2012 Opinion and Order, 841 F. Supp. 2d 867, 2012 U.S. Dist. LEXIS 37265, 2012 WL 935669* (Doc. Nos. 631 and 632). That Opinion also discussed the applicable legal standards for reviewing a motion to dismiss in this case, including the relevance of the *Erie* doctrine's precepts to the Court's consideration of the

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[1] The Motions addressed here are: Motion to Dismiss Indirect Purchaser Second Amended Consolidated Complaint as to Defendants Michael Foods, Inc. and Papetti's **[*2]** Hygrade Egg Products, Inc. (Doc. No. 327) (hereinafter, "Michael Foods Mot."); Defendant Rose Acre Farm, Inc.'s Motion to Dismiss Indirect Purchasers' Second Consolidated Amended Class Action Complaint (Doc. No. 328) (hereinafter, "Rose Acre Mot."); Defendant Ohio Fresh Eggs, LLC's Renewed Motion to Dismiss the Indirect Purchasers' Second Consolidated Amended Class Action Complaint (Doc. No. 330) (hereinafter, "Ohio Fresh Mot."); Defendant Daybreak Foods, Inc.'s Motion to Dismiss Indirect Purchasers' Second Amended Consolidated Class Action Complaint (Doc. No. 324) (hereinafter, "Daybreak Mot."); Motion to Dismiss the Indirect Purchaser Plaintiffs' Second Consolidated Amended Class Action Complaint on Behalf of Defendants Hillandale-Gettysburg, L.P., Hillandale Farms, Inc., and Hillandale Farms East, Inc. (Doc. No. 326) (hereinafter, "Hillandale Entities Mot."); United Egg Association's Motion to Dismiss the Claims Against it in Indirect Purchasers' Second Consolidated Amended Class Action Complaint (Doc. No. 329) (hereinafter, "UEA Mot."); Defendant Land O'Lakes, Inc.'s Motion to Dismiss Indirect Purchasers' Second Amended Consolidated Class Action Complaint (Doc. No. 325) (hereinafter, **[*3]** "Land O'Lakes Mot."). The Plaintiffs' responded to the Motions (Doc. No. 354), and the Defendants' filed reply briefs (Doc. Nos. 375, 377, 378, 379, 381, 382, 383). Additionally, the parties filed various supplemental materials in support of their positions. The transcript of the oral argument on the Motions is contained in the record at Docket No. 597.

[2] Certain claims in the IPSAC are presently not, or are no longer, subject to these motions, namely, those state claims which the Court dismissed by granting in part a prior joint defense motion to dismiss—the consumer protection claims arising under the laws of Kansas, New York, and West Virginia, the North Dakota unjust enrichment claim, the Plaintiffs' Utah Antitrust Act claim with respect to alleged damages occurring prior to May 1, 2006, and certain federal and state antitrust claims with respect to alleged injuries relating to purchases of manufactured products incorporating processed eggs—and those claims that Plaintiffs voluntarily withdrew, namely, all claims brought under Maine or Puerto Rico law, and the consumer protection claims brought under the laws of Michigan, South Dakota, and Wisconsin. *See March 19, 2012 Op. and Order, 841 F. Supp. 2d 867, 2012 U.S. Dist. LEXIS 37265, 2012 WL 935669* **[*4]** (Doc. Nos. 631 and 632). The Court also has dismissed all damages for pending claims outside the various applicable statutes of limitation periods. *See Apr. 4, 2012 Mem. and Order, 2012 U.S. Dist. LEXIS 48321, 2012 WL 1137100* (Doc. Nos. 650 and 651). To the extent that the motions *sub judice* seek to dismiss any such claims that are no longer a part of the case, the Court does not address that aspect of these motions.

[3] Although movant Papetti's Hygrade Egg Products, Inc., identifies itself as a wholly-owned subsidiary of Defendant Michael Foods and has jointly **[*5]** filed a motion to dismiss with Michael Foods, Michael Foods Mot. at 1, this movant is not named as a defendant in the IPSAC. Only Paragraph 129 refers to Papetti's Hygrade Egg Products, Inc. as a "Defendant," but given the structure of the IPSAC, the Court concludes such a reference is an editorial oversight. Ergo, Papetti's Hygrade Egg Products, Inc. is not a party in this suit and lacks standing to bring a motion to dismiss. As such, the Court denies Papetti's Hygrade Egg Products, Inc.'s motion to dismiss insofar that it seeks dismissal from the suit. The Court does not include Papetti's Hygrade Egg Products, Inc. in its count of the nine moving Defendants.

Plaintiffs' state law claims, as well as *Federal Rules of Civil Procedure 8* **[*6]** and *12(b)(6)*. Therefore, the Court will not repeat that legal framework in this Memorandum except to incorporate the prior Opinion by reference. *See 2012 U.S. Dist. LEXIS 48321, [WL] at *1-6*. Insofar as any such previously-discussed matters arise in-depth as a predicate to the Court's rulings here, the Court includes more explicit discussion as appropriate.

III. Legal Discussion

The Court first addresses whether the IPSAC states a Sherman Act Section 1 claim as to each moving Defendant. The Court then addresses the Defendants' arguments for dismissal of the various state antitrust, consumer protection, and unjust enrichment claims.

A. Sherman Act § 1 Claims

Each of the nine Defendants argues that the IPSAC's allegations are insufficient to support a Section 1 Sherman Act claim against it. They all contend that the allegations fail to plausibly suggest that the individual Defendants were respectively parties to the alleged conspiracy to manipulate the supply of, and thereby fix prices for, domestically-sold eggs, by joining and participating in it. The Court addressed similar, if not identical, arguments once before with respect to the Direct Purchaser Plaintiffs' case. *See Sept. 26, 2011 Mem., 821 F. Supp. 2d 709, 2011 U.S. Dist. LEXIS 109641, 2011 WL 4465355* (Doc. **[*7]** No. 562). In that decision, the Court also explained the relevant legal framework pertinent to a Sherman Act Section 1 claim, which the Court references here. *See 2011 U.S. Dist. LEXIS 109641, [WL] at *5-8*.

In that case, many of the same defendants individually moved to dismiss the Direct Purchaser Plaintiffs' Second Consolidated Amended Class Action Complaint (hereinafter, the "SAC") on the grounds that the facts pled against them were insufficient to demonstrate that they joined and participated in the alleged conspiracy. The Court concluded that, in light of the entirety of the complaint, a defendant's agreement to join and participate in the conspiracy was plausibly suggested by allegations that the defendant was involved with trade group associations and attended trade group meetings where allegedly key decisions fundamental to the alleged conspiracy were made or where effects of alleged coordinated actions were extolled, in conjunction with allegations that the defendant participated in, or complied with, the guidelines of the United Egg Producers Certification Program ("UEP Certification Program"). *See 2011 U.S. Dist. LEXIS 109641, [WL] at *11, 24, 26*; *see also 2011 U.S. Dist. LEXIS 109641, [WL] at *19* (concluding that a defendant's adoption of the Certification Program's **[*8]** chick hatch reduction guidelines, in addition to involvement with trade group associations and certain meetings, was consistent with agreement to the conspiracy). As alleged, the UEP Certification Program guidelines, which mandated lower cage space densities for hens, embraced particular features which were anti-competitive with no apparent alternative pro-competitive benefits, including, *inter alia*, chick hatch reduction, prohibition on the practice of backfilling, and requirement that egg producers to commit 100% of their facilities to the guidelines. *2011 U.S. Dist. LEXIS 109641, [WL] at *12-14*. The Court also found additional allegations against certain defendants suggestive of agreement to the conspiracy, such as public and private comments reflecting awareness of certain features of the egg market that could be manipulated by actions that impacted supply, participation in the United States Egg Marketers export program, a commitment with other egg producers to undertake an early molting and disposal initiative, and a written commitment agreeing to disposal or flock reduction within fixed time periods. *2011 U.S. Dist. LEXIS 109641, [WL] at *18-19, 22-24, 26*.

Based upon this assessment, the Court held that Direct Purchaser Plaintiffs sufficiently **[*9]** alleged that Defendants Michael Foods, Daybreak, Rose Acre, and Ohio Fresh joined and participated in the conspiracy to reduce the supply of eggs. Accordingly, the Court denied the corresponding motions to dismiss.

As to the other defendants that moved to dismiss the Direct Purchaser Plaintiffs' SAC, the Court considered whether the alleged facts sufficiently connected those defendants to the conspiracy on the grounds of either independent liability, or some other basis for imputing liability, *i.e.*, secondary liability. In considering the motion to dismiss filed by the Hillandale Entities, the Court first determined that "[t]here simply is an absence of specific factual allegations in the [complaint] to connect each (or any) of the Hillandale Entities directly to the conspiracy." *2011 U.S. Dist. LEXIS 109641, [WL] at *28*. Additionally, the Court recognized that the SAC's "general allegations as to 'Hillandale Farms' or 'Hillandale' are insufficient to give notice to the Hillandale Entities of the claims against them." *2011 U.S. Dist. LEXIS 109641, [WL] at *32*.

The Court then determined that allegations that the Hillandale Entities were "vertically integrated" and had overlapping ownership and control were insufficient to support a claim that the **[*10]** Hillandale Entities and a fourth entity, Defendant Hillandale Farms of Pa., Inc., "were so linked that they effectively function as a single entity with respect to alleged antitrust conduct." *2011 U.S. Dist. LEXIS 109641, [WL] at *31*. The Court also concluded that Direct Purchaser Plaintiffs had not presented any legal authority that would support a "single enterprise" theory for imputing liability, and indeed, that there was legal authority to the contrary. *2011 U.S. Dist. LEXIS 109641, [WL] at *29-30*. Accordingly, the Court granted the Hillandale Entities' motion to dismiss without prejudice to Direct Purchaser Plaintiffs to seek leave to amend their complaint.

The Court similarly granted without prejudice UEA's motion to dismiss, concluding that the allegations in the SAC were insufficient to state a claim against the trade group. *2011 U.S. Dist. LEXIS 109641, [WL] at *37*. The Court found that the complaint's allegations of, *inter alia*, common resources in terms of leadership, staff, and membership between incorporated trade groups, United Egg Producers ("UEP") and United States Egg Marketers ("USEM"), as well as allegations that UEA and UEP held meetings at concurrent times and places and was in an "alliance" with UEP and USEM, could not sustain a claim that UEA joined **[*11]** or participated in the alleged conspiracy. *2011 U.S. Dist. LEXIS 109641, [WL] at *35-36*. Moreover, the Court found that allegations concerning the conduct of certain UEA leaders or staff did not plausibly suggest that UEA could be liable for antitrust violations of its agents premised on a theory of apparent authority. *2011 U.S. Dist. LEXIS 109641, [WL] at *36*. As to the facts pled against UEA that alleged "UEA's actual conduct as an entity," which included allegations that UEA's "Further Processors" division invited the UEP Executive Committee to a meeting on April 27, 2004 and that UEA approved the provision of funds for UEP to apply to "animal welfare research projects," UEP's "management," and UEP's "programs and management," the Court determined that they were inadequate to support a claim against UEA. *2011 U.S. Dist. LEXIS 109641, [WL] at *37*.

Here, the IPSAC's allegations against the nine moving Defendants are generally almost identical to—and certainly, in most respects, not materially different from—those allegations that the Court previously examined in its ruling on the individual motions to dismiss the Direct Purchaser Plaintiffs' complaint. Indeed, many parties explicitly acknowledge that the two complaints are on the whole factually identical. *See, e.g.*, Daybreak **[*12]** Mot. at 1, 4-5; Ohio Fresh Mot. at 1; Tr. at 126:10-17; *see also* *March 19, 2012 Op., 2012 U.S. Dist. LEXIS 37265, 2012 WL 935669, at *2* (recognizing the similarities between the two pleadings). By way of example, the complaints contain virtually identical allegations about the various facets of the UEP Certification Program guidelines, ranging from the reduced cage densities of hens to the 100% facilities commitment rule, prohibition on backfilling, and chick hatch reduction. *See, e.g.*, IPSAC ¶¶ 159, 174-75, 202, 295; *see also* *March 19, 2012 Op., 2012 U.S. Dist. LEXIS 37265, 2012 WL 935669, at *2-3*.

Akin to the Direct Purchaser Plaintiffs' SAC, the IPSAC alleges that Michael Foods, Rose Acres, and Ohio Fresh were involved with egg trade group associations as members and leaders of committees or boards, attended trade group meetings where allegedly key decisions instrumental to the conspiracy were made or where effects of alleged coordinated actions were extolled, and participated in the UEP Certification Program. *See, e.g.*, IPSAC ¶¶ 74, 163, 177, 204, 209, 211, 215, 218, 224, 245, 259, 260, 269. Additionally, Plaintiffs allege that Ohio Fresh both (1) made a commitment with other egg producers to undertake an early molting and disposal initiative, **[*13]** and (2) made a written commitment agreeing to disposal or flock reduction within fixed time periods. *Id.* ¶¶ 198, 210, 218. [4]

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[4] At this time, the Court notes that several Defendants request the Court's judicial notice of certain documents in order to bolster their arguments in support of dismissal. However, the Court declines to consider any of the proffered documents for purposes of evaluating the adequacy of the IPSAC.

Based upon these allegations and in consideration of the complaint in its entirety, the Court concludes that the allegations as to these three Defendants are sufficient to give notice of the contours of the Sherman Act Section 1 claim against them. The IPSAC's allegations plausibly suggest that those Defendants joined and participated in the alleged conspiracy to reduce the supply of eggs. Accordingly, the Court denies the Motions of Michael Foods, Rose Acres, and Ohio Fresh.

However, unlike the Direct Purchaser Plaintiffs' SAC, the IPSAC does not allege that Daybreak adopted or followed the UEP Certification guidelines generally, or specifically as to chick hatch. Instead, Plaintiffs **[*17]** allege that Daybreak was a member of and held leadership positions in UEP and attended UEP meetings where allegedly key decisions instrumental to the conspiracy were made or where effects of alleged coordinated actions were extolled. *Id.* ¶¶ 91, 204, 211, 215, 218, 245. Additionally, the IPSAC alleges that Daybreak's President made a comment published in *Egg Industry* "attributed high shell egg prices to the 'United Egg Producer's animal welfare program that most shell egg producers participate in.'" *Id.* ¶ 233. These allegations alone are insufficient to plausibly suggest that Daybreak participated or joined the conspiracy. *See* *Sept. 26, 2011 Mem., 2011 U.S. Dist. LEXIS 109641, 2011 WL 4465355, at *9, 18*. Thus, the Court grants without prejudice Daybreak's Motion as to the Sherman Act Section 1 claim.

Additionally, the IPSAC does not contain sufficient facts to state a claim against the Hillandale Entities or UEA. Plaintiffs point to the same facts upon which Direct Purchaser Plaintiffs relied in defending the SAC and which the Court found unpersuasive. Like the SAC, the IPSAC lacks factual allegations that connect any of the Hillandale Entities directly to the conspiracy, and general allegations as to "Hillandale **[*18]** Farms" or "Hillandale" are

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Michael Foods asks for notice of a Declaration of William L. Greene, counsel for Michael Foods, and several attachments purportedly comprising certain UEP meeting minutes, for the purposes of demonstrating that "Michael Foods was selling egg products made with non-UEP Certified eggs" prior to its joining the UEP Certified Program. Michael Foods Mot. at 11; *see also id.* at 6-7. Michael Foods also cites the Declaration in relation to arguments concerning whether trade group meeting attendance allegations can sustain the claim that Michael Foods joined the alleged conspiracy. Michael Foods Reply at 7. In seeking to refute factual allegations suggestive of its agreement to the alleged conspiracy, Rose Acre seeks judicial notice of several documents cited in the IPSAC—four **[*14]** news or periodical articles and a document purported to be UEP's Animal Husbandry Guidelines for U.S. Egg Laying Flocks (2000 ed.). Rose Acre Mot. at 6-7 & n.7, 12; *see also id.*, Ex. C; Rose Acre Reply at 7. Additionally, Land O'Lakes asks the Court to judicially notice January 25, 2005 UEP meeting minutes to demonstrate that its representative was present at the meeting but did not participate. Land O'Lakes Mot. at 3.

Neither these materials, nor the Defendants' arguments in support of judicial notice of these materials, provide occasion for the Court to deviate from the general rule that "a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings." *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997)* (citation omitted). In ruling on a *Rule 12(b)(6)* motion, "a court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick, 605 F.3d 223, 230 (3d Cir. 2010)* (citation omitted). Here, the Court need not consider the Defendants' proffered materials because none **[*15]** of the exceptions apply. Plaintiffs did not attach the materials to the IPSAC as exhibits; the materials are not incorporated through citation or limited quotation; and it is unclear whether the authenticity of the materials are unchallenged. *See* *Sept. 26, 2011 Mem., 2011 U.S. Dist. LEXIS 109641, 2011 WL 4465355, at *23*. Additionally, the Plaintiffs' federal and state claims are not central to, based upon, or integral to these proffered materials. *See id.*

The Court recognizes that if any of the proffered materials verges on being central to the Plaintiffs' claims, it would be Rose Acre's proffered UEP Animal Husbandry Guidelines. *See* *2011 U.S. Dist. LEXIS 109641, [WL] at *23 n. 32* ("By illustrative contrast [to certain other documents offered for judicial notice], the UEP Certification guidelines are arguably integral to Plaintiffs' antitrust claim . . . . . But this example is purely academic ...."). However, as is true of the other Defendants' extrinsic documents, it is unclear whether the authenticity of Rose Acre's document is challenged or not. Moreover, as alleged in the IPSAC, the UEP Certification guidelines are not static, but instead constitute an ever-evolving set of documented standards that over time were modified to incorporate **[*16]** many of the features that the Court has concluded are anti-competitive, such as the prohibition on backfilling, the 100% rule, and so forth *See, e.g., id.* ¶¶ 62, 170, 174-75, 202, 224, 295. So although the "UEP Certification guidelines" as a general concept are central to the Plaintiffs' claims, as the guidelines are described in the IPSAC, no single version of the guidelines as embodied by a single document could be so integral to the Plaintiffs' claims as to be properly before the Court on a motion to dismiss.

inadequate to plausibly suggest that the Hillandale Entities joined or participated in the conspiracy. *See* 2011 U.S. Dist. LEXIS 109641, [WL] at *32. For the same reasons the Court articulated as to the Direct Purchaser Plaintiffs' SAC, the Court finds that the IPSAC's allegations concerning "vertical integration" and overlapping ownership and control across the Hillandale Entities and Defendant Hillandale Farms of Pa., Inc. do not sustain a claim against the Hillandale Entities on basis of imputed Section 1 liability. *See* 2011 U.S. Dist. LEXIS 109641, [WL] at *31; *cf.* 2011 U.S. Dist. LEXIS 109641, [WL] at *25. Thus, the Court concludes that it is appropriate to grant the Hillandale Entities' Motion, again without prejudice, subject to the same provisos. *See* 2011 U.S. Dist. LEXIS 109641, [WL] at *32 n.39 ("[T]he Court would expect any new effort by Plaintiffs to amend as to any of the Hillandale Entities would represent and entail a meaningfully more substantive claim as to the individual entities than was mounted against any one of—or all of—them in the [complaint].").

As in the Direct Purchaser Plaintiff's SAC, the IPSAC alleges that UEA had overlapping membership, leadership, and staff with UEP and USEM, held meetings at concurrent times and locations as UEP, invited the UEP Executive **[*19]** Committee to a meeting on April 27, 2004, and provided financial support to UEP projects. *See, e.g.*, IPSAC ¶¶ 50, 138, 139, 255-60, 271-74. Like the SAC, the IPSAC sets forth facts concerning the conduct of certain UEA leaders and staff, as well as UEA members' attendance at UEP meetings. *See, e.g., id.* ¶¶ 195, 206, 257, 264-65. As the Court has already determined, such allegations, in light of the entirety of the facts pled, do not sustain a claim that UEA joined or participated in the alleged conspiracy, nor that it can be liable for Section 1 violations on account of secondary liability. *See* Sept. 26, 2011 Mem., 2011 U.S. Dist. LEXIS 109641, 2011 WL 4465355, at *33-37. The Court thereby grants UEA's Motion without prejudice.

As a final matter, the Court concludes that the IPSAC does not adequately state a Section 1 claim against Land O'Lakes. Although the Court previously has not ruled on a motion to dismiss by Land O'Lakes as to any complaint in this litigation, nor has the Court considered factual allegations specific to Land O'Lakes before, the Court already has assessed facts similar to those made against Land O'Lakes and found them deficient for pleading purposes. In the IPSAC, the specific facts pled as **[*20]** to Land O'Lakes include charges that a Land O'Lakes employee attended as a member or guest [5] a January 25, 2005 meeting of the UEP Board of Directors at which "a motion was made and seconded that extended through Labor Day the 'intentions program' whereby members agreed to dispose of their flocks 4 weeks earlier than previously scheduled and/or reduce flock size by 5%" and no dissents to the vote were recorded. IPSAC ¶¶ 215-218. The IPSAC also alleges that Land O'Lakes formed Moark LLC in a "joint venture" with Moark Productions in 2000, "acquired 100% of the ownership" of Moark LLC in 2006, is the parent company of Moark LLC, and "operat[ed] through its subsidiary, Moark [LLC]," to market and process eggs. IPSAC ¶¶ 62, 64. The IPSAC sets forth various alleged facts as to Moark LLC, including its membership in UEP and UEA, attendance at trade group meetings, and so forth, however, without reference to Land O'Lakes. [6] These allegations, when considered in view of the entirety of the IPSAC, do not plausibly suggest that Land O'Lakes is independently liable for a Section 1 violation. [7] Likewise, there are insufficient allegations that would sustain a claim

[5] The IPSAC designates the Land O'Lakes employee's attendance at the meeting as either a UEP member or guest. IPSAC ¶ 215. The IPSAC, however, does not explicitly allege that Land O'Lakes was ever a member of UEP.

[6] As an exception to this, Land O'Lakes is ambiguously referred to parenthetically in an allegation that Moark LLC applied and was certified under the UEP Certification Program: "The following Defendants submitted applications for certification and agreed to implement the [UEP Certification Program] guidelines: as of March 22, 2002, . . . Moark (Land O'Lakes) . . . ." *Id.* ¶ 163. However, this allegation is simply too vague to provide adequate notice to Land O'Lakes of its supposed offense.

[7] Because the applicable pleading standards do not allow the Court to consider allegations that are unsupported and bald conclusions, the Court cannot appropriately consider the IPSAC's allegation that "Land O'Lakes has been an active participant in . . . Moark's, UEP's, and its co-conspirators' efforts to reduce supply and fix prices" as anything more than **[*22]** a conclusory allegation. *Id.* ¶ 62. There are simply no specific facts in the IPSAC to support Land O'Lakes' alleged "active participation" in the conspiracy, and as such the Court need not accept such a charge as true. *See* Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 183-84 (3d Cir. 2000); Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997).

that Land O'Lakes is secondarily **[*21]** liable for Moark's alleged conduct as a parent company or otherwise. [8] Accordingly, the Court grants Land O'Lake's Motion without prejudice.

B. State Antitrust, Consumer Protection, and Unjust Enrichment Claims

All moving Defendants essentially have placed their arguments as to all federal and state claims in one basket. To wit, Defendants seek dismissal of the various state claims brought against them on the grounds that Plaintiffs have not alleged facts that plausibly suggest that any of the moving Defendants joined or participated in the alleged conspiracy to reduce the supply of eggs—the same standard upon which they rely in urging the dismissal of the Sherman Act Section 1 claims. The Court does not find that such arguments provide appropriate grounds for dismissal of the various state claims at this time.

Defendants have not provided any appropriate legal authority to demonstrate that the federal antitrust conspiracy principles that they appear to invoke apply to any of the state antitrust, consumer protection, or unjust enrichment claims. The case law upon which Defendants rely is focused upon Sherman Act claims. **[*24]** [9] And indeed, the issue of whether a defendant has joined or participated in an alleged antitrust conspiracy is consistent with a Section 1 claim because such a claim is contingent upon the existence of an agreement to the conspiracy. *See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* ("Because *§ 1 of the Sherman Act* 'does not prohibit [all] unreasonable restraints of trade ... but only restraints effected by a contract, combination, or conspiracy," [t]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express," (quoting *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* and *Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L. Ed. 273 (1954))*; *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 315 (3d Cir. 2010)* (stating that the "existence of an agreement is the hallmark of a Section 1 claim"); *see also* note 9, *supra* (citing cases that recognize the same).

Defendants, however, have not demonstrated the propriety of applying federal **[*26]** antitrust conspiracy principles to the particular 46 state antitrust, consumer protection, or unjust enrichment claims posed here. Defendants have not established whether any of the 22 jurisdictions under which Plaintiffs have brought their state claims have adopted, follow, or would follow this standard as to each type of claim asserted.

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[8] To the extent that Plaintiffs seek to premise secondary liability on a "joint venture" liability theory, Pls.' Resp. at 57-58, and assuming, *arguendo*, this theory is applicable in the federal antitrust context, there are insufficient facts to adequately plead such a form of liability. In the absence of any other specific facts pled, the conclusory and vague accusation that Land O'Lakes and Moark were in a "joint venture" simply does not suffice for pleading purposes. *See generally, e.g.*, *Restatement (Third) of Agency § 3.03 cmt. (e)(2)* (2006) ("An association limited to a single project is a joint venture. A joint venture is treated as a form of partnership, in which duties and authority are limited by the scope of the venture."); Uniform Partnership Act § 202 (1997) (discussing criteria for forming a partnership); *id.* **[*23]** § 306 ("Except as otherwise provided in subsections (b) and (c), all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.").

[9] Defendants cite case law that speaks to Section 1 claims in support of the proposition that a defendant must have joined and participated in the alleged conspiracy in order for a claim against them to **[*25]** be sufficiently pled. *See* Michael Foods Mot. at 3-4 (citing *Jung v. Ass'n of Am. Med. Colls., 300 F. Supp. 2d 119, 161 (D.D.C. 2004)*, *Hinds County v. Wachovia Bank N.A., 620 F. Supp. 2d 499, 513 (S.D.N.Y. 2009)*, *In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008))*; Ohio Fresh Mot. at 2 (citing *TFT-LCD (Flat Panel), 586 F. Supp. 2d at 1117* and *Jung, 300 F. Supp. 2d at 161*); Rose Acre Mot. at 8-9 (citing *TFT-LCD (Flat Panel), 586 F. Supp. 2d at 1110*, *In re Travel Agent Comm'n Antitrust Litig., No. 03-30000, 2007 U.S. Dist. LEXIS 79918, 2007 WL 3171675, at *1-2, *3 n.4 (N.D. Ohio 2007)*, *aff'd*, *583 F.3d 896 (6th Cir. 2009)*, and *Jung, 300 F. Supp. 2d at 161*); Daybreak Mot. at 3 (citing *Jung, 300 F. Supp. 2d at 160-61*); Hillandale Entities Mot. at 5 (citing *TFT-LCD (Flat Panel), 586 F. Supp. 2d at 1117*); UEA Reply at 2 (citing *In re OSB Antitrust Litig., No. 06-826, 2007 U.S. Dist. LEXIS 56573, 2007 WL 2253419, at *5 (E.D. Pa. Aug. 3, 2007)* and *TFT-LCD (Flat Panel), 586 F. Supp. 2d at 1117*); Land O'Lakes Mot. at 3 (citing *TFT-LCD (Flat Panel), 586 F. Supp. 2d at 1117*, *Hinds County, 620 F. Supp. 2d at 513*, and *Jung, 300 F. Supp. 2d at 161*).

The Court certainly recognizes that federal ***antitrust law*** often serves as an analogue to, or controlling in the interpretation of, jurisdiction-specific ***antitrust law***, and that, accordingly, it is not an unreasonable proposition to argue that the principles of federal ***antitrust law*** might apply in determining whether a defendant joined or participated in the alleged conspiracy. *See* 1 ABA Section of ***Antitrust Law***, ***Antitrust Law*** *Developments*, 624 (6th ed. 2007) ("Many states have statutory provisions that require varying degrees of deference to federal precedent in applying state ***antitrust law*** to practices also subject to federal law. These statutes are often called 'harmonization statutes.' Some courts in states without harmonization statutes have adopted similar policies of deference, also varying in degree, to federal antitrust precedent."). [10] Nonetheless, **[*27]** in some jurisdictions, state ***antitrust law*** is not always a symbiont of federal ***antitrust law***. Moreover, the parties have not presented this issue in the context of jurisdiction-specific law that would permit the Court draw the conclusion that each of the state antitrust claims should be treated consistently with the Plaintiffs' Section 1 claim for purposes of stating a state antitrust claim against each Defendant.

Furthermore, any symbiosis that the Plaintiffs' state law claims generally might have with federal ***antitrust law*** becomes more attenuated when considering the state consumer protection and unjust enrichment claims at issue. As demonstrated by the Court's March 19, 2012 Opinion, which assessed many of the Plaintiffs' state consumer protection and unjust enrichment claims, these types of claims proscribe conduct that is not exclusively limited to anticompetitive activities among conspirators akin to ***antitrust law***. The Court's earlier decision also exemplifies **[*28]** the degree of variation among these claims across jurisdictions. It follows that the various jurisdictions' laws as to consumer protection or unjust enrichment claims may not necessarily embrace any federal conspiracy principles (or any principles of civil conspiracy for that matter). [11] But, in the absence of any meaningful jurisdiction-specific legal authority and given the spare nature of the Defendants' arguments as presented to the Court, the Court cannot conclude at this time that the various state consumer protection and unjust enrichment claims (or any claims that Defendants conspired to violate those laws) embrace federal antitrust conspiracy principles in determining whether Plaintiffs have stated these claims against individual Defendants. [12] Accordingly, the Court denies each of the Defendants' Motions as to the state claims.

IV. Conclusion

For the foregoing reasons, the Court denies the Motions of Defendants Michael Foods, Inc., Rose Acre Farms, Inc., and Ohio Fresh Eggs, LLC. The Court also grants in part the Motions of Daybreak Foods, Inc., Hillandale-Gettysburg L.P., Hillandale Farms Inc., and Hillandale Farms East, Inc., United Egg Association, and Land O'Lakes,

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[10] Ostensibly, this observation also would hold true for the Plaintiffs' consumer protection claims that arise from violations of ***antitrust law*** in jurisdictions that follow or have adopted federal antitrust conspiracy principles.

[11] The same would be true for various jurisdictions' civil conspiracy claims—in the event that Plaintiffs are relying on civil conspiracy to establish the individual Defendants' vicarious or joint liability for the underlying consumer protection or unjust enrichment claims, as opposed to individual liability.

[12] It may well be that each and every one of **[*29]** the jurisdictions at issue has adopted federal antitrust conspiracy principles or follows similar, if not identical, principles of civil conspiracy as to the various antitrust, consumer protection, and unjust enrichment claims. Yet, in light of the Defendants' failure to proffer any meaningful legal authority in support of their arguments, the Court presently has no means of evaluating or recognizing the validity *vel non* of those arguments. The Court simply is not in a position to rule as a matter of law as to any state claim that Plaintiffs must plausibly suggest that Defendants joined or participated in the alleged conspiracy in order to state a claim against each moving Defendant. The Court shall not and cannot assume the burden of deciding this matter as to the 46 state claims when the Defendants have elected not to do so.

The Court recognizes that Plaintiffs also rely on similar legal authority as Defendants in responding to the Defendants' individual motions. Nonetheless, a motion to dismiss requires a defendant to bear the onus of raising and properly supporting arguments for dismissal. As such, in these circumstances, the Plaintiffs' equivalent failure to address relevant jurisdiction-specific **[*30]** case law cannot constitute grounds for dismissal.

Inc. as to the Sherman Act Section 1 claim without prejudice to Plaintiffs to seek leave to amend their pleading [13] and denies in part their Motions as to the state claims.

An Order consistent with this Memorandum follows.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

ORDER

AND NOW, this 24th day of April, 2012, upon **[*31]** consideration of the seven motions to dismiss filed by Defendants Michael Foods, Inc., [1] Rose Acre Farms, Inc., Ohio Fresh Eggs, LLC, Daybreak Foods, Inc., Hillandale-Gettysburg, L.P., Hillandale Farms, Inc., and Hillandale Farms East, Inc., United Egg Association, and Land O'Lakes, Inc. (Doc. Nos. 327, 328, 330, 324, 326, 329, 325), and the Indirect Purchaser Plaintiffs' response (Doc. No. 354), the Defendants' replies (Doc. Nos. 375, 377, 378, 379, 381, 382, 383), and the parties' supplemental filings thereto, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED as follows:

1. Motion to Dismiss Indirect Purchaser Second Amended Consolidated Complaint as to Defendants Michael Foods, Inc. and Papetti's Hygrade Egg Products, Inc. (Doc. No. 327) is DENIED.

2. Defendant Rose Acre Farm, Inc.'s Motion to Dismiss Indirect Purchasers' Second Consolidated Amended Class Action Complaint (Doc. No. 328) is DENIED.

3. Defendant Ohio Fresh Eggs, LLC's Renewed Motion to Dismiss the Indirect Purchasers' Second Consolidated Amended Class Action Complaint (Doc. No. 330) is DENIED.

4. Defendant Daybreak Foods, Inc.'s Motion to Dismiss Indirect Purchasers' Second Amended Consolidated **[*32]** Class Action Complaint (Doc. No. 324) is GRANTED without prejudice as to Count I and DENIED as to the other claims. Plaintiffs may seek leave to file an amended complaint consistent with the terms of the Court's Memorandum.

5. Motion to Dismiss the Indirect Purchaser Plaintiffs' Second Consolidated Amended Class Action Complaint on Behalf of Defendants Hillandale-Gettysburg, L.P., Hillandale Farms, Inc., and Hillandale Farms East, Inc. (Doc. No. 326) is GRANTED without prejudice as to Count I and DENIED as to the other claims. Plaintiffs may seek leave to file an amended complaint consistent with the terms of the Court's Memorandum.

6. United Egg Association's Motion to Dismiss the Claims Against it in Indirect Purchasers' Second Consolidated Amended Class Action Complaint (Doc. No. 329) is GRANTED without prejudice as to Count I and DENIED as to the other claims. Plaintiffs may seek leave to file an amended complaint consistent with the terms of the Court's Memorandum.

7. Defendant Land O'Lakes, Inc.'s Motion to Dismiss Indirect Purchasers' Second Amended Consolidated Class Action Complaint (Doc. No. 325) is GRANTED without prejudice as to Count I and DENIED as to the other claims. Plaintiffs **[*33]** may seek leave to file an amended complaint consistent with the terms of the Court's Memorandum.

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[13] "Leave to amend must generally be granted unless equitable considerations render it otherwise unjust." *Arthur v. Maersk, Inc., 434 F.3d 196, 204 (3d Cir. 2006)* (citing *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*, and *Lorenz v. CSX Corp., 1 F.3d 1406, 1414 (3d Cir. 1993))*. No Defendant has raised arguments that provide sufficient grounds to weigh against permitting Plaintiffs to seek leave to amend those claims that the Court dismisses without prejudice.

[1] Jointly with non-party movant, Papetti's Hygrade Egg Products, Inc.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

FTC v. Watson Pharms., Inc.

United States Court of Appeals for the Eleventh Circuit

April 25, 2012, Decided; April 25, 2012, Filed

No. 10-12729

Reporter

677 F.3d 1298 *; 2012 U.S. App. LEXIS 8377 **; 102 U.S.P.Q.2D (BNA) 1561 ***; 2012-1 Trade Cas. (CCH) P77,865; 23 Fla. L. Weekly Fed. C 966; 2012 WL 1427789

FEDERAL TRADE COMMISSION, Plaintiff-Counter Defendant-Appellant, versus WATSON PHARMACEUTICALS, INC., SOLVAY PHARMACEUTICALS, INC., Defendants-Appellees, PAR PHARMACEUTICAL COMPANIES, INC., PADDOCK LABORATORIES, INC., Defendants-Counter Claimants-Appellees.

Subsequent History: US Supreme Court certiorari granted by *FTC v. Watson Pharms., Inc., 133 S. Ct. 787, 184 L. Ed. 2d 527, 2012 U.S. LEXIS 9415 (U.S., 2012)*

Stay granted by, Motion granted by *FTC v. Abbvie Prods. LLC, 2013 U.S. App. LEXIS 17978 (11th Cir. Ga., Jan. 10, 2013)*

Decision reached on appeal by *FTC v. Abbvie Prods. LLC, 713 F.3d 54, 2013 U.S. App. LEXIS 5691 (11th Cir. Ga., 2013)*

Reversed by, Remanded by *FTC v. Actavis, Inc., 133 S. Ct. 2223, 186 L. Ed. 2d 343, 2013 U.S. LEXIS 4545 (U.S., 2013)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of Georgia. D.C. Docket No. 1:09-cv-00955-TWT.

In re AndroGel Antitrust Litig., 687 F. Supp. 2d 1371, 2010 U.S. Dist. LEXIS 16017 (N.D. Ga., 2010)

Disposition: AFFIRMED.

Core Terms

patent, settlement, generic, infringement, monopoly, manufacturers, exclusionary, antitrust, invalid, profits, patent holder, parties, generic drug, expired, settlement agreement, lawsuit, pioneer, district court, competitor, new drug, rights, settle, holder, certification, likely to prevail, approval process, drug company, effects, patent infringement, time of settlement

LexisNexis® Headnotes

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Patent Law > ... > Defenses > Patent Invalidity > General Overview

HN1[] **Exclusive Rights, Manufacture, Sale & Use**

In a type of patent litigation settlement known as a pay for delay or reverse payment agreement, a patent holder pays the allegedly infringing generic drug company to delay entering the market until a specified date, thereby protecting the patent monopoly against a judgment that the patent is invalid or would not be infringed by the generic competitor.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food & Drugs Act

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN2[] **Agriculture & Food, Federal Food & Drugs Act**

No one can market or sell a new drug in the United States without first gaining the approval of the Food and Drug Administration (FDA). *21 U.S.C.S. § 355(a)*. The particular pathway to approval depends largely on the type of drug involved. One pathway is for pioneer drugs, which are ones that have never before received FDA approval. To initiate that approval process, an applicant files a New Drug Application (NDA). The NDA must contain detailed information about the drug, including its chemical composition, full reports of investigations about its safety and efficacy, descriptions of its production and packaging processes, and proposed labeling language. *§ 355(b)(1)*. An NDA applicant must also provide the FDA with the patent number and the expiration date of any patent that a generic manufacturer would infringe by making or selling the applicant's drug. If the FDA approves the NDA, it publishes the drug and patent information in a book called "Approved Drug Products with Therapeutic Equivalence and Evaluations," commonly referred to as the Orange Book. *21 U.S.C.S. § 355(j)(7)(A)*. The pioneer company may then market and sell the drug.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food & Drugs Act

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN3[] **Agriculture & Food, Federal Food & Drugs Act**

A more streamlined pathway to approval is reserved for generic versions of pioneer drugs that the Food and Drug Administration (FDA) has already approved and listed in a book called "Approved Drug Products with Therapeutic Equivalence and Evaluations," commonly referred to as the Orange Book. To begin the generic drug approval process, an applicant files an Abbreviated New Drug Application (ANDA). *21 U.S.C.S. § 355(j)*. The ANDA allows an applicant to piggyback on the safety and efficacy studies conducted for the pioneer drug and thereby gain Food and Drug Administration approval by establishing that the generic drug is chemically identical to a pioneer drug already listed in the Orange Book. *21 U.S.C.S. § 355(j)(2)(A)*. Rather than providing independent evidence of safety and efficacy, the typical ANDA shows that the generic drug has the same active ingredients as, and is biologically equivalent to, the brand-name drug.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food & Drugs Act

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN4[] **Agriculture & Food, Federal Food & Drugs Act**

An Abbreviated New Drug Application that piggybacks on a drug listed in a book called "Approved Drug Products with Therapeutic Equivalence and Evaluations," commonly referred to as the Orange Book, must make one of four paragraph certifications with respect to any patents affiliated with the listed drug. It must certify that: (I) no patent information for the brand name drug has been filed with the Food and Drug Administration; (II) the patent has expired; (III) the patent will expire on a specifically identified date; or (IV) the patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted. *21 U.S.C.S. § 355(j)(2)(A)(vii)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food & Drugs Act

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN5[] **Agriculture & Food, Federal Food & Drugs Act**

It matters which *21 U.S.C.S. § 355* certification is made. If the Abbreviated New Drug Applicant (ANDA) certifies under paragraphs I or II, the Food and Drug Administration (FDA) reviews the ANDA and may approve it. *§ 355(j)(5)(B)(i)*. If the applicant certifies under paragraph III, however, the FDA will not approve the application until the patent for the listed drug has expired. *§ 355(j)(5)(B)(ii)*. If the applicant certifies under paragraph IV, the ANDA applicant must send notice to the patent holder of its position that the patent listed in a book called "Approved Drug Products with Therapeutic Equivalence and Evaluations," commonly referred to as the Orange Book, is invalid or will not be infringed by the applicant's generic drug. *§ 355(j)(2)(B)*. The patent holder then has 45 days to file an infringement lawsuit against the ANDA applicant. *§ 355(j)(5)(B)(iii)*. If the patent holder does not sue within that time frame, the FDA proceeds with the ANDA approval process. *21 U.S.C.S. § 355(j)(5)(B)(iii)*. If a suit is timely filed, however, the FDA stays the ANDA approval process for 30 months to allow the parties or a court to resolve the infringement dispute. If, during that 30-month stay, a court decides that the patent is invalid or not infringed, the FDA's approval of the ANDA, if any, is effective on the date that the court enters its judgment. *§ 355(j)(5)(B)(iii)(I)(aa)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food & Drugs Act

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN6[] **Agriculture & Food, Federal Food & Drugs Act**

Federal law encourages generic drug manufacturers to file paragraph IV certifications. The first Abbreviated New Drug Applicant (ANDA) applicant making a paragraph IV certification that receives Food and Drug Administration (FDA) approval is granted a 180-day exclusivity period during which the FDA postpones its approval process for other ANDA applications for generic versions of the same Orange Book listed drug. *21 U.S.C.S. § 355(j)(5)(B)(iv)*. That exclusivity period begins to run after the date of the first commercial marketing of the generic drug. *§ 355(j)(5)(B)(iv)(I)*. As a result, the first generic manufacturer to make a paragraph IV certification could receive a 180-day head start to compete with the pioneer drug, which is a significant incentive for generic manufacturers to challenge weak or narrow drug patents.

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

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

HN7[] **Motions to Dismiss, Failure to State Claim**

Where an appeal arises from the district court's *Fed. R. Civ. P. 12(b)(6)* dismissal of a complaint for failure to state a claim, an appellate court accepts as true all of the factual allegations in that complaint.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN8[] **Consumer Protection, Deceptive & Unfair Trade Practices**

15 U.S.C.S. § 45(a)(1) bans unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.

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

HN9[] **Motions to Dismiss, Failure to State Claim**

An appellate court reviews de novo the district court's grant of a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim. In doing so, the court accepts the allegations in the complaint as true and construe them in the light most favorable to the plaintiff. A complaint must state a plausible claim for relief, and 'a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Stated differently, the factual allegations in a complaint must possess enough heft to set forth a plausible entitlement to relief.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > Scope

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

HN10[] **Sherman Act, Claims**

The analysis of whether a reverse payment agreement gives rise to antitrust liability is the same for claims brought under the Sherman Antitrust Act and under the Federal Trade Commission Act.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN11[] **Sherman Act, Claims**

Antitrust laws typically prohibit agreements where one company pays a potential competitor not to enter the market, but reverse payment settlements of patent litigation present atypical cases because one of the parties owns a patent. The patent makes all the difference because it meant that the patent holder had a lawful right to exclude others from the market.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN12[] **Antitrust & Trade Law, Federal Trade Commission Act**

A court must judge the antitrust implications of a reverse payment settlement in a patent infringement action as of the time that the settlement was executed. The mere subsequent invalidity of the patent does not render the patent irrelevant to the appropriate antitrust analysis.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN13[] **Antitrust & Trade Law, Federal Trade Commission Act**

Even a court judgment about a patent's actual exclusionary power, unless that judgment comes before settlement, does not count in an antitrust analysis of the settlement. What does count is the patent's potential exclusionary power as it appeared at the time of settlement.

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Civil Procedure > Settlements > Settlement Agreements > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN14[] **Antitrust & Trade Law, Federal Trade Commission Act**

Discussion about the potential exclusionary power of patents does not mean that all reverse payment settlements of patent litigation are immune from antitrust attack. A patent holder and any of its challengers cannot enter into an agreement that excludes more competition than the patent has the potential to exclude. If a reverse payment settlement reduces generic competition to a greater extent than the patent grant potentially does, the holder of the patent has used the settlement to buy exclusionary rights that are not contained in the patent grant, and those additional rights are vulnerable to antitrust attack. The patent exception to antitrust liability is limited by the terms of the patent and the statutory rights granted the patentee. Put another way, a patent gives its holder a bundle of rights, but any new exclusionary rights the holder buys to add to that bundle do not fall within the scope of the patent grant and for that reason do not fall within the scope of the patent's antitrust immunity.

Governments > Courts > Judicial Precedent

HN15[] **Courts, Judicial Precedent**

The United States Court of Appeals for the Eleventh Circuit has adopted as binding precedent all decisions of the former United States Court of Appeals for the Fifth Circuit handed down before October 1, 1981.

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Civil Procedure > Settlements > Settlement Agreements > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN16[] **Antitrust & Trade Law, Federal Trade Commission Act**

Parties to a reverse payment settlement should be immune from antitrust liability if the anticompetitive effects of their settlement fall within the scope of the exclusionary potential of the patent. If any provisions of the settlement create restraints on competition beyond that scope, however, those excesses may then be subject to traditional antitrust analysis to assess their probable anticompetitive effects in order to determine whether they violate *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*. The traditional antitrust analysis consists of two tests: the per se test and the rule of reason test. Under the per se test, the challenged restraint categorically violates the antitrust laws because it is so obviously anticompetitive, or so unlikely to be pro-competitive, that it can be deemed to violate the antitrust laws without much more than an examination of the agreement itself and the relationships of the parties to the agreement. Under the rule of reason test, the legality of the challenged restraint hinges upon whether it promotes or suppresses competition.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Civil Procedure > Settlements > Settlement Agreements > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN17[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Neither the rule of reason nor the per se test is an appropriate way to analyze the antitrust implications of a reverse payment settlement of patent litigation. That traditional analysis is inappropriate because one of the signatories to the settlement holds a patent, and a patent conveys the right to cripple competition. The proper analysis requires an examination of: (1) the scope of the exclusionary potential of the patent; (2) the extent to which the agreements exceed that scope; and (3) the resulting anticompetitive effects. The essence of this three-prong analysis is an evaluation of whether the settlement agreements contain provisions that restrict competition beyond the scope of the exclusionary potential of the patent.

Civil Procedure > Settlements > General Overview

HN18[] **Civil Procedure, Settlements**

The general policy of the law is to favor the settlement of litigation.

Patent Law > Infringement Actions > Exclusive Rights > General Overview

HN19[] **Infringement Actions, Exclusive Rights**

When read in the context of the facts and the reasoning of Schering-Plough, the phrase "strength of the patent" refers to the potential exclusionary scope of the patent—that is, the exclusionary rights appearing on the patent's face and not the underlying merits of the infringement claim. Nowhere in the Schering-Plough opinion did the court actually evaluate the merits of the infringement claim when defining how much competition the patent could potentially exclude from the market.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food & Drugs Act

Patent Law > Infringement Actions > Exclusive Rights > General Overview

HN20[] **Agriculture & Food, Federal Food & Drugs Act**

In 2003 Congress amended the statutory provisions governing the 180-day exclusivity period to keep corks out e bottle by providing that the first paragraph IV Abbreviated New Drug Application (ANDA), *21 U.S.C.S. § 355*, filer forfeits its right of exclusivity if it fails to market a generic drug within certain time periods. *21 U.S.C.S. § 355(j)(5)(D)*. A grandfather provision of that amendment specified that the changes would not apply to paragraph IV ANDAs filed before the date of enactment. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 1102(b)(1), 117 Stat. 2066.

Antitrust & Trade Law > General Overview

Civil Procedure > Settlements > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN21[] **Antitrust & Trade Law**

Absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent.

Patent Law > Infringement Actions > Claim Interpretation > General Overview

Patent Law > Infringement Actions > Defenses > General Overview

HN22[] **Infringement Actions, Claim Interpretation**

It is simply not true that an infringement claim that is likely to fail actually will fail. "Likely" means "more likely than not, and that includes a 51% chance of a result one way against a 49% chance of a result the other way. Giving the word its plain meaning, as many as 49 out of 100 times that an infringement claim is likely to fail it actually will succeed and keep the competitor out of the market. Caselaw decisions focus on the potential exclusionary effect of the patent, not the likely exclusionary effect.

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

Civil Procedure > Appeals > Standards of Review > General Overview

HN23[] **Motions to Dismiss, Failure to State Claim**

The allegations of the complaint is all that an appellate court can consider in an appeal from a *Fed. R. Civ. P. 12(b)(6)* dismissal.

Patent Law > Infringement Actions > General Overview

Patent Law > Infringement Actions > Defenses > General Overview

HN24[] **Patent Law, Infringement Actions**

Predicting the future is precarious at best; retroactively predicting from a past perspective a future that never occurred is even more perilous. And it is too perilous an enterprise to serve as a basis for antitrust liability and treble damages. Patent litigation is too complex and the results too uncertain for parties to accurately forecast whether enforcing the exclusionary right through settlement will expose them to treble damages if the patent immunity were destroyed by the mere invalidity of the patent.

Civil Procedure > Settlements > General Overview

HN25[] **Civil Procedure, Settlements**

There is no question that settlements provide a number of private and social benefits as opposed to the inveterate and costly effects of litigation.

Antitrust & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

Civil Procedure > Settlements > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Patent Law > Infringement Actions > General Overview

HN26[] **Federal Trade Commission Act, US Federal Trade Commission**

An after-the-fact inquiry by the Federal Trade Commission (FTC) into the merits of underlying litigation is not only unlikely to be particularly helpful in addressing an antitrust complaint against a patent infringement settlement, but also likely to be unreliable. As a general matter, tribunals decide patent issues in the context of a true adversary proceeding, and their opinions are informed by the arguments of opposing counsel. Once a case settles, however, the interests of the formerly contending parties are aligned. A generic competitor that has agreed to delay its entry no longer has an incentive to attack vigorously the validity of the patent in issue or a claim of infringement. For those reasons, the FTC has concluded that it would not be necessary, practical, or particularly useful to embark on an inquiry into the merits of the underlying patent dispute when resolving antitrust issues in patent settlements. The FTC was right then for the same reasons it is wrong now.

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

Patent Law > Infringement Actions > General Overview

HN27[] **Subject Matter Jurisdiction, Appeals**

Congress has given the United States Court of Appeals for the Federal Circuit exclusive appellate jurisdiction over patent cases. *28 U.S.C.S. § 1295(a)(1)*. Non-specialized circuit courts have no expertise or experience in the area. Such courts are ill-equipped to make a judgment about the merits of a patent infringement claim.

Counsel: For FEDERAL TRADE COMMISSION, Plaintiff - Appellant: Imad Dean Abyad, Bradley S. Albert, John F. Daly, Markus H. Meier, John R. Robertson, Mark J. Woodward, Federal Trade Commission, Office of General Counsel, WASHINGTON, DC; Cindy A. Liebes, Federal Trade Commission, ATLANTA, GA;Lore A. Unt, U.S. Federal Trade Commission, WASHINGTON, DC.

For WATSON PHARMACEUTICALS, INC., Defendant - Appellee: Jason W. Eakes, David A. Rabin, Morris Manning & Martin, LLP, ATLANTA, GA; Maria A. Raptis, Skadden Arps Slate Meagher & Flom, LLP, NEW YORK, NY; Steven Craig Sunshine, Julia K. York, Skadden Arps Slate Meagher & Flom, LLP, WASHINGTON, DC.

For PAR PHARMACCUTICAL COMPANIES, INC., PADDOCK LABORATORIES, INC., Defendants - Appellees: J. Mark Gidley, Eric Grannon, White & Case, LLP, WASHINGTON, DC; Mark Gerald Trigg, Greenberg Traurig, LLP, ATLANTA, GA.

For SOLVAY PHARMACEUTICALS, INC., Defendant - Appellee: Jeffrey I. Weinberger, Munger Tolles & Olson, LLP, LOS ANGELES, CA; Teresa Thebaut Bonder, Matthew Kent, Alston & Bird, LLP, ATLANTA, GA; John Roberti, Rebecca Valentine, **[**2]** Mayer Brown, LLP, WASHINGTON, DC; Rohit K. Singla, Munger Tolles & Olsen, LLP, SAN FRANCISCO, CA.

Judges: Before CARNES, KRAVITCH and FARRIS,[*] Circuit Judges.

Opinion by: CARNES

Opinion

[*1561]** **[*1300]** CARNES, Circuit Judge:

The system of developing new drugs in this country exemplifies the maxims "no risk, no reward" and "more risk, more reward." Developing new drugs is a risky, lengthy, and costly endeavor, but it also can be highly lucrative. Only one in every 5,000 medicines tested for the potential to treat illness is eventually approved for patient use, and studies estimate that developing a new drug takes 10 to 15 years and costs more than $1.3 billion.[1] No rational actor would take that kind of a risk **[***1562]** over that period of time without the prospect of a big reward. The reward, if any, comes when the drug is approved and patented, giving the pioneer or "brand name" company that developed it a monopoly over the sale of the new drug for the life of the patent. The pioneer company can then exploit the patent monopoly by charging higher prices than it could if competitors were allowed to sell bioequivalent or "generic" versions of **[**3]** the drug. In that manner, the pioneer company is usually able to recoup its investment and gain a profit, sometimes a super-sized one.

Another maxim might also apply to the patent monopoly of drug pioneers: "more money, more problems." The huge profits that new drugs can bring frequently attract competitors in the form of generic drug manufacturers that challenge or try to circumvent the pioneer's monopoly in the market. Patent litigation often results, threatening the pioneer's monopoly and profits. Instead of rolling the dice and risking their monopoly profits in the infamously costly

[*] Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

[1] Bret Dickey, Jonathan Orszag & Laura Tyson, An Economic Assessment of Patent Settlements in the Pharmaceutical Industry, 19 Annals Health L. 367, 369 & n.10 (2010).

and notoriously unpredictable process of patent litigation, many patent-holding companies choose to settle **[*1301]** lawsuits in order to preserve their patents and keep the monopoly profits flowing.

This case involves ***HN1***[] a type of patent litigation settlement known as a "pay for delay" or "reverse payment" agreement. In this type of settlement, a patent holder pays the allegedly infringing generic drug company to delay entering the market until a specified **[**4]** date, thereby protecting the patent monopoly against a judgment that the patent is invalid or would not be infringed by the generic competitor. This case began when the Federal Trade Commission filed a complaint in district court alleging that the reverse payment settlements between the holder of a drug patent and two generic manufacturers of the drug are unfair restraints on trade that violate federal antitrust laws. The FTC claims that the settlements are simply tools that the three manufacturers used to avoid a judgment that the patent was invalid or would not be infringed by the generics, thereby protecting monopoly profits that the companies divvied up by means of payments from the patent holder to the generic manufacturers. The key allegation in the FTC's complaint is that the patent holder was "not likely to prevail" in the infringement actions that it brought against the generic manufacturers and then settled. According to the FTC, the reverse payment settlements unlawfully protected or preserved a monopoly that likely was invalid and that should not be shielded from antitrust attack.

The drug companies counter that, far from being devices designed to dodge antitrust restrictions, **[**5]** reverse payment settlements are simply a way that patent holders protect and maintain the lawful exclusionary rights patent law grants them. Cf. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 86 S.Ct. 347, 350, 15 L. Ed. 2d 247 (1965)* ("A patent . . . is an exception to the general rule against monopolies . . . ." (quotation marks omitted)); *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 816, 65 S.Ct. 993, 998, 89 L. Ed. 1381, 1945 Dec. Comm'r Pat. 582 (1945)* (same). They say that punishing a patent holder for paying a potential competitor to stay out of the market as part of a settlement agreement would penalize precisely what patents are designed to permit: the exclusion of competition. That erosion of patent rights, the drug companies argue, would weaken incentives for investing in drug development, which would reduce the number of life-saving or life-enhancing innovations that benefit consumers.

The FTC would like us to hold that reverse payment settlements, like the ones in this case, are presumptively unlawful restraints of trade. It argues that such settlements allow brand name and generic drug companies to be partners in unlawful monopolies. Monopoly profits, the FTC says, will typically **[**6]** exceed the sum of the individual profits that the two drug companies could make by competing against each other. So even if the generic drug company is likely to win the infringement suit, it has a strong economic incentive to drop its lawsuit in exchange for a share of the brand name company's monopoly profits.[2] **[*1302]** Viewed **[***1563]** this way, a reverse payment settlement ending patent litigation is a "win-win" for the two companies. The brand name drug company maintains its monopoly by enforcing a patent that may be invalid, and the generic drug company makes more money under the settlement than it could have earned by competing in a market free of the patent's restraints. While the drug companies are the big winners in this scenario, consumers are the big losers; they continue paying monopoly prices for the drug even though the patent creating the monopoly is likely invalid or would not be infringed by generic competition. The FTC estimates that reverse payment settlements cost consumers about $3.5 billion per year in the form of higher drug prices.

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[2] The FTC's brief offers this explanation of the economic incentives involved:

> According to a study conducted by the FTC of the industry as a whole . **[**7]** . ., a branded manufacturer typically loses about 90 percent of its unit sales over the course of generic entry. While generic entrants gain that unit volume, they do not gain all the revenues lost by the branded manufacturer because, as generic competition sets in, the price falls, on average, to about 15 percent of what the branded manufacturer was charging. Thus, a branded manufacturer can expect that, if a drug is earning $1 billion a year before generic entry, the manufacturer will only earn about $100 million a year once generic competition has matured, and all the generic companies put together will only earn about $135 million a year (90% x 15% x $1 billion), thus leaving approximately $765 million a year for the public through the benefits of competition. The parties have a strong economic incentive to avoid that result.

Appellant Br. 33-34 (footnotes omitted).

I.

The usual protocol in opinions is to put the facts and procedural history of the case before a discussion of the applicable statutes, but in this case the facts make more sense after a discussion of the statutory process for introducing new drugs to the market.

HN2[] No one can market or sell a new drug in the United States **[**8]** without first gaining the approval of the Food and Drug Administration. See *21 U.S.C. § 355(a)*. The particular pathway to approval depends largely on the type of drug involved. One pathway is for pioneer drugs, which are ones that have never before received FDA approval. To initiate that approval process, an applicant files a New Drug Application. See id. The NDA must contain detailed information about the drug, including its chemical composition, "full reports of investigations" about its safety and efficacy, descriptions of its production and packaging processes, and proposed labeling language. Id. *§ 355(b)(1)*. An NDA applicant must also provide the FDA with "the patent number and the expiration date of any patent" that a generic manufacturer would infringe by making or selling the applicant's drug. Id.; see also *21 C.F.R. § 314.53(b)*. If the FDA approves the NDA, it publishes the drug and patent information in a book called "Approved Drug Products with Therapeutic Equivalence and Evaluations," commonly referred to as the "Orange Book." See *21 U.S.C. § 355(j)(7)(A)*; see also *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, No. 10-844, 132 S. Ct. 1670, 182 L. Ed. 2d 678, 2012 U.S. LEXIS 3106, 2012 WL 1288732, at *5 (U.S. Apr. 17, 2012)*. The **[**9]** pioneer company may then market and sell the drug.

HN3[] A more streamlined pathway to approval is reserved for generic versions of pioneer drugs that the FDA has already approved and listed in the Orange Book. To begin the generic drug approval process, an applicant files an Abbreviated New Drug Application. See *21 U.S.C. § 355(j)*. The ANDA allows an applicant "to piggyback on the safety and efficacy studies conducted for the pioneer drug" and thereby gain FDA approval by establishing that the generic drug is chemically identical to a pioneer drug already listed in the Orange Book. *Valley Drug Co. v. Geneva Pharms., Inc., 344 F.3d 1294, 1296 (11th Cir. 2003)*; see *21 U.S.C. § 355(j)(2)(A)*; *Caraco Pharm. Labs., 2012 U.S. LEXIS 3106, 2012 WL 1288732, at *5* ("Rather than providing independent evidence of safety and efficacy, the typical ANDA shows that the generic drug has the same **[*1303]** active ingredients as, and is biologically equivalent to, the brand-name drug.").

HN4[] An ANDA that piggybacks on a drug listed in the Orange Book must make one of four "paragraph certifications" with respect to any patents affiliated with the listed drug. It must certify that: (I) no patent information for the brand name drug has been filed **[**10]** with the FDA; (II) the patent has expired; (III) the patent will expire on a specifically identified date; or (IV) the "patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted." *21 U.S.C. § 355(j)(2)(A)(vii)*.

HN5[] It matters which certification is made. If the applicant certifies under paragraphs I or II, the FDA reviews the ANDA and may approve it. See id. *§ 355(j)(5)(B)(i)*. If the applicant certifies under paragraph III, however, the FDA will not approve the application until the patent for the listed drug has expired. See id. *§ 355(j)(5)(B)(ii)*.

If the applicant certifies under paragraph IV, things get complicated. The ANDA applicant must send notice to the patent holder of its position **[***1564]** that the patent listed in the Orange Book is invalid or will not be infringed by the applicant's generic drug. See id. *§ 355(j)(2)(B)*. The patent holder then has 45 days to file an infringement lawsuit against the ANDA applicant. Id. *§ 355(j)(5)(B)(iii)*; cf. *35 U.S.C. § 271(e)(2)(A)* (making it a constructive act of infringement to file a paragraph IV certification); *Caraco Pharm. Labs., 2012 U.S. LEXIS 3106, 2012 WL 1288732, at *6* ("Filing a paragraph **[**11]** IV certification means provoking litigation."). If the patent holder does not sue within that time frame, the FDA proceeds with the ANDA approval process. *21 U.S.C. § 355(j)(5)(B)(iii)*. If a suit is timely filed, however, the FDA stays the ANDA approval process for 30 months to allow the parties or a court to resolve the infringement dispute. Id. If, during that 30-month stay, a court decides that the patent is invalid or not infringed, the FDA's approval of the ANDA, if any, is effective on the date that the court enters its judgment. Id. *§ 355(j)(5)(B)(iii)(I)(aa)*.

HN6[] Federal law encourages generic drug manufacturers to file paragraph IV certifications. The first ANDA applicant making a paragraph IV certification that receives FDA approval is granted a 180-day "exclusivity period" during which the FDA postpones its approval process for other ANDA applications for generic versions of the same Orange Book listed drug. Id. *§ 355(j)(5)(B)(iv)*. That exclusivity period begins to run "after the date of the first commercial marketing of the [generic] drug." Id. *§ 355(j)(5)(B)(iv)(I)*; see also *21 C.F.R. § 314.107(c)(1)*. As a result, the first generic manufacturer to make a paragraph IV certification **[**12]** could receive a 180-day head start to compete with the pioneer drug, which is "a significant incentive for generic manufacturers to challenge weak or narrow drug patents." *Valley Drug, 344 F.3d at 1298*.

II.

With that statutory approval process in mind, we turn to the facts of this case. ***HN7***[] Because this appeal arises from the district court's Rule 12(b)(6) dismissal of the FTC's complaint for failure to state a claim, we accept as true all of the factual allegations in that complaint. *Thaeter v. Palm Beach Cnty. Sheriff's Office, 449 F.3d 1342, 1352 (11th Cir. 2006)*.

A.

Besins Healthcare, S.A., developed the prescription drug AndroGel, a topical gel that treats the symptoms of low testosterone in men. Chemicals in the gel gradually **[*1304]** penetrate the skin and enter the bloodstream, providing a sustained release of synthetic testosterone. In August 1995, Besins granted Solvay Pharmaceuticals, Inc., a license to sell AndroGel in the United States and agreed to provide a commercial supply of the drug if the FDA approved it for sale. Solvay filed an NDA for AndroGel in April 1999, which the FDA approved in February 2000. Solvay then began marketing and selling the drug with great success. Between 2000 **[**13]** and 2007, revenue from the sale of AndroGel in the United States exceeded $1.8 billion, far more than it cost to develop the drug.

Shortly after the FDA approved AndroGel, Solvay filed a patent application with the Patent and Trademark Office. A prior patent covering the synthetic testosterone used in AndroGel had expired decades earlier, but Solvay's application sought patent protection for a particular gel formulation of it. The Patent and Trademark Office granted Solvay's application on January 7, 2003, and jointly awarded Solvay and Besins Patent Number 6,503,894 ("the '894 patent"), which expires in August 2020. Within 30 days of being granted the patent, Solvay asked the FDA to include the '894 patent information in the Orange Book alongside the AndroGel listing. Cf. *21 U.S.C. § 355(c)(2)* (requiring successful NDA applicants to inform the FDA within 30 days of receiving a new patent for a listed drug).

Other drug manufacturers soon developed generic versions of AndroGel. Two of those companies, Watson Pharmaceuticals, Inc. and Paddock Laboratories, Inc., filed ANDAs with the FDA in May 2003. Watson was the first to file its ANDA, which made it eligible for the 180-day exclusivity **[**14]** period under *21 U.S.C. § 355(j)(5)(B)(iv)*. Both companies made paragraph IV certifications, claiming that their generic AndroGel products did not infringe on the '894 patent or that the patent was invalid. Within the relevant 45-day window, id. *§ 355(j)(5)(B)(iii)*, Solvay filed in federal district court a patent infringement lawsuit **[***1565]** against Watson and Paddock.[3] That filing triggered the 30-month stay of the FDA's approval process for Watson's and Paddock's generic versions of AndroGel. See id. The stay was set to expire in January 2006.

The parties litigated the infringement action for the next few years. To spread the risks and costs of litigation, Paddock partnered with Par Pharmaceutical Companies, Inc., which agreed to share the costs of litigation with Paddock in exchange for part of the potential profits from Paddock's generic AndroGel product if that product gained final FDA approval. After conducting discovery, Watson and Par/Paddock, the defendants in the patent infringement lawsuit, filed motions for summary judgment on the validity of the '894 patent. Those **[**15]** motions were fully briefed and ready for decision when the statutorily imposed 30-month stay on the FDA's approval process for Watson's ANDA ended in January 2006. The FDA approved Watson's generic AndroGel product that same month.

[3] Besins filed a separate lawsuit against Watson and Paddock, but the outcome of that case is not relevant to this appeal.

As a result, Solvay was facing the possibility of losing its monopoly in the AndroGel market in early 2006. If the district court granted Watson's motion for summary judgment either on the ground that the '894 patent was invalid or that it would not be infringed by the generic drugs, Watson could immediately flood the market with generic versions of AndroGel **[*1305]** without fear of being found to have violated Solvay's patent (unless the district court's decision was overturned on appeal). See *21 U.S.C. § 355(j)(5)(B)(iii)(I)(aa)*. Watson forecast that its generic version of AndroGel would sell for about 25% of the price of branded AndroGel, which could decrease the sales of branded AndroGel by 90% and cut Solvay's profits by $125 million per year. A lot was riding on the outcome of the patent litigation.

Before the district court ruled on Watson's and Par/Paddock's motions for summary judgment, and before any generic AndroGel was brought to market, the parties resolved **[**16]** their patent dispute with several settlement agreements. Under the terms of the settlements, Watson, Par, and Paddock agreed not to market generic versions of AndroGel until August 31, 2015, unless another manufacturer launched one before then. In addition, Watson agreed to promote branded AndroGel to urologists, and Par agreed to promote it to primary care doctors. Par also agreed to serve as a backup manufacturer for branded AndroGel but assigned that part of the agreement to Paddock.

For its part, Solvay agreed to pay Par/Paddock $10 million per year for six years and an additional $2 million per year for the backup manufacturing assistance. Solvay also agreed to share some of its AndroGel profits with Watson through September 2015, projecting that those payments would be between $19 million and $30 million per year. After finalizing the agreements, all of the parties—Solvay, Watson, Par, and Paddock—filed in district court a stipulation of dismissal terminating the patent infringement lawsuit.

B.

After the settlement agreements ending the patent litigation were reported to the FTC as required by *21 U.S.C. § 355* note (2003) (Federal Trade Commission Review), the FTC filed an antitrust **[**17]** lawsuit against Solvay, Watson, Par, and Paddock. That lawsuit was then transferred to the Northern District of Georgia, which is where the parties had litigated the patent infringement claims. The FTC then filed an amended complaint against all four drug companies.[4]

The FTC's amended complaint claimed that the settlement agreements, in which Solvay promised to pay Watson and Par/Paddock in exchange for those companies not selling generic AndroGel until 2015, are unlawful agreements not to compete in violation of *Section 5(a)* of the Federal Trade Commission Act. ***HN8***[] *15 U.S.C. § 45(a)(1)* (banning "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce"). It alleged that the settlement agreements were attempts to "defer" generic competition with branded AndroGel by postponing the entry date of the generic drugs, thereby maintaining Solvay's monopoly and allowing the parties to share **[**18]** monopoly profits "at the expense of the consumer savings that would result from price competition." **[***1566]**

The lynchpin of the FTC's complaint is its allegation that Solvay probably would have lost the underlying patent infringement action—that is, Watson and Par/Paddock had a strong case that the '894 patent did not bar their entry into the generic AndroGel market. More specifically, the complaint alleges that "Solvay was not likely to prevail" in the patent litigation because "Watson and Par/Paddock developed **[*1306]** persuasive arguments and amassed substantial evidence that their generic products did not infringe the ['894] patent and that the patent was invalid and/or unenforceable" (emphasis added). According to the FTC, because the '894 patent "was unlikely to prevent generic entry," Solvay's reverse payments to the generic drug producers continued and extended a monopoly that the patent laws did not authorize. By doing that, it argues, the reverse payment agreements unlawfully restrain competition.

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4 Two other sets of plaintiffs—direct and indirect purchasers of AndroGel—joined the FTC in the district court and made a variety of state law claims. None of those plaintiffs joined the FTC in this appeal, and their claims are not before us.

The four defendants moved to dismiss the FTC's complaint under *Rule 12(b)(6)*, arguing that this Court's precedent immunizes reverse payment settlements from antitrust attack unless a settlement "imposes **[**19]** an exclusion greater than that contained in the patent at issue." Because the FTC had not alleged the settlements did that, the defendants argued, the complaint failed to state a claim on which relief could be granted. The district court agreed with the defendants, concluded that the FTC did "not allege that the settlements exceed the scope of the '894 patent," and granted the defendants' motion to dismiss. The FTC then filed this appeal, contending that it had sufficiently pleaded an antitrust claim by alleging that the parties had entered into the settlement agreements even though Solvay was "not likely to prevail" in the infringement actions against the generic producers.

III.

HN9[] "We review de novo the district court's grant of a motion to dismiss under *12(b)(6)* for failure to state a claim . . . ." *Ironworkers Local Union 68 v. AstraZeneca Pharms., LP, 634 F.3d 1352, 1359 (11th Cir. 2011)* (quotation marks omitted). In doing so, we accept the allegations in the complaint as true and construe them "in the light most favorable to the plaintiff." *Clark v. Riley, 595 F.3d 1258, 1264 (11th Cir. 2010)* (quotation marks omitted). "A complaint must state a plausible claim for relief, and '[a] **[**20]** claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1261 (11th Cir. 2009)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009))* (alteration in Sinaltrainal). "Stated differently, the factual allegations in a complaint must 'possess enough heft' to set forth 'a plausible entitlement to relief' . . . ." *Fin. Sec. Assurance, Inc. v. Stephens, Inc., 500 F.3d 1276, 1282 (11th Cir. 2007)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 559, 127 S.Ct. 1955, 1966-67, 167 L. Ed. 2d 929 (2007))*.

A.

The difficulty at the heart of this case is deciding how to resolve the tension between the pro-exclusivity tenets of patent law and the pro-competition tenets of ***antitrust law***. That difficulty is made less difficult, however, by the law's pro-precedent tenets. Our earlier decisions carry us much of the way to a resolution in this case.

This Court first confronted an antitrust challenge to a reverse payment settlement in *Valley Drug Co. v. Geneva Pharmaceuticals, Inc., 344 F.3d 1294 (11th Cir. 2003)*. The facts of **[**21]** that case parallel the facts of this one: Two generic manufacturers alleged that the patent for a drug listed in the Orange Book was invalid, the patent holder filed infringement claims against the generic manufacturers, and the parties settled before a court decided the merits of the claims. *Id. at 1298-300*. One generic manufacturer received millions of dollars in exchange for acknowledging the validity **[*1307]** of the pioneer's patent and agreeing not to enter the market until another generic manufacturer did or until the patent expired, whichever came first. *Id. at 1300*. The other generic manufacturer, also in exchange for millions of dollars, agreed not to enter until one of those two events occurred or until a court held that the patent was invalid, whichever came first. Id.

Several private parties filed an antitrust lawsuit against the three manufacturers alleging that their settlement agreements were per se illegal contracts in restraint of trade in violation of *Section 1* of the Sherman Act.[5] See *id. at 1295-96*; see also *15 U.S.C. § 1* ("Every **[***1567]** contract . . . in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."). The district court **[**22]** agreed with the plaintiffs and granted their motion for partial summary judgment. See *Valley Drug, 344 F.3d at 1295, 1301*. After the court granted the drug companies' request for permission to take an interlocutory appeal, see *28 U.S.C. § 1292(b)*, we reversed. *Valley Drug, 344 F.3d at 1295, 1313*.

Our Valley Drug decision began by acknowledging that ***HN11***[] antitrust laws typically prohibit agreements where one company pays a potential competitor not to enter the market, but we reasoned that reverse payment

[5] ***HN10***[] The analysis of whether a reverse payment agreement gives rise to antitrust liability is the same for claims brought under the Sherman Antitrust Act, which was involved in Valley Drug, and under the Federal Trade Commission Act, which is involved in this case. See *Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005)* (applying the same antitrust analysis to Sherman Act and FTC Act claims).

settlements of patent litigation presented atypical cases because "one of the parties own[s] a patent." *Id. at 1304*. The patent made all the difference because it meant that the patent holder had a "lawful right to exclude others" from the market. Id.; see also *35 U.S.C. § 154(a)(1)* ("Every patent **[**23]** shall . . . grant to the patentee . . . the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States . . . ."); *Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 215, 100 S.Ct. 2601, 2623, 65 L. Ed. 2d 696 (1980)* ("[T]he essence of a patent grant is the right to exclude others from profiting by the patented invention."). The district court, we explained, "failed to consider" those exclusionary rights in its antitrust analysis when it held that the agreements were per se illegal. *Valley Drug, 344 F.3d at 1306*. Because one party to the reverse payment agreements held a patent, the agreements did not necessarily decrease the level of competition in the market. *Id. at 1309*. It followed that the district court had erred in using a per se test for determining the legality of the agreements. See id. ("If [the patent holder] had a lawful right to exclude competitors, it is not obvious that competition was limited more than that lawful degree by paying potential competitors for their exit."); see also *Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1065-66 (11th Cir. 2005)* ("By their nature, patents create an environment of exclusion, and consequently, **[**24]** cripple competition. The anticompetitive effect is already present."); cf. *Asahi Glass Co. v. Pentech Pharms., Inc., 289 F. Supp. 2d 986, 994 (N.D. Ill. 2003)* (Posner, J., sitting by designation) ("In a reverse-payment case, the settlement leaves the competitive situation unchanged from before the [generic manufacturer] tried to enter the market.").

After deciding to reverse the district court's partial grant of summary judgment in favor of the plaintiffs in Valley Drug, we went on to discuss several other matters **[*1308]** "that promise[d] to be relevant on remand." *Valley Drug, 344 F.3d at 1306*. We first addressed the plaintiffs' argument that the analysis on remand should disregard the patent altogether because after the parties had entered into their settlement agreements a federal district court had invalidated the patent at issue. According to the plaintiffs in Valley Drug, that post-settlement invalidation meant the patent holder "never had any patent rights," which meant the settlements necessarily excluded more competition from the market than the patent holder was lawfully entitled to exclude (namely, none). *Id. at 1306-07*. Which meant, according to the plaintiffs, there were no patent **[**25]** rights to shield the settlements from antitrust attack, which meant the settlements were "subject to per se condemnation." *Id. at 1306*.

We rejected that argument, explaining that ***HN12***[] a court must judge the antitrust implications of a reverse payment settlement as of the time that the settlement was executed. Id. "[T]he mere subsequent invalidity of the patent does not render the patent irrelevant to the appropriate antitrust analysis." *Id. at 1306-07*. For that reason, even though the patent at issue in Valley Drug was in fact invalid, its terms had to be given full effect. See *id. at 1305* (explaining that, at the time of settlement, the patent holder had "the right to exclude others from making, using, or selling anhydrous terazosin hydrochloride until October of 2014, when [the patent] is due to expire").

Our decision to give full effect to the patent's terms in Valley Drug means that ***HN13***[] even a court judgment about a patent's actual exclusionary power, unless that judgment comes before settlement, does not count. What does count is the patent's "potential exclusionary power" as it appeared at the time of settlement. *Id. at 1311* (emphasis added). The patent in Valley Drug had the potential **[**26]** to exclude competition at the time of settlement because, **[***1568]** at that time, "no court had declared [the] patent invalid." *Id. at 1306*; cf. *35 U.S.C. § 282* ("A patent shall be presumed valid."). Because the patent had that potential at the time of settlement, we treated the holder as though it had an exclusionary right at that time. See *Valley Drug, 344 F.3d at 1306*.

HN14[] Our discussion in Valley Drug about the "potential exclusionary power" of patents did not mean, however, that all reverse payment settlements of patent litigation are immune from antitrust attack. A patent holder and any of its challengers cannot enter into an agreement that excludes more competition than the patent has the potential to exclude. If a reverse payment settlement reduces generic competition to a greater extent than the patent grant potentially does, the holder of the patent has used the settlement to buy exclusionary rights that are not contained in the patent grant, and those additional rights are vulnerable to antitrust attack. See *id. at 1312* ("[T]he patent exception to antitrust liability . . . is limited by the terms of the patent and the statutory rights granted the patentee."); cf. *United States v. Masonite Corp., 316 U.S. 265, 277, 62 S.Ct. 1070, 1077, 86 L. Ed. 1461, 1942 Dec. Comm'r Pat. 777 (1942)* **[**27]** ("The owner of a patent cannot extend his statutory grant by contract or agreement. A patent affords no immunity for a monopoly not fairly or plainly within the grant."). Put another way, a patent gives its holder a "bundle of rights," CMS Indus., Inc. v. L. P. S. Int'l, Ltd., 643 F.2d 289, 294 (5th Cir. 1981),[6] but any new exclusionary rights **[*1309]** the holder buys to add to that bundle do not fall within the scope of the patent grant and for that reason do not fall within the scope of the patent's antitrust immunity.

In keeping with those principles, we said in Valley Drug that ***HN16***[] parties to a reverse payment settlement should be immune from antitrust liability if the anticompetitive effects of their settlement fall "within the scope of the exclusionary potential of the patent." *344 F.3d at 1311*. If any provisions of the settlement create restraints on competition beyond that scope, however, those excesses "may then be subject to traditional antitrust analysis **[**28]** to assess their probable anticompetitive effects in order to determine whether [they] violate *§ 1* of the Sherman Act."[7] *Id. at 1312*. What was left for the district court to do on remand was to consider "the scope of the exclusionary potential of the patent [and] the extent to which the[] provisions of the Agreements exceed that scope." Id.

B.

Our next decision involving an antitrust challenge to a reverse payment settlement of patent litigation came in *Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005)*. **[**29]** Schering, which held the patent for a drug called K-Dur 20, settled lawsuits it had filed against two generic drug manufacturers, Upsher-Smith Laboratories, Inc. and ESI Lederle, Inc. *Id. at 1058-60*. Schering's settlement with Upsher had two main parts: (1) Upsher agreed not to enter the K-Dur 20 market until five years before Schering's patent expired, and (2) Schering paid Upsher more than $60 million to license some of Upsher's other drug products. *Id. at 1059-60*. Schering's settlement with the other generic manufacturer, ESI, also had two main parts: (1) ESI agreed not to enter the K-Dur 20 market until almost three years before Schering's patent expired; and (2) Schering paid ESI $5 million in legal fees and $15 million to license some of ESI's other drug products, plus another $10 million if ESI's generic drug received FDA approval. *Id. at 1060-61 & n.8*.

The FTC determined in an administrative proceeding that the settlement agreements violated the FTC Act and the Sherman Act. *Id. at 1058*. Although it did not expressly say that reverse payment agreements are per se illegal, the FTC's order nonetheless announced a rule prohibiting all reverse payment settlements in which the generic **[**30]** company receives anything **[***1569]** of value in exchange for deferring its research, development, or entry to market. *Id. at 1062*. The defendant drug companies petitioned this Court to review the order, we did so, and we vacated it. *Id. at 1076*.

We began our review of the FTC's order by reiterating what we had said in Valley Drug: ***HN17***[] neither the rule of reason nor the per se test is an appropriate way to analyze the antitrust implications of a reverse payment settlement of patent litigation. **[*1310]** *Id. at 1065*. That traditional analysis is inappropriate because one of the signatories to the settlement holds a patent, and a patent conveys the right to "cripple competition." *Id. at 1066*. The proper analysis, we explained, "requires an examination of: (1) the scope of the exclusionary potential of the patent; (2) the extent to which the agreements exceed that scope; and (3) the resulting anticompetitive effects." *Id.* (citing *Valley Drug, 344 F.3d at 1312*). The essence of this three-prong analysis is an evaluation of whether the settlement agreements contain provisions that restrict competition beyond the scope of the exclusionary potential of the patent. Cf. *United States v. Singer Mfg. Co., 374 U.S. 174, 196-97, 83 S.Ct. 1773, 1785, 10 L. Ed. 2d 823, 1963 Dec. Comm'r Pat. 547 (1963)* **[**31]** ("[I]t is . . . well settled that the possession of a valid patent or patents does not give

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[6] In *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)* (en banc), ***HN15***[] we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. The CMS decision was issued on April 22, 1981.

[7] The traditional antitrust analysis consists of two tests: the "per se" test and the "rule of reason" test. See *Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1064 (11th Cir. 2005)*. Under the per se test, the challenged restraint categorically violates the antitrust laws because it is "so obviously anticompetitive, or so unlikely to be pro-competitive, that [it] can be deemed to violate [the antitrust laws] without much more than an examination of the agreement itself and the relationships of the parties to the agreement." *Valley Drug, 344 F.3d at 1303*. Under the rule of reason test, the legality of the challenged restraint hinges upon whether it promotes or suppresses competition. See *Schering-Plough, 402 F.3d at 1064*.

the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly."); *In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 213 (2d Cir. 2006)* ("[T]here is no injury to the market cognizable under existing ***antitrust law***, as long as competition is restrained only within the scope of the patent.").

After describing that analysis in Schering-Plough, we defined the potential exclusionary scope of the K-Dur 20 patent, giving full force to the exclusionary rights it potentially conveyed. Under the patent, Schering could exclude both of the generic companies from the K-Dur 20 market. *Schering-Plough, 402 F.3d at 1066*. The patent also gave Schering the "right to grant licenses, if it so chooses." *Id. at 1067*. Those exclusionary and licensing rights existed until the patent expired on September 5, 2006, or until the generic manufacturers "proved either that the . . . patent was invalid or that their products . . . did not infringe Schering's patent." *Id. at 1066-67*.

With the potential exclusionary scope of the patent defined in Schering-Plough, we then evaluated **[**32]** whether the settlements extended Schering's exclusionary rights beyond that scope. That was simple to do. The settlement with Upsher permitted that company to market its generic K-Dur 20 product more than five years before the expiration of Schering's patent, and the settlement with ESI allowed it to market its generic product almost three years before the patent expired. *Id. at 1068-71*. The settlements excluded competition for a shorter period of time (five years less and three years less) than the face of the patent allowed. For that reason, we held that the reverse payment settlements did not impermissibly extend Schering's patent monopoly.

Our Schering-Plough decision also rejected the FTC's argument that Schering had agreed to pay too much money to settle the case and that the generic companies had agreed to stay off the market for too long. See *id. at 1073*. If that were true, the FTC asserted, it meant that Schering must have paid the generic companies not only to settle the infringement lawsuit but also to obtain increased exclusionary rights in the K-Dur 20 market. See id. In other words, the FTC claimed that Schering used the reverse payment settlements not just to protect **[**33]** its legitimate bundle of patent rights, but also to mask a "naked payment" to horizontal competitors in order to expand the scope of its monopoly. *Id. at 1070, 1072*.

We rejected the FTC's contention in part because it did not take into account the underlying patent litigation, which was "certain[ ] to be a bitter and prolonged process." *Id. at 1072*; see also *id. at 1075* ("[T]he size of the payment . . . should not dictate the availability of a settlement remedy."). We emphasized that ***HN18***[] "[t]he general **[*1311]** policy of the law is to favor the settlement of litigation," *id. at 1072*, and reiterated that patent litigation is costly and complex, see *id. at 1073-74*. All three drug companies in Schering-Plough were facing high risks and costs if they continued to litigate the infringement action. See *id. at 1075* (discussing the costs of attorney fees, expert fees, and discovery expenses, and noting the "caustic environment of patent litigation" that may increase the "period of uncertainty" for patenting and marketing new drugs). The agreements among the parties reflected that high-stakes reality, so their settlements "fell well within the protections of the **[***1570]** [K-Dur 20] patent, and were therefore not **[**34]** illegal." *Id. at 1076*.[8]

C.

Our third and most recent decision involving the antitrust implications of reverse payment settlements is *Andrx Pharmaceuticals, Inc. v. Elan Corp., 421 F.3d 1227 (11th Cir. 2005)*. The district court in that case granted a patent holder's motion for **[**35]** judgment on the pleadings, but we reversed the judgment because the plaintiff had sufficiently pleaded an antitrust claim. It had done so in two ways. First, the complaint in Andrx alleged that the

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[8] The FTC's brief in this case places great weight on our statement in Schering-Plough that a proper antitrust analysis of reverse payment agreements needs to "evaluate the strength of the patent." *402 F.3d at 1076* (emphasis added). The FTC argues that evaluating the "strength of the patent" means evaluating "the strength of the patent holder's claims of validity and infringement, as objectively viewed at the time of settlement." We disagree. ***HN19***[] When read in the context of the facts and the reasoning of Schering-Plough, the phrase "strength of the patent" refers to the potential exclusionary scope of the patent—that is, the exclusionary rights appearing on the patent's face and not the underlying merits of the infringement claim. Nowhere in the *Schering-Plough* opinion did we actually evaluate the merits of the infringement claim when defining how much competition the patent could potentially exclude from the market.

generic manufacturer had agreed "to refrain from ever marketing a generic" version of the patented drug. Id. at 1235 (emphasis added). If true, that meant the settlement agreement blocked generic competition after the patent expired, and in that way excluded competition beyond "the scope of exclusion intended by the . . . patent." Id.

The other way the complaint in Andrx stated a plausible antitrust claim was by alleging that the settlement agreement allowed the generic company to retain its 180-day exclusivity period of 21 U.S.C. § 355(j)(5)(B)(iv) even though that company had "no intention of marketing its generic drug." Andrx, 421 F.3d at 1231. If true, that meant the 180-day period, which begins to run "after the date of first commercial marketing," 21 U.S.C. § 355(j)(5)(B)(iv)(I), would never be "trigger[ed]," Andrx, 421 F.3d at 1231. As a result, the exclusivity period would have acted like a cork in a bottle, blocking other generic competition from pouring into the market.[9] By doing **[**36]** that, the settlement created anticompetitive effects beyond the scope of the patent. Id. at 1235; see also id. at 1231 ("[T]he settlement agreement **[*1312]** had the effect of preventing any generic competition in the . . . market and constituted a conspiracy to restrain trade." (emphasis added)). For those reasons, we held that the complaint in Andrx stated a plausible antitrust claim. Id. at 1236.

IV.

Our Valley Drug, Schering-Plough, and Andrx decisions establish the rule that, ***HN21***[] absent sham litigation **[**37]** or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent.[10] The issue in this case is whether, under that test, the FTC's complaint states an antitrust claim by alleging that Solvay was "not likely to prevail" in the underlying infringement action against Watson, Par, and Paddock. **[***1571]**

The FTC argues that its "not likely to prevail" allegation sufficiently states an antitrust claim because a patent has no exclusionary potential if its holder was not likely to win the underlying infringement suit. And if the patent has no exclusionary potential, the FTC continues, then any reverse payment settlement that excludes any competition from the market necessarily exceeds the potential exclusionary scope of the patent and must be seen as the patent holder's illegal "'buying off' of a serious threat to competition." Consistent with that reasoning, the FTC urges us to adopt "a rule that an exclusion payment is unlawful **[**39]** if, viewing the situation objectively as of the time of the settlement, it is more likely than not that the patent would not have blocked generic entry earlier than the agreed-upon entry date." Under that rule, the FTC's allegation that Solvay was "not likely to prevail" in the patent litigation would state a plausible antitrust claim.

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[9] ***HN20***[] In 2003 Congress amended the statutory provisions governing the 180-day exclusivity period to keep corks out of the bottle by providing that the first paragraph IV ANDA filer forfeits its right of exclusivity if it fails to market a generic drug within certain time periods. See 21 U.S.C. § 355(j)(5)(D). A grandfather provision of that amendment specified that the changes would not apply to paragraph IV ANDAs filed before the date of enactment. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, ***Pub. L. No. 108-173, § 1102(b)(1), 117 Stat. 2066***. See generally Caraco Pharm. Labs., Ltd. v. Forest Labs., Inc., 527 F.3d 1278, 1284 n.2 (Fed. Cir. 2008) (discussing the amendment).

[10] There was no allegation in our first two decisions that the patents were fraudulently obtained or that the litigation giving rise to the settlement was a sham. See Valley Drug, 344 F.3d at 1307-09 & nn.19, 21; Schering-Plough, 402 F.3d at 1068. The plaintiff in our third decision did contend that there had been sham litigation, but we rejected that contention as unfounded. See Andrx, 421 F.3d at 1233-34.

We stated in Valley Drug that: "[A]ppellees have neither alleged nor asserted that the patent was procured by fraud, that appellants knew the patent was invalid, that there was no objective basis to believe that the patent was valid, or any such similar allegations. We therefore are not called upon to decide what the antitrust consequences of such circumstances might **[**38]** be." 344 F.3d at 1307 n.19. We make the same observations about this case and limit our decision in the same way. Although the FTC's complaint alleges that Solvay was "not likely to prevail" in its infringement actions against Watson and Par/Paddock, it does not contend that any of the three companies knew that the patent was invalid or not infringed or that there was no objective basis to believe the patent was valid and infringed. Accordingly, we do not rule out the possibility that sufficient allegations of any of those facts would state a valid antitrust claim.

We decline the FTC's invitation and reject its argument. The FTC's position equates a likely result (failure of an infringement claim) with an actual result, but *HN22*[] it is simply not true that an infringement claim that is "likely" to fail actually will fail. "Likely" means more likely than not, and that includes a 51% chance of a result one way against a 49% chance of a result the other way. Cf. *United States v. Frazier, 387 F.3d 1244, 1280-81 (11th Cir. 2004)* ("[I]t is more likely than not—that is, there is more than a fifty-percent chance—that [the event] would have occurred."). Giving the word its plain meaning, as many as 49 out of 100 times that an infringement claim is "likely" to fail it actually will succeed and keep the competitor out of the market. Our decisions focus on **[*1313]** the potential exclusionary effect of the patent, not the likely exclusionary **[**40]** effect. See, e.g., *Valley Drug, 344 F.3d at 1305*; *Schering-Plough, 402 F.3d at 1066*; *Andrx, 421 F.3d at 1235*.

In few cases that are settled is the probability needle pointing straight up. One side or the other almost always has a better chance of prevailing, but a chance is only a chance, not a certainty. Rational parties settle to cap the cost of litigation and to avoid the chance of losing. Those motives exist not only for the side that is likely to lose but also for the side that is likely, but only likely, to win. A party likely to win might not want to play the odds for the same reason that one likely to survive a game of Russian roulette might not want to take a turn. With four chambers of a seven-chamber revolver unloaded, a party pulling the trigger is likely (57% to 43%) to survive, but the undertaking is still one that can lead to undertaking.

Patent litigation can also be a high stakes, spin-the-chambers, all or nothing undertaking. See *Valley Drug, 344 F.3d at 1308*; *Schering-Plough, 402 F.3d at 1075-76*. For the company with a patented drug, it obviously makes sense to settle the infringement action if it is "not likely to prevail," even though that company may have a substantial **[**41]** (up to 49%) chance of winning. On the other side of the settlement equation is the generic drug company that is only "likely to prevail" in the action; with a substantial (up to 49%) chance of losing, that company also has a legitimate motive for settling. When both sides of a dispute have a substantial chance of winning and losing, especially when their chances may be 49% to 51%, it is reasonable for them to settle. That companies with conflicting claims settle drug patent litigation in these circumstances is not a violation of the antitrust laws.

The FTC argues in its brief that "Solvay's patent was vulnerable," that it "knew that its patent was in trouble," and that "its claims of infringement were very much in doubt." Those arguments not only go beyond *HN23*[] the allegations of the complaint, which is all that we can consider in this appeal from a Rule 12(b)(6) dismissal, but they also do little more than reflect the reality of patent litigation and the risks it presents to the patent holder. That reality and those risks are precisely why a party is likely to choose to settle a patent dispute even if it might well prevail. When hundreds of millions of dollars of lost profits are at stake, **[**42]** "even a patentee confident in the validity of its patent might pay a potential infringer a substantial sum in settlement." *Valley Drug, 344 F.3d at 1310*; cf. *In re Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 208 (E.D.N.Y. 2003)* ("No matter how valid a patent is—no matter how often it has been upheld in other litigation or successfully reexamined—it is still a gamble to place a technology case in the hands of a lay judge or jury. Even the confident patent owner knows that the chances of prevailing in patent litigation rarely exceed seventy percent. Thus, there are risks involved even in that rare **[***1572]** case with great prospects." (alterations and quotation marks omitted)).

There are other reasons to reject the FTC's approach. It would require an after-the-fact calculation of how "likely" a patent holder was to succeed in a settled lawsuit if it had not been settled. *HN24*[] Predicting the future is precarious at best; retroactively predicting from a past perspective a future that never occurred is even more perilous. And it is too perilous an enterprise to serve as a basis for antitrust liability and treble damages. See *Valley **[*1314]** Drug, 344 F.3d at 1308* ("Patent litigation is too **[**43]** complex and the results too uncertain for parties to accurately forecast whether enforcing the exclusionary right through settlement will expose them to treble damages if the patent immunity were destroyed by the mere invalidity of the patent."); cf. *Whitmore v. Arkansas, 495 U.S. 149, 159-60, 110 S.Ct. 1717, 1725, 109 L. Ed. 2d 135 (1990)* ("It is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case.").

The FTC's retrospective predict-the-likely-outcome-that-never-came approach would also impose heavy burdens on the parties and courts. It would require, in the FTC's words, "viewing the situation objectively as of the time of the settlement." In this case, assaying the infringement claim "as of the time of settlement" would have required mining through mountains of evidence—when the lawsuit settled, more than 40 depositions had been taken and one side alone had produced more than 350,000 pages of documents. The settlement made that unnecessary, but the FTC's approach would put that burden back on the parties and the court, undo much of the benefit of settling patent litigation, and discourage settlements. Our legal system can ill afford **[**44]** that. See *Schering-Plough, 402 F.3d at 1075* (***HN25***[] "There is no question that settlements provide a number of private and social benefits as opposed to the inveterate and costly effects of litigation."); see also *Valley Drug, 344 F.3d at 1309* (noting "the important role played by settlement in the enforcement of patent rights"); cf. *In re Tamoxifen Citrate, 466 F.3d at 202* ("Where a case is complex and expensive, and resolution of the case will benefit the public, the public has a strong interest in settlement." (quotation marks omitted)); *Flex-Foot, Inc. v. CRP, Inc., 238 F.3d 1362, 1368 (Fed. Cir. 2001)* (noting "the important policy of enforcing settlement agreements").

There is also the fact that retrospective prediction, at least in this type of case, is unlikely to be reliable. The FTC itself has recognized as much in the past. In its order in the Schering-Plough case, the full Commission explained that:

> ***HN26***[] An after-the-fact inquiry by the Commission into the merits of the underlying litigation is not only unlikely to be particularly helpful, but also likely to be unreliable. As a general matter, tribunals decide patent issues in the context of a true adversary proceeding, and their opinions **[**45]** are informed by the arguments of opposing counsel. Once a case settles, however, the interests of the formerly contending parties are aligned. A generic competitor that has agreed to delay its entry no longer has an incentive to attack vigorously the validity of the patent in issue or a claim of infringement.

*In re Schering-Plough Corp., 136 F.T.C. 956, 2003 WL 22989651, at *22 (F.T.C. 2003)*, vacated by *Schering-Plough, 402 F.3d 1056*. For those reasons, the FTC concluded that "it would not be necessary, practical, or particularly useful . . . to embark on an inquiry into the merits of the underlying patent dispute when resolving antitrust issues in patent settlements." *136 F.T.C. 956, Id. at *23*. The FTC was right then for the same reasons it is wrong now.

There is another reason to reject the FTC's new approach. ***HN27***[] Congress has given the United States Court of Appeals for the Federal Circuit exclusive appellate jurisdiction over patent cases. See *28 U.S.C. § 1295(a)(1)*; see also *Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 89, 113 S.Ct. 1967, 1971, 124 L. Ed. 2d 1 (1993)*; *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 807, 108 S.Ct.* ***[*1315]*** *2166, 2173, 100 L. Ed. 2d 811 (1988)*. This Court and the other non-specialized circuit **[**46]** courts have no expertise or experience in the area. We are ill-equipped to make a judgment about the merits of a patent infringement claim, which is what we would have to do in order to decide how likely the claim was to prevail if it had been pursued to the end. The FTC's approach is in tension with Congress' decision to have appeals involving patent issues decided by the Federal Circuit. **[***1573]**

As we discussed at the beginning of this opinion, the FTC warns that the alternative to its approach of looking back to decide what the likely outcome of settled infringement claims would have been is unacceptable. The alternative, according to the FTC, will allow patent holders and potential competitors "to forgo litigation over patent infringement and split up an ongoing stream of monopoly profits, even in situations in which it is evident that it is more likely than not that the patent would be found invalid or not infringed." The FTC believes that, because drug prices will be higher in the absence of competition, the profits generated by a patent holder's monopoly will typically exceed the aggregated profits that all companies individually would earn through competition. As a result, a potential **[**47]** competitor can make more money by dropping its patent challenge in return for a share of the holder's monopoly profits than it can by continuing to attack an invalid patent and bringing a less expensive version of the drug to market before the patent expires.

The FTC's ominous forecast discounts the reality that there usually are many potential challengers to a patent, at least to drug patents. If the patent actually is vulnerable, then presumably other generic companies, which are not bound by the first challenger's reverse payment settlement, will attempt to enter the market and make their own challenges to the patent. Blood in the water can lead to a feeding frenzy. Although a patent holder may be able to escape the jaws of competition by sharing monopoly profits with the first one or two generic challengers, those profits will be eaten away as more and more generic companies enter the waters by filing their own paragraph IV certifications attacking the patent. Cf. Herbert Hovenkamp, Sensible Antitrust Rules for Pharmaceutical Competition, *39 U.S.F. L. Rev. 11, 25 (2004)* ("In a world in which there are numerous firms willing and able to enter the market, an exit payment to one particular **[**48]** infringement defendant need not have significant anticompetitive effects. If there is good reason for believing the patent [is] invalid others will try the same thing.").

In closing, it is worth emphasizing that what the FTC proposes is that we attempt to decide how some other court in some other case at some other time was likely to have resolved some other claim if it had been pursued to judgment. If we did that we would be deciding a patent case within an antitrust case about the settlement of the patent case, a turducken task. Even if we found that prospect palatable, we would be bound to follow the simpler recipe for deciding these cases that is laid out in our existing precedent. As we interpret that precedent, the FTC loses this appeal.

AFFIRMED.

County of San Mateo v. CSL Ltd. (In re Plasma-Derivative Protein Therapies Antitrust Litig.)

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

April 27, 2012, Decided; April 27, 2012, Filed

No. 09 C 7666; No. 11 C 1468

Reporter
2012 U.S. Dist. LEXIS 61114 *

IN RE: PLASMA-DERIVATIVE PROTEIN THERAPIES ANTITRUST LITIGATION; COUNTY OF SAN MATEO, on behalf of itself and all others similarly situated, Plaintiffs vs. CSL LIMITED; CSL BEHRING LLC; CSL PLASMA; BAXTER INTERNATIONAL INC.; and THERAPEUTICS ASSOCIATION, Defendants.

Subsequent History: Later proceeding at *In re Plasma-Derivative Protein Therapies Antitrust Litig. v. CSL Ltd., 2012 U.S. Dist. LEXIS 159368 (N.D. Ill., Nov. 7, 2012)*

Prior History: *In re Plasma-Derivative Protein Therapies Antitrust Litig., 2012 U.S. Dist. LEXIS 2501 (N.D. Ill., Jan. 9, 2012)*

Core Terms

discovery, Mayo, downstream, subpoena, purchaser, documents, indirect, absent class members, motion to compel, requests, parties, consolidated, Plaintiffs', purchaser's action, interrogatories, burdensome, albumin, pass-on, courts, request information, class action, non-downstream, antitrust, agrees, unduly, cases

Counsel: **[*1]** For Allen Memorial Hospital Corporation (1:09-cv-07666), Plaintiff: Adam J. Levitt, LEAD ATTORNEY, Wolf, Haldenstein, Adler, Freeman & Herz LLC, Chicago, IL; Mary Jane Fait, LEAD ATTORNEY, Wolf, Haldenstein, Adler, Freeman & Herz LLC (Chicago), Chicago, IL; Christopher Lovell, Lovell Stewart Halebian, LLP, New York, NY; Fred Taylor Isquith, 1971, PRO HAC VICE, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY; John E Tangren, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Rachel Poplock, PRO HAC VICE, Wolf Haldenstein Adler Freeman & Herz, New York, NY; Roxanne Conlin, PRO HAC VICE, Conlin & Associates PC, Des Moines, IA.

For The Finley Hospital, Trinity Regional Medical Center, Plaintiffs: Adam J. Levitt, LEAD ATTORNEY, Wolf, Haldenstein, Adler, Freeman & Herz LLC, Chicago, IL; Mary Jane Fait, LEAD ATTORNEY, Wolf, Haldenstein, Adler, Freeman & Herz LLC (Chicago), Chicago, IL; John E Tangren, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Roxanne Conlin, PRO HAC VICE, Conlin & Associates PC, Des Moines, IA.

For St. Luke's Methodist Hospital, Plaintiff: Adam J. Levitt, LEAD ATTORNEY, Wolf, Haldenstein, Adler, Freeman & Herz LLC, Chicago, IL; Mary Jane Fait, LEAD **[*2]** ATTORNEY, Wolf, Haldenstein, Adler, Freeman & Herz LLC (Chicago), Chicago, IL; Douglas A Abrahams, Joseph C Kohn, PRO HAC VICE, Kohn, Swift & Graf, P.C., Philadelphia, PA; Fred Taylor Isquith, 1971, PRO HAC VICE, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY; John E Tangren, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Rachel Poplock, PRO HAC VICE, Wolf Haldenstein Adler Freeman & Herz, New York, NY; Roxanne Conlin, PRO HAC VICE, Conlin & Associates PC, Des Moines, IA.

For St. Luke's Regional Medical Center, Plaintiff: Adam J. Levitt, LEAD ATTORNEY, Wolf, Haldenstein, Adler, Freeman & Herz LLC, Chicago, IL; Mary Jane Fait, LEAD ATTORNEY, Wolf, Haldenstein, Adler, Freeman & Herz LLC (Chicago), Chicago, IL; John E Tangren, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Kyle

Gustin DeValerio, Berman DeValerio, Palm Beach Gardens, FL; Manuel Juan Dominguez, Cohen Milstein Sellers & Toll, Palm Beach Gardens, FL; Roxanne Conlin, PRO HAC VICE, Conlin & Associates PC, Des Moines, IA.

For University of Utah, Plaintiff: David C. Gustman, Jeffery Moore Cross, LEAD ATTORNEYS, Garry L Wills, Gia Fonte Colunga, Freeborn & Peters, Chicago, IL; Deborah H. Bornstein, LEAD **[*3]** ATTORNEY, PRO HAC VICE, Freeborn & Peters LLP, Chicago, IL; Andrew C. Curley, Eric L. Cramer, PRO HAC VICE, Berger & Montague, P.c., Philadelphia, PA; Benjamin D. Brown, Christopher Cormier, Daniel A. Small, Emmy L. Levens, Kit A. Pierson, Richard Koffman, Robert A. Cacace, PRO HAC VICE, Cohen, Milstein, Sellers & Toll PLLC, Washington, DC; Carol V Gilden, Cohen Milstein Sellers & Toll PLLC, Chicago, IL; Elizabeth R. Odette, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; John Daniel Radice, Linda P. Nussbaum, Grant & Eisenhofer, P.A., New York, NY; Joseph Goldberg, Freedman Boyd Hollander, Goldberg Ives & Duncan, PA, Albuquerque, NM; Louis C. Ricciardi, Mary L. Russell, Roberta D. Liebenberg, PRO HAC VICE, Fine, Kaplan And Black, R.P.C., Philadelphia, PA; Natalie Finkelman Bennett, PRO HAC VICE, Shepherd Finkelman Miller & Shah, LLP, Media, PA; Richard Thomas Kienzler, Freeborn & Peters LLP, Chicago, IL; W. Joseph Bruckner, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; William H Von oehsen, PRO HAC VICE, Powers Pyles Sutter & Verville, Pc, Washington, DC.

For Hospital Damas, Inc., Plaintiff: Donald Lewis Sawyer, Douglas A Millen, Michael Jerry Freed, Steven A Kanner, Freed **[*4]** Kanner London & Millen, LLC, Bannockburn, IL; Elizabeth R. Odette, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Jessica Noel Servais, Vincent J Esades, PRO HAC VICE, Heins Mills & Olson, P.l.c., Minneapolis, MN; W. Joseph Bruckner, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN.

For Solaris Health Systems, Plaintiff: Michael P. Donohue, Robert G. Hughes, PRO HAC VICE, Haviland Hughes, Llc, Philadelphia, PA.

For Comprehensive Blood and Cancer Center, Plaintiff: Charles E. Tompkins, Edward F. Haber, Ian J. Mcloughlin, Rachel M Brown, Todd S. Heyman, Shapiro Haber & Urmy Llp, Boston, MA; Garry L Wills, Freeborn & Peters, Chicago, IL.

For Ravi Patel, M.D. Inc., doing business as Comprehensive Blood and Cancer Center, Plaintiff: Charles E. Tompkins, Edward F. Haber, Ian J. Mcloughlin, Todd S. Heyman, Shapiro Haber & Urmy Llp, Boston, MA; Elizabeth R. Odette, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Pamela A. Markert, Solomon B Cera, PRO HAC VICE, Gold, Bennett, Cera & Sidener, LLP, San Francisco, CA; Richard Koffman, PRO HAC VICE, Cohen, Milstein, Sellers & Toll PLLC, Washington, DC; W. Joseph Bruckner, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN.

For Beth Israel Medical **[*5]** Center, Plaintiff: Lee Albert, PRO HAC VICE, Murray Frank LLP, New York, NY.

For Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, Plaintiffs: John Daniel Radice, Grant & Eisenhofer, P.A., New York, NY; Joseph Michael Vanek, Vanek, Vickers & Masini, P.C., Chicago, IL; Linda P. Nussbaum, PRO HAC VICE, Grant & Eisenhofer, P.A., New York, NY.

For County of San Mateo, Plaintiff: Steven N. Williams, LEAD ATTORNEY, Joseph W Cotchett, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Arthur S. Gold, Gold & Coulson, Chicago, IL; Niki Okcu, PRO HAC VICE, Cotchett, Pitre & Mccarthy, Llp, Burlingame, CA; Stuart George Gross, PRO HAC VICE, Gross Law, San Francisco, CA; Victor S Elias, Cotchett Pitre & McCarthy, LLP, Burlingame, CA.

For CSL Limited, CSL Behring, Defendants: Aimee H. Goldstein, Alan Craig Turner, Ian Ronald Dattner, PRO HAC VICE, Simpson Thacher & Bartlett LLP, New York, NY; Andrew M. Lacy, PRO HAC VICE, Simpson Thacher & Bartlett LLP, Washington, DC; Brian D. Roche, Vanessa Marti Heftman, Reed Smith LLP, Chicago, IL; Kevin J Arquit, Rogers & Wells, New York, NY.

For Baxter International Inc., Defendant: David J. Zott, LEAD ATTORNEY, Christa Cynthia Cottrell, Daniel E. **[*6]** Laytin, Luke Christian Ruse, Kirkland & Ellis LLP, Chicago, IL; Michael Sennett, LEAD ATTORNEY, Brent P. Ray, Pamela Lavon Taylor, Paula W. Render, Jones Day (CH), Chicago, IL.

For Plasma Protein Therapeutics Association, Defendant: Joanna Elizabeth Baden-mayer, Kelley Drey & Warren Llp, Washington, DC; John Carmine Pirra, Matthew Charles Luzadder, Kelley Drye & Warren LLP, Chicago, IL; Richard D. Milone, Jr, PRO HAC VICE, Stephen R. Freeland, Kelley Drye & Warren Llp, Washington, DC; Stephen Arthur Wood, Kelley, Drye & Warren, Chicago, IL.

For CSL Plasma Inc., Defendant: Brian D. Roche, Reed Smith LLP, Chicago, IL; Kevin J Arquit, Rogers & Wells, New York, NY.

For County of San Mateo, on behalf of itself and all others similarly situated (1:11-cv-01468), Plaintiff: Stuart George Gross, LEAD ATTORNEY, Gross Law, San Francisco, CA; John C. Beiers, San Mateo County Counsel's Office, Hall of Justice and Records, Redwood City, CA; Joseph W Cotchett, Steven Noel Williams, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA.

For CSL Limited, CSL Behring LLC, CSL Plasma, Defendants: Kevin J Arquit, LEAD ATTORNEY, Aimee H. Goldstein, Alan Craig Turner, Simpson Thacher & Bartlett LLP, New York, NY; **[*7]** Andrew M. Lacy, Simpson Thacher & Bartlett LLP, Washington, DC; Brian D. Roche, Vanessa Marti Heftman, Reed Smith LLP, Chicago, IL.

For Baxter International Inc., Defendant: David J. Zott, LEAD ATTORNEY, Christa Cynthia Cottrell, Daniel E. Laytin, Luke Christian Ruse, Kirkland & Ellis LLP, Chicago, IL.

Judges: ARLANDER KEYS, United States Magistrate Judge. Judge Joan B. Gottschall.

Opinion by: ARLANDER KEYS

Opinion

MEMORANDUM OPINION AND ORDER

Pending before the Court are Defendants', CSL Behring, CSL Limited, and CSL Plasma Inc. ("CSL" or "Defendants"), Motion to Compel the Mayo Clinic ("Mayo") to Produce Documents [411] in response to its May 10, 2011 subpoena, Defendants' Motion to Compel Downstream Discovery [425] in both the direct and indirect purchaser actions, and the Direct Purchaser Class Plaintiffs', The University of Utah, Hospital Damas Inc., and Ravi Patel, M.D., Inc. D/b/a Comprehensive Blood and Cancer Center ("Plaintiffs"), Motion for a Protective Order Quashing Subpoenas and Precluding Downstream Discovery [420]. For the reasons set forth below, Defendants' Motion to Compel Mayo Clinic [411] is granted in part and denied in part, Defendants' Motion to Compel Downstream Discovery [425] is denied, **[*8]** and Plaintiffs' Motion for a Protective Order Quashing Subpoenas and Precluding Downstream Discovery [420] is denied.

DISCUSSION

The Court is tasked with deciding the proper scope of discovery in a class action suit pursuant to the Sherman Act. Prior to consolidation of this multidistrict litigation, Mayo Clinic was one of the initial individual plaintiffs that filed a complaint against CSL and other Defendants alleging a conspiracy to restrict the supply of two plasma-derivative protein therapies, immune globulin ("Ig") and albumin, within the United States in violation of *Section 1 of the Sherman Act*. On June 29, 2010, Mayo Clinic filed for voluntarily dismissal, and is now an absent class member. Mayo contends that, as an absent class member, Defendants' Motion to Compel should be denied as legally irrelevant, unduly burdensome, and because CSL has not met its burden of showing entitlement to such discovery.

While absent class members are not required to submit to discovery as a matter of course, the court has the power to authorize the use of discovery procedures under the Federal Rules of Civil Procedure if the court determines that justice to all parties requires that the absent **[*9]** parties furnish certain information and if adequate precautionary measures are taken to insure that the absent class members are not misled. *Brennan v. Midwestern United Life Ins. Co., 450 F.2d, 999, 15 Fed. R. Serv. 2d 351, 13 A.L.R. Fed. 243 (7th cir. 1971)*.

Before ordering discovery from absent class members, the court must be assured that the requested information is actually needed in preparation for trial and that the discovery devices are not used to take unfair advantage of absent class members or as a stratagem to reduce the number of claimants. Moreover, adequate notice must be given to absent class members, so that such persons are fully informed of the discovery order and the possible consequences of their noncompliance. *Id.*

I. Relevance of Subpoenaed Documents

Mayo's first contention against production of the information requested by CSL is that it pertains to "downstream information," or documents and data reflecting a purchaser's use or sale of a product after the purchase. Mayo opines that such information is irrelevant as a matter of law and inadmissable. Plaintiffs cite to *Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 489, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968)* **[*10]** and *Illinois Brick Co. v. Illinois, 431 U.S. 720, 745-46, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977)* for the proposition that antitrust defendants cannot avoid liability for damages on the grounds that plaintiffs were able to pass-on any additional costs, and a string of district court rulings barring discovery of downstream data as irrelevant given the unavailability of the "pass-on" defense. Mayo concludes that CSL is attempting to rely upon a pass-on defense which courts generally prohibit in price-fixing cases. (Dkt. #419, P's Opp'n at 6-7.)

CSL argues that out of the 33 document requests contained in their subpoena, the majority of the categories sought are entirely unrelated to downstream information. Therefore, Defendants contend that Mayo has no excuse for failing to produce the majority of the categories of requested information. (Dkt. #424, Def.'s Reply at 3.) Moreover, CSL maintains entitlement to the data that is in fact downstream information, asserting that *Hanover Shoe* and *Illinois Brick* have no applicability here because defendants are not seeking the downstream data in order to assert a pass-on defense. Hedging all bets, CSL opines that this MDL proceeding is not limited **[*11]** to the direct purchaser claims, but also those of the putative indirect purchaser class, and "at a minimum, information relating to [Mayo's] downstream sales of Ig and albumin are relevant to the claims in the indirect purchasers action." (Dkt. #424, Def's Reply at 5.)

The Court must first clarify the *direct purchaser vs. indirect purchaser* distinction. This MDL proceeding consists of two parts - a *direct purchaser* class action, which Mayo Clinic's action has been consolidated into, (Consolidated Am. Compl. [Dkt. #222] ¶ 262, *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, 1:09-cv-07666 (N.D. Ill. June 4, 2010)), and an *indirect purchaser* class action (Class Action Compl.[Dkt. #1] ¶¶ 300-01, *County of San Mateo v. CSL Ltd.*, 1:11-cv-01468 (N.D. Ill. Dec 14, 2010)). The named *direct purchaser* class brings a putative class action that purports to comprise any entity or person who bought Ig and/or albumin directly from Defendants during the class period, whereas the putative *indirect purchaser* class purports to comprise any entity or person who bought Ig and/or albumin indirectly from Defendants during the class period. Mayo Clinic remains a member of the putative direct purchaser **[*12]** class on whose behalf this action is being asserted.

Plaintiffs seek to highlight the line distinguishing between the direct purchasers and indirect purchasers, arguing that they are two very different groups, represented by different counsel, and are consolidated herein solely for pretrial purposes by the MDL. (Hr'g Tr.17,Feb. 15, 2012.) However, Defendants opine that the distinction is not as clear, pointing to the fact that the substantive allegations of both groups are identical, there are common questions of fact, and that both the "direct and indirect plaintiffs' complaints are verbatim." (Id. at 17.) Defendants seek to blur the line between the two groups in an effort to solicit downstream information from both. Otherwise, Defendants would generally be prohibited from downstream discovery in a direct purchaser action, yet are able to demand such discovery from an indirect purchaser.

Mayo directs the Court to a plethora of case law in which courts analyzing facts similar to those herein did not permit discovery into downstream data and financial information. *See In re Auto. Refinishing Paint Antitrust Litig., 2006 U.S. Dist. LEXIS 34129, 2006 WL 1479819, at *7-*8 (E.D. Pa. May 26, 2006)* (declining to "depart **[*13]** from the longheld practice of proscribing discovery of downstream data" in a price-fixing case); *see also, e.g., In re Air Cargo Shipping Svcs. Antitrust Litig., 2010 U.S. Dist. LEXIS 125623, 2010 WL 4916723, at *2-*3 (E.D.N.Y. Nov. 24, 2010)*; *Meijer Inc. et al. v. Abbott Labs., 251 F.R.D. 431, 433-36 (N.D. Cal. 2008)*; *In re Aspartame Antitrust Litig., 2008 U.S. Dist. LEXIS 121490, 2008 WL 2275528, at *4 (E.D. Pa. April 8, 2008)*; *In re K-Dur Antitrust Litig., 2007 U.S. Dist. LEXIS 96066, 2007 WL 5302308, at *10-*15 (D.N.J. Jan. 2, 2007)*; *In re Pressure Sensitive Labelstock*

Antitrust Litig., 226 F.R.D. 492, 497-98 (M.D. Pa. 2005) (noting that courts "generally proscribe downstream discovery" in price-fixing cases); *In re Plastics Additives Antitrust Litig., 2004 U.S. Dist. LEXIS 23989, 2004 WL 2743591, at *16 (E.D. Pa. Nov. 29, 2004)* ("courts have refused to require production of downstream data in antitrust price-fixing cases"); *In re Vitamins Antitrust Litig., 198 F.R.D. 296, 298-301 (D.D.C. 2000)*; *In re Folding Cartons Antitrust Litig., No. MDL 250, 1978 U.S. Dist. Lexis 20409, at *4-9 (N.D. Ill. May 5, 1978)* (holding plaintiff's financial data irrelevant to the issue of whether defendants conspired to fix prices).

Notwithstanding the above selection of case law in which courts prohibited downstream **[*14]** discovery, some even despite the actions also involving a related indirect purchaser such as the instant case, Defendants, nonetheless, aver that they have a right to the information as "none of the cases addressed the point that a pass-on defense, while not allowed under federal ***antitrust law***, is permitted under the state laws asserted by the County of San Mateo in the indirect purchaser action. *See, e.g., Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 111 Cal. Rptr. 3d 666, 233 P.3d 1066, 1086 (Cal. 2010)*; *In re Vitamins Antitrust Litig., 259 F. Supp. 2d 1, 4-8 (D.D.C. 2003)*." (Dkt. #424, Def's Repl, p.5 n.3.) While Defendants may have realized a possible nuance that arguably distinguishes the facts herein from the long-held case law above, it is futile due to Judge Gottschall, on March 23, 2012, recommending that the Judicial Panel on Multidistrict Litigation remand the indirect purchaser action (*County of San Mateo v. CSL Ltd.*, Case No. 11 C 1468) back to the Northern District of California. (*See* Dkt. #446). For the purpose of the ruling on the instant motion, the Court wil assume that Judge Gottschall's recommendation will be followed.

Aside from the now moot point that the MDL proceeding contains both groups, Defendants **[*15]** state that they "laid out several independent reasons the Court should allow downstream discovery in both the direct and indirect actions." (Dkt. #455, Defs.' Response p. 1.) However, the Court found none of the other arguments articulated sufficiently, and only the relevance to the indirect purchaser action to be the most compelling reason to grant such discovery in an antitrust case. Without the indirect purchaser action being consolidated herein, the Court cannot justify going against the long-held precedent of proscribing downstream discovery in antitrust litigation. Thus, due to Judge Gottschall's recommendation of remanding the indirect purchaser action, the Court will not grant Defendants' Motion to Compel Downstream Discovery, and will instead wait for the JPML's ruling on remand. Therefore, Defendants' Motion to Compel Downstream Discovery [425] is denied.

Defendant is correct, however, that a large number of requests contained in the subpoena are not related to downstream discovery whatsoever, and that Mayo should not be allowed to hide behind the possibility of a pass-on defense as a reason to be totally unresponsive to the subpoena. The Court agrees. Plaintiffs' attempt to **[*16]** cast the entirety of the subpoena in a light of downstream information is unavailing. On the other hand, Mayo is correct that many of the requests, as they are currently worded, are too broad in scope and burdensome to produce. However, the Court finds no compelling reason as to why Plaintiffs should not respond to the other, non-downstream categories of requested documents as long as the parameters of production are not unnecessarily broad.

II. Burden of Subpoenaed Documents

Plaintiff asserts that the information Defendants request is unduly burdensome to produce and that therefore, Mayo should not be compelled to produce any further data. (Dkt. #419, P's Opp'n at 8-9.) For example, Mayo points out that subpoenaed request 22 demands "'[a]ll communications with physicians or patients regarding uses or substitutes for Ig/and/or albumin,'" and Mayo contends that "[i]nformation related to each and every use of Ig or albumin since 2003 cannot be derived without a detailed search of individual patient records." (Id. at 8.) Defendants argue that the information sought need not be unduly burdensome, if only Plaintiff would cooperate in efforts to refine the discovery process together. During **[*17]** a meet-and-confer conference call on November 3, 2011, CSL's counsel, "in an effort to explore whether there was any scope for agreement with mayo Clinic on production of a subset of the materials sought by the Subpoena," indicated to Mayo 8 of the 33 requests that CSL sought as a matter of priority. (Dkt. #411, Defs.' Motion at 3) However, Mayo offered only to produce the additional limited set of documents "if CSL would agree to consider Mayo's obligations under the subpoena satisfied with that production." (Dkt. #419, Response, at 5, n.5) The Court agrees that Defendants' subpoena is overly broad, and that discovery into individual patient records poses substantial patient-privacy concerns. However, the Court believes that the parties did not optimally utilize their meet-and-confer opportunities, and that it is possible for the parties to reconvene and possibly devise a mutually agreed upon set of requests for production.

Mayo argues that Defendants' Motion should be denied because Defendants have not moved to compel production of documents by the named Plaintiffs, yet seek them from Mayo, a non-party. (Dkt. #419, Pl.'s Opp'n at 9-12.) Defendants assert that the named Plaintiffs **[*18]** have agreed to produce many of the categories of documents requested, the parties have negotiated search terms to be employed, and "while the University of Utah (one of the named direct purchaser Plaintiffs) recently produced more than 90,000 pages of documents in response to Defendants' requests, Mayo Clinic has refused to produce anything other than the 157 pages of documents it produced to the Federal Trade Commission." (Dkt. #424, Defs.'Reply at 8) The Court finds Mayo's argument misplaced, as the number of pages of documents the named Plaintiffs have produced, or not, is not at all relevant to CSL's motion to compel Mayo Clinic specifically. Mayo argues that CSL is improperly using its subpoena power to target a non-party versus compelling the named Plaintiffs. However, service of subpoenas for documents on third parties is a common and accepted practice, regardless of what other parties are involved. Pursuant to the *Federal Rule of Civil Procedure Rule 45*, a "party can also subpoena a third party to produce materials." (*Rule 45*).

III. Entitlement to Subpoenaed Documents

Finally, Mayo asserts that its status as a non-party warrants consideration in the analysis of the reasonableness **[*19]** of CSL's requests, and relies upon *McPhail v. First Command Financial Planning, Inc., 251 F.R.D. 514, 517 (S.D. Cal. 2008)* to assert that any further discovery by CSL should be denied. *McPhail* requires a party seeking individualized discovery of an absent class member to satisfy four factors: (1) that the discovery is not designed "as a tactic to take undue advantage of the class members or as a stratagem to reduce the number of claimants," (2) the discovery is "necessary," (3) responding to the discovery would not require "the assistance of technical and legal advice,", and (4) the discovery does not seek information already known to the requesting party. (*Id.*) Mayo contends that CSL does not satisfy any of the four *McPhail* factors, while Defendants argue that not only do they meet all of the four factors, but that *McPhail* is distinguishable and inapplicable to an absent class member such as Mayo. The Court agrees with Defendants.

Mayo Clinic is not your garden variety absent class member. Prior to their voluntary dismissal, Mayo Clinic was one of the initial individual plaintiffs that filed a complaint against CSL and other Defendants, which was ultimately consolidated in this MDL. **[*20]** Mayo successfully sought appointment of its chosen counsel as one of the two lead firms representing the putative direct purchaser class in the instant lawsuit, on the basis that Mayo was the individual plaintiff with the most at stake - an "empowered plaintiff" in fact. (Pl.'s Mayo Clinic's Resp. To Appl. To Serve on the Pls.' Steering Comm. [133] 1-2.) Since filing for voluntary dismissal, Mayo attempts to detract from its original active role as a class representative, arguing that "Mayo's prior posture is legally irrelevant to the question whether certain information is relevant or not to a claim by direct purchasers under the Sherman Act." (Dkt. #419, Pl.'s Opp'n at 2.)

While the Court agrees with Mayo that its prior posture in this proceeding indeed is irrelevant to CSL's right to downstream discovery and unduly burdensome document requests, it is, however, instrumental in determining the appropriate limits that the Court will set regarding its discovery. A court should inquire as to whether the information sought from absent class members is available from other sources, and whether the proposed discovery will require class members to obtain personal legal counsel or technical **[*21]** advice from an expert. However, a court's flexibility in this arena is wide-ranging. Where some courts have held that absent class members are not parties for the purpose of discovery by interrogatories, others have permitted limited numbers of interrogatories upon a showing of need, or imposed on defendants the added cost of mailing otherwise permissible interrogatories to absent members of a plaintiff class. (*Manual for Complex Litigation*, Fourth § 21.41 (2011).)

It is clear that deposing absent class members requires a greater justification than written interrogatories, and accordingly, a subpoena solely for documents requires even less justification. Defendants argue that the "cases cited by Mayo Clinic in support of its contention that CSL's *Rule 45* third-party subpoena should be quashed are off-point because those concerned discovery requests, such as interrogatories and requests for admission, that the Federal Rules only permit to be served upon a *party*, rather than non-party subpoenas for documents under *Rule 45*." (Dkt. #424, Defs.'Reply at 9.) The Court agrees that Plaintiffs' reliance on *McPhail* and the like is readily distinguishable and warrants no further analysis of each **[*22]** factor, as *McPhail* sought interrogatories and requests for admission -not documents. Moreover, *McPhail* addressed discovery from absent members of a certified class. In the instant case, the discovery is sought of a "putative but as-yet *uncertified* [emphasis added] class." (Id.) The Court is not convinced by the precedent that Plaintiff relies on, and does not find Mayo's status as an absent class member a compelling reason to shield it from further non-downstream discovery.

The Court is well aware that one of the principal advantages of class actions over massive joinder or consolidation would be lost if all class members were routinely subjected to discovery. However, herein, the Court is assured that the requested information is actually needed in preparation for trial, and that the discovery devices are not used to take unfair advantage of Mayo as an absent class members or as a stratagem to reduce the number of claimants. Therefore, Defendant's Motion to Compel Mayo Clinic [411] is granted in part and denied in part. The Motion is denied as it relates to any requested downstream information, or broad/vague terminology. However, it is granted as to the other non-downstream related **[*23]** categories of requested information. Defendants must remove all requests for downstream information and narrow the other categories of information sought. The Court encourages the parties to again hold a meet-and-confer, and this time to ardently work together in an effort to agree upon production of non-downstream, relevant, and streamlined categories of data that will be helpful in resolving this litigation. In the event that no mutual agreement can be reached, CSL is ordered to modify its requests in a manner that is consistent to what has been advised herein, and resubmit its motion to compel. The modified motion to compel will be considered without prejudice.

Finally, a court must "quash or modify a subpoena if it fails to allow a reasonable time for compliance or subjects the deponent to an undue burden." *CSC Holdings Inc. v. Redisi, 309 F.3d 988, 993 (7th Cir. 2002.)* (citing *Fed.R.Civ.P. 45*.) In deciding whether to grant a motion to quash or modify, a court "must evaluate such factors as timeliness, good cause, utility, and materiality." (*Id.*) (citation omitted) Although Defendants' subpoena warrants redrafting, it is nonetheless timely and brought forward in good faith. Overall, **[*24]** the subpoena seeks relevant and material information. Once modifications are made to remove requests for downstream information and better parameters for information are implemented to control for breadth, CSL's subpoena will be fully enforceable. Therefore, Plaintiffs' Motion for a Protective Order Quashing Subpoenas and Precluding Downstream Discovery [420] is denied.

In conclusion, the Court suggests that the parties again hold a meet-and-confer, and ardently work together in an effort to agree upon production of non-downstream, relevant, and streamlined categories of data that will be helpful in resolving this litigation and not unduly burdensome to produce.

CONCLUSION

For the reasons set forth above, Defendants' Motion to Compel Mayo Clinic [411] is granted in part and denied in part. Defendants' Motion to Compel Downstream Discovery [425] is denied. Lastly, Plaintiffs' Motion for a Protective Order Quashing Subpoenas and Precluding Downstream Discovery [420] is denied.

Dated: April 27, 2012

ENTERED:

/s/ Arlander Keys

ARLANDER KEYS

United States Magistrate Judge

End of Document

CamSoft Data Sys. v. Southern Elecs. Supply, Inc.

United States District Court for the Middle District of Louisiana

April 30, 2012, Decided; April 30, 2012, Filed

CIVIL ACTION NO. 09-1047-JJB

Reporter

2012 U.S. Dist. LEXIS 59889 *; 2012-2 Trade Cas. (CCH) P78,016

CAMSOFT DATA SYSTEMS, INC. versus SOUTHERN ELECTRONICS SUPPLY, INC., ET AL.

Subsequent History: Motion granted by, Motion denied by, Summary judgment denied by *CamSoft Data Sys. v. S. Elecs. Supply, Inc., 2012 U.S. Dist. LEXIS 116818 (M.D. La., Aug. 16, 2012)*

Prior History: *CamSoft Data Sys. v. Southern Elecs. Supply, Inc., 2011 U.S. Dist. LEXIS 82263 (M.D. La., July 26, 2011)*

Core Terms

antitrust, joint venture, camera, parties, networking, standing to bring, allegations, concrete, summary judgment, pilot program, no reply, speculative, proposals

Counsel: **[*1]** For Camsoft Data Systems, Inc., Plaintiff: Marx David Sterbcow, LEAD ATTORNEY, Sterbcow Law Group LLC, New Orleans, LA; David H. Schwartz, PRO HAC VICE, Law Offices of David H. Schwartz, San Francisco, CA; Jason Luke Melancon, Robert C. Rimes, Melancon | Rimes, Baton Rouge, LA.

For Southern Electronics Supply, Inc., Defendant: Edmond C. Haase', III, LEAD ATTORNEY, Montgomery Barnett, LLP, New Orleans, LA; Christopher D. Cazenave, Edward Dirk Wegmann, Mark A. Cunningham, Jones, Walker-NO, New Orleans, LA; James Conner Percy, Ryan Estes Johnson, Jones, Walker - B.R., Baton Rouge, LA; Jason Ross Anders, Ajubita, Leftwich & Salzer, New Orleans, LA.

For Active Solutions, L.L.C., Brian Fitzpatrick, Henry J. Burkhardt, Defendants, ThirdParty Plaintiffs: Mark A. Cunningham, LEAD ATTORNEY, Christopher D. Cazenave, Edward Dirk Wegmann, Jones, Walker-NO, New Orleans, LA; James Conner Percy, Ryan Estes Johnson, Jones, Walker - B.R., Baton Rouge, LA.

For Ignace Perrin, Defendant: Edmond C. Haase', III, LEAD ATTORNEY, Montgomery Barnett, LLP, New Orleans, LA; Christopher D. Cazenave, Edward Dirk Wegmann, Mark A. Cunningham, Jones, Walker-NO, New Orleans, LA; James Conner Percy, Ryan Estes Johnson, **[*2]** Jones, Walker - B.R., Baton Rouge, LA.

For Dell, Inc., Defendant: Michael P Kenny, LEAD ATTORNEY, PRO HAC VICE, Christopher Allen Riley, PRO HAC VICE, Erica L Fenby, PRO HAC VICE, Alston & Bird, LLP, Atlanta, GA; James Rodney Chastain, Jr, Kean, Miller, Hawthorne, D'Armond— B.R., Baton Rouge, LA; Karli Glascock Johnson, Kean Miller LLP — B.R., Baton Rouge, LA; Tara Montgomery Madison, Kean Miller LLP, Baton Rouge, LA.

For CIBER, Inc., Defendant, Cross Claimant: Christine Lipsey, LEAD ATTORNEY, McGlinchey Stafford, PLLC, Baton Rouge, LA; Dylan Michelle Tuggle, McGlinchey Stafford- New Orleans, New Orleans, LA; Willa Rebecca LeBlanc Smith, McGlinchey Stafford- B.R., Baton Rouge, LA.

Christopher Drake, Defendant, Pro se, Mandeville, LA.

For Gregory Meffert, Defendant: Robert J. Ellis, Jr., LEAD ATTORNEY, City of New Orleans, New Orleans, LA.

For Mark Kurt, Defendant: Kevin P. Kress, LEAD ATTORNEY, McCranie, Sistrunk, Anzelmo, Hardy, McDaniel & Welch - NO, New Orleans, LA; Kyle P. Kirsch, McCranie, Sistrunk, Anzelmo, Hardy, McDaniel & Welch, LLC, New Orleans, LA; Robert J. Ellis, Jr., City of New Orleans, New Orleans, LA; Thomas P. Anzelmo, Sr., McCranie, Sistrunk, Anzelmo, Hardy, Maxwell & **[*3]** McDaniel- MET, Metairie, LA.

For Dell Marketing, L.P., Steve Renecker, Billy Ridge, Heather Smith, Defendants: Tara Montgomery Madison, LEAD ATTORNEY, Kean Miller LLP, Baton Rouge, LA.

For Dwayne Hodges, Defendant: John S. McLindon, LEAD ATTORNEY, Rainer, Anding & McLindon, Baton Rouge, LA.

For Michael Charbonnet, Defendant: Dwight L. Acomb, LEAD ATTORNEY, William F. Bologna & Associates, New Orleans, LA.

For Donald Evans, Defendant: Alfred C. Williams, LEAD ATTORNEY, Baton Rouge, LA.

For Bill Tolpegin, Donald Berryman, Earthlink, Inc., Defendants: John Michael Parker, Sr., LEAD ATTORNEY, Edward Daniel Hughes, Taylor, Porter, Brooks & Phillips, Baton Rouge, LA; Lawrence A. Slovensky, PRO HAC VICE, King & Spalding LLP, Atlanta, GA.

For Motorola, Inc., Defendant: Michael Reese Davis, Sr., LEAD ATTORNEY, L. J. Hymel, Jr., Tim P. Hartdegen, Hymel, Davis & Petersen, LLC, Baton Rouge, LA; Joseph Edwin Blackwell, Hymel Davis and Petersen, Baton Rouge, LA.

For MMR Constructors, Inc., doing business as MMR Communications, Defendant: Patrick A. Bruno, LEAD ATTORNEY, Dawn Theresa Trabeau-Mire, MMR Group, Inc., Baton Rouge, LA.

NetMethods, LLC, Defendant, Pro se, Marrero, LA.

Method Investments, LLC, Defendant, **[*4]** Pro se, Marrero, LA.

Veracent, LLC, Defendant, Pro se, Marrero, LA.

Mark St. Pierre, Defendant, Pro se, Marrero, LA.

For First Financial Insurance Company, ThirdParty Defendant: Christopher H. Hebert, LEAD ATTORNEY, Rabalais, Hanna & Hebert, Lafayette, LA.

For Southern Electronics Supply, Inc., ThirdParty Plaintiff: Christopher D. Cazenave, Edward Dirk Wegmann, Mark A. Cunningham, Jones, Walker-NO, New Orleans, LA; James Conner Percy, Ryan Estes Johnson, Jones, Walker - B.R., Baton Rouge, LA; Jason Ross Anders, Ajubita, Leftwich & Salzer, New Orleans, LA.

For Ignace Perrin, ThirdParty Plaintiff: Edmond C. Haase', III, LEAD ATTORNEY, Montgomery Barnett, LLP, New Orleans, LA; Jason Ross Anders, LEAD ATTORNEY, Ajubita, Leftwich & Salzer, New Orleans, LA; Christopher D. Cazenave, Edward Dirk Wegmann, Mark A. Cunningham, Jones, Walker-NO, New Orleans, LA; James Conner Percy, Ryan Estes Johnson, Jones, Walker - B.R., Baton Rouge, LA.

For Zurich American Insurance Co., American Zurich Insurance Co., ThirdParty Defendants: Daryl A. Higgins, LEAD ATTORNEY, Michael D. Peytavin, Gaudry, Ranson, Higgins, & Gremillion, LLP, Gretna, LA.

For Continental Casualty Co., ThirdParty Defendant: Gustave A. Fritchie, **[*5]** III, LEAD ATTORNEY, Irwin Fritchie Urquhart & Moore LLC; Christopher R. Carroll, PRO HAC VICE, Carroll McNulty and Kull LLC, Basking Ridge, NJ; Edward W. Trapolin, Irwin, Fritchie, Urquhart & Moore, LLC, New Orleans, LA; Kristin V. Gallagher, PRO HAC VICE, Carrol McNulty & Kull LLC.

For Active Solutions, L.L.C., Cross Defendant: Mark A. Cunningham, LEAD ATTORNEY, Christopher D. Cazenave, Edward Dirk Wegmann, Jones, Walker-NO, New Orleans, LA; James Conner Percy, Ryan Estes Johnson, Jones, Walker - B.R., Baton Rouge, LA.

For Southern Electronics Supply, Inc., Cross Defendant, ThirdParty Plaintiff: Edmond C. Haase', III, LEAD ATTORNEY, Montgomery Barnett, LLP, New Orleans, LA; Christopher D. Cazenave, Edward Dirk Wegmann, Mark

A. Cunningham, Jones, Walker-NO, New Orleans, LA; James Conner Percy, Ryan Estes Johnson, Jones, Walker - B.R., Baton Rouge, LA; Jason Ross Anders, Ajubita, Leftwich & Salzer, New Orleans, LA.

For Ignace Perrin, ThirdParty Plaintiff: Edmond C. Haase', III, LEAD ATTORNEY, Montgomery Barnett, LLP, New Orleans, LA; Christopher D. Cazenave, Edward Dirk Wegmann, Mark A. Cunningham, Jones, Walker-NO, New Orleans, LA; James Conner Percy, Ryan Estes Johnson, Jones, Walker **[*6]** - B.R., Baton Rouge, LA.

For Continental Casualty Co., ThirdParty Defendant: Gustave A. Fritchie, III, LEAD ATTORNEY, Irwin Fritchie Urquhart & Moore LLC; Christopher R. Carroll, PRO HAC VICE, Carroll McNulty and Kull LLC, Basking Ridge, NJ; Edward W. Trapolin, Irwin, Fritchie, Urquhart & Moore, LLC, New Orleans, LA; Kristin V. Gallagher, PRO HAC VICE, Carrol McNulty & Kull LLC; Kelly Cambre Bogart, Nicole Marie Boyer, Duplass, Zwain, Bourgeois, Morton, Pfister & Weinstock, Metairie, LA.

Judges: JAMES J. BRADY, UNITED STATES DISTRICT JUDGE.

Opinion by: JAMES J. BRADY

Opinion

RULING

This matter is before the Court on motions to dismiss Plaintiff's antitrust and RICO claims filed by various Defendants in this matter as well as cross- motions for summary judgment on the issue of joint venture. In a prior ruling, the Court addressed numerous claims, dismissing some but not others. (Doc. 313). As the Court had allowed Plaintiff CamSoft Data Systems, Inc. ("CamSoft") to amend its Petition again on only its antitrust and RICO claims, the Court did not address those claims at that time. These new allegations are contained in the Third Amended Complaint ("TAC"). CamSoft filed omnibus oppositions in response to the antitrust **[*7]** (doc. 341) and RICO (doc. 342) claims. Defendants filed the their motions and replies individually as follows: Active Solutions, LLC, Brian Fitzpatrick, Henry J. Burkhardt, Ignace A. Perrin III, and Southern Electronics Supply, Inc. ("Southern") (collectively, the "Active-Southern Defendants") (docs. 324, 356); Motorola Solutions Inc. ("Motorola") (doc. 325, no reply); CIBER Inc. ("CIBER") (doc. 326, no reply); MMR Constructors, Inc. ("MMR") (docs. 327, 350); EarthLink, Inc. ("EarthLink") (docs. 328, 347); Donald Berryman and Bill Tolpegin (together with EarthLink, "EarthLink Defendants") (docs. 329, 348); Dell Inc. and Dell Marketing, L.P. ("Dell") (docs. 330, 354); Billy Ridge (doc. 331, no reply); Heather Smith and Steve Reneker (doc. 332, no reply) (together with Dell, "Dell Defendants") and Mark Kurt (doc. 333, no reply), the former director of technology for the City of New Orleans. At the direction of the Court, the parties filed cross-motions for summary judgment on whether a joint venture existed between CamSoft and the Active-Southern Defendants. CamSoft filed several briefs on this subject (docs. 315, 337, 339, 340), as did Active-Southern and the associated individuals **[*8]** (docs. 319, 321, 338, 346, 349, 370). Nearly all other Defendants also filed motions (docs. 317, 320, 322) relating to the potential CamSoft/Active-Southern joint venture.

By this point, many judicial resources have been consumed trying to unravel the New Orleans crime camera project. There have been criminal convictions and civil verdicts handed down against former city employees and technology vendors—many of whom are named in this lawsuit. CamSoft's role in this is either that of a partner of the Active-Southern Defendants who has not had its day in court yet or that of a former subcontractor with limited recourse against the Defendants. What follows is the factual background as it relates to CamSoft. As the parties tell it, CamSoft won favorable press coverage for work it was doing on wi-fi networking in Baton Rouge in 2003. Southern's president, Mr. Fitzgerald, emailed CamSoft's president, Mr. MacDonald, to congratulate him. The two then had a telephone discussion wherein Fitzgerald told MacDonald about a pilot program they were working on for the City of New Orleans ("the city") related to crime cameras. The two discussed ways they might be able to put their heads together—along **[*9]** with other technology vendors, including Active—to make the crime camera system work in New Orleans by incorporating CamSoft's networking abilities in with Southern's camera system. CamSoft was a licensed retailer for TROPOS, a networking hardware company. The alliance they formed will be discussed below, but nothing was reduced to writing. The pilot project was completed—with varying levels of success, depending on which party is telling the story—and the city put out a request for proposals ("RFP") for a large scale implementation of a wireless crime camera network. Southern won the July 19, 2004 contract ("the contract") and CamSoft participated in the implementation, although without a written agreement with Southern—the two sides had been trading subcontractor proposals without agreement. The terms of the contract called for Southern to supply crime cameras to the city on a per camera basis with certain minimum purchase requirements but no concrete commitments. At some point, Southern quietly replaced CamSoft with Dell and Ciber. Later Southern itself was replaced—again quietly—through the machinations of members of the Mayor's Office of Technology ("MOT"). This suit seeks damages **[*10]** against Active and Southern for their role in cutting CamSoft out of the work and also against the other defendants for their role in cutting Southern—and by extension CamSoft—out. As the existence, or lack thereof, of a joint venture could be critical to CamSoft's standing to bring these antitrust and RICO claims, the Court will address the cross motions for summary judgment first.

Joint Venture

A motion for summary judgment should be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. While multiple Defendants have filed motions on the joint venture issue, the Court will focus on CamSoft's and the Active-Southern Defendants' briefs, noting that there are no allegations of a joint venture existing between CamSoft and any of the other Defendants.

In Louisiana joint ventures are fiduciary in nature and are generally governed by partnership law. *Scheffler v. Adams and Reese, LLP, 950 So.2d 641, 648 n. 2 (La. 2007)*. The Louisiana Civil Code defines partnership as "a **[*11]** juridical person, distinct from its partners, created by a contract between two or more persons to combine their efforts or resources in determined proportions and to collaborate at mutual risk for their common profit or commercial benefit." *La. Civ. Code Art. 2801*. The Louisiana First Circuit developed a test in *Cajun Elec. Power Co-op Inc. v. McNamara* that incorporates these principals. *452 So. 2d 212, 215 (La. App. 1 Cir. 1984)*. The Seven elements of the *Cajun Electric* test are as follows:

(1) A contract between two or more persons;
(2) A juridical entity or person is established;
(3) Contribution by all parties of either efforts or resources;
(4) The contribution must be in determinate proportions;
(5) There must be joint effort;
(6) There must be a mutual risk vis-á-vis losses;
(7) There must be a sharing of profits.

The Court notes that this *Cajun Electric* test is the only one formulated after the 1980 revision to the Louisiana Civil Code. And while some Louisiana circuits use older tests, the Court finds that there is no substantial differences between those tests and the *Cajun Electric* test that would change the analysis in this case. The Active Southern Defendants claim CamSoft cannot **[*12]** prove the existence of any of these elements and that there is no joint venture as a result. (Doc. 369 at 19). The Court need not decide whether Southern is correct as to all the elements, as it finds there was no contract to enter a joint venture, the first element. The parties agree that there was a telephone conversation in June 2003 between Mr. MacDonald, CamSoft's president, and Mr. Fitzgerald, Southern's president. During this call, Fitzgerald was interested in a networking project MacDonald was doing in Baton Rouge [1] and told MacDonald about the crime camera project the City of New Orleans was planning. The two discussed how those cameras might run on the network CamSoft was building in Baton Rouge. MacDonald testified in his deposition that during the call "at that time we both agreed to let's work together to see if we can come up with a solution to answer the thousand cameras using the networks that we were building." (Doc. 315-3 at 2). Nothing was

[1] The Baton Rouge project was being performed by Verge, a wholly owned subsidiary of CamSoft. For the sake of clarity, the Court will not distinguish between Verge and CamSoft.

reduced to writing, nor was it fleshed out for specific details. The parties ultimately worked together through the pilot project program, which featured TROPOS wireless antennas. The city subsequently put out a request for proposals **[*13]** ("RFP") for the overall camera project. The question before the Court is whether this conversation constitutes the formation of a contract that binds the parties through not only the pilot project but also the RFP process and ultimately the crime camera program, and beyond to Baton Rouge, and Jacksonville. The Court finds it does not.

While the phone conversation could be enough to form a binding oral agreement, the Court finds the lack of specificity and the subsequent actions of the parties indicate that, at most, the parties agreed to join together for the pilot program but not the subsequent crime camera program. This is borne out by the subsequent actions of the parties. Southern, which won the crime camera contract, and CamSoft began trading contract proposals. Both parties' proposals referred to CamSoft as a subcontractor. And while the determination of the relationship is made based on the facts, not the representations of the parties, the Court wonders why CamSoft would have negotiated at all if it felt **[*14]** it was already in a joint venture relationship with Southern. The proper response to a contract proposal from Southern would seem to have been a statement to the effect of, "Hey, we're partners, remember our agreement?" Nowhere is such a sentiment expressed by CamSoft. The January 30, 2004 email clearly shows CamSoft felt it deserved better due to the work it had done and the value it presented—not because of a contractual relationship. In fact, nowhere in the email does he mention being a joint venture or a partner or anything other than a businessman making a pitch to other business people to use more of his services. The Court finds the depositions, emails, and other documents indicate that CamSoft, as a TROPOS retailer, participated in the pilot program with the hope that it would be involved in future projects relating to this area. All the parties participated in the pilot program in hopes that more work would come from it. The fact that there ultimately was more work—though the city contract— bears this out. CamSoft, however, was not pleased with its new role and complained to Southern. Had there been no RFP process and the scope of work been the same on the crime camera project **[*15]** as on the pilot program, CamSoft would have a stronger argument. However, this was not the case.

The cases CamSoft puts forth are inapposite in that they both involve parties who clearly agreed to form a joint venture and then fought later over the terms. See *Joyner v. Liprie, 44,852 (La. App. 2 Cir. 1/29/10), 33 So. 3d 242*; *Gonzales Man. & Ind. Mach. Works, Inc. v. Hoover, 415 So.2d 359 (La. App. 1 Cir. 1982)*. In the case at bar, it is the contractual formation element is at issue. Had such a contract been formed, these cases would help with the other element so of joint venture.

As the Court finds there was no contract to enter a joint venture, the Court will not address the other elements of joint venture. This is not the say there was no enforceable relationship between CamSoft and the Active-Southern Defendants. Rather, the Court only finds it cannot be based on joint venture.

Antitrust and RICO Standing

Several Defendants allege CamSoft does not have standing to bring its anti-trust and RICO claims and request dismissal under *Rule 12(b)(1)*. The Court will address standing as it relates to the Active and Southern Defendants and the non-Active and Southern Defendants separately.

First, **[*16]** as to the antitrust claims, in order to have standing, a plaintiff must show: (1) injury-in-fact, an injury to the plaintiff proximately caused by the defendant's conduct; (2) antitrust injury; and (3) and proper plaintiff status, which assures that other parties are not better situated to bring suit. *Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc., 123 F.3d 301, 305 (5th Cir. 1997)*. The Court notes that this standing inquiry should not "become the tail wagging the dog in 'classical' antitrust cases [] by an allegedly excluded competitor." *Id. at 306*. "Another way to explain the standing inquiry is that is ensures the plaintiff's demand for relief ultimately serves the purposes of ***antitrust law*** to increase consumer choice, lower prices and assist competition, not competitors." *Id.* An antitrust injury is an injury "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's act unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. In assessing whether a party is the proper plaintiff to bring antitrust claims, a court may consider the following factors: 1) the nature of plaintiff's alleged **[*17]** injury; 2) the directness of the injury; 3) the speculative measure of the harm; 4) the risk of duplicative recovery; and 5) the complexity in apportioning damages. *Bell v. Dow Chemical Co., 847 F.2d 1179, 1183 (5th Cir. 1988)*, citing *Associated General Contractors v. Carpenters, 459 U.S. 519, 535 n. 31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*.

As it relates to the non-Active-Southern Defendants, the Court finds CamSoft is not a proper plaintiff. In making this finding, the Court notes that all of the *Associated General* factors weigh against CamSoft. The injury alleged is interference with the July 19, 2004 contract between Southern and the city. And while this may well be the sort of injury that flows from the alleged antitrust activity, the Court finds the lack of contractual privity between CamSoft and the Active-Southern Defendants renders it too speculative and indirect in nature. It is undisputed that CamSoft was not a signatory to the contract, which was signed by Southern on behalf of Active and Southern. As the Court has found there is not a joint venture between CamSoft and Active and Southern, CamSoft has no connection to the July 19, 2004 contract. Therefore, any injury it may have sustained through interference **[*18]** with the contract is too speculative in nature to provide standing for an antitrust suit. As for CamSoft's allegations of disruption of sales and marketing efforts the Court finds this at least as speculative and indirect as the contract claim. Further, the allowing CamSoft to proceed would open Defendants to the risk of duplicative recovery by every company that has conducted marketing in the relevant markets during that time frame. Finally, apportioning damages under the latter theory would be difficult if not impossible.

Because CamSoft is not a proper party, all federal and state antitrust claims against the non-Active-Southern Defendants are dismissed for lack of standing.

As to the antitrust claims against the Active-Southern Defendants, the Court agrees that CamSoft cannot show an antitrust injury caused by Active-Southern. (Doc. 324-1 at 4). The Court notes the case law from the Fifth Circuit that holds a "downstream firm merely substitutes one supplier for another, there is certainly injury-in-fact" but seldom antitrust injury to that supplier. *Jebaco, Inc. v. Harrah's Operating Co., 587 F.3d 314, 320 (5th Cir. 2009)*. Active-Southern found a new supplier to provide camera equipment **[*19]** under its contract with the city. Nothing about this injured competition in general. To the extent Active-Southern were originally part of a conspiracy to circumvent public bid laws, it seems they themselves were cut out by their conspirators before Active-Southern committed any antitrust violations. The Court finds CamSoft has not alleged an antitrust injury; therefore, it does not have standing to bring the federal and state claims against Active-Southern and they are dismissed.

Next, in order to have standing to bring a RICO claims, a person must "be injured in his business or property by reason of a violation of" *18 U.S.C. § 1962*. *18 U.S.C. § 1964(c)*. The Fifth Circuit requires a RICO plaintiff to show two elements, injury and causation. *Price v. Pinnacle Brands, Inc. 138 F.3d 602, 606 (5th Cir. 1998)*. Speculative damages are not allowed, instead "concrete financial loss" in terms of money is necessary. *Anderson v. Kutak, Rock and Campbell, 51 F.3d 518, 523 (5th Cir. 1995)*. Further, "lost opportunity by itself does not constitute an injury that confers RICO standing." *Id.*

Again, CamSoft alleges its injury is interference with the July 19, 2004 contract. Because of the Court's ruling **[*20]** on joint venture, this is not a concrete injury, CamSoft cannot complain about a contract it was not a part of. As for its lost opportunity claims relating to its good faith marketing efforts, the Court finds again that this is not a concrete injury. The same is true for CamSoft's good faith marketing efforts. Nowhere in the Complaint can the Court find an allegation that CamSoft bid on and would have won a contract were it not for the alleged RICO activities of the Defendants. CamSoft alleges in its brief that it was one of "possibly three" Louisiana TROPOS resellers and that its good faith marketing efforts in Baton Rouge "went nowhere" due to alleged RICO activities and that it was denied the opportunity to bid in other markets. (Doc. 342). Even assuming these allegations are contained in the Complaint—CamSoft was not kind enough to direct the Court to them—the Court finds these are not the kind of concrete injury that is required to have RICO standing.

The same is true of the RICO claims against the Active-Southern Defendants, the injury is not concrete and therefore CamSoft has not satisfied the injury element of the standing analysis. The RICO claims against them are dismissed **[*21]** as well.

As CamSoft does not have standing to bring either antitrust or RICO claims, the Court will not discuss elements of the claims; these claims are dismissed as to all Defendants under *Rule 12(b)(1)*.

For these reasons, Defendants' motiosn for summary judgment (doc. 317, 319, 320, 322) are GRANTED and CamSoft's motion (doc. 315) is DENIED. As the Court finds CamSoft does not have standing to bring antitrust and RICO claims against any of the Defendants, their motions to dismiss (docs. 324, 325, 326, 327, 328, 329, 330, 331, 332) are GRANTED under *Rule 12(b)(1)*. As all of the federal claims have been dismissed, the Court will follow the "general rule" and decline to exercise jurisdiction over the remaining state law claims. *Brookshire Bros. Holding, Inc. v. Dayco Prods., Inc., 554 F.3d 595, 601-02 (5th Cir. 2009)*. The parties are hereby put on notice that the Court intends to remand those claims to the state court in five (5) days. Any opposition (less than two pages) to this must be filed within three (3) days.

Signed in Baton Rouge, Louisiana, on April 30, 2012.

/s/ James J. Brady

JUDGE JAMES J. BRADY

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

End of Document

N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park

Court of Appeals of North Carolina

November 8, 2011, Heard in the Court of Appeals; May 1, 2012, Filed

NO. COA11-651

Reporter

220 N.C. App. 212 *; 725 S.E.2d 638 **; 2012 N.C. App. LEXIS 582 ***; 2012 WL 1512570

THE NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, Plaintiff-Appellant, v. CULLY'S MOTORCROSS PARK, INC., and LAURIE VOLPE, Defendants-Appellees.

Subsequent History: Motion dismissed by *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 366 N.C. 379, 2012 N.C. LEXIS 1214 (N.C., Dec. 7, 2012)*

Review granted by *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 366 N.C. 405, 734 S.E.2d 856, 2012 N.C. LEXIS 984 (N.C., 2012)*

Motion granted by *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 735 S.E.2d 343, 2012 N.C. LEXIS 1111 (N.C., 2012)*

Motion granted by *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 736 S.E.2d 195, 2013 N.C. LEXIS 86 (N.C., 2013)*

Motion granted by *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 736 S.E.2d 195, 2013 N.C. LEXIS 92 (N.C., 2013)*

Motion granted by *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 737 S.E.2d 107, 2013 N.C. LEXIS 109 (N.C., 2013)*

Motion granted by *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 739 S.E.2d 151, 2013 N.C. LEXIS 200 (N.C., 2013)*

Motion granted by *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 738 S.E.2d 399, 2013 N.C. LEXIS 229 (N.C., 2013)*

Motion granted by *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 366 N.C. 584, 739 S.E.2d 153, 2013 N.C. LEXIS 328 (N.C., 2013)*

Reversed by, in part, Vacated by, in part, Remanded by *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 366 N.C. 505, 742 S.E.2d 781, 2013 N.C. LEXIS 491 (N.C., June 13, 2013)*

Prior History: [*1]** Wilson County. No. 09 CVS 974. Wayland J. Sermons Jr., Judge.

Disposition: Affirmed.

Core Terms

trial court, malicious prosecution, damages, commerce, initiated, unfair, probable cause, argues, malice, criminal proceeding, contends, antitrust, malicious prosecution claim, present case, counterclaim, immunity, lawsuit, arrest, deceptive trade practices, trust deed, investigator, conducting, leverage, reasonable investigation, criminal prosecution, deceptive act, instituted, proximate, objectively reasonable, unfair trade practice

LexisNexis® Headnotes

Civil Procedure > Trials > Bench Trials

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

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

HN1[] **Trials, Bench Trials**

When reviewing a bench trial, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of the facts. The trial court's conclusions of law are reviewed de novo. Whether probable cause exists is a mixed question of law and fact, but where the facts are admitted or established, the existence of probable cause is a question of law for the court.

Torts > ... > Malicious Prosecution > Elements > General Overview

HN2[] **Malicious Prosecution, Elements**

To prove a claim for malicious prosecution, a plaintiff must establish four elements: (1) the defendant initiated the earlier proceeding; (2) malice on the part of the defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff.

Torts > Intentional Torts > Malicious Prosecution > Defenses

Torts > ... > Malicious Prosecution > Elements > Malice

Torts > ... > Elements > Lack of Probable Cause > Evidence

HN3[] **Malicious Prosecution, Defenses**

The plain language of *N.C. Gen. Stat. § 58-79-40(c)* is clear that immunity applies in absence of fraud or malice. Although a want of probable cause may not be inferred from malice, the rule is well settled that malice may be inferred from want of probable cause, e.g., as where there was a reckless disregard of the rights of others in proceeding without probable cause.

Evidence > Types of Evidence > Judicial Admissions > General Overview

HN4[] **Types of Evidence, Judicial Admissions**

A stipulation admitting a material fact becomes a judicial admission in a case and eliminates the necessity of submitting an issue in regard thereto to the jury.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN5[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington doctrine immunizes conduct undertaken to influence or petition government bodies from antitrust liability. Attempts to influence the legislative process, even if prompted by an anticompetitive intent, are immune from antitrust liability. This doctrine rests on two grounds: the First Amendment's protection of the right to petition the government, and the recognition that a representative democracy, such as ours, depends upon the ability of the people to make known their views and wishes to the government.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN6[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Noerr-Pennington doctrine applies to citizen communications with police.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

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

HN7[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington doctrine has been recognized in North Carolina and is applicable to cases involving claims under *N.C. Gen. Stat. § 75-1.1*.

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

HN8[] **Deceptive & Unfair Trade Practices, State Regulation**

Chapter 75 of the North Carolina General Statutes was modeled after that federal ***antitrust law***, and federal decisions may provide guidance in determining the scope and meaning of chapter 75.

Counsel: Harris, Creech, Ward and Blackerby, P.A., by Jay C. Salsman, C. David Creech, and Luke A. Dalton, for Plaintiff-Appellant.

Hemmings & Stevens, PLLC, by Aaron C. Hemmings and M. Cory Howes, for Defendants-Appellees.

Young Moore and Henderson, P.A., by Glenn C. Raynor and Andrew P. Flynt, for North Carolina Association of Defense Attorneys, amicus curiae.

Schulz Stephenson Law, by Bradley N. Schulz; and Wait Law, P.L.L.C., by John L. Wait, for North Carolina Advocates for Justice, amicus curiae.

Judges: McGEE, Judge. Judges CALABRIA and STROUD concur.

Opinion by: McGEE

Opinion

[*213] **[**639]** Appeal by Plaintiff from orders and judgment entered 7 February 2011 by Judge Wayland J. Sermons, Jr. in Superior Court, Wilson County. Heard in the Court of Appeals 8 November 2011.

[640]** McGEE, Judge.

[*214] The North Carolina Farm Bureau Mutual Insurance Company (Plaintiff) filed a complaint on 24 February 2009 against Cully's Motorcross Park, Inc. (Cully's); Laurie Volpe (Ms. Volpe) (together, Defendants); and Louis Volpe (Mr. Volpe). Plaintiff sought declaratory judgment regarding Plaintiff's liability as insurer of real property owned by Defendants and Mr. Volpe. Defendants, along with Mr. Volpe, filed a motion for **[***2]** a change of venue and an answer and counterclaim on 23 March 2009. They asserted claims of breach of contract, unfair claims settlement practices, bad faith, and unfair and deceptive trade practices. [1] Defendants also sought punitive damages. They filed an amended answer and counterclaim on 22 June 2009, adding an additional claim for malicious prosecution.

Mr. Volpe died in the summer of 2010 and, prior to trial, Plaintiff dismissed Mr. Volpe as a party. Following a bench trial, the trial court entered judgment on 7 February 2011. The trial court ordered, *inter alia*, that Ms. Volpe recover the sum of $26,075.00 from Plaintiff for Ms. Volpe's malicious prosecution claim, treble damages in the amount of $30,000.00 for her *Section 75-1.1* claim, and attorney's **[***3]** fees. Plaintiff appeals.

I. Factual Background

The following facts in this case are undisputed. Ms. Volpe was the president and sole shareholder of Cully's, a dirt bike and cart racing track originally based in Florida. Mr. Volpe was the secretary of Cully's. Cully's purchased an historic building (the Building) in Wilson from James Skinner (Mr. Skinner) for $31,500.00 on 19 December 2007. Cully's paid $25,000.00 in cash and executed a purchase money note and deed of trust in the amount of $6,500.00. Plaintiff issued an insurance policy to Cully's, insuring the Building with a policy limit of $60,000.00.

During the late evening of 5 September and early morning hours of 6 September 2008, the Building burned in a fire. A red gas can labeled "Race Fuel" was found, tilted on its side, in a room at the end of a "burn trail" that led from the fire. Cully's owned similar red gas cans. Randall Loftin (Mr. Loftin), an investigator for Plaintiff's Special Investigations Unit, was in charge of investigating Cully's insurance claim related to the Building.

[*215] Both Mr. Volpe and Ms. Volpe provided a recorded statement to Plaintiff on 3 October 2008. In their statements, they each denied knowledge of the **[***4]** fire. Mr. Volpe told Plaintiff's agents that Cully's intended to sell the remnants of the Building to "a Hispanic male for salvage value." Ms. Volpe, on behalf of Cully's, executed a "Sworn Proof of Loss" statement for the damage to the Building. In her proof of loss statement, Ms. Volpe did not indicate that the Building was subject to a mortgage, but she did disclose that Cully's owed $6,500.00 on the Building. At trial, Ms. Volpe testified that "she did not consider a purchase money deed of trust due in one year that did not require monthly payments[] to be a mortgage."

Plaintiff requested that Mr. Volpe and Ms. Volpe submit to examinations under oath. Ms. Volpe complied on 5 January 2009, but Mr. Volpe refused to submit to an examination. Mr. Loftin became convinced that Mr. Volpe and Ms. Volpe were experiencing financial difficulties and had attempted to hide the deed of trust on the Building from Plaintiff. Plaintiff denied Cully's claim on 23 February 2009.

[641]** After Plaintiff filed its complaint, and Defendants and Mr. Volpe filed their answer, Mr. Loftin met with Sergeant J.C. Lucas (Sgt. Lucas) of the Wilson Police Department on 16 April 2009. Mr. Loftin provided Sgt. Lucas with **[***5]** documentation of the sale of the Building for salvage, as well as documentation of the deed of trust in the amount of $6,500.00. Mr. Loftin also informed Sgt. Lucas that Ms. Volpe had sold the Building to Jose Giron (Mr. Giron) without paying off the deed of trust. Sgt. Lucas thereafter met with Mr. Giron, who confirmed that he had purchased the Building.

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[1] We note that the parties in this case, as well as the trial court, refer to "unfair and deceptive trade practices" claims. Because *N.C. Gen. Stat. § 75-1.1* refers to "unfair or deceptive acts or practices in or affecting commerce[,]" and no longer contains the word "trade," we will refer to Defendants' claims as "*Section 75-1.1* claims." *See* *N.C. Gen. Stat. § 75-1.1* (2011); *see also* *Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986)*.

Sgt. Lucas executed a warrant for the arrest of Ms. Volpe for obtaining property by false pretenses, on the ground that Ms. Volpe had allegedly sold the Building to Mr. Giron without paying the $6,500.00 secured by the deed of trust. Ms. Volpe retained an attorney and the charges against her were dismissed on 18 May 2009. Defendants and Mr. Volpe amended their answer and counterclaim on 22 June 2009, adding a claim for malicious prosecution.

The trial court conducted a bench trial during the week of 6 December 2010. Prior to entry of judgment, Plaintiff filed a motion to amend the pleadings and to make additional findings, or in the alternative, for a new trial. The trial court granted Plaintiff's motion to amend the pleadings in order to consider the issue of the *Noerr-Pennington* doctrine. In an order entered 7 February 2011, the trial **[***6]** court concluded that the *Noerr-Pennington* doctrine was inapplicable **[*216]** as a defense. In its judgment, also entered 7 February 2011, the trial court ordered: (1) that Defendants recover nothing from Plaintiff as to Defendants' breach of contract claim; (2) that Defendants recover nothing from Plaintiff as to Defendants' *Section 75-1.1* claim based on Plaintiff's refusal to pay the insurance claim; (3) that Ms. Volpe recover from Plaintiff $26,075.00 for malicious prosecution; and (4) that Ms. Volpe recover from Plaintiff treble damages of $30,000.00 for her *Section 75-1.1* claim arising from the malicious prosecution claim. The trial court also awarded Ms. Volpe attorney's fees in the amount of $29,752.50 and costs in the amount of $2,400.28.

II. Issues on Appeal

Plaintiff raises the following issues on appeal: (1) whether the trial court erred by determining that Plaintiff initiated criminal proceedings against Ms. Volpe; (2) whether the trial court erred by finding probable cause lacking to charge Ms. Volpe with obtaining property by false pretenses; (3) whether Plaintiff was entitled to immunity under *N.C. Gen. Stat. § 58-79-40*; (4) whether the trial court erred by entering judgment in **[***7]** favor of Ms. Volpe as to her *Section 75-1.1* claim; (5) whether the *Noerr-Pennington* doctrine immunized Plaintiff from a *Section 75-1.1* claim; (6) whether the trial court erred in awarding Ms. Volpe damages for both her *Section 75-1.1* claim and her malicious prosecution claim; and (7) whether the trial court erred in granting Ms. Volpe attorney's fees under *N.C. Gen. Stat. § 75-16.1*.

III. Standards of Review

HN1[] When reviewing a bench trial, the standard of review is "'whether there was competent evidence to support [the trial court's] findings of fact and whether its conclusions of law were proper in light of the facts.'" *City of Wilmington v. Hill, 189 N.C. App. 173, 175, 657 S.E.2d 670, 671-72 (2008)* (citation and alteration omitted). "The trial court's conclusions of law are reviewed *de novo.*" *Id. at 176, 657 S.E.2d at 672*. "Whether probable cause exists is a mixed question of law and fact, but where the facts are admitted or established, the existence of probable cause is a question of law for the court." *Best v. Duke University, 337 N.C. 742, 750, 448 S.E.2d 506, 510 (1994)*.

IV. Malicious Prosecution

> ***HN2***[] "To prove a claim for malicious prosecution, a plaintiff must establish four elements: **[***8]** (1) the defendant initiated the earlier proceeding; (2) malice on the part of the defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; **[*217]** and (4) termination of the earlier proceeding in favor of the plaintiff."

Kirschbaum v. McLaurin Parking Co., 188 N.C. App. 782, 789, 656 S.E.2d 683, 687-88 (2008) (citation omitted).

[642]** a. Initiation

Plaintiff first argues that it did not initiate the criminal proceedings against Ms. Volpe. Plaintiff argues that "[b]y merely giving honest assistance and information to law-enforcement, [Plaintiff] did not initiate the criminal proceeding against [Ms.] Volpe." Plaintiff contends that the trial court's findings of fact did not support its conclusions of law. Plaintiff challenges the following findings of fact by the trial court:

> 44. That Plaintiff instituted or caused to be instituted a criminal proceeding[] without probable cause, said criminal proceeding being Wilson County criminal case number 09 CR 52084, charging [Ms.] Volpe with Obtaining Property with False Pretenses.
> 45. That Plaintiff instituted or caused to be instituted said criminal proceedings against [Ms.] Volpe with malice.
> . . . .
>
> 61. That Plaintiff did **[***9]** cause to be instituted a criminal proceeding against [Ms.] Volpe, when it had full knowledge of the debt owed [Mr.] Skinner upon the [Building], by being told of the same by [Ms.] Volpe in her recorded statement on October 3, 2008, and further with full knowledge that [Mr.] Loftin, the investigator for the Plaintiff, had been told that the property had been sold to someone else, as early as October 3rd, 2008,and further was present at the October 3, 2008 statements given to the Plaintiff concerning the debt and the fact that the structure had been sold to a Hispanic male for salvage value, but did not release or pursue this information to Detective Lucas or any other officer of the Wilson Police Department until April 2009, after a counter claim had been filed by [Ms.] Volpe and Cully's Motorcross Park Inc against Plaintiff.
>
> 62. That the acts of the Plaintiff in providing all such information, which does not amount to a crime, to Detective J.C. Lucas, an experienced officer but unfamiliar with fire investigations, were designed to achieve leverage in this action, and the [c]ourt specifically finds that it was highly unlikely that **[*218]** Detective Lucas would have ever known about all the circumstances **[***10]** concerning the debt to [Mr.] Skinner and the sale to [Mr.] Giron, and further never have pursued criminal charges based upon that evidence, without the instigation of Plaintiff through [Mr.] Loftin.

Plaintiff also cites the following findings of fact:

> 34. That on or about April 16, 2009, [Mr.] Loftin met with Detective J.C. Lucas of the Wilson Police Department, at the Wilson Farm Bureau office, at Loftin's request. Detective Lucas had been out on sick leave for a number of months and was just returning to the case. Detective Lucas was mainly a sex offense investigator and this was his second fire case. Loftin provided Lucas with the real estate documents showing the $6,500 debt and the deed to Giron.
> 35. That Loftin informed Lucas of the conveyance of the property to Mr. Giron and the failure of [Ms.] Volpe to pay off the $6500 owed Mr. James Skinner pursuant to the terms of the deed of trust.

Plaintiff argues that findings of fact 34 and 35 "amount to nothing more than merely providing honest assistance and information, which is insufficient to establish initiation."

Plaintiff's argument that it did not initiate the criminal proceedings against Ms. Volpe relies on *Harris v. Barham, 35 N.C. App. 13, 239 S.E.2d 717 (1978)* **[***11]** and *Shillington v. K-Mart Corp., 102 N.C. App. 187, 402 S.E.2d 155 (1991)*. In *Harris*, this Court held that the trial court had properly granted summary judgment in favor of the defendant on the following facts. A person using the plaintiff's name had opened a bank account and had written several checks which had been returned for insufficient funds. *Harris, 35 N.C. App. at 14, 239 S.E.2d at 718*. Raleigh police officers contacted the bank where the account had been opened, inquired about the account, and asked an officer of the bank, Mr. Mangum, to notify police officers if a person with the plaintiff's name came to the bank. *Id.* The plaintiff entered the bank to obtain traveler's checks, for which he paid cash. *Id. at 15, 239 S.E.2d at 718*. Mr. Mangum approached the plaintiff, asked his name, and requested that the plaintiff accompany him to a side room where he had the **[**643]** plaintiff write out his signature several times. *Id. at 15, 239 S.E.2d at 718-19*. Mr. Mangum informed the plaintiff of the account and the checks written thereon, and the plaintiff denied opening the account. *Id. at 15, 239 S.E.2d at 718*.

[*219] The plaintiff was detained by police officers after the bank notified them of the **[***12]** plaintiff's presence. *Id. at 15, 239 S.E.2d at 719*. This Court held there was insufficient evidence that the bank, or its agents, had initiated the proceedings against the plaintiff, citing the following facts:

> It is undisputed that neither [Mr.] Mangum nor any other employee of the Bank ever signed any warrant or otherwise directly instituted any criminal proceeding against the plaintiff, nor did they procure anyone else to do so. Neither [Mr.] Mangum nor any other employee appeared at the preliminary hearing or before the grand jury. Indeed, the entire extent of [Mr.] Mangum's or the Bank's participation in this matter was to notify the police, as

> [Mr.] Mangum had been requested by them to do, when a person named George Harris came into the Bank. This he did only after information given him by the police and his own investigation indicated that someone using that name had perpetrated a fraud. This falls short of being the participation in a criminal prosecution required to establish the first element of a valid claim for malicious prosecution.

Id. at 16, 239 S.E.2d at 719. This Court concluded that the bank had merely given honest assistance to the police officers and reiterated that **[***13]** "'[m]erely giving honest assistance and information to prosecuting authorities . . . does not render one liable as a co-prosecutor.'" *Id.* (citation omitted).

In *Shillington*, this Court held that there was insufficient evidence of initiation, when the arresting "[o]fficer . . . testified that he and his supervisor decided to arrest plaintiff based on the information they received from defendant, but defendant's agents neither directed that they do so nor did defendant's agents press charges themselves, nor did they appear at the magistrate's office at any time." *Shillington, 102 N.C. App. at 196, 402 S.E.2d at 160*. The Court noted that the "[o]fficer . . . testified that he also considered the fact that plaintiff had entered an area he had been warned to stay out of." *Id.* The plaintiff in *Shillington* had been wandering around near a K-Mart store that had recently suffered tornado damage. *Id. at 191, 402 S.E.2d at 157*. The plaintiff worked near the K-Mart store and there was uncertainty as to whether the plaintiff had actually crossed onto K-Mart property when he was arrested. *Id.*

[*220] In the present case, Plaintiff contends that Sgt. Lucas initiated the criminal proceedings on his own accord. **[***14]** In support of this argument, Plaintiff cites the Restatement Second of Torts:

> When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable [for malicious prosecution] even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.

Restatement (Second) of Torts § 653 cmt. g (1977). Plaintiff also argues that, when asked at trial whether Mr. Loftin or Plaintiff had initiated the criminal proceeding against Ms. Volpe, Sgt. Lucas gave the following answer: "No, no. . . . I have probable cause. I felt like I could win this case in court, and I wanted to go forward with it. That was my decision, my decision only." Plaintiff argues that "Sgt. Lucas's uncontroverted testimony establishes that the trial court erred in finding that [Mr.] Loftin's 'investigation' **[***15]** brought about the criminal charge."

In support of their counter-argument, Defendants cite *Williams v. Kuppenheimer Manufacturing Co., 105 N.C. App. 198, 412 S.E.2d 897 (1992)*. Citing *Williams*, Defendants argue that "where 'it is unlikely there would have been a criminal prosecution of [a] plaintiff' except for the efforts of a defendant, this Court has held a genuine issue of fact **[**644]** existed and the jury should consider the facts comprising the first element of malicious prosecution." In *Williams*, the plaintiff was a retail employee of the defendant company and had resigned after being confronted with a number of suspicious sales receipts. *Id. at 198-99, 412 S.E.2d at 898-99*. The plaintiff denied any wrongdoing, but an agent of the defendant company contacted the Charlotte Police Department and "turned over the evidence which [the agent] had compiled against plaintiff." *Id. at 199, 412 S.E.2d at 899*. This Court also noted the following facts:

> According to testimony of law enforcement officials, they relied on the evidence compiled by [the plaintiff's supervisor]. In the course of their investigation, law enforcement officials reviewed the materials provided by [the plaintiff's supervisor] **[***16]** and the only witnesses that Detective Job, the investigator for **[*221]** the Police Department, contacted were the three people she talked to by telephone whose names had been furnished by [the plaintiff's supervisor] as being persons who had alterations performed on garments purchased that had been voided.

Id. This Court held that there was sufficient evidence of initiation to submit the question to the jury, conducting the following analysis:

> Defendant brought all the documents used in the prosecution to the police. As discussed earlier, these documents included the eleven suspicious void sales, the three suspicious alteration tickets, and the names and addresses of witnesses to be contacted. From the record it appears the only additional investigation undertaken by the authorities was to contact the three individuals who had suspicious alterations performed. Law enforcement officials never interviewed other customers, store employees or plaintiff prior to the time of his arrest. Except for the efforts of defendant, it is unlikely there would have been a criminal prosecution of plaintiff. Under these circumstances, the trial court was correct in determining this was a factual matter for the **[***17]** jury.

Id. at 201, 412 S.E.2d at 900.

We find *Williams* more analogous to the facts before us. Mr. Loftin had all of the information he provided to Sgt. Lucas as early as 3 October 2008. On 16 April 2009, after Defendants' counterclaim was filed, Mr. Loftin called Sgt. Lucas and set up a meeting at which Mr. Loftin informed Sgt. Lucas of Ms. Volpe's actions. Sgt. Lucas thereafter interviewed Mr. Giron, and Ms. Volpe was then arrested. We find competent evidence in the record to support the trial court's determination that Plaintiff initiated the proceedings against Ms. Volpe on the grounds that: "Except for the efforts of [Plaintiff], it is unlikely there would have been a criminal prosecution of [Ms. Volpe]. Under these circumstances, the trial court was correct in determining this was a factual matter[.]" *Id. at 201, 412 S.E.2d at 900*. Thus, on the facts before us, we are not persuaded that the trial court erred in determining that Plaintiff initiated the proceedings against Ms. Volpe.

b. Probable Cause

Plaintiff also argues that "the trial court erred by finding probable cause lacking to criminally charge [Ms.] Volpe with obtaining property by false pretenses." Plaintiff contends that **[***18]** "[t]he test for determining probable cause in a claim for malicious prosecution . . . **[*222]** is whether a reasonable man of ordinary prudence and intelligence would have believed there was probable cause, not whether a crime was in fact committed."

At trial, Mr. Loftin was asked during direct examination what crime he suspected Ms. Volpe of committing. Mr. Loftin testified that he thought "she had committed insurance fraud in an attempt, material misrepresentation with an attempt to hide the fact that there was a $6,500 payment that was due on this house with a deed of trust involved." However, the trial court found that Plaintiff "had been told as early as [Ms.] Volpe's statement on September 8, 2008, that [Defendants] owed $6,500 on the property." We conclude that there was competent evidence in the record for the trial court to conclude that a reasonable person would not have believed Ms. Volpe was hiding information that she had already provided to Plaintiff. In light of the testimony at trial, and the findings of fact made by the trial court, we find no error in the trial court's finding that probable cause was lacking.

[645]** V. Immunity Pursuant to N.C. Gen. Stat. § 58-79-40

Plaintiff argues **[***19]** that the trial court erred in failing to find, pursuant to *N.C. Gen. Stat. § 58-79-40*, that Plaintiff was immune from civil liability. *N.C. Gen. Stat. § 58-79-40(c)* (2011) provides in pertinent part:

> In the absence of fraud or malice, no insurance company (or insurance agency), or person who furnishes information on its behalf, shall be liable for damages in a civil action or subject to criminal prosecution for any oral or written statement made or any other action that is necessary to supply information required pursuant to this section.

Plaintiff contends that, in the absence of malice or fraud, it cannot be held liable for its own, or its agent's, conduct in providing information that the police requested.

Plaintiff asserts that: "All information provided by [Plaintiff] to the Wilson Police Department was supplied in accordance with [Plaintiff's] obligations under *N.C. Gen. Stat. § 58-79-40*." Plaintiff also argues that the "record is void of any allegation or evidence of fraud." Plaintiff next contends that, in order to overcome *N.C.G.S. § 58-79-40* immunity, Defendants were required to show that Plaintiff acted with "actual malice[.]" Specifically, Plaintiff contends that "[a] holding **[***20]** that anything less than actual malice can overcome the immunity provided by *§ 58-79-40(c)* would not only conflict with the common law **[*223]** privilege, but would improperly frustrate the legislative intent behind enactment of the statute."

Plaintiff argues that "[t]he record is void of any evidence that [Plaintiff] acted with actual malice when it provided truthful information relevant to an incendiary fire, information it was statutorily obligated to provide[.]" Citing *Dobson v. Harris, 352 N.C. 77, 86, 530 S.E.2d 829, 837 (2000)*, Plaintiff contends that "[a]ctual malice requires proof of ill-will or personal hostility, or a showing that the declarant published a statement with knowledge that it was false[.]"

However, we can find no cases interpreting *N.C.G.S. § 58-79-40(c)* that require "actual malice." ***HN3***[] The plain language of the statute is clear that immunity applies "in absence of fraud or malice[.]" *N.C.G.S. § 58-79-40(c)*. In the present case, the trial court found that Mr. Lofton acted without probable cause. "Although a want of probable cause may not be inferred from malice, the rule is well settled that malice may be inferred from want of probable cause, *e.g.*, as where there was a reckless **[***21]** disregard of the rights of others in proceeding without probable cause." *Cook v. Lanier, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966)*; *see also* *Dickerson v. Refining Co., 201 N.C. 90, 96, 159 S.E. 446, 450 (1931)* ("Malice, in the sense in which it is used in actions for malicious prosecutions . . . is inferable from the absence of probable cause."). We therefore find Plaintiff's argument to be without merit.

VI. Ms. Volpe's *Section 75-1.1* Claim

Plaintiff next argues that the trial court erred by entering judgment for Ms. Volpe as to her counterclaim under *Section 75-1.1* because the claim was premised on the malicious prosecution claim. As we have held that the trial court did not err with respect to Ms. Volpe's malicious prosecution claim, Plaintiff's argument is without merit. Plaintiff also asserts that the acts which the trial court determined were unfair or deceptive were not "in or affecting commerce." Plaintiff contends that Mr. Lofton did not engage in commerce by merely reporting Ms. Volpe's conduct to the police. Defendants contend that Plaintiff stipulated to the actions as being involved in commerce. Plaintiff counters this argument by contending that it stipulated only to **[***22]** the business of insurance affecting commerce, and not to the alleged malicious prosecution affecting commerce.

The trial court held a conference with the parties to establish the issues the trial court would resolve. During the conference, the trial court enumerated each element of each claim brought by the parties, **[*224]** and determined whether the elements would be listed among the issues to be determined by the trial court. When the trial court reached the issue of the *Section 75-1.1* claim, the following exchange occurred:

> **[**646]** [THE COURT:] 5. Did Farm Bureau participate in unfair and deceptive acts in the malicious prosecution of Laurie Volpe. We talked about that, and I think that that is allowable under the unfair trade practices. Now, what say[] you, Mr. Salsman [(Plaintiff's Counsel)]?
>
> MR. SALSMAN: Your Honor, our position would be that that's a claim that belongs to Laurie Volpe. There's been no evidence that Cully's, the corporation, had any involvement in the alleged malicious prosecution, certainly no evidence that Cully's was ever harmed in any way by any alleged malicious prosecution of Laurie Volpe by Farm Bureau.
>
> . . . .
>
> THE COURT: So in this particular request for special instructions **[***23]** or special issues, can you — how does the malicious prosecution of Laurie Volpe enter into the benefit of or claim by corporation?
>
> I can see how we would — I guess if we couch this in the terms of did Farm Bureau — as to the claim of Laurie Volpe for unfair trade practice, is the malicious prosecution of Laurie Volpe an unfair trade practice, but not as to the corporation.
>
> MR. HEMMINGS [(Defendant's Counsel)]: Well, it happened during the claim process that the corporation was making.
>
> . . . .
>
> MR. SALSMAN: In order to submit — one of the elements, and I'm jumping a little ahead on this first issue still is that damages were proximate in cause. There was absolutely no evidence put on that Cully's suffered any damages proximately caused by the alleged malicious prosecution of Laurie Volpe.

She talked about how she personally suffered harm, but there's no evidence to show that Cully's suffered any harm as a result of the criminal prosecution of Laurie Volpe. So I just — I don't think there's any damages proximately caused to Cully's as a result of that alleged conduct.

[*225] THE COURT: Well, obviously we're just talking about now the special interrogatories as to the actions. The unreasonable refusal **[***24]** — without conducting a reasonable investigation could have nearly benefit Cully's thereby making number 3 appropriate. So if perhaps since we have a claim by corporation and a claim by Laurie Volpe for unfair deceptive trade practices, we will have to consider them separately. They're separately made in separately filed answers. I don't see why we wouldn't separate them out then if we have this issue of problems of —

MR. SALSMAN: Your Honor, we think that's important when we — if you were to find some unfair and deceptive trade practices and figure out what damages might be attributed to that. If it was because of the malicious prosecution, I think the damages are perhaps much more limited for that, so I think it's important to separate out.

THE COURT: I'm going to separate out the damages — I mean separate out the claims, so I'm going to do a claim for unfair deceptive for the corporation. I'm going to use number 1 without conducting a reasonable investigation.

And I don't have any other grounds — do you have any additional grounds that you would like for me to submit as a basis for question of fact on for the corporation other than without conducting a reasonable investigation understanding **[***25]** that the other three that you suggested I've already indicated I will not give?

MR. HEMMINGS: No.

THE COURT: Then I'm only going to give number 1.

Sticking with the corporation, second issue will be: Was it in commerce or did it affect commerce? Will the Plaintiff[] stipulate that insurance is commerce?

MR. SALSMAN: Yes, Your Honor, and we in fact admitted that in our answer.

THE COURT: I will not consider that.

Number 3, I will consider was any conduct the proximate cause of any injuries that may have been given for Cully's.

And then number 4, what amount, if any, has Cully's been injured.

[*226] Thus, the trial court determined that the element of whether a course of conduct was "in or affecting commerce" was stipulated by **[**647]** Plaintiff as to the *Section 75-1.1* claim brought by Cully's. The trial court then addressed the *Section 75-1.1* claim brought by Ms. Volpe:

And then going back to the unfair and deceptive trade practices claim for Laurie Volpe, I'm going to give number 1 without conducting a reasonable investigation, and number 5, did they participate in unfair and deceptive acts. Second issue I'm going to not consider, having been stipulated.

The "second issue" with respect to Cully's was the determination **[***26]** of whether insurance was commerce. With respect to Ms. Volpe, the determination would have been whether Plaintiff's malicious prosecution was "in or affected commerce." However, the trial court clearly stated: "I'm not going to consider [that issue], having been stipulated." Immediately following the above-quoted material, the trial court moved on to the remaining issues. At no point did Plaintiff object to the trial court's statement that Plaintiff stipulated to the "second issue" as to Ms. Volpe; i.e. whether Plaintiff's actions giving rise to Ms. Volpe's *Section 75-1.1* claim were in or affecting commerce. The trial court also a provided a final summary of the issues as follows:

THE COURT: All right. Let me try to restate then the Defendant's contested issues then. All right.

. . . .

Number 2 — I mean number 3. Excuse me. Before number 3, label this Unfair and Deceptive Trade Practices.

Number 3. Did Farm Bureau refuse to pay the claim submitted by Cully's Motorcross Park, Inc. without conducting a reasonable investigation based upon all available information?

Number 4. Was Farm Bureau's conduct — well, strike. Go back and eliminate Laurie Volpe from that question so it just reads — so **[***27]** it just reads Cully's Motorcross Park, Inc.

> Number 4 then would be, was Farm Bureau's conduct a proximate cause of Cully's Motorcross Park, Inc.'s injuries?
> Number 5 will read, what amount of damages, if any, were sustained by Cully's Motorcross Park, Inc.?
>
> **[*227]** Next issue. Did Farm Bureau refuse to pay the claim submitted by Laurie Volpe without conducting a reasonable investigation based upon all available information?
> Next issue. Did Farm Bureau participate in an unfair and deceptive act in the malicious prosecution of Laurie Volpe?
> Number next. Was Farm Bureau's conduct a proximate cause of Laurie Volpe's injuries?
> Number 6. What amount, if any, has Laurie Volpe been injured?
> . . . .
> Comments on those, Mr. Salsman?
> MR. SALSMAN: No, sir.
> THE COURT: Mr. Hemmings. Other than the objections that you made for failure to give punitive damages and failure to give your other contentions of unfair and deceptive trade practices which are preserved for appellate review.
> MR. HEMMINGS: Just wanted to make sure four elements and you asked that we stipulate to the fourth one.
>
> THE COURT: Yeah. I did not include the elements that we've already stipulated to and the facts that would have been established, four are **[***28]** in commerce. I think everybody stipulates the insurance already had. And the last one on malicious prosecution, the claim was clearly dismissed. That's not an issue of fact that I would submit to a jury. I would instruct them summarily on that.
> . . . .
> All right. Anything else from the Plaintiff in regards to the issues or the jury instructions or applicable law that I'm going to consider that we haven't talked about?
> MR. SALSMAN: No, sir.
> THE COURT: Thank you very much. Anything else for the Defendant other than to note your objections to the requested instructions or issues that I have indicated I will not give, anything other than those?
> MR. HEMMINGS: No, sir.

[648]** **[*228]** Reviewing this colloquy, it is clear that, during the discussion establishing the issues to be decided by the trial court, Plaintiff was given the opportunity to address the *Section 75-1.1* claim. When setting forth this issue, the trial court was clear that Ms. Volpe's *Section 75-1.1* claim arose from the malicious prosecution. Regarding the second element of the claim, Plaintiff was asked: "Was it in commerce or did it affect commerce? Will the Plaintiff[] stipulate that insurance is commerce?" Plaintiff clearly stipulated to this **[***29]** second element, and the trial court concluded that it would not address the second element with respect to Cully's.

While we acknowledge that the specific language of the stipulation was "insurance is commerce[,]" it is clear from the colloquy quoted above that Plaintiff was aware the trial court was discussing the element of "affecting commerce" with respect to Ms. Volpe's *Section 75-1.1* claim. Because Plaintiff failed to object to the trial court's statement that Plaintiff stipulated to the fact, Plaintiff allowed the trial court to determine all issues as discussed during the colloquy, and did not require the trial court to determine whether Ms. Volpe's *Section 75-1.1* claim involved actions "in or affecting commerce."

This situation is analogous to those circumstances arising when a plaintiff fails to request specific jury instructions or fails to object to instructions provided. We therefore agree with Defendants that, on the facts arising from the transcript, Plaintiff stipulated to this element and is bound by that stipulation. *See* *Crowder v. Jenkins, 11 N.C. App. 57, 62, 180 S.E.2d 482, 485 (1971)* (***HN4***[ ]) "[A] stipulation admitting a material fact becomes a judicial admission in a case **[***30]** and eliminates the necessity of submitting an issue in regard thereto to the jury.").

Plaintiff further argues that, because the trial court found Ms. Volpe's counterclaims to be frivolous and malicious, she was not entitled to recover under *Section 75-1.1*. Plaintiff asserts that, because the trial court concluded that Plaintiff was not liable for breach of contract with respect to the fire policy on the Building, Ms. Volpe did not suffer any damage as a result of Plaintiff's unfair and deceptive act in seeking to gain leverage in the lawsuit. However, we note that the trial court found that Ms. Volpe had "sustained damages in the amount of $10,000.00 as a result of such unfair trade practices of Plaintiff." Plaintiff contends this finding of fact was unsupported by the evidence.

[*229] However, there is ample evidence in the transcript and the record concerning the legal fees and other costs that Ms. Volpe incurred from her arrest and malicious prosecution. Plaintiff's argument would require us to hold that, because the unfair and deceptive act was intended to "gain leverage in the civil action," the only damages the trial court should have considered would have been those that Ms. Volpe suffered **[***31]** as a result of Plaintiff's having gained such leverage. In other words, because Ms. Volpe did not prevail in her breach of contract counterclaim against Plaintiff, she suffered no damages for the purposes of the *Section 75-1.1* claim. However, Plaintiff cites no authority in support of this argument. We hold that the trial court was correct in concluding that Plaintiff, by engaging in the unfair and deceptive act of malicious prosecution in order to gain leverage in the civil action, caused Ms. Volpe to suffer damages in the form of legal fees and other costs deriving from her prosecution.

VII. The *Noerr-Pennington* Doctrine

Plaintiff next argues that the trial court erroneously found the *Noerr-Pennington* doctrine inapplicable to the present case. ***HN5***[] The *Noerr-Pennington* doctrine immunizes conduct undertaken to influence or petition government bodies from antitrust liability:

> In *Noerr* and *Pennington*, the Supreme Court held that attempts to influence the legislative process, even if prompted by an anticompetitive intent, are immune from antitrust liability. This doctrine rests on two grounds: the *First Amendment's* protection of the right to petition the government, and the recognition that **[***32]** a representative democracy, such as ours, depends upon the ability of the people to make known their views and wishes to the government.

[649]** *Potters Medical Center v. City Hosp. Ass'n, 800 F.2d 568, 578 (6th Cir., 1986)*. Citing *Forro Precision, Inc. v. Intern. Business Machines, 673 F.2d 1045 (9th Cir. 1982)*, Plaintiff argues that providing information to the police triggers the *Noerr-Pennington* doctrine.

In *Forro*, the plaintiff company (Forro) had its business searched by police officers who were "accompanied by and aided in the search by employees" of the defendant company (IBM). *Forro, 673 F.2d at 1049*. "Forro brought suit against IBM on the basis of its participation in the search[.]" *Id.* The claims were eventually limited to whether "IBM had intentionally interfered with prospective business advantage under California law and had monopolized and attempted to monopolize in violation of *section 2* of the Sherman Act." *Id.* IBM **[*230]** asserted "a counterclaim under California law that Forro had misappropriated its trade secrets." *Id.* The jury returned a verdict in favor of Forro as to its "intentional interference claim and awarded actual damages in the amount of $2,739,010." *Id.* The jury also "found **[***33]** in favor of IBM on the misappropriation claim and awarded actual damages in the sum of $260,777, but deadlocked on the antitrust claims and on both parties' claims for punitive damages." *Id.*

The police involvement in *Forro* arose from IBM's cooperation with police agents in an effort to "discourage trade secret thievery." *Id. at 1051*. The cooperation resulted in a widely publicized search of Forro's place of business which caused Forro to "incur[] out-of-pocket expenses in the amount of $79,000 as a result of the search, and allegedly suffer[] further losses in sales and profits as a result of the adverse publicity." *Id.* The police operation resulted in ten indictments, none of which was "sought against Forro or any of its employees or principals." *Id.*

On appeal, the Ninth Circuit Court of Appeals reviewed, *inter alia*, the Sherman Act antitrust claims. The Ninth Circuit conducted the following discussion of whether IBM's involvement with the police warranted the application of the *Noerr-Pennington* doctrine:

> We do not liken an approach to the police for aid in apprehending wrongdoers to political activity. However, we think that the public policies served by ensuring the free flow of information **[***34]** to the police, although somewhat different from those served by *Noerr-Pennington*, are equally strong. Encouraging citizen communication with police does not generally promote the free exchange of ideas, nor does it provide citizens with the opportunity to influence policy decisions. Nonetheless, it would be difficult indeed for law enforcement

> authorities to discharge their duties if citizens were in any way discouraged from providing information. We therefore hold that the ***HN6***[] *Noerr-Pennington* doctrine applies to citizen communications with police.

Id. at 1060 (citation omitted). We note, however, that the underlying cause of action to which the Ninth Circuit held *Noerr-Pennington* applicable was Forro's claim of an attempted "violation of the Sherman Act's proscription of monopolization [which] must establish three things: (1) possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal 'antitrust' injury." *Id. at 1058* (citation omitted).

[*231] In the present case, the trial court's order making additional findings and conclusions of law in response to Plaintiff's *Noerr-Pennington* argument contains the following conclusion of law:

> Defendant's **[***35]** reliance upon *Forro Precision, Inc. v. International Business Machines Inc., 673 F. 2d 1045 (9th circuit 1982)* and *Ottensmeyer vs. Chesapeake and Potomac Telephone Company of Maryland 756 F. 2d 986 (1985)* is misplaced and the [c]ourt distinguishes each case from the factual situation present herein. Those cases dealt with claims of intentional interference with prospective business advantage, and antitrust claims in Forro, and Sherman Act issues regarding telephone service in the state of Maryland, both issues of wide spread commercial interest and protection of the public at large from monopolization and unfair business practices to the community **[**650]** as a whole. The Court distinguishes those cases from the facts herein, which deal with a single fire insurance policy claim affecting only the Plaintiff and Defendants.

HN7[] The *Noerr-Pennington* doctrine has been recognized in North Carolina in *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs., 174 N.C. App. 266, 275, 620 S.E.2d 873, 881 (2005)* ("We hold that *Noerr* applies in the state courts of North Carolina."). This Court has also held it is applicable to cases involving claims under *N.C. Gen. Stat. § 75-1.1*. *See* *Reichhold Chems., Inc. v. Goel, 146 N.C. App. 137, 156, 555 S.E.2d 281, 293 (2001)* **[***36]** ("We therefore hold that the reasoning of *Noerr* and *PRE* apply to *N.C.G.S. § 75-1.1*.").

"This Court has noted that***HN8***[] Chapter 75 of the North Carolina General Statutes was modeled after that federal ***antitrust law***, and that federal decisions may 'provide guidance in determining the scope and meaning of chapter 75.'" *Reichhold, 146 N.C. App. at 156, 555 S.E.2d at 293* (citation omitted). In *Reichhold*, this Court discussed whether a plaintiff, bringing an objectively reasonable lawsuit, was protected from liability by the holdings in either *Noerr* or another Supreme Court case, *Professional Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* (*PRE*). In *Reichhold*, this Court stated that "[u]nder *PRE*, a plaintiff may not be held liable under federal ***antitrust law*** for bringing an objectively reasonable lawsuit, regardless of the plaintiff's subjective intent in bringing the suit." *Reichhold, 146 N.C. App. at 157, 555 S.E.2d at 293*. After concluding that the lawsuit in question was objectively reasonable, this Court held that the plaintiff's action in bringing **[*232]** the objectively reasonable lawsuit was not "an unfair trade practice under *N.C.G.S. § 75-1.1*." *Id.*

We **[***37]** first note that *Forro* involved Forro's lawsuit concerning the "Sherman Act's proscription of monopolization[.]" *Forro, 673 F.2d at 1058*. *Reichhold* concerned whether the plaintiff's objectively reasonable lawsuit was shielded from unfair and deceptive practices liability by *Noerr* and *PRE*. *Reichhold, 146 N.C. App. at 157, 555 S.E.2d at 293*. In the present case the action underlying the *Section 75-1.1* claim was Plaintiff's instigation of a malicious prosecution without probable cause, which the trial court found to be done for the improper purpose of gaining leverage in a lawsuit. We find the present case distinguishable from both *Reichhold* and *Forro* and hold that *Noerr-Pennington* does not apply on these facts. We therefore find the trial court's reasoning sound and find *Noerr-Pennington* inapplicable to the facts of the present case. *See, e.g.* *Reichhold, 146 N.C. App. at 148, 555 S.E.2d at 288* ("Because we see no relation between the tort of tortious interference and the legislative intent behind federal ***antitrust law***, we decline to attempt to conform the reasoning of *Noerr* to the present case.").

VIII. Damages

Plaintiff argues that the trial court erred by concluding that Ms. Volpe suffered **[***38]** separate injuries resulting from the malicious prosecution and from the *Section 75-1.1* claim because the conduct giving rise to those causes of action was the same. Plaintiff, citing *MRD Motorsports, Inc. v. Trail Motorsports, LLC, 204 N.C. App. 572, 576, 694 S.E.2d 517, 520 (2010)* (citation omitted), asserts that a claimant is "'entitled to only one redress for a single wrong[.]'" However, in this case, the trial court found that "Plaintiff's actions in having [Ms.] Volpe arrested constitute a separate and distinctive injury to [Ms. Volpe] . . . in that it was done for such improper purpose [of gaining leverage in their civil action], and Plaintiff is liable . . . to [Ms.] Volpe for such unfair and deceptive trade practice." Plaintiff does not address the trial court's conclusion that there was a separate, additional element involved in the *Section 75-1.1* claim. Because the trial court found an additional element, we are not persuaded by Plaintiff's argument.

IX. Attorney's Fees

Plaintiff's final argument is that the trial court erred in awarding attorney's fees in favor of Ms. Volpe because she should not have prevailed **[*233]** in her *Section 75-1.1* claim. In light of our holding with respect **[***39]** to Ms. **[**651]** Volpe's *Section 75-1.1* claim, this argument is without merit.

Affirmed.

Judges CALABRIA and STROUD concur.

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Hope for Families & Cmty. Serv. v. Warren

United States District Court for the Middle District of Alabama, Eastern Division

May 3, 2012, Decided; May 3, 2012, Filed

CASE NO. 3:06-CV-1113-WKW

Reporter
2012 U.S. Dist. LEXIS 208226 *

HOPE FOR FAMILIES & COMMUNITY SERVICE, INC., et al., Plaintiffs, v. DAVID WARREN, et al., Defendants.

Prior History: *Hope for Families & Cmty. Serv. v. Warren, 2008 U.S. Dist. LEXIS 17107 (M.D. Ala., Mar. 5, 2008)*

Core Terms

methodology, reliability, monopoly, Bingo, expert testimony, market power, scientific

Counsel: [*1] For Hope for Families & Community Services, Inc., Beulah Missionary Baptist Church, E.D. Nixon Apartments, Inc., McRae Prostate Cancer Awareness Foundation, Milstead Community Center, Inc., New Elam Missionary Baptist Church, Shorter Community Development, Inc., Shorter Lodge # 533, Shorter Volunteer Fire Department, Sweet Gum AME Zion Church, Tabernacle Baptist Church, Tubman Gardens, Inc., Tuskegee Macon County Community Foundation, Inc., Plaintiffs: Michael Todd Sansbury, Robert Keeling Spotswood, LEAD ATTORNEYS, Grace Long Kipp, John Singleton Pitts Samford, Spotswood, Sansom & Sansbury LLC, Birmingham, AL USA.

For All Plaintiffs, Plaintiff: Michael Todd Sansbury, Robert Keeling Spotswood, LEAD ATTORNEYS, Grace Long Kipp, Spotswood, Sansom & Sansbury LLC, Birmingham, AL USA; Stephen D. Heninger, LEAD ATTORNEY, Heninger Garrison Davis, LLC, Birmingham, AL USA.

For Lucky Palace, LLC, Plaintiff: Gayle LaRece Douglas, LEAD ATTORNEY, Stephen D. Heninger, William Lewis Garrison, Jr., Heninger Garrison Davis, LLC, Birmingham, AL USA.

For Greater White Church, RG Apartments, Inc., Plaintiffs: Grace Long Kipp, Michael Todd Sansbury, Robert Keeling Spotswood, LEAD ATTORNEYS, John Singleton Pitts **[*2]** Samford, Spotswood Sansom & Sansbury LLC, Birmingham, AL USA.

For David Warren, in his Official Capacity as the Sheriff of Macon County, Defendant: Fred Jr. David Gray, Fred Sr. D. Gray, LEAD ATTORNEYS, Gray Langford Sapp McGowan Gray Gray & Nathanson PC, Tuskegee, AL USA; Ryan Wesley Shaw, LEAD ATTORNEY, Beers, Anderson, Jackson, Patty, Van Heest & Fawal, P.C., Montgomery, AL USA; Charlanna White Spencer, Jesse Kirk Anderson, Hill, Hill, Carter, Franco, Cole & Black P.C., Montgomery, AL USA; Hilary Yother Parks, Jackson Anderson & Patty PC, Montgomery, AL USA; James Harold Anderson, Copeland, Franco, Screws & Gill, P.A., Montgomery, AL USA.

For Macon County Greyhound Park, Inc., Defendant: Augusta Salem Dowd, Hope S. Marshall, John Mark White, LEAD ATTORNEYS, Katherine Rogers Brown, Rebecca Garity DePalma, White Arnold & Dowd PC, Birmingham, AL USA; Khristi Doss Driver, LEAD ATTORNEY, Haskell Slaughter Young & Rediker, LLC, Birmingham, AL USA; Patricia C. Diak, William Mayfield Slaughter, LEAD ATTORNEYS, Haskell Slaughter Young & Rediker LLC -- B'ham, Birmingham, AL USA; Peter John Tepley, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, P.C., Birmingham, AL USA; Charlanna White Spencer, **[*3]** John Merrill Bolton, III, Hill, Hill, Carter, Franco, Cole & Black P.C., Montgomery, AL USA; Meredith Jowers Lees, Rebecca A Beers, Rumberger, Kirk & Caldwell, P.C., Birmingham, AL USA; Ruth H. Whitney, PRO HAC VICE, InVeritas, Little Rock, AR USA.

For Milton McGregor, Defendant: Augusta Salem Dowd, Hope S. Marshall, John Mark White, Katherine Rogers Brown, LEAD ATTORNEYS, White Arnold & Dowd PC, Birmingham, AL USA; Charlanna White Spencer, John Merrill Bolton, III, LEAD ATTORNEYS, Hill, Hill, Carter, Franco, Cole & Black P.C., Montgomery, AL USA; Doy Leale McCall, III, Hill Hill Carter Franco Cole & Black, Montgomery, AL USA; Joseph Cleodus Espy, III, Melton Espy & Williams, PC, Montgomery, AL USA; Rumberger, Kirk & Caldwell, P.C., Birmingham, AL USA.

For NonParty Charities, Movant: James Roy Pratt, III, LEAD ATTORNEY, James Pratt LLC, Birmingham, AL USA.

For Steve Windom, Steve Windom, LLC, Movants: Robert Bernard Harwood, LEAD ATTORNEY, Rosen Harwood, Tuscaloosa, AL USA.

For John M. Tyson, Jr., Special Prosecutor for the State of Alabama's Task Force on Illegal Gambling, Movant: Edgar W Greene, Jr, LEAD ATTORNEY, Hobbs & Hain, P.C., Selma, AL USA; John Malcolm Tyson, Jr, LEAD ATTORNEY, **[*4]** Attorney at Law, Mobile, AL USA; Martha A. Tierney, LEAD ATTORNEY, Mobile County District Attorney's Office, Mobile, AL USA.

For William Stanley Gregory, Movant: Philip Joseph Carroll, III, Bradley Arant Boult Cummings LLP, Birmingham, AL USA.

For NonParty Shareholders, Movant: George David Johnston, LEAD ATTORNEY, Johnston Hinesley PC, Dothan, AL USA; Peter John Tepley, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, P.C., Birmingham, AL USA.

Judges: W. Keith Watkins, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: W. Keith Watkins

Opinion

ORDER

Before the court is a Renewed Motion to Exclude the Expert Report and Testimony of Michael A. Williams, Ph.D.[1] (Doc. # 574), filed by Defendant Macon County Greyhound Park ("VictoryLand"). (Docs. # 572, 503.) VictoryLand moves to exclude the expert report and testimony of Dr. Williams, an economist, based upon *Rule 702 of the Federal Rules of Evidence* and *Daubert* principles. *See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. For the reasons to follow, the motion is DENIED in part and DEFERRED in part.

Dr. Williams's testimony focuses on (1) whether the Bingo rules have conferred monopoly or market power on VictoryLand, (2) the effects of that power on consumers, employees and potential employees of the bingo gaming industry in Macon County, (3) the effects of such monopoly **[*5]** power on government revenues, and (4) the effects of such monopoly power on the broader public policy objectives of Macon County. (*See* Dr. Williams's Expert Decl. 2 (Ex. to Doc. # 419).) Prior to the summary judgment ruling, Plaintiffs argued that Dr. Williams's opinions were "highly pertinent" to the RICO claims and to the equal protection claims predicated on theories that the Bingo rules were facially discriminatory. (Doc. # 503, at 14-15.) Subsequently, the equal protection claims predicated on the theory that the Bingo rules were facially discriminatory and the RICO claims were dismissed on summary judgment.

In post-summary judgment briefing, Plaintiffs now argue that Dr. Williams's testimony is "directly relevant to . . . the tortious interference with contractual and business relations claim and therefore should be allowed at trial." (Doc. # 572, at 2.) Plaintiffs contend, for instance, that Dr. Williams's testimony will show Defendants' financial motive to

[1] In accordance with the court's prior Orders, VictoryLand's brief (Doc. # 574) is construed as a Renewed Motion to Exclude the Expert Report and Testimony of Michael A. Williams, Ph.D. (*See* Doc. # 563 ¶ 3; Doc. # 549 (denying the motion to exclude without prejudice with leave to renew).)

interfere with Lucky Palace's and the Charities' contracts and/or business relationships, and that Defendants' influence on the rulemaking process resulted in Bingo rules that rendered Plaintiffs' contracts impossible, and **[*6]** that, contrary to Sheriff David Warren's stated intentions, were not in the best interests of Macon County.

VictoryLand counters that Plaintiffs impermissibly have changed the theory of their case on the eve of trial and merely have attempted to shoehorn Dr. Williams's testimony into the remaining tortious interference claim as a "last ditch effort to insert extraneous testimony that paints Defendants in a negative light and to make an improper appeal to the jury." (Doc. # 574, at 2.) While VictoryLand does not challenge Dr. Williams's qualifications, it argues that Sheriff Warren's intent, VictoryLand's alleged monopoly power, and the adverse effects that the Bingo rules allegedly had on the community are not relevant to whether Mr. McGregor and VictoryLand intended to interfere with Plaintiffs' contractual and business relationships. VictoryLand further argues that Dr. Williams's testimony that, before its closure, VictoryLand operated a profitable business and was the only venue operating electronic bingo in Macon County would not be helpful to the jury, as those facts are conceded. VictoryLand also contends that Dr. Williams's methodology for measuring monopoly or market power is **[*7]** unreliable for his failure to define the "relevant market." Alternatively, Defendants argue that the probative value of Dr. Williams's testimony is substantially outweighed by its prejudicial effect.

As the Supreme Court made clear in *Daubert*, *Rule 702* compels the district court to perform a "gatekeeping" function concerning the admissibility of expert testimony to ensure that speculative and unreliable opinions do not reach the jury. *Daubert, 509 U.S. at 589 n.7*. In the Eleventh Circuit, expert testimony is admissible under *Rule 702* if it satisfies three broad requirements:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004) (quoting *City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1999)*). These requirements are referred to as the "qualifications," "reliability," and "helpfulness" prongs. *See id.*

When evaluating the reliability of scientific expert testimony, the trial judge must assess "whether the reasoning or methodology **[*8]** underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert, 509 U.S. at 592-93*. To evaluate the reliability of a scientific expert opinion, a court considers several factors: (1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) whether the known or potential rate of error of the methodology is acceptable; and (4) whether the theory is generally accepted in the proper scientific community. *McDowell v. Brown, 392 F.3d 1283, 1298 (11th Cir. 2004)* (citing *Daubert, 509 U.S. at 593-94*). "[T]he trial judge [has] considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. Moreover, whether the expert testimony will assist the trier of fact in understanding the evidence or a fact in issue "goes primarily to relevance." *Daubert, 509 U.S. at 591*. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Id.* (citation and internal quotation marks omitted).

In this case, the court finds that it is appropriate to defer ruling on the admissibility of Dr. Williams's testimony until trial. The court has concerns with Plaintiffs' seeming **[*9]** shift in gears as to which claims Dr. Williams's testimony bears relevance. On the other hand, it appears that evidence of VictoryLand's market power would be relevant to show an alleged strong financial motive on the part of Defendants to interfere with Plaintiffs' contractual and business relationships. This court already has found that evidence from which a reasonable jury can infer a strong financial motive of interference may be used to show intentional interference. (*See* Doc. # 537, at 200-02 (citing *Ex parte Henderson, 732 So. 2d 295, 298 (Ala. 1999)* (observing that evidence of a "strong financial motive" on the part of the defendant can support a finding of intentional interference)).) Dr. Williams's testimony also may be relevant to show that Defendants engaged in conduct that had an anti-competitive effect and that conduct very well may be relevant to whether Defendants acted intentionally toward Plaintiffs. In short, although discussion of Dr.

Williams's testimony in the context of the tortious interference claim has only recently surfaced, the court is hesitant to exclude the testimony prior to Plaintiffs' having presented their factual foundation and legal framework at trial. Ruling on the issue of relevancy, thus, is **[*10]** reserved.

However, should it be determined that Dr. Williams's testimony is relevant, it will not be excluded as unreliable. While it is true that Dr. Williams's definition of monopoly or market power does not align with that employed under *Section 2* of the Sherman Act, the court declines to find unreliable Dr. Williams's methodology for analyzing monopoly or market power in a case that is outside the parameters of federal ***antitrust law***. Dr. Williams has explained his methodology. He has contended his methodology is premised on accepted economic principles that have been subjected to peer review and publication. (*See, e.g.*, Dr. Williams's Dep. at 75-81, 85-89, 96-98, 150-55, 158-59, 289-92; Dr. Williams's Expert Report, at 14-20.) Given the demonstration of reliability, the court finds that any weaknesses in the methodology bear to the weight of his testimony, not its ultimate admissibility. The court's function as gatekeeper "is not to determine whether [Dr. Williams's] analysis is ultimately correct." *Allied Erecting & Dismantling Co., Inc. v. Genesis Equip. & Mfg., Inc., No. 4:06CV114, 2009 U.S. Dist. LEXIS 70655, 2009 WL 8592874, at *3 (N.D. Ohio Aug. 12, 2009)*. Rather, generally, a challenge "to the . . . overall correctness of a proffered expert opinion 'goes to the weight of the evidence, not to its admissibility.'" *Id.* (quoting *In re Scrap Metal Antitrust Litig., 527 F.3d 517, 531-32 (6th Cir. 2009)*).

To the extent that Dr. Williams's **[*11]** opinions have loose ends, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert, 509 U.S. at 596*. In this case, these means are available to Defendants, and, notably, Defendants have proffered their own expert to challenge Dr. Williams's methodology and opinions. Indeed, courts have allowed trial testimony by rebuttal expert witnesses whose purpose is to criticize the reliability of the opposing side's expert's opinions, and Defendants will be permitted to do the same in this case. *See In re Cessna 208 Series Aircraft Prods. Liab. Litig., No. 05-md-1721-KHV, 2009 U.S. Dist. LEXIS 63185, 2009 WL 1649773, at *1 (D. Kan. June 9, 2009)* ("Numerous courts have permitted experts to testify at trial about the reliability of the opinions of opposing experts." (collecting cases)). In this case, as to methodology, the court finds that "[a] trial setting . . . will provide the best operating environment for the triage [that] *Daubert* demands." *Rafaela Cortes—Irizarry v. Corp. Insular De Seguros, 111 F.3d 184, 188 (1st Cir. 1997)*.

Accordingly, it is ORDERED that VictoryLand's Renewed Motion to Exclude the Expert Report and Testimony of Michael A. Williams, Ph.D. (Doc. # 574) is DENIED as to the challenge to Dr. Williams's methodology, and DEFERRED as to the challenge to reliability and, thus, to the testimony's **[*12]** ultimate admissibility.

DONE this 3rd day of May, 2012.

/s/ W. Keith Watkins

CHIEF UNITED STATES DISTRICT JUDGE

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Mississippi ex rel. Hood v. AU Optronics Corp.

United States District Court for the Southern District of Mississippi, Jackson Division

May 3, 2012, Decided; May 3, 2012, Filed

CAUSE NO. 3:11-CV-345-CWR-FKB

Reporter

876 F. Supp. 2d 758 *; 2012 U.S. Dist. LEXIS 62089 **; 2012-1 Trade Cas. (CCH) P77,883

STATE OF MISSISSIPPI ex rel. Jim Hood, Attorney General, PLAINTIFF v. AU OPTRONICS CORPORATION; AU OPTRONICS CORPORATION AMERICA, INC.; CHI MEI CORPORATION; CHI ME OPTOELECTRONICS CORPORATION; CHI MEI OPTOELECTRONICS USA, INC.; CMO JAPAN CO., LTD; CHUNGHWA PICTURE TUBES LTD; HANNSTAR DISPLAY CORPORATION; HITACHI, LTD; HITACHI ELECTRONIC DEVICES (USA), INC.; JAPAN DISPLAY EAST, INC.; LG DISPLAY CO.; LG DISPLAY AMERICA, INC.; SAMSUNG ELECTRONICS CO., LTD; SAMSUNG SEMICONDUCTOR, INC.; SAMSUNG ELECTRONICS AMERICA, INC.; SHARP CORPORATION; SHARP ELECTRONICS CORPORATION; TOSHIBA CORPORATION; TOSHIBA MOBILE DISPLAY CO., LTD; TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC.; TOSHIBA AMERICA INFORMATION SYSTEMS, INC., DEFENDANTS

Subsequent History: Reversed by, Remanded by *State ex rel. Hood v. AU Optronics, Corp., 701 F.3d 796, 2012 U.S. App. LEXIS 24096 (5th Cir. Miss., Nov. 21, 2012)*

Core Terms

class action, parens patriae, mass action, attorney general, real party in interest, consumers, general public, suits, federal jurisdiction, local government, parties, anti trust law, removal, federal court, state court, policyholders, punitive damages, diversity, legislative history, treble damages, damages, district court, state law, defendants', restitution, antitrust, preempted, products, civil penalty, state statute

Counsel: **[**1]** For The State of Mississippi, ex rel Jim Hood, Attorney General, Plaintiff: A. Lee Abraham, Jr., ABRAHAM & ASSOCIATES, Greenwood, MS; Carolyn Glass Anderson - PHV, PRO HAC VICE, ZIMMERMAN REED, PLLP, Minneapolis, MN; Geoffrey C. Morgan, George W. Neville, OFFICE OF THE ATTORNEY GENERAL, Jackson, MS; Meredith McCollum Aldridge, MISSISSIPPI ATTORNEY GENERAL'S OFFICE, Jackson, MS; Preston D. Rideout, Jr., ABRAHAM & RIDEOUT, Greenwood, MS.

For AU Optronics Corporation, AU Optronics Corporation America, Inc., Defendants: Charles E. Ross, WISE, CARTER, CHILD & CARAWAY, Jackson, MS; James W Shelson, Luther T. Munford, PHELPS DUNBAR, LLP - Jackson, Jackson, MS; Michael B. Wallace, WISE, CARTER, CHILD & CARAWAY - Jackson, Jackson, MS.

For Chi Mei Corporation, Chi Me Optoelectronics Corporation, Chi Mei Optoelectronics USA, Inc., F/K/A International Display Technology USA, Inc., CMO Japan Co., LTD, F/K/A International Display Technology LTD, Defendants: Charles E. Ross, WISE, CARTER, CHILD & CARAWAY, Jackson, MS; Michael B. Wallace, WISE, CARTER, CHILD & CARAWAY - Jackson, Jackson, MS; Stephen Lee Thomas, BRADLEY ARANT BOULT CUMMINGS LLP - Jackson, Jackson, MS.

For Chunghwa Picture Tubes LTD, Defendant: **[**2]** Charles E. Ross, WISE, CARTER, CHILD & CARAWAY, Jackson, MS.

For Hannstar Display Corporation, Defendant: Charles E. Ross, WISE, CARTER, CHILD & CARAWAY, Jackson, MS; Michael B. Wallace, WISE, CARTER, CHILD & CARAWAY - Jackson, Jackson, MS; Thomas C. Gerity, WYATT, TARRANT & COMBS, PLLC - Jackson, Jackson, MS.

For Hitachi, LTD., Hitachi Displays, LTD., n/k/a Japan Display East, Inc., Hitachi Electronic Devices (USA), Inc., Defendants: Charles E. Ross, WISE, CARTER, CHILD & CARAWAY, Jackson, MS; Herman J. Hoying - PHV, Kent M. Roger - PHV, Minna L. Naranjo - PHV, PRO HAC VICE, MORGAN, LEWIS & BOCKIUS, LLP - San Francisco, San Francisco, CA; Michael B. Wallace, WISE, CARTER, CHILD & CARAWAY - Jackson, Jackson, MS; Walter H. Boone, FORMAN, PERRY, WATKINS, KRUTZ & TARDY, LLP - Jackson, Jackson, MS.

For LG Display Co., F/K/A LG Phillips LCD Co., LTD., LG Display America, Inc., F/K/A LGD LCD America, Inc., Defendants: Charles E. Ross, WISE, CARTER, CHILD & CARAWAY, Jackson, MS; John Adam Crawford, Jr., P. Ryan Beckett, BUTLER, SNOW, O'MARA, STEVENS & CANNADA, Jackson, MS; Michael B. Wallace, WISE, CARTER, CHILD & CARAWAY - Jackson, Jackson, MS; Robert A. Miller, BUTLER, SNOW, O'MARA, STEVENS **[**3]** & CANNADA, PLLC-Ridgeland, Ridgeland, MS.

For Samsung Electronics Co., LTD, Samsung Semiconductor, Inc., Samsung Electronics America, Inc., Defendants: Cecil Maison Heidelberg, HEIDELBERG HARMON, PLLC, Ridgeland, MS; Charles E. Ross, WISE, CARTER, CHILD & CARAWAY, Jackson, MS; Michael B. Wallace, WISE, CARTER, CHILD & CARAWAY - Jackson, Jackson, MS.

For Sharp Corporation, Sharp Electronics Corporation, Defendants: Charles E. Ross, WISE, CARTER, CHILD & CARAWAY, Jackson, MS; Michael B. Wallace, WISE, CARTER, CHILD & CARAWAY - Jackson, Jackson, MS; Philip Williams Thomas, Philip W. Thomas, P.A., Jackson, MS.

For Toshiba Corporation, Toshiba Mobile Display Co., LTD., F/K/A Toshiba Matsushita Display Technology Co., LTD., Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Defendants: Charles E. Ross, WISE, CARTER, CHILD & CARAWAY, Jackson, MS; George L. Paul, Kristen J. McAhren - PHV, PRO HAC VICE, WHITE & CASE, LLP - Washington, Washington, DC; John H. Chung - PHV, Ross Elfand - PHV, PRO HAC VICE, WHITE & CASE, LLP, New York, NY; Michael B. Wallace, WISE, CARTER, CHILD & CARAWAY - Jackson, Jackson, MS.

Judges: Carlton W. Reeves, UNITED STATES DISTRICT JUDGE.

Opinion by: Carlton W. Reeves **[**4]**

Opinion

[*761] **ORDER**

Pending before the Court is the plaintiff's motion to remand. Docket No. 19. The defendants have responded in opposition, Docket No. 25, the plaintiff has replied, Docket No. 29, and the Court is ready to rule. The motion to remand will be granted. Also pending is the defendants' motion to strike portions of the plaintiff's reply brief. Docket No. 30. That motion is fully briefed, *see* Docket Nos. 31 & 33, and will be granted.

I. Factual and Procedural History

On March 25, 2011, the State of Mississippi filed a complaint in the Chancery Court of Hinds County alleging that the defendants had engaged in price-fixing in violation of the Mississippi Consumer Protection Act ("MCPA"), *Miss. Code § 75-24-1 et seq.*, and the Mississippi Antitrust Act ("MAA"), *id.* *§ 75-21-1 et seq.* Docket No. 1-1.

The action was brought by the Attorney General of Mississippi, who sought to protect the State's "quasi-sovereign interest" in its economy and its citizens' economic well-being. *Id.* at 3. The State claimed that the number of citizens harmed by the defendants' conduct is "a sufficiently substantial segment of the State's population to establish Mississippi's quasi-sovereign interests, as relief **[**5]** is sought on behalf of all local governmental entities and consumers (not limited groups of private parties) who bought a wide range of price-fixed products." *Id.* at 4. With this and other language, the Attorney General invoked his authority to file suit as *parens patriae* on behalf of the State and its citizens. *Id.* at 3-4.

The defendants are companies that manufactured, marketed, sold, and/or distributed LCD panels, which are components of computers, televisions, and a wide variety of other electronic devices. *Id.* at 4-9. According to the State, the defendants formed an international cartel that conspired to artificially limit the supply and increase the price of LCD panels between **[*762]** 1996 and 2006, thereby increasing the price of every product containing a LCD panel during that time period. *Id.* at 3-4, 11-12, and 20. The complaint described how the defendants, who together make up over 80% of the market for LCD panels, carried out their scheme through regular meetings of high-level executives, public statements, and a tangled web of cross-licensing and cross-purchasing agreements and joint ventures. *Id.* at 11-36. As a result of these acts, when Mississippi's consumers, local governments, **[**6]** and state agencies purchased products containing LCD panels, they allegedly paid more than they otherwise would have, had the market been fair and competitive. *Id.* at 19 and 39-49.

It was further alleged that several of the defendants and their co-conspirators had pled guilty to criminal charges brought by the United States Department of Justice for this conduct and paid more than $890 million in criminal fines to the United States government. *Id.* at 3 and 38-39. The State claimed that none of those fines were dedicated to recompense Mississippi's consumers and governmental entities, nor were funds set aside for civil penalties owed to States under state laws. *Id.* at 3.

The State sought the following relief: (1) a permanent injunction prohibiting the defendants from continuing to engage in anti-competitive behavior; (2) civil penalties of $10,000 per LCD panel product sold in Mississippi during the relevant time period, pursuant to the MCPA [1]; (3) civil penalties of up to $2,000 per month, per defendant for violations of the MAA during the relevant time period; (4) restitution to the State for its own losses caused by purchasing LCD panel products during the relevant time period; (5) **[**7]** restitution to the State on behalf of its citizens and local governments who suffered losses by purchasing LCD panel products during the relevant time period; (6) punitive damages; and (7) other relief including costs of court, pre- and post-judgment interest, and attorney's fees. *Id.* at 55-56.

On June 9, 2011, the defendants jointly removed the case to this Court. Docket No. 1. They asserted that federal jurisdiction was satisfied under the Class Action Fairness Act ("CAFA"), *28 U.S.C. §§ 1332(d)* and *1453*. *Id.* at 4. That law establishes federal jurisdiction over certain suits determined to be "class actions" or "mass actions." *28 U.S.C. § 1332(d)*. The defendants further asserted that a federal question existed pursuant to the Sherman Act, *15 U.S.C. § 7 et seq.* Docket No. 1-1, at 10.

Shortly thereafter, the United States Judicial Panel on Multidistrict Litigation issued a Conditional Transfer Order transferring this case to the United States District Court for the Northern District of California, **[**8]** where Judge Illston presides over a number of other suits against LCD panel manufacturers. Docket No. 19-1; *see In re TFT-LCD (Flat Panel) Antitrust Litig., No. C 07-1827, 2011 U.S. Dist. LEXIS 17793, 2011 WL 560593 (N.D. Cal. Feb. 15, 2011)*. That Order was postponed to await a decision on the motion to remand. Docket No. 24.

II. Standard of Review

"The party seeking removal bears the burden of showing that federal jurisdiction is proper." *Lone Star OB/GYN Assocs. v. Aetna Health, Inc., 579 F.3d 525, 528 (5th Cir. 2009)* (citation omitted); *see Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97, 42 S. Ct. 35, 66 L. Ed. 144 (1921)*. "[B]ecause **[*763]** the effect of removal is to deprive the state court of an action properly before it, removal raises significant federalism concerns." *Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 365-66 (5th Cir. 1995)* (citations omitted). "The removal statute is therefore to be strictly construed and any doubt as to the propriety of removal should be resolved in favor of remand." *In re Hot-*

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[1] Civil penalties recovered under the MCPA are divided evenly between the Attorney General's Office of Consumer Protection and the General Fund of the State of Mississippi. *Miss. Code § 75-24-19(1)(b)*.

Hed Inc., 477 F.3d 320, 323 (5th Cir. 2007) (citations omitted). "The court has wide, but not unfettered, discretion to determine what evidence to use in making its determination of jurisdiction." Hollinger v. Home State Mut. Ins. Co., 654 F.3d 564, 570-71 (5th Cir. 2011) **[**9]** (quotation marks and citations omitted) (affirming the district court's decision to decline federal jurisdiction pursuant to a CAFA exception).

III. Discussion

The defendants claimed two independent sources of federal jurisdiction: diversity jurisdiction under CAFA and a federal question presented under the Sherman Act. Each will be evaluated below. The Court will begin, though, with a discussion of *parens patriae* actions and a summary of a significant Fifth Circuit case that addressed some of the issues presented here.

A. The Nature of These Actions

"The concept of *parens patriae* stems from the English constitutional system, where the King retained certain duties and powers, referred to as the 'royal prerogative,' which he exercised in his capacity as 'father of the country.'" Louisiana ex rel. Caldwell v. Allstate Ins. Co., 536 F.3d 418, 425 (5th Cir. 2008) (citation omitted); *see* Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez, 458 U.S. 592, 600-02, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982). While the term originally meant the King's power to protect those without "the legal capacity to act for themselves," Caldwell, 536 F.3d at 425, in the United States *parens patriae* actions were "greatly expanded" over the **[**10]** 1900s, Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 257, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972) (collecting cases). Today they are "an increasingly popular vehicle for state attorneys general to vindicate the rights of their constituents." Alexander Lemann, *Sheep in Wolves' Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 Colum. L. Rev. 121, 122 (2011).

Parens patriae actions are brought to protect a state's "quasi-sovereign interests," which include interests in "the health and well-being - both physical and *economic* - of its residents in general . . . [and] not being discriminatorily denied its rightful status within the federal system." Snapp, 458 U.S. at 607 (emphasis added). More specifically, quasi-sovereign interests have been held to include suits seeking to abate public nuisances, maintain access to energy sources, and halt price fixing [2]. Id. at 604-06 (collecting cases).

[*764] There are boundaries on the *parens patriae* authority. "A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens. But it may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way." Maryland v. Louisiana, 451 U.S. 725, 737, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981) (citations omitted). [3] *Parens patriae* actions are disfavored where the injury falls "on a small group of citizens who are likely to challenge" the harm directly. Id. at 739. But where "a great many citizens . . . are faced with increased costs aggregating millions of dollars per year" and "cannot be expected **[**12]** to litigate [the issue] given that the amounts paid by each consumer are likely to be relatively small," *parens patriae* suits are appropriate. *Id.* Unsurprisingly, then, "[p]arens

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[2] In *Hawaii v. Standard Oil*, the Supreme Court held that the Clayton Act did not permit the State of Hawaii to seek damages for its citizens via a *parens patriae* suit alleging antitrust violations. *Hawaii, 405 U.S. at 260-62*. In response, Congress passed 15 U.S.C. § 15c, which authorizes state attorneys **[**11]** general to sue for antitrust violations and recover damages on behalf of their citizens. *State v. Marsh & McLennan Companies, 286 Conn. 454, 466-68, 944 A.2d 315 (2008)*; *see* *Caldwell, 536 F.3d at 427 n.5*; *TFT-LCD, 2011 U.S. Dist. LEXIS 17793, 2011 WL 560593, at *4 n.2*. The Supreme Court has acknowledged "the long history of state common-law and statutory remedies against monopolies and unfair business practices" and concluded that "this is an area traditionally regulated by the States." *California v. ARC America Corp., 490 U.S. 93, 101, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*.

[3] While *Maryland* was brought in the Supreme Court as an original action, it remains a helpful explanation of the *parens patriae* authority.

patriae statutes are most common in the antitrust and consumer protection contexts." Dwight R. Carswell, *CAFA and Parens Patriae Actions*, 78 U. Chi. L. Rev. 345, 348 (2011)

The Supreme Court "has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior." Snapp, 458 U.S. at 607. In *Snapp*, it reiterated that a state must allege "injury to a sufficiently substantial segment of its population," not just an "injury to an identifiable group of individual residents." *Id.* A district court determines the proportion of the population that has allegedly been affected by analyzing the complaint as of the date it was filed. *See* Hollinger, 654 F.3d at 573 ("Citizenship, for purposes of proving an exception to CAFA, must be analyzed as of the date the complaint or amended complaint was filed.") **[**13]** (citations omitted).

There is a debate, both in our case and in the wider legal community, over whether *parens patriae* suits are class actions brought under a different label or *sui generis. Parens patriae* actions are certainly a form of representative action, and "attorneys general often hire plaintiffs' lawyers to help prosecute parens patriae suits. . . . [T]he conceptual similarity between [class actions and parens patriae actions] is unavoidable." Lemann, 111 Colum. L. Rev. at 133 (citations omitted).

That said, distinctions can be identified. For one, an attorney general is not a true class representative. "Rather, in representing the citizens, the State [through its Attorney General] acts more in the capacity of trustee representing beneficiaries or a lawyer representing clients, neither of which is the type of representation essential to the representational aspect of a class action." West Virginia ex rel. McGraw v. CVS Pharmacy, Inc., 646 F.3d 169, 176-77 (4th Cir. 2011); *see* LG Display Co. v. Madigan, 665 F.3d 768, 772 (7th Cir. 2011) ("This case was brought by the Attorney General, not by a representative of a class."). The Fourth Circuit has concluded that "[a]ll class actions **[**14]** are representative in nature; but not all representative actions are necessarily class actions." McGraw, 646 F.3d at 175 n.1.

There also are procedural differences between the two. *See* id. at 175-76; Madigan, 665 F.3d at 772. "Unlike private litigants, the Attorneys General have statutory authority to sue in *parens patriae* and need not demonstrate standing through a representative injury nor obtain certification of a class in order to recover on behalf of individuals." Washington v. **[*765]** Chimei Innolux Corp., 659 F.3d 842, 848 (9th Cir. 2011) (citations omitted). "Additionally, attorneys general are not always required to provide notice to the citizens whose damages they are recovering, and the citizens may not be able to opt out." Carswell, 78 U. Chi. L. Rev. at 362. Further, in some states a *parens patriae* suit may result in a recovery for the state's General Fund but not the individual victims of the fraud. Washington, 659 F.3d at 848.

The Fifth Circuit has found that a *parens patriae* suit may, in certain circumstances, constitute a CAFA mass action. Caldwell, 536 F.3d at 430. It has recited CAFA's legislative history to conclude that "the term 'class action' should be defined broadly **[**15]** to prevent 'jurisdictional gamesmanship.'" Id. at 424. But it has not held that *parens patriae* suits are necessarily class or mass actions. Id. at 430.

B. The Fifth Circuit's Decision in Caldwell

Because Caldwell controls our case and its interpretation is contested by the parties, it will be summarized here.

In *Caldwell*, the Attorney General of Louisiana filed suit against a number of insurance companies and their business partners, claiming that they had "continuously manipulated Louisiana commerce by rigging the value of policyholder claims and raising the premiums." Id. at 422 (quotation marks omitted). The complaint alleged that the defendants had systematically undervalued and underpaid policyholders' property claims in the aftermath of Hurricanes Katrina and Rita. Id. at 422-23. The suit, which was styled as a *parens patriae* action and filed in Louisiana state court, sought forfeiture of illegal profits, treble damages, and injunctive relief. Id. at 423.

The defendants removed the case to the United States District Court for the Eastern District of Louisiana, arguing federal jurisdiction under CAFA. *Id.* The district court determined that the real parties in interest were the individual

[16]** policyholders who had been harmed, and reasoned that the suit was "really an artfully pled class action." Transcript of Hearing at 32, *State of Louisiana v. Allstate Ins. Co.*, No. 07-9409 (E.D. La. Apr. 2, 2008) ("Caldwell Transcript"). The district court rejected the argument that the suit was a CAFA mass action. *Id.* at 21.

The Fifth Circuit affirmed on different grounds. It analyzed the complaint claim-by-claim, finding that Louisiana was a real party in interest as to the injunctive relief and that the policyholders were real parties in interest with respect to the treble damages. *Caldwell, 536 F.3d at 429-30*. As real parties in interest, the policyholders' citizenship had to be counted, and since they were Louisiana residents, there was minimal diversity of the parties as required by CAFA. *Id. at 430*. The Fifth Circuit declined to address whether the suit was a class action - the district court's rationale for federal jurisdiction - and found that it was a mass action: "a civil action involving the monetary claims of 100 or more persons that is proposed to be tried jointly." *Id.*

Judge Southwick, in dissent, concluded that the suit was neither a class action nor a mass action as CAFA **[**17]** defines those terms. *Id. at 433* (Southwick, J., dissenting). The Attorney General's complaint did not invoke the federal or state class action rules, and the mass action provision could not be invoked by a defendant seeking to join additional parties. *Id. at 434-35*. Instead, Judge Southwick argued that Louisiana's courts had jurisdiction over the complaint as it was pled and should first resolve whether the Attorney General **[*766]** could recover treble damages on behalf of Louisiana consumers in a representative capacity. *Id.* Under the applicable standard of review, which requires doubts and uncertainties to be resolved against a finding of federal jurisdiction, he thought the case should have been remanded. *Id. at 433*. [4]

C. The Present Dispute

1. The Class Action Fairness Act

"Congress enacted CAFA to encourage federal jurisdiction over interstate class action lawsuits of national interest." *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc., 485 F.3d 793, 797 (5th Cir. 2007)*. "The CAFA exceptions are 'designed to draw a delicate balance between making a federal forum available to genuinely national litigation and allowing the state courts to retain cases when the controversy is strongly linked to that state.'" *Id. at 803* (quoting *Hart v. FedEx Ground Package Sys., Inc., 457 F.3d 675, 682 (7th Cir. 2006))*; *see* McGraw, 646 F.3d at 178 ("CAFA is also sensitive to deeply-rooted principles of federalism, reserving to the States primarily local matters.").

To establish jurisdiction under CAFA, the removing party must first show that the parties are minimally diverse, which means that:

> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
>
> (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is **[**19]** a citizen of a State; or
> (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

28 U.S.C. § 1332(d)(2)(A)-(C). The removing party must then prove that the action is a class action or a mass action.

A CAFA class action is "any civil action filed under *rule 23 of the Federal Rules of Civil Procedure* or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a

[4] *Caldwell* was "groundbreaking," Lemann, *111 Colum. L. Rev. at 133*, and has been discussed in a number of circuit and district court decisions, discussed below. It also has been the subject of academic attention, perhaps because of an emerging circuit split. *E.g., id.*; Jacob Durling, *Waltzing Through a Loophole: How Parens Patriae Suits Allow Circumvention of the Class Action Fairness Act*, *83 U. Colo. L. Rev. 549 (2012)*; Carswell, *78 U. Chi. L. Rev. at 353-57*; Guyon Knight, **[**18]** *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, *78 Fordham L. Rev. 1875 (2010)*.

class action." *Id.* § 1332(d)(1)(B). A class action must have 100 or more "members of all proposed plaintiff classes" and an aggregate amount in controversy in excess of $5 million. *Id.* § 1332(d)(2), (d)(5)(B), and (d)(6).

CAFA defines a mass action as:

> any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

Id. § 1332(d)(11)(B)(i). The jurisdictional amount requirement in 28 U.S.C. § 1332(a) **[**20]** is $75,000. *Id.* § 1332(a). Therefore, in a mass action, federal courts have jurisdiction "only" over plaintiffs whose individual claims exceed $75,000, exclusive of interest and costs. *Id.* § 1332(d)(2) and (d)(11)(B)(i). Mass actions may not be transferred to a multidistrict litigation court "unless a majority of the plaintiffs in the action request transfer." *Id.* § 1332(d)(11)(C)(I).

[*767] Once the removing party meets its burden to establish federal jurisdiction, the party seeking remand can attempt to prove one of CAFA's exceptions to jurisdiction. *Hollinger, 654 F.3d at 571*. One of those exceptions states that "the term 'mass action' shall not include any civil action in which . . . all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action." *28 U.S.C. § 1332(d)(11)(B)(ii)* and *(d)(11)(B)(ii)(III)*.

2. Arguments

The State argues that when the complaint is viewed as a whole, the real party in interest is the State of Mississippi, not its citizens and local governments. Docket No. 20, at 5-7. Because the State is not a 'citizen' for purposes **[**21]** of diversity jurisdiction, it concludes that there is no minimal diversity. *Id.* at 5. The State next claims that the action is not a CAFA class action because it was not filed pursuant to *Federal Rule of Civil Procedure 23* or an analogous state rule; in fact, Mississippi lacks a class action rule. *Id.* at 9-10. Finally, the State argues that its suit is not a mass action pursuant to an exception in CAFA denying mass action status to suits brought on behalf of the general public. *Id.* at 10-11.

The defendants agree that the State is the real party in interest as to the damages it seeks on its own behalf, civil penalties, and injunctive relief. Docket No. 25, at 6. They argue, though, that because the complaint also seeks damages for injuries incurred by Mississippi's consumers and local governments, those consumers and local governments are also real parties in interest. *Id.* at 6-9. Because Mississippi's consumers and local governments are obviously citizens of Mississippi, and none of the defendants are citizens of Mississippi, the defendants conclude that minimal diversity is established. *Id.* The defendants next challenge the State's interpretation of "class action," claiming that this **[**22]** suit is one within the meaning of CAFA. *Id.* at 9-12. Finally, they argue that the suit is a mass action that does not fall into the State's claimed statutory exception, again because "individual Mississippi consumers are the real parties in interest when the State seeks to recover damages on their behalf in a representative capacity." *Id.* at 12.

In its reply, the State explains in more detail its contention that *parens patriae* actions are procedural vehicles separate and distinct from class actions. Docket No. 29, at 5-9. It again claims that mass action status should be denied because the case is brought on behalf of the general public, arguing that the products at issue "are ubiquitous in modern life and inflated prices for these products would affect nearly every single Mississippi resident." *Id.* at 12 n.6.

3. The Defendants' Motion to Strike

The State's reply brief then argues that the defendants failed to prove CAFA's amount in controversy requirements. *Id.* at 13-17. It denies that the defendants have put forward any evidence that the aggregate amount sought in the complaint exceeds $5 million and that at least one consumer or local government seeks more than $75,000. *Id.* The State **[**23]** claims that the defendants were required to provide such proof in their Notice of Removal. *Id.* at 14-16. Finally, it recites that if this case is a mass action, the Court should bifurcate the suit. *Id.* at 19.

The defendants have moved to strike these arguments, claiming that these grounds were not briefed in the State's original motion to remand. Docket No. 30, at 2-3. In the alternative, the defendants ask for leave to file a sur-reply and attach affidavits to establish the amount in controversy **[*768]** requirements. *Id.* They have included a summary of their argument to be made in any sur-reply. *Id.* at 3-8. The State opposes the motion, Docket No. 31, and the defendants have responded, Docket No. 33. The defendants' response brief contains the affidavits they would have attached to any sur-reply. *See* Docket Nos. 33-1; 33-2; 33-3.

The defendants' motion is well-taken and will be granted. The State should have presented all of its arguments for remand in its original motion. *Kennedy v. BAE Sys. Info. Tech., Inc., No. 1:09-cv-254, 2011 U.S. Dist. LEXIS 144227, 2011 WL 6211171, at *7 (S.D. Miss. Dec. 14, 2011)* ("A reply memorandum is not the appropriate place to raise new arguments"). The State's new arguments will be stricken **[**24]** and the defendants are excused from proving CAFA's amount in controversy requirements. Further, for reasons that will become apparent later, the State's suggestion of bifurcation is moot.

4. Analysis

a. Minimal Diversity

The State of Mississippi is not a 'citizen' for purposes of diversity jurisdiction. *In re Katrina Canal Litig. Breaches, 524 F.3d 700, 706 (5th Cir. 2008)* ("*Road Home*"). In this situation, "a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy." *Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 461, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980)* (citations omitted). The question is whether Mississippi's citizens and local governments are real parties in interest and must be counted for citizenship purposes.

"[T]he 'real party in interest' is the party who, by substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." *Richards v. Reed, 611 F.2d 545, 546 n.2 (5th Cir. 1980)* (quotation marks and citation omitted). *Federal Rule of Civil Procedure 17* states that actions "must be prosecuted in the name of the real party in interest." *Fed. R. Civ. P. 17(a)(1)*. It **[**25]** also states, however, that executors, administrators, guardians, and parties "authorized by statute" "may sue in their own names without joining the person for whose benefit the action is brought." *Id.; see Proctor v. Gissendaner, 579 F.2d 876, 880 (5th Cir. 1978)*.

In *Caldwell*, the property insurance policyholders who had been injured by the defendants' conduct were considered real parties in interest as to the claim for treble damages, because Louisiana law granted the policyholders the right to bring suit on their own for those damages.

> We conclude that as far as the State's request for treble damages is concerned, the policyholders are the real parties in interest. The text of *§ 137 of the Monopolies Act*, which authorizes the recovery of treble damages, plainly states that "any person who is injured in his business or property" under the Monopolies Act "shall recover[] treble damages." The plain language of that provision makes clear that individuals have the right to enforce this provision. Accordingly, we agree with the district court and hold that under *§ 137* the policyholders, and not the State, are the real parties in interest.

Caldwell, 536 F.3d at 429 (brackets omitted); *see* ***[**26]*** *West Virginia ex rel. McGraw v. Comcast Corp., 705 F. Supp. 2d 441, 450 (E.D. Pa. 2010)* (finding that "a discrete group of Comcast's premium subscribers" were real parties in interest as to an attorney general's claim for treble damages on their behalf).

[*769] Here, the MCPA permits individuals to sue for damages incurred as a result of prohibited business practices. *Miss. Code § 75-24-15(1)*. Before filing such an action, the consumer "must have first made a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the Attorney General." *Id. § 75-24-15(2)*. The MAA also permits individuals to sue when "injured or damages by a trust and combine . . . or by its effects direct or indirect." *Id. § 75-21-9*. Under *Caldwell*, Mississippi's consumers are considered real parties in interest with respect to the State's request for restitution on their behalf. Caldwell, 536 F.3d at 429; *accord* Hood v. F. Hoffman-La Roche, Ltd., 639 F. Supp. 2d 25, 31-33 (D.D.C. 2009).

These statutes afford local governments similar rights. The MCPA provides a remedy to "any person who purchases or leases goods or services primarily for personal, family or household purposes" who **[**27]** is injured by a prohibited business practice. Miss. Code § 75-24-15(1). A local government is considered a person under the law, *id.* § 75-24-3(a), and at least one state court has found that a governmental entity purchases goods for its own, "personal" uses, *id.* § 75-24-15(1). *Hood ex rel. State v. BASF Corp.*, No. 56863, 2006 WL 308378, at *12 (Miss. Ch. Jan. 17, 2006). Further, local governments have the right to sue under the MAA for "all damages of every kind sustained . . . and in addition a penalty of five hundred dollars ($500.00)." Miss. Code § 75-21-9.

As a result, the State of Mississippi, its consumers, and its local governments are all real parties in interest in this action. While the State has no citizenship for purposes of diversity jurisdiction, Mississippi's consumers and local governments are obviously citizens of Mississippi. Counting their citizenship, and seeing that no defendant is a citizen of Mississippi, CAFA's requirement of minimal diversity has been met. *See* 28 U.S.C. § 1332(d)(2)(A).

b. Class Action

This suit is not a CAFA class action because it was not brought pursuant to Federal Rule of Civil Procedure 23 or a "similar **[**28]** State statute or rule of judicial procedure." *Id.* § 1332(d)(1)(B). The action was not originally filed in federal court under Rule 23 and the parties agree that Mississippi has no rule permitting class actions. [5] None of the state laws under which this action was brought impose class action-like requirements of adequacy, numerosity, commonality, or typicality, nor is the Attorney General, with his distinct duties, powers, and interests, a typical class representative. *See* Madigan, 665 F.3d at 772; McGraw, 646 F.3d at 174-77; In re Vioxx Prods. Liab. Litig., MDL No. 1657, 843 F. Supp. 2d 654, 2012 U.S. Dist. LEXIS 2526, 2012 WL 10552, at *7-8 (E.D. La. Jan. 3, 2012).

In a recent decision addressing issues much like our own, Judge Fallon of the Eastern District of Louisiana found that "Congress chose to define 'class action' not **[*770]** in terms of joinder of individual claims or by representative relief in general, but in terms of the statute or rule the case is filed under." Vioxx, 2012 U.S. Dist. LEXIS 2526, 2012 WL 10552, at *8 (citing 28 U.S.C. § 1332(d)(1)(B)). Because the Attorney General of Kentucky's *parens patriae* suit was not brought under such a federal or state statute or rule, it was remanded to Kentucky state court. [6] *Id.* Judge Fallon reasoned, "[i]f this is a formalistic outcome, it is a formalism dictated by Congress. Moreover, it is an understandable bright-line rule." *Id.* The Fifth Circuit declined to review the decision. Order, In re Vioxx Prod. Liab. Litig., No. 12-90002 (5th Cir. Feb. 24, 2012).

The defendants in our case interpret CAFA more broadly. They rely upon **[**30]** CAFA's legislative history to argue that "generally speaking, lawsuits that *resemble* a purported class action should be considered class actions for the purpose of applying CAFA." Docket No. 25, at 11 (brackets omitted) (quoting S. Rep. No. 109-14, at 35). But the word "resemble" is not found in 28 U.S.C. § 1332(d). That omission leads to an ongoing debate about whether the Senate Report relied upon by the defendants is a reliable source to discern Congress's intent in enacting CAFA.

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[5] To be clear, class actions are not authorized in Mississippi courts. USF&G Ins. Co. of Miss. v. Walls, 911 So. 2d 463, 467 (Miss. 2005) ("Since there is no rule or statute which expressly or impliedly provides for class actions, we are compelled to conclude that they are not permitted in any legal proceedings in our state courts.").

The MCPA also bars class actions attempted to be brought under its auspices. Miss. Code § 75-24-15(4). "Thus, any purported class action complaint or master complaint on behalf of several plaintiffs asserting violations of Section 75-24-5 is **[**29]** arguably improper." Walker W. Jones, III & Jason R. Bush, *An Overview of the Mississippi Consumer Protection Act*, Mississippi Defense Lawyers Assoc. Quarterly, Winter 2006, at 12 (collecting cases).

[6] The defendant in *Vioxx* did not argue that the suit was a mass action. Vioxx, 2012 U.S. Dist. LEXIS 2526, 2012 WL 10552, at *5 n.4.

The Fourth Circuit has found that the Senate Report in question "was issued 10 days *after* CAFA was signed into law, and for that reason alone, it is a questionable source of congressional intent. . . . *Post hoc* statements of a congressional Committee are not entitled to much weight." McGraw, 646 F.3d at 177 (citations, quotation marks, and brackets omitted); *see* Blockbuster, Inc. v. Galeno, 472 F.3d 53, 58 (2d Cir. 2006) (same). The Second and Third Circuits declined to rely upon this Senate Report to establish CAFA's burden-shifting framework, where CAFA's text did not address burden-shifting. Galeno, 472 F.3d at 57-58; Morgan v. Gay, 471 F.3d 469, 472-73 (3d Cir. 2006). The Seventh Circuit also found **[**31]** this Senate Report problematic, reasoning that "when the legislative history stands by itself, as a naked expression of 'intent' unconnected to any enacted text, it has no more force than an opinion poll of legislators - less, really, as it speaks for fewer." Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005); *see also* Abrego Abrego v. The Dow Chem. Co., 443 F.3d 676, 685-86 (9th Cir. 2006).

The Eleventh Circuit thought the Senate Report of greater value, observing that although it "was issued ten days following CAFA's enactment, it was submitted to the Senate on February 3, 2006 - while that body was considering the bill." Lowery v. Alabama Power Co., 483 F.3d 1184, 1206 n.50 (11th Cir. 2007) (citation omitted). But that court used legislative history to interpret the "statutory labyrinth" of CAFA's mass action provisions, not the relatively more straightforward class action provisions. Id. at 1199. The Fifth Circuit has quoted the Senate Report and the language relied upon by the defendants, but also did not address whether the suit before it was a class action. Caldwell, 536 F.3d at 424 and 430. Others have found "no clear answer" on the Senate Report's validity **[**32]** for a legislative history analysis. Guyon Knight, *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 Fordham L. Rev. 1875, 1892 (2010).

"[A] powerful line of Supreme Court authority suggests that legislative history should rarely be used in statutory interpretation, **[*771]** because only the text of the law has been passed by Congress, not the often-contrived history." Stanley ex rel. Estate of Hale v. Trinchard, 579 F.3d 515, 518 n.6 (5th Cir. 2009) (quotation marks and citations omitted). "[T]here is no reason to recite legislative history" when the statutory text is clear, in part because "as is often the case with legislative history, statements can be pulled from the record to support the contrary proposition as well." Khalid v. Holder, 655 F.3d 363, 371 (5th Cir. 2011) (citation omitted); *see* Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355, 377 (5th Cir. 2009) (collecting cases). [7]

Because **[**33]** CAFA unambiguously defines class action, it is unnecessary to consider the legislative history on this point. This Court will apply the "understandable bright-line rule" articulated in Vioxx, 2012 U.S. Dist. LEXIS 2526, 2012 WL 10552, at *8.

The conclusion that this suit is not a class action accords with rulings by the Fourth, Seventh, and Ninth Circuits. 2012 U.S. Dist. LEXIS 2526, [WL] at *6-8 (citing Madigan, 665 F.3d at 770-72; Washington, 659 F.3d at 846-48 [8]; and McGraw, 646 F.3d at 174-77); *see also* Kentucky ex rel. Conway v. Daymar Learning, Inc., No. 4:11-cv-103, 2012 U.S. Dist. LEXIS 39221, 2012 WL 1014989, *6 (W.D. Ky. Mar. 22, 2012). Nor is it in conflict with the Fifth Circuit's decision in *Caldwell*, which again did not resolve whether Louisiana's suit was a CAFA class action. Vioxx, 2012 U.S. Dist. LEXIS 2526, 2012 WL 10552, at *5-6 and 8 (quoting Caldwell, 536 F.3d at 429-30).

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[7] An opinion from the United States District Court for the District of New Jersey aptly illustrates one way in which CAFA's legislative history can be manipulated to support either party's position. *See* Harvey v. Blockbuster, Inc., 384 F. Supp. 2d 749, 752-54 (D.N.J. 2005).

[8] *Madigan* and *Washington* involved the same issues pending before this Court: whether the attorney generals of Illinois, Washington, and California could, via *parens patriae* suit alleging antitrust violations by LCD panel makers, seek restitution, damages for their citizens, injunctive relief, and civil penalties in their own state courts. Madigan, 665 F.3d at 770; Washington, 659 F.3d at 846.

The Attorney General **[**34]** of South Carolina brought a similar suit in state court. The defendants removed the action to federal court for reasons akin to those argued here. The action was remanded. South Carolina v. AU Optronics Corp., No. 3:11-cv-731, 2011 U.S. Dist. LEXIS 104213, 2011 WL 4344079 (D.S.C. Sept. 14, 2011).

c. Mass Action

Under Caldwell, this suit is a mass action. It is a civil action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). *Caldwell* stands for the proposition that the words "persons" and "plaintiffs" in this subsection are to be defined as "real parties in interest." Here, as there, this suit is a mass action because there are more than 100 real parties in interest that seek a joint trial on common questions of law or fact. [9]

[*772] The State argues that a statutory exception requires remand. [10] CAFA denies federal jurisdiction to any mass action in which "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action." *Id. § (d)(11)(B)(ii)(III)*. This will be referred to as the "general **[**38]** public exception."

Other courts have found the general public exception to exclude *parens patriae* suits from federal jurisdiction. *See* *Madigan, 665 F.3d at 772* ("By the plain language of that provision, too, this case is not a mass action."); *Connecticut v. Moody's Corp., No. 3:10-cv-546, 2011 U.S. Dist. LEXIS 780, 2011 WL 63905, at *4 (D. Conn. Jan. 5, 2011)* ("Because the State is a real party in interest and sues to protect and vindicate the rights of its public in general under *Conn. Gen. Stat. § 42-110m*, this action is not a 'mass action.'"); *see also* *South Carolina v. AU Optronics Corp., No. 3:11-cv-731, 2011 U.S. Dist. LEXIS 104213, 2011 WL 4344079, at *7 (D.S.C. Sept. 14, 2011)* (same). [11] Several commentators also believe this exception applies to *parens patriae* suits. *See* Marcy Hogan

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[9] Although *Caldwell* forecloses it, there is a possibility that a "mass action" should be thought of as a "mass joinder." Courts apply CAFA's mass action provisions to mass joinders, and typically decline to apply the mass action provisions to suits lacking 100 named plaintiffs. *See* *Lowery, 483 F.3d at 1198* ("CAFA's mass action provisions extend **[**35]** federal diversity jurisdiction to certain actions brought individually by large groups of plaintiffs.") (evaluating an amended complaint listing over 400 plaintiffs under CAFA's mass action provisions); *Abrego Abrego, 443 F.3d at 678* (evaluating a complaint filed by 1,160 plaintiffs as a mass action); *Nevada v. Bank of America Corp., 672 F.3d 661, 672 (9th Cir. 2012)* (holding that the State of Nevada's *parens patriae* suit was not removable as a mass action because the state was the real party in interest and thus "the action [fell] 99 persons short of a 'mass action'"); *Anderson v. Bayer Corp., 610 F.3d 390, 393 (7th Cir. 2010)* ("The instant cases contain fewer than 100 plaintiffs and thus are not removable under the plain language of the statute."); *Nunn v. Monsanto Co., No. 4:11-cv-1657, 2011 U.S. Dist. LEXIS 128375, at *8 (E.D. Mo. Nov. 7, 2011)* ("In order for this Court to have jurisdiction under the mass action provisions, defendants must demonstrate that there really are 100 plaintiffs."); *TFT-LCD, 2011 U.S. Dist. LEXIS 17793, 2011 WL 560593, at *8* ("courts have held that the plaintiffs in a mass action must be individually named plaintiffs with their own direct claims in order to be counted toward CAFA's 100 person requirements.") **[**36]** (collecting cases); *see also* Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, *35 J. Legis. 76, 104-05 (2009)*; Hittner et al., Fed. Civ. Pro. Before Trial - 5th Cir. Ed. ¶ 2:3027 (2011) (mass actions require 100 or more plaintiffs and CAFA can be avoided "by filing separate lawsuits, each involving fewer than 100 plaintiffs").

Mississippi's own history sheds some light on the issue. Because Mississippi law prohibits class actions, mass joinders became a popular work-around. *See, e.g.,* *Harold's Auto Parts, Inc. v. Mangialardi, 889 So. 2d 493, 494 (Miss. 2004)* ("The case before us has endured seven amended complaints, and now involves the claims of 264 plaintiffs against 137 named defendants who have identified approximately 600 different employers where asbestos exposure might have taken place."). Mass joinders were arguably so popular that CAFA's drafters made them removable; at least, some lawyers have concluded as much: "The inclusion of 'mass actions' in [CAFA's] definition of 'class action' was a Congressional attempt to address notorious joinder abuses at the state level in Mississippi and other states." Anthony Rollo & Gabriel A. Crowson, *Mapping **[**37]** the New Class Action Frontier - A Primer on the Class Action Fairness Act and Amended Federal Rule 23*, 59 Consumer Fin. L. Q. Rep. 11, 14 (Spring-Summer 2005); *see also* S. Amy Spencer, *Once More Into the Breach, Dear Friends: The Case for Congressional Revision of the Mass Action Provisions in the Class Action Fairness Act of 2005*, *39 Loy. L.A. L. Rev. 1067, 1081 (2006)* (discussing the mass action provision's attempt to address "cases with claims joined under liberal West Virginia or Mississippi statutes"); 14B Charles A. Wright et al., Fed. Practice & Procedure § 3724, at 910-11 (4th ed. 2009) ("The mass actions made removable [by CAFA] typically are actions brought in states whose court systems do not provide for class actions."); Knight, *78 Fordham L. Rev. at 1878*.

[10] "Indeed, [CAFA] is not complete without its exceptions." *Hollinger, 654 F.3d at 569*.

Greer & Paul L. Peyronnin, *The Class Action Fairness Act of 2005, in* A Practitioner's Guide to Class Actions 241, 282 (Marcy Hogan Greer, ed. 2010) ("a mass action does not include state attorney general actions"); Peter M. Cummins, *Parens Patriae Suits Filed by State AGs*, For the Defense, Feb. **[*773]** 2008 ("CAFA similarly offers no hope to defendants in this situation because **[**39]** enforcement actions filed by State AGs are specifically excluded from the statute's coverage."); Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, *156 U. Pa. L. Rev. 1971, 1979 n.33 (2008)* ("CAFA permits defendants to remove 'mass actions' (or class-action-like lawsuits) from state to federal court, but it contains an exception for parens patriae actions."); Antitrust Modernization Commission, Report and Recommendations 272 (2007) ("CAFA also does not apply to *parens patriae* actions by state attorneys general."); Gregory P. Joseph, *Federal Class Action Jurisdiction After CAFA, Exxon Mobil and Grable*, *8 Del. L. Rev. 157, 181 (2006)*.

Whether the general public exception can be invoked in the Fifth Circuit is contested. *Caldwell* determined that the State of Louisiana's suit was a mass action without addressing whether the exception applied. **[**40]** One possible reason for this is that the Attorney General of Louisiana failed to argue the exception to the Fifth Circuit. *See* Brief of Appellant, State of Louisiana ex rel. Caldwell v. Allstate Ins. Co., No. 08-30465 (5th Cir. May 19, 2008); *see also* *South Carolina, 2011 U.S. Dist. LEXIS 104213, 2011 WL 4344079, at *4* (noting that the Attorney General of Louisiana waived another argument on appeal as well). The failure to brief the issue resulted in the State forfeiting any claim it had to the exception. *See* *United States v. Delgado, 672 F.3d 320, 329 n.6 (5th Cir. 2012)*. Nor did the district court need to consider the general public exception, as it considered the suit a class action only. *See* Caldwell Transcript at 21.

With no such procedural default here, this Court will proceed to consider whether this action satisfies CAFA's general public exception.

i. "Claims . . . Asserted on Behalf of the General Public"

The exception first states that all of the claims in the suit must be asserted on behalf of the general public, not individuals or a purported class. *28 U.S.C. § 1332(d)(11)(B)(ii)(III)*. The facts of *Caldwell* would not have satisfied this requirement. The State of Louisiana's claim for treble damages was **[**41]** brought on behalf of a limited subset of its population: those policyholders who had paid premiums to certain defendants for particular kinds of insurance policies. *See* *Ohio v. GMAC Mortg., LLC, 760 F. Supp. 2d 741, 748 (N.D. Ohio 2011)* (denying motion to remand *parens patriae* suit where relief sought "would benefit only a specific subset of Ohio citizens . . . and would do little to protect Ohio citizens generally").

In contrast, the complaint in our case alleges that the defendants, who control over 80% of the market for LCD panels, have substantially affected a product contained in laptops, desktop computer monitors, mobile phones, digital cameras, video cameras, televisions, motor vehicles, and other electronic devices commonly used and purchased in everyday life. Docket No. 1-1, at 4 and 17. [12] United States census data shows that during the relevant time period, computers and mobile phones were present in more than half of America's households. Docket No. 1-1, at 4 n.1. [13] The alleged price-fixing was so **[*774]** broad and pervasive as to affect the general public, and the State's claims in this suit are asserted on behalf of the general public. *See* *TFT-LCD, 2011 U.S. Dist. LEXIS 17793, 2011 WL 560593, at *5* ("In **[**42]** contrast to *Comcast* and *Caldwell*, where the States sued on behalf of limited groups of private parties (premium cable subscribers and insurance policyholders), here the States

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[11] At least one court has found the exception applicable outside of the *parens patriae* context, in a case where the sole plaintiff was a citizen suing on behalf of the general public. *Breakman v. AOL LLC, 545 F. Supp. 2d 96, 100-01 (D.D.C. 2008)*. The defendant conceded that the general public exception applied. *Id. at 101*.

[12] The State further alleged that LCD panels are not minor components of those devices, claiming that LCD technology has a "virtually 100% market share for laptops and flat panel computer monitors, and at least 80% market share for flat panel TVs." Docket No. 1-1, at 14.

[13] Courts may take judicial notice of census data. *Hollinger, 654 F.3d at 571-72* ("United States census data is an appropriate and frequent subject of judicial notice.") (citations omitted).

are suing on behalf of all consumers in their respective states who purchased a wide range of allegedly price-fixed products.").

There also are significant differences between the insurance market at issue in *Caldwell* and the electronics market here that broaden the latter's reach into the general population. The insurance industry has a paper trail documenting each agreement between insured and insurer, and more importantly, each insured is readily identifiable. But electronics retailers permit customers to pay with cash and do not record personally identifiable **[**43]** information on every transaction. It is unlikely that the defendants have records identifying every Mississippian who purchased a product containing a LCD panel between 1996 and 2006. There also is a person-to-person resale market of electronic goods that does not exist in the insurance industry, which further expands the percentage of the population affected by the violations alleged in this suit. Moreover, the sheer number of LCD panel products purchased and used by consumers - including computers, mobile phones, toys, car navigation systems, and televisions, among others - indisputably fall within the state's quasi-sovereign interest. If this collection of items did not implicate the overall economic well-being of Mississippi's citizens, then the Court would be hard pressed to find something which does.

ii. Pursuant to a "Statute Specifically Authorizing Such Action"

The second and final element of the general public exception is satisfied, as the claims in this action are brought under state statutes specifically authorizing these kinds of suits.

The Attorney General of Mississippi is generally empowered by a state law granting him "the powers of the Attorney General at common law." **[**44]** *Miss. Code § 7-5-1*; *see* *Hood ex rel. Mississippi v. Microsoft Corp., 428 F. Supp. 2d 537, 544-45 (S.D. Miss. 2006)*. Under Mississippi common law, the Attorney General has the "power and authority . . . to institute, conduct and maintain all suits necessary for the enforcement of the laws of the State, preservation of order and the protection of public rights." *Hood v. AstraZeneca Pharms., LP, 744 F. Supp. 2d 590, 595 (N.D. Miss. 2010)* (citations omitted). *Parens patriae* suits to protect the State's quasi-sovereign interest in its citizens' economic well-being are a part of that common law tradition. *See* Part III.A, *infra*. A number of state and federal courts have recognized the Attorney General's *parens patriae* authority to represent Mississippi's consumers. *See BASF*, 2006 WL 308378, at *3 (collecting cases); *Microsoft, 428 F. Supp. 2d at 544-46*.

More specifically, the MCPA and the MAA provide statutory grounds for the relief sought in this suit. Under the MCPA,

> [w]henever the Attorney General has reason to believe that any person is using, has used, or is about to use any method, act or practice prohibited by Section 75-24-5, and that proceedings would be in the public interest, he may **[**45]** bring an action in the name of the state against such person to restrain by temporary **[*775]** or permanent injunction the use of such method, act or practice.

Miss. Code § 75-24-9. The next section confirms that in those suits, "[t]he court may make such additional orders or judgments, including restitution, as may be necessary to restore to any person in interest any monies or property, real or personal, which may have been acquired by means of any practice prohibited by this chapter." *Id.* *§ 75-24-11*. Civil penalties, investigative costs, and reasonable attorney's fees are authorized by a later section. *Id.* *§ 75-24-19(1)(b)*.

The MAA not only authorizes persons to recover damages for anti-competitive behaviors, *id.* *§ 75-21-9*, but permits the Attorney General and the Attorney General alone to recover civil penalties for those behaviors, *id.* *§ 75-21-7*. "This statute clearly gives the Attorney General of the State the authority to bring suit in the name of the State for violations of Mississippi ***antitrust law***." *Moore ex rel. State of Miss. v. Abbott Laboratories, Inc., 900 F. Supp. 26, 31 (S.D. Miss. 1995)*. Further, a Mississippi state court has found punitive damages to be available for violations **[**46]** of the MAA. *BASF*, 2006 WL 308378, at *11.

Taken together, these statutes authorize the Attorney General to receive all of the relief sought in the complaint. Because "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class)," and are brought "pursuant to a State statute specifically authorizing such action," this suit satisfies the general public exception. 28 U.S.C. § 1332(d)(11)(B)(ii)(III).

Having determined that this case is neither a class action nor a mass action that does not fall into a statutory exception, the case will be remanded to state court.

D. The Future of This Case

An exception to the usual law of remand permits the defendants to seek an immediate appeal. *See* Road Home, 524 F.3d at 702 n.1 (quoting 28 U.S.C. § 1453(c)(1)). Should the Fifth Circuit reverse and remand this case here as a CAFA mass action, the Court will now describe its understanding of what the law requires upon its return. All involved have an interest in there being only one appeal.

If returned here as a mass action, the case will be severed in accordance with the command of 28 U.S.C. § 1332(d)(11)(B)(i). The **[**47]** State's interests in permanent injunctive relief; civil penalties; restitution for losses incurred by the State in its proprietary capacity; and restitution for losses incurred by individuals [14] claiming less than or equal to $75,000 each, including individual punitive damages but excluding interest and costs; will all be remanded to state court. In mass actions, federal jurisdiction extends "only" to individual claims that exceed $75,000. 28 U.S.C. § 1332(d)(11)(B)(i). This Court's supplemental jurisdiction cannot be extended to those individuals with claims under $75,000. *See* Lowery, 483 F.3d at 1206 n.51.

The defendants argue that the State's request for punitive damages suffices to permit every individual claim to remain in federal court, because the aggregate amount of punitive damages exceeds $75,000 and is imputed to each individual. Docket No. 1, at 8 (citing Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335-36 (5th Cir. 1995)). But Allen was determined to conflict with a previous panel decision and therefore is no longer good law as to that point. "Because Lindsey is the earliest, **[**48]** and thus controlling, decision in this circuit, **[*776]** the punitive damages claims of the putative class cannot be aggregated and attributed to each plaintiff to meet the jurisdictional requirement." H&D Tire and Automotive-Hardware, Inc. v. Pitney Bowes Inc., 227 F.3d 326, 330 (5th Cir. 2000) (discussing Lindsey v. Alabama Tel. Co., 576 F.2d 593 (5th Cir. 1978)). Other circuits have recognized that *Pitney Bowes* effectively overruled this part of *Allen. E.g.,* Martin v. Franklin Capital Corp., 393 F.3d 1143, 1148 (10th Cir. 2004); Smith v. GTE Corp., 236 F.3d 1292, 1301 (11th Cir. 2001).

It is not clear how much in restitution the State is seeking on behalf of individuals. Assuming without deciding that this case merits punitive damages under Mississippi law, the parties are bound by constitutional limits on punitive damages. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) ("in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"); *see also* Church v. Nationwide Ins. Co., No. 3:10-cv-636, 2011 U.S. Dist. LEXIS 58956, 2011 WL 2112416, at *4 n.2 (S.D. Miss. May 26, 2011) (citing Munro v. Golden Rule Ins. Co., 393 F.3d 720, 721 (7th Cir. 2004) **[**49]** (discussing constitutional limits on punitive damages imposed in cases of simple economic loss)). Again assuming that the maximum punitive damages allowed under due process would apply, an individual claim could remain in state court by seeking only an amount of restitution, plus a punitive damages multiplier in accordance with *Campbell*, that totals $75,000 or less. *See id.; accord* Smith, 236 F.3d at 1304 (applying similar reasoning).

Whether the case will develop in that fashion remains to be seen; the purpose of this section is to minimize the necessity for a second appeal on a jurisdictional question by resolving the parties' dispute over *Allen*. This Court

[14] In this discussion, "individuals" and "individual claims" includes consumers and local governments.

recognizes uncertainty about the application of the $75,000 amount in controversy clause, *see* Lowery, 483 F.3d at 1203-07, and certifies that guidance would help this case proceed should it remain in federal court. [15]

There is another practical concern that **[**51]** could be clarified on appeal. In a later part of CAFA - in a sub-section not presented to the *Caldwell* court - the statute states that mass actions removed to federal court "shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer **[*777]** pursuant to section 1407." 28 U.S.C. § 1332(d)(11)(C)(i). "[S]ection 1407" refers to the federal statute authorizing and governing multidistrict litigation. *See id.* § 1407. CAFA thus bars a transfer to a MDL court unless a majority of plaintiffs in the mass action consent. [16]

The concern is this: in our case, who may grant or deny such consent? The State of Mississippi is the sole plaintiff. While Mississippi's consumers constitute hundreds of thousands if not millions of real parties in interest, they are not plaintiffs and there is no mechanism through which they can consent to transfer this case to a MDL court. In *Caldwell*, the real parties in interest were fewer and identifiable, and there **[**52]** was an opportunity for them to be found and offered a chance to participate in the case pursuant to the statute. In contrast, applying this sub-section to our real parties in interest would require a substantial number of people to be polled about their preferred forum. This is not an outcome directed by the plain language of CAFA. Nor is it one that comports with traditional standards of judicial economy and efficiency. *See* State of N.J. v. State of N.Y., 345 U.S. 369, 372-73, 73 S. Ct. 689, 97 L. Ed. 1081 (1953) (describing, in a *parens patriae* action brought pursuant to the Supreme Court's original jurisdiction, "a working rule for good judicial administration" that places a "practical limitation on the number of citizens . . . who would be entitled to be made parties" alongside the state as sovereign). If this case is returned to federal court, the parties will be asked to provide supplemental briefing on how to resolve this issue.

E. Federal Question Under the Sherman Act

As recited above, "[t]he party seeking removal bears the burden of showing that federal jurisdiction is proper," Lone Star, 579 F.3d at 528 (citation omitted), and "any doubt as to the propriety of removal should be resolved in favor of remand," **[**53]** Hot-Hed, 477 F.3d at 323 (citations omitted).

1. Arguments

The State contends that state antitrust remedies supplement federal remedies and are not completely preempted by them. Docket No. 20, at 11-12. It claims that the defendants' commercial activities are subject to the MAA and that any substantive defect in the complaint is for the state courts to resolve. *Id.* at 13-15. The State argues that

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[15] Other courts have recognized the difficulty in construing CAFA's mass action provisions. The Eleventh Circuit found that "CAFA's mass action provisions present an opaque, baroque maze of interlocking cross-references that defy easy interpretation." Lowery, 483 F.3d at 1198. The Ninth Circuit called the mass action **[**50]** language "bewildering" and once declined to rule on some of its "thorniest" provisions. Abrego Abrego, 443 F.3d at 682, 686. Commentators have agreed. Andrew D. Weinstock & Philip G. Watson, *Where Defendants Fear to Tread*?, For The Defense, Apr. 2009, at 15, 17 ("Unfortunately, the language of the [mass action] provision is dense and ambiguous. . . . [Congress] passed a law that is puzzling, overly complex, and at times contradictory."); Spencer, 39 Loy. L.A. L. Rev. at 1073 ("CAFA's plain language by no means provides clear guidelines for attorneys or the judiciary.").

Fortunately, then, mass actions "are apparently not common. Clermont and Eisenberg's study [of federal cases decided under CAFA between February 18, 2005 and August 18, 2007] unearthed only two cases that involved a mass action and only three others that discussed a mass action." Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. Pa. L. Rev. 1439, 1449 n.29 (2008) (citing Clermont & Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. Pa. L. Rev. 1553, 1566 n.34 (2008) (describing federal mass actions as "rare")).

[16] In other cases, this sub-section has been moot because the action had already been transferred to a MDL court. *E.g.,* Vioxx, 2012 U.S. Dist. LEXIS 2526, 2012 WL 10552.

federal question jurisdiction here is foreclosed by existing Supreme Court caselaw. Docket Nos. 20, at 11-12; 29, at 17-19.

The defendants respond that the Sherman Act, *15 U.S.C. § 7 et seq.*, completely preempts Mississippi's antitrust laws in this instance because the alleged violations are interstate and international in nature. Docket No. 25, at 14. "Mississippi antitrust laws apply only to intrastate activity." *Id.* (citing *Standard Oil Co. of Ky. v. State, 107 Miss. 377, 65 So. 468, 470-71 (Miss. 1914))*. They acknowledge caselaw holding that there is no complete federal preemption in this area, but argue it is inapposite because "the Attorney General here has artfully pleaded phantom Mississippi state antitrust remedies, which do not exist for interstate conduct and transactions." *Id.* at 15.

2. Discussion

"We **[**54]** start with the long-established axiom that a plaintiff is master of his complaint and may generally allege only a state law cause of action even where a federal remedy is also available." *Bernhard* ***[*778]*** *v. Whitney Nat'l Bank, 523 F.3d 546, 551 (5th Cir. 2008)* (citation omitted). "In determining whether a case arises under federal law, we look to whether the plaintiff's well-pleaded complaint raises issues of federal law." *Budget Prepay, Inc. v. AT&T Corp., 605 F.3d 273, 278 (5th Cir. 2010)* (quotation marks and citation omitted).

The defendants have invoked "the 'artful pleading' doctrine, which is an 'independent corollary' to the well-pleaded complaint rule." *Bernhard, 523 F.3d at 551* (citation omitted). "Under this principle, even though the plaintiff has artfully avoided any suggestion of a federal issue, removal is not defeated by the plaintiff's pleading skills in hiding the federal question." *Id.* (citation omitted). But the artful pleading doctrine "applies *only* where state law is subject to complete preemption." *Id.* (citation omitted).

"[A] **[**55]** state claim may be removed to federal court . . . when a federal statute wholly displaces the state-law cause of action through complete pre-emption." *Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003)*. In *Beneficial*, "the dispositive question" was whether "the National Bank Act provide[d] the exclusive cause of action for usury claims against national banks." *Id. at 9*. A review of that Act and "the special nature of federally chartered banks" supported that the answer was 'yes'; federal jurisdiction was appropriate. *Id. at 10*. This was a rare instance of complete preemption, which is an "extraordinary" finding. *Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987)*; *see* *Hoskins v. Bekins Van Lines, 343 F.3d 769, 773 (5th Cir. 2003)* (collecting the few cases finding complete preemption).

"The question in complete preemption analysis is whether Congress intended the federal cause of action to be the exclusive cause of action for the particular claims asserted under state law." *Elam v. Kansas City S. Ry. Co., 635 F.3d 796, 803 (5th Cir. 2011)* (quotation marks and citations omitted). Courts presume that state laws are not preempted until Congress clearly states otherwise. *Id. at 803-04*. **[**56]** "This assumption applies with 'particular force' when Congress legislates in a field traditionally occupied by state law." *Id. at 804* (citation omitted).

The Supreme Court has concluded that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." *California v. ARC America Corp., 490 U.S. 93, 102, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)* (citations omitted). "And on several prior occasions, the Court has recognized that the federal antitrust laws do not pre-empt state law." *Id.* (citations omitted); *Moore, 900 F. Supp. at 33*.

The defendants concede the existence of *ARC America*, even as they observe that it did not address Mississippi law. Docket No. 25, at 15. They have not pointed to any statute indicating that Congress intended federal antitrust laws to completely preempt state antitrust laws and be the exclusive remedy for claimed violations of state antitrust laws. The defendants further acknowledge that "the Fifth Circuit has not decided whether a Mississippi state antitrust claim based on interstate activity is preempted by the Sherman Act," and rely instead upon two district court decisions in New York that allegedly found state antitrust laws preempted. Docket Nos. 1, **[**57]** at 11; 25, at 17-18.

That is not enough. The defendants have not met their burden to show that federal antitrust laws completely preempt Mississippi's antitrust laws. There is no federal question jurisdiction. *See* *Adams v. General Motors*

Acceptance Corp., 307 F. Supp. 2d 812, 817 (N.D. Miss. 2004) (citing **[*779]** *Waste Control Specialists, LLC v. Envirocare of Tex., Inc., 199 F.3d 781, 784 (5th Cir.)* (holding that federal court lacked jurisdiction to consider whether state law claims were viable "considering the absence of complete preemption in the antitrust context"), *withdrawn and superseded in part*, *207 F.3d 225 (5th Cir. 2000))*.

IV. Conclusion

The Attorney General of Mississippi filed this action in a Mississippi state court, to enforce Mississippi's consumer protection and antitrust laws, for the protection of the economic well-being of Mississippi's consumers and governmental entities. *See* *McGraw, 646 F.3d at 178*. The State's motion to remand [Docket No. 19] is granted. The defendants' motion to strike [Docket No. 30] is granted. This cause will be remanded to the Chancery Court of Hinds County, Mississippi.

SO ORDERED, this the third day of May, 2012.

/s/ Carlton W. Reeves

UNITED STATES **[**58]** DISTRICT JUDGE

Astrotel, Inc. v. Verizon Fla., LLC

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

May 4, 2012, Decided; May 4, 2012, Filed

Case No. 8:11-cv-2224-T-33TBM

Reporter

2012 U.S. Dist. LEXIS 63172 *; 2012-1 Trade Cas. (CCH) P77,887; 2012 WL 1581596

ASTROTEL, INC., Plaintiff, v. VERIZON FLORIDA, LLC and VERIZON COMMUNICATIONS, INC., Defendants.

Subsequent History: Motion to strike denied by, Motion denied by *Astrotel, Inc. v. Verizon Fla., LLC, 2012 U.S. Dist. LEXIS 121069 (M.D. Fla., Aug. 27, 2012)*

Summary judgment granted by *Astro Tel, Inc. v. Verizon Fla., LLC, 2013 U.S. Dist. LEXIS 153498 (M.D. Fla., Oct. 25, 2013)*

Core Terms

alleges, unjust enrichment, monopolization, customers, motion to dismiss, advertising, competitor, promotion, business relationship, Lanham Act, antitrust, civil conspiracy, leave to amend, representations, disparagement, telephone, monopoly, billing, equitable accounting, antitrust claim, monopoly power, anticompetitive, Communications, enhanced, anticompetitive conduct, fiduciary relationship, telecommunications, circumstances, facilities, interfered

LexisNexis® Headnotes

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

HN1[] **Pleadings, Complaints**

A demand for relief is not a complaint count.

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

HN2[] **Defenses, Demurrers & Objections, Motions to Dismiss**

On a motion to dismiss, a court accepts as true all the allegations in the complaint and construes them in the light most favorable to the plaintiff. Further, the court favors the plaintiff with all reasonable inferences from the allegations in the complaint.

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

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

HN3[] Motions to Dismiss, Failure to State Claim

While a complaint attacked by a Fed. R. Civ. P. 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. Further, courts are not bound to accept as true a legal conclusion couched as a factual allegation.

Antitrust & Trade Law > Regulated Industries > Communications > Telecommunications Act

HN4[] Communications, Telecommunications Act

Competitors in the telecommunications industry have no duty to cooperate with one another. Courts should be hesitant to enforce antitrust liability where there is a complex regulatory scheme already in place (as is the case with the Telecommunications Act of 1996).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN5[] Regulated Practices, Price Fixing & Restraints of Trade

As a general matter, ***antitrust law*** does not restrict the long recognized right of a trader or manufacturer engaged in business, freely to exercise his own independent discretion as to the parties with whom he will deal.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN6[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Although Trinko forestalls antitrust claims based on refusals to deal with a competitor, Trinko does not prevent a plaintiff from bringing antitrust claims based on other valid antitrust theories.

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

HN7[] Scope, Monopolization Offenses

Section 2 (15 U.S.C.S. § 2) of the Sherman Act prohibits monopolization, attempts to monopolize, and conspiracy to monopolize any part of trade or commerce. 15 U.S.C.S. § 2. The Act and subsequent case law have distinguished anticompetitive behavior from growth or development as a consequence of a superior product, business acumen, or historic accident.

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

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

HN8[] Actual Monopolization, Claims

The offense of monopolization under Sherman Act § 2 (15 U.S.C.S. § 2) has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power. Monopoly power is defined as the power to control prices or exclude competition, and may be inferred from a firm's predominant share of a market. This market must be defined for both the product and the location where the alleged monopolizer is operating.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN9[] Actual Monopolization, Monopoly Power

The second prong of Grinnell requires the willful acquisition or maintenance of monopoly power. However, the line between lawful competitive conduct and unlawful monopolization is difficult to draw. It is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects. Unlawful anticompetitive conduct is conduct without a legitimate business purpose that makes sense only because it eliminates competition. Examples of such unlawful anticompetitive conduct include instituting sham litigation, providing false information to retailers, and systematically removing a competitor's display racks or products from retail establishments. However, even an act of pure malice by one business competitor against another, without more, fails to state a claim under the federal antitrust laws.

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

HN10[] Attempts to Monopolize, Elements

To state a claim for attempted monopolization, a plaintiff must show (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. Anticompetitive conduct is conduct which unfairly tends to destroy competition itself. In addition, ***antitrust law*** was created for the protection of competition not competitors. To be actionable, a defendant's conduct must harm the competitive process and thereby harm consumers. Harm to one or more competitors does not suffice.

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

HN11[] Attempts to Monopolize, Elements

A plaintiff claiming attempted monopolization must allege that the defendant specifically intended to control prices or destroy competition and took action to effectuate that result.

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

HN12[] Regulated Practices, Monopolies & Monopolization

Monopoly leveraging involves a firm using its market power in one market to gain more market share in another market, other than by competitive means.

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

HN13[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Tying is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product.

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

HN14[] **Tying Arrangements, Sherman Act Violations**

Not all tying arrangements violate the Sherman Act; a plaintiff must allege five elements of an illegal tying arrangement: (1) an actual tying and tied product, (2) some evidence of coercion showing that the seller in fact forced the buyer to purchase the tied product, (3) some evidence that the seller has sufficient market power to carry out the coercion, (4) anticompetitive effects in the tied market, and (5) more than an insubstantial amount of interstate commerce in the tied product market.

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

HN15[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The essential nature of a tying arrangement requires that the products in the first element, the tying and tied product, be distinct. Distinctness in tying claims rests on the character of demand for the two items, not just the functional relationship between them.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN16[] **Racketeer Influenced & Corrupt Organizations, Claims**

To state a Racketeer Influenced and Corrupt Organizations Act claim, a plaintiff must plead (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly participates in the specific prohibited activity in (6) an "enterprise" (7) that affects interstate or foreign commerce.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

HN17[] **Claims, Fraud**

The federal Racketeer Influenced and Corrupt Organizations Act statute includes both mail and wire fraud in the definition of "racketeering activity." *18 U.S.C.S. § 1961(1)(B)*.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

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

HN18[] **Heightened Pleading Requirements, Fraud Claims**

A plaintiff's allegations of fraud must not only comply with the pleading requirements articulated in Twombly and Iqbal but also with the heightened pleading standard of *Fed. R. Civ. P. 9(b)*, which requires a party alleging fraud to state with particularity the circumstances underlying the fraud claim. To meet this burden, the plaintiff must allege: (1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the plaintiff; and (4) what the defendant gained by the alleged fraud.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Scope

HN19[] **False Advertising, Elements of False Advertising**

See *15 U.S.C.S. § 1125(a)(1)(B)*.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

HN20[] **False Advertising, Elements of False Advertising**

Although the Lanham Act does not define either "advertising" or "promotion," courts within the Eleventh Circuit use the following four-part test set forth in Gordon & Breach Science Publishers S.A. v. American Institite of Physics and American Physical Society in determining whether a representation falls within the ambit of the Lanham Act: In order for representations to constitute "commercial advertising or promotion" under the Lanham Act, they must be (1) commercial speech; (2) by a defendant who is in commercial competition with the plaintiff; (3) for the purpose of influencing consumers to buy the defendant's goods or services. While the representations need not be made in a "classical advertising campaign," but may consist instead of more informal types of "promotion," the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > ... > Contracts > Intentional Interference > Elements

HN21[] **Intentional Interference, Elements**

In order to properly plead a claim for tortious interference with a contractual or business relationship under Florida law, a plaintiff must assert: (1) the existence of a business relationship that affords the plaintiff existing or prospective legal rights; (2) the defendant's knowledge of the business relationship; (3) the defendant's intentional and unjustified interference with the relationship; and (4) damage to the plaintiff.

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

HN22[] **Intentional Interference, Elements**

A claim for interference with a prospective business relation will lie if the parties' understanding would have been completed if not for the defendant's intervention. However, no cause of action exists for tortious interference with a business's relationship to the community at large.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN23[] **Regulated Practices, Trade Practices & Unfair Competition**

Unfair competition is a creature of common law and serves as an umbrella for all statutory and nonstatutory causes of action arising out of conduct that is contrary to honest practice in industrial and commercial matters.

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

HN24[] **State Regulation, Claims**

To state a claim for unfair competition under Florida common law a party must plead (1) deceptive or fraudulent conduct of a competitor and (2) likelihood of consumer confusion.

Torts > Business Torts > Trade Libel > Elements

HN25[] **Trade Libel, Elements**

The reputation of a corporation can be injured by a false publication of defamatory matter, which prejudices its trade or business, or deters third persons from dealing with it.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN26[] **Civil Conspiracy, Elements**

A civil conspiracy requires: (a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to the plaintiff as a result of the acts done under the conspiracy.

Torts > ... > Concerted Action > Civil Conspiracy > Defenses

HN27[] **Civil Conspiracy, Defenses**

Pursuant to the intra-corporate conspiracy doctrine, alleged agreements between an employee and the company the employee works for cannot form the basis for a civil conspiracy claim. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. This doctrine also applies to a parent-subsidiary relationship: there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor and the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise.

Torts > ... > Concerted Action > Civil Conspiracy > Defenses

HN28[] Civil Conspiracy, Defenses

If a subsidiary is wholly owned by a parent company, the intra-corporate conspiracy doctrine cannot be overcome. However, if the subsidiary is not a wholly owned subsidiary, a plaintiff may be able to plead factors showing separateness of the subsidiary from its parent company in order to overcome the doctrine.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN29[] Equitable Relief, Quantum Meruit

To state a claim for unjust enrichment, a plaintiff must plead the following elements: (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred; and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN30[] Equitable Relief, Quantum Meruit

Liability in unjust enrichment has nothing to do with fault. Indeed, an unjust enrichment claim should be premised on circumstances under which it would be inequitable for the defendant to retain the benefit without paying for it. The law of unjust enrichment is concerned solely with enrichments that are unjust independently of wrongs and contracts. When the plaintiff relies on a breach of a contract to supply the "unjustness" of the defendant's holdings, the right on which he or she relies arises from the breach of the contract, not from an unjust enrichment; analogously, when the plaintiff relies on a wrong to supply the "unjust factor," the causative event is a wrongful enrichment rather than an unjust enrichment. The paradigm examples of unjust enrichment are mistaken transfers. Where a plaintiff predicates its unjust enrichment claim on wrongful conduct of a defendant, then the plaintiff's right of recovery, if any, arises from the wrong of the alleged tort rather than unjust enrichment.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN31[] Equitable Relief, Quantum Meruit

As soon as a claimant relies on a wrong to supply the unjust factor, the right on which he relies arises from that wrong, not from unjust enrichment. Thus, the plaintiff's right of recovery, if any, for the alleged wrongful conduct of the defendant arises in tort or statutory law, which, if proven, might entitle the plaintiff to damages, rather than unjust enrichment. The law of unjust enrichment is concerned solely with enrichments that are unjust independent of alleged wrongs.

Civil Procedure > Remedies > Equitable Accountings > Grounds for Accountings

HN32[] **Equitable Accountings, Grounds for Accountings**

To successfully plead a claim for equitable accounting under Florida law, a plaintiff must allege that (1) a fiduciary relationship or complex transaction exists, and (2) a remedy at law would be inadequate.

Business & Corporate Law > Agency Relationships > Fiduciaries > Definitions

Business & Corporate Law > Agency Relationships > Fiduciaries > Formation

HN33[] **Fiduciaries, Definitions**

A fiduciary relationship may be either express or implied. Express fiduciary relationships are created by contract, such as principal/agent, or can be created by legal proceedings in the case of a guardian/ward. A fiduciary relationship which is implied in law is based on the circumstances surrounding the transaction and the relationship of the parties and may be found when confidence is reposed by one party and a trust accepted by the other.

Counsel: [*1] For Astro Tel, Inc., Plaintiff: Herbert Roy Donica, LEAD ATTORNEY, Donica Law Firm, PA, Tampa, FL; John C. Dent, Jr., LEAD ATTORNEY, Dent & Johnson, Chartered, Sarasota, FL; Christine R. Sensenig, Sensenig Law Firm, Sarasota, FL.

For Verizon Florida LLC, Verizon Communications, Inc., Defendants: Aaron M. Panner, Alexander S. Edelson, Christopher J. Walker, LEAD ATTORNEYS, PRO HAC VICE, Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, Washington, DC; Darryl S. Laddin, LEAD ATTORNEY, Arnall Golden Gregory LLP, Atlanta, GA; Hardy L. Roberts, III, LEAD ATTORNEY, Carlton Fields, PA, Tampa, FL.

Judges: VIRGINIA M. HERNANDEZ COVINGTON, UNITED STATES DISTRICT JUDGE.

Opinion by: VIRGINIA M. HERNANDEZ COVINGTON

Opinion

ORDER

This matter comes before the Court pursuant to Defendants Verizon Florida, LLC and Verizon Communications, Inc.'s Motion to Dismiss (Doc. # 27), filed on November 4, 2011. Plaintiff AstroTel, Inc., filed a Response to Verizon's Motion to Dismiss on December 2, 2011. (Doc. # 32). For the reasons that follow, the Court grants in part and denies in part Verizon's Motion to Dismiss.

I. Factual and Procedural Background

AstroTel is a Bradenton, Florida-based company that provides basic local telephone services, **[*2]** enhanced services, and Internet access to Florida residences and small to mid-size businesses. (Doc. # 9 at ¶ 7). AstroTel also operates its own telecommunications network which provides services to more than half of the state. (Id.). In providing these services, AstroTel directly competes with Verizon. [1] (Id. at ¶ 17). Due to the nature of the telephone industry, significant infrastructure is required to provide both basic and enhanced telephone services. [2] (Id. at ¶¶ 19-21). Verizon currently owns the only facilities capable of providing these services in AstroTel's operating area. (Id. at ¶ 23). AstroTel leases access to portions of Verizon's network such as local loops and transports, so that AstroTel may provide basic local phone services. (Id. at ¶ 22).

AstroTel filed suit against Verizon (Doc. # 8) and subsequently filed an Amended Complaint on **[*3]** October 3, 2011. (Doc. # 9). In the Amended Complaint AstroTel describes numerous acts of allegedly anticompetitive behavior by Verizon, including:

> (1) failing to timely install services ordered by AstroTel;
> (2) failing to meet due dates without reasonable explanation;
> (3) ordering field installers to close AstroTel's orders as completed even though they were not complete;
> (4) repeatedly billing for services not installed;
> (5) disparaging and misrepresenting AstroTel's products to the public and damaging AstroTel's reputation;
> (6) supplying false bills at rates substantially higher than those approved by the state;
> (7) using AstroTel's confidential information for Verizon's own marketing purposes in an attempt to persuade AstroTel subscribers to switch companies;
> (8) failing or refusing to provide access to facilities information; and
> (9) cross-subsidizing its unregulated services such as Internet Access Services, wireless mobile telephone service and television service with its regulated local telecommunications services creating an illegal price squeeze in an effort to prevent AstroTel from competing in the market for local telephone service.

(Id. at ¶ 8).

The Amended Complaint contains six **[*4]** counts arising under federal law: (Count 1) monopolization, (Count 2) attempted monopolization, (Count 3) monopoly leveraging, (Count 4) tying, (Count 5) civil RICO, and (Count 6) Lanham Act violations. The remaining seven counts arise under Florida law: (Count 7) tortious interference with contract, (Count 8) interference with prospective business relations, (Count 9) unfair competition, (Count 10) business defamation and disparagement, (Count 11) civil conspiracy, (Count 12) unjust enrichment, and (Count 13) equitable accounting. [3] Verizon moves to dismiss the Amended Complaint in its entirety pursuant to *Fed. R.Civ. P. 12(b)(6)*.

II. Legal Standard

HN2[] On a motion to dismiss, this Court accepts as true all the allegations in the complaint and construes them in the light most favorable to the plaintiff. *Jackson v. Bellsouth Telecomms., 372 F.3d 1250, 1262 (11th Cir. 2004)*. Further, this Court favors the plaintiff with **[*5]** all reasonable inferences from the allegations in the complaint. *Stephens v. Dep't of Health & Human Servs., 901 F.2d 1571, 1573 (11th Cir. 1990)* ("On a motion to dismiss, the facts stated in [the] complaint and all reasonable inferences therefrom are taken as true.").

However, the Supreme Court explains that:

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[1] Verizon Communications, Inc. is the parent corporation of Verizon Florida, LLC. (Doc. # 9 at ¶ 5). The Court collectively refers to both entities as "Verizon" herein.

[2] Basic local telephone services connect one customer to another using telephone lines or wires. (Id. at ¶ 18). Enhanced services include features such as voice mail. (Id.).

[3] AstroTel's Amended Complaint also contains "Count 14" in which AstroTel requests a permanent injunction. As ***HN1***[] a demand for relief is not a complaint count, it is not necessary to examine AstroTel's request for injunctive relief under the rubric of *Rule 12(b)(6), Fed.R.Civ.P.*

> HN3[] While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)(internal citations omitted). Further, courts are not "bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*.

By attaching various documents to the Motion to Dismiss and by referencing facts and legal actions, including arbitration proceedings, not mentioned in the Amended Complaint, Verizon has invited the Court to broaden the scope of its review beyond the four corners of **[*6]** the Amended Complaint. The Court declines to do so. [4]

III. Analysis

A. Antitrust Liability under Trinko

Verizon challenges the sufficiency of AstroTel's antitrust claims on the basis of *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408-09, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* and its progeny. In a case with strikingly similar facts to the present suit, the Trinko Court emphasized that ***HN4***[] competitors in the telecommunications industry have no duty to cooperate with one another. [5] *540 U.S. at 408*. The Trinko Court also highlighted that courts should be hesitant to enforce antitrust liability where there is a complex regulatory scheme already in place (as we have in this case, with the Telecommunications Act of 1996). *540 U.S. at 411*.

HN6[] Although Verizon is generally correct in the assertion that Trinko forestalls antitrust claims based on refusals to deal with a competitor, Trinko does not prevent AstroTel from bringing antitrust claims based on other valid antitrust theories, to wit:

> In Trinko, the plaintiff brought a claim under *§ 2* of the Sherman Act, arguing that Verizon failed to fulfill orders of rival carriers in violation of a detailed regulatory scheme enacted by Congress. The Court found that the legislation at issue did not foreclose antitrust claims. Nevertheless, the Court ruled that the plaintiff failed to state a claim under traditional antitrust principles because plaintiff's claim would not have existed in the absence of the legislation—prior to the legislation, Verizon had no obligation to share its facilities with its competitors.

*Parsons v. Bright House Networks, Case No. 2:09-cv-267-AKK, 2010 U.S. Dist. LEXIS 55277, at *26-27 (N.D. Ala. Feb. 23, 2010)*(citing *Trinko, 540 U.S. at 404-11*)(internal citations and **[*8]** emphasis omitted). If AstroTel's antitrust allegations were limited to its complaint that Verizon failed to share its essential facilities and otherwise failed to deal with AstroTel, the Court would end its antitrust analysis here, based on Trinko. However, the Amended Complaint raises other antitrust claims that do not sound in failure to deal with a competitor, such as disparagement, monopolization, tying, and price squeezing. Accordingly, the Court declines to dismiss the antitrust claims based on Trinko's holding.

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[4] Although the Court could consider the external documents and convert the Motion to Dismiss into a Motion for Summary Judgment pursuant to *Rule 12(d), Fed.R.Civ.P.*, the Court determines that it would not be appropriate to do so at this early juncture. The Court will give the parties an opportunity to conduct discovery before moving forward with Summary Judgment analysis.

[5] ***HN5***[] As a general matter, ***antitrust law*** "does not restrict the long recognized right of [a] trader or **[*7]** manufacturer engaged in . . . business, freely to exercise his own independent discretion as to the parties with whom he will deal." *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*.

1. Count 1 - Monopolization

HN7[] *Section 2* of the Sherman Act prohibits monopolization, attempts to monopolize, and conspiracy to monopolize any part of trade or commerce. *15 U.S.C. § 2*. The Act and subsequent case law have distinguished anticompetitive behavior from "growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*.

HN8[] "The offense of monopolization under Sherman *§ 2* has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power." *Id.* Monopoly power is defined as the power to control prices **[*9]** or exclude competition, and may be inferred from a firm's predominant share of a market. *Id. at 571*. This market must be defined for both the product and the location where the alleged monopolizer is operating. *Smithkline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1063-64 (3d Cir. 1978)*.

AstroTel defines the product market as "(1) basic analog dial-tone service to residences and small to medium-sized businesses" and "(2) 'enhanced services'" and defines the geographic market as the State of Florida. (Doc. # 9 at ¶¶ 18, 24). AstroTel alleges that Verizon controls more than 75% of this relevant market, enough to infer that Verizon enjoys monopoly status under Grinnell. Verizon does not dispute the market definitions or the market share alleged by AstroTel. Therefore, prong one of the *Grinnell* monopolization test is met.

HN9[] The second prong of Grinnell requires the willful acquisition or maintenance of monopoly power. *384 U.S. at 570-571*. However, the line between lawful competitive conduct and unlawful monopolization is difficult to draw. As stated in *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458-59, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*, "It is sometimes difficult to distinguish robust competition from conduct with **[*10]** long-term anticompetitive effects." Unlawful anticompetitive conduct is "conduct without a legitimate business purpose that makes sense only because it eliminates competition." *Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1295 (11th Cir. 2004)*.

Examples of such unlawful anticompetitive conduct include instituting sham litigation, [6] providing false information to retailers, and systematically removing a competitor's display racks or products from retail establishments. [7] However, the Eleventh Circuit has remarked that "even an act of pure malice by one business competitor against another, without more, fails to state a claim under the federal antitrust laws." Id. (internal citation and quotation marks omitted).

The Court determines that AstroTel meets its burden for establishing monopolization with respect to the second prong, concerning willful maintenance of monopoly power. The Amended Complaint alleges several acts committed by Verizon including falsification of records for services that were not installed, billing for services that were not installed, misuse of confidential and protected information, price squeezing, and misrepresentation regarding AstroTel's services, and false billing. (Doc. # 9 at ¶¶ 8). At this preliminary juncture, these actions are sufficient to allege the type of anticompetitive behavior contemplated by the statute. The Motion to Dismiss is therefore denied as to Count 1 of the Amended Complaint.

2. Count 2 - Attempted Monopolization

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[6] *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*(defining "sham litigation" in the context of ***antitrust law***); *Andrx Pharms., Inc. v. Elan Corp., 421 F.3d 1227, 1233* (same).

[7] See, e.g., *Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 776, 783-88 (6th Cir. 2002)*(finding Sherman violation when defendant (1) deliberately provided false information to retail establishments to exclude competitors from the market and (2) removed **[*11]** the competitor's point of sale racks from retail establishments).

HN10[] To state a claim for attempted monopolization, AstroTel must show "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, 506 U.S. at 456*.

Anticompetitive conduct is "conduct which unfairly tends to destroy competition itself. *Id. at 458*. **[*12]** In addition, ***antitrust law*** was created "for the protection of *competition* not *competitors*." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*(emphasis in original). To be actionable, Verizon's conduct "must harm the competitive *process* and thereby harm consumers . . . . Harm to one or more *competitors* [does] not suffice." *United States v. Microsoft Corp., 253 F.3d 34, 58, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*(emphasis added). As noted above, this Court has preliminarily determined that AstroTel has sufficiently alleged that Verizon engaged in anticompetitive conduct.

HN11[] A plaintiff claiming attempted monopolization must allege that the defendant specifically intended to control prices or destroy competition and took action to effectuate that result. *Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 626, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*. AstroTel describes Verizon's "deliberate," "intentional," and "conscious strategy" to maintain its monopoly in the detailed, 54-page Amended Complaint. (Doc. # 9 at ¶ 8). Among other allegations, AstroTel complains that Verizon has utilized "a variety of tactics with one unshakeable goal: to protect and defend the monopoly that it inherited and to defeat and dismantle competition **[*13]** in any possible manner. To achieve this goal, Verizon has undertaken a variety of actions for the sole purpose of preventing the erosion of its monopoly power." Id. at ¶ 30.

Verizon's actions as alleged in the Amended Complaint are sufficient to establish the specific intent necessary to support AstroTel's claim. Thus, AstroTel meets the pleading requirements to state a claim for attempted monopolization under Sherman *§ 2*. The Court therefore denies the Motion to Dismiss as to Count 2 of the Amended Complaint.

3. Count 3 - Monopoly Leveraging

HN12[] Monopoly leveraging involves a firm using its market power in one market to gain more market share in another market, other than by competitive means. See *Aquatherm Indus., Inc. v. Fla. Power & Light Co., 145 F.3d 1258, 1262 (11th Cir. 1998)*.

Eastman Kodak Co. v. Xerox Corp., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992), provides an example of monopoly leveraging. In Eastman, the Kodak sold copiers to customers, allowing the customers to service their own machines or go through an independent service organization. *Id. at 456*. Once Kodak achieved substantial sales, it claimed all of the repair work for itself. Id. The court found that this move had the potential to raise the **[*14]** total cost of the copier/service package above the competitive level and above the price that Kodak could have charged had it begun with the copier/service package from the outset. Id.

Here, AstroTel alleges that Verizon used its market power in the basic services market to gain an advantage in the enhanced services market. (Doc. # 9 at ¶¶ 64-67). Specifically, AstroTel alleges that Verizon has denied and delayed AstroTel's ability to combine basic and enhanced services by increasing costs and limiting access to information. (Id.). At this preliminary juncture, the Court determines that AstroTel has satisfied its burden. Accordingly, Count 3 of the Amended Complaint survives the Motion to Dismiss.

4. Count 4 - Tying

Count 4 of AstroTel's Amended Complaint alleges Verizon's violation of Sherman *§ 1* by tying internet and television services with basic local telephone service. (Doc. # 9 at ¶ 67). ***HN13***[] Tying is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*.

HN14[] Not all tying arrangements violate the Sherman Act; a plaintiff must allege five elements of an illegal **[*15]** tying arrangement: (1) an actual tying and tied product, (2) some evidence of coercion showing that the seller in fact forced the buyer to purchase the tied product, (3) some evidence that the seller has sufficient market power to carry out the coercion, (4) anticompetitive effects in the tied market, and (5) more than an insubstantial amount of interstate commerce in the tied product market. *Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502-03 (11th Cir. 1985)*.

HN15[] The essential nature of a tying arrangement requires that the products in the first element be distinct. *N. Pac. Ry. Co., 356 U.S. at 5*. Distinctness in tying claims rests on the character of demand for the two items, not just the functional relationship between them. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 19, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, abrogated on other grounds by *Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. AstroTel alleges that Verizon is tying its internet and television service to the enhanced and basic telephone services. (Doc. # 9 at ¶ 72). This allegation is sufficient to meet the first element of a tying claim.

Although AstroTel has alleged tied services, the Court agrees with Verizon that **[*16]** "[t]he complaint fails to plead specific factual allegations regarding . . . anticompetitive effects, or level of involvement in interstate commerce . . . Furthermore, the complaint alleges no coercion by Verizon that could have forced customers to purchase the tied product." (Doc. # 27 at 13). Therefore, the Court dismisses Count 4 of the Amended Complaint without prejudice and with leave to Amend.

5. Civil RICO - Count 5

HN16[] "To state a RICO claim, a plaintiff must plead (1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly [participates in the specific prohibited activity in] (6) an 'enterprise' (7) [that affects] interstate or foreign commerce." *McCulloch v. PNC Bank Inc., 298 F.3d 1217, 1225 (11th Cir. 2002)*. Verizon has challenged the sufficiency of elements four and six arguing that "the complaint fails to adequately plead the predicate acts of racketeering activity." (Doc. # 27 at 14).

In the Amended Complaint, AstroTel alleges that Verizon has engaged in the predicate acts of mail fraud pursuant to *18 U.S.C. § 1341*, and wire fraud pursuant to *18 U.S.C. § 1343*. (Doc. # 9 at ¶ 81). **[*17]** *HN17*[] The federal RICO statute includes both mail and wire fraud in the definition of "racketeering activity." *18 U.S.C. § 1961(1)(B)*.

However, *HN18*[] AstroTel's allegations of fraud must not only comply with the pleading requirements articulated in *Twombly* and Iqbal but also with the heightened pleading standard of *Rule 9(b), Fed.R.Civ.P.*, which require a party alleging fraud to "state with particularity" the circumstances underlying the fraud claim. *Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1290 (11th Cir. 2010)*. To meet this burden, AstroTel must allege: "(1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled [AstroTel]; and (4) what [Verizon] gained by the alleged fraud." *Id. at 1291*.

AstroTel has failed to carry its burden regarding the predicate acts of mail and wire fraud. The Amended Complaint bases the predicate acts upon "continued submission of false and fraudulent invoices and other information to AstroTel." (Doc. # 9 at ¶ 82). The most specific allegation simply alleges that Verizon "supplied false bills to AstroTel for services it has not ordered **[*18]** or received, services which were ordered but never provided, services which had been previously ordered disconnected, or services billed at rates substantially higher than those approved by state regulators." (Id. at ¶ 8(k)). AstroTel fails to plead the necessary "who, what, when, where, and how" of the alleged fraud as required by *Rule 9(b)*. See *Mizzaro v. Home Depot, Inc., 544 F.3d 1230, 1237 (11th Cir. 2008)*. As a result, the Court dismisses Count 5 of the Amended Complaint without prejudice and with leave to amend.

6. Count 6 - Lanham Act

The Lanham Act prohibits false advertising as follows:

> ***HN19***[] Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—in *commercial advertising or promotion*, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(B)(emphasis **[*19]** added).

Here, Verizon contends that AstroTel cannot meet the requirement that the alleged representations be made in an advertisement or promotion. ***HN20***[] Although the Lanham Act does not define either "advertising" or "promotion," courts within the Eleventh Circuit use the following four-part test set forth in *Gordon & Breach Science Publishers S.A. v. American Institite of Physics and American Physical Society, 859 F. Supp. 1521, 1535-36 (S.D.N.Y. 1994)*, in determining whether a representation falls within the ambit of the Lanham Act:

> In order for representations to constitute "commercial advertising or promotion" under [the Lanham Act], they must be: (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services. While the representations need not be made in a "classical advertising campaign," but may consist instead of more informal types of "promotion," the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

See *Futuristic Fences, Inc. v. Illusion Fence Corp., 558 F. Supp. 2d 1270, 1279 (S.D. Fla. 2008)*(finding **[*20]** that the Gordon four-part test has been adopted by the majority of other circuits and is utilized by the district courts within the Eleventh Circuit).

AstroTel bases its Lanham Act allegations on: (1) instances where Verizon has characterized AstroTel as a "middleman," (2) Verizon's communications to AstroTel's customers about Verizon's superior service, and (3) Verizon's representations to AstroTel's customers that AstroTel did not pay its bills. (Doc. # 9 at ¶¶ 8(i)-(j), 9). The Court finds that these communications do not rise to the level necessary to constitute an advertisement or promotion under the Lanham Act because the communications were not disseminated sufficiently to the relevant purchasing public within the telecommunications industry. See *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 942 F. Supp. 209, 216 (S.D.N.Y. 1996)*(holding that an employee's disparaging comments to twelve customers and nine investigators was not an advertising or promotion under the Lanham Act because the relevant purchasing public was comprised of thousands of customers).

AstroTel has failed to state a claim under the Lanham Act because it did not sufficiently allege that Verizon's conduct **[*21]** constituted an advertisement or promotion. Thus, Count 6 of the Amended Complaint is dismissed without prejudice and with leave to amend.

7. Count 7 - Tortious Interference with a Contract

HN21[] In order to properly plead a claim for tortious interference with a contractual or business relationship under Florida law, a plaintiff must assert: "(1) the existence of a business relationship that affords the plaintiff existing or prospective legal rights; (2) the defendant's knowledge of the business relationship; (3) the defendant's intentional and unjustified interference with the relationship; and (4) damage to the plaintiff." *Int'l Sales & Serv., Inc. v. Austral Insulated Prods., Inc., 262 F.3d 1152, 1154 (11th Cir. 2001)* (quoting *Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So. 2d 812, 814 (Fla. 1994))*.

AstoTel has alleged facts sufficient to survive Verizon's motion to dismiss. Verizon allegedly interfered with relationships between AstroTel and at least one customer. (Doc. # 9 at ¶ 96). Although AstroTel does not plead specific customer contracts that were injured, that is not necessary at this point in the litigation. AstroTel meets the remaining requirements by alleging that Verizon **[*22]** knew of this relationship and intentionally interfered with it, resulting in the customer switching from AstroTel to Verizon. (Doc. # 9 at ¶ 96-100). Count 7 of the Amended Complaint thus survives Verizon's Motion to Dismiss.

8. Count 8 - Interference with Prospective Business Relations

AstroTel alleges that Verizon intentionally excluded AstroTel from competing in the Florida region and, as a result, improperly interfered with AstroTel's prospective business relations with customers. (Doc. # 9 at ¶¶ 105-06). ***HN22***[] A claim for interference with a prospective business relation will lie if the parties' understanding would have been completed if not for the defendant's intervention. *Collins & Co. v. City of Jacksonville, 38 F. Supp. 2d 1338, 1347 (M.D. Fla. 1998)*.

However, "No cause of action exists for tortious interference with a business's relationship to the community at large." *Ethan Allen, Inc., 647 So. 2d at 815*. Rather than alleging that Verizon interfered with an identifiable prospective business relationship, AstroTel has alleged that Verizon interfered with its ability to do business in general. Accordingly, AstroTel failed to allege facts sufficient to support this claim. Count 8 of **[*23]** the Amended Complaint is accordingly dismissed without prejudice and with leave to amend.

9. Count 9 - Unfair Competition

HN23[] Unfair competition is a creature of common law and serves as an "umbrella for all statutory and nonstatutory causes of action arising out of conduct that is contrary to honest practice in industrial and commercial matters." *Third Party Verification, Inc. v. Signaturelink, Inc., 492 F. Supp. 2d 1314, 1325 (M.D. Fla. 2007)*(internal citation omitted). ***HN24***[] "To state a claim for unfair competition under Florida common law a party must plead (1) deceptive or fraudulent conduct of a competitor and (2) likelihood of consumer confusion." *Id. at 1324*.

AstroTel has met its burden of pleading deceptive or fraudulent conduct of a competitor. The statements by Verizon employees to AstroTel customers are sufficient to meet the federal pleading standards. (Doc. # 9 at ¶ 8(i)). AstroTel has also met its burden in pleading a likelihood of consumer confusion. The nature of the statements to AstroTel customers, including an assertion that AstroTel is a "useless middleman," has the possibility of confusing AstroTel customers about the nature of AstroTel's business. (Id.). Accordingly, Count **[*24]** 9 of the Amended Complaint survives Verizon's Motion to Dismiss.

10. Count 10 - Business Defamation and Disparagement

Verizon has allegedly made several false statements and misrepresentations about AstroTel to AstroTel's customers. (Doc. # 9 at ¶¶ 8; 116). AstroTel bases its claim for business defamation and disparagement on these statements. (Id.). ***HN25***[] "The reputation of a corporation can be injured by a false publication of defamatory matter, which prejudices its trade or business, or deters third persons from dealing with it." *St. Paul Fire & Marine Ins. Co. v. Naples Cmty. Hosp., Inc., 585 So. 2d 374, 376 (Fla. 2d DCA 1991)*. AstroTel has sufficiently pled facts to support a claim for defamation and disparagement. The Amended Complaint contains numerous allegations that Verizon made false representations about AstroTel and that those representations have harmed AstroTel's business. (Doc. # 9 at ¶¶ 116-20). Thus, Count 10 survives Verizon's Motion to Dismiss.

11. Count 11 - Civil Conspiracy

AstroTel alleges that Verizon entered into a civil conspiracy with "other defendants" to "unlawfully depriv[e] AstroTel of its legal rights." (Doc. # 9 at ¶ 49).

> ***HN26***[] A civil conspiracy requires: (a) an agreement **[*25]** between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.

Nationwide Mut. Co. v. Ft. Myers Total Rehab Ctr., Inc., 657 F. Supp. 2d 1279, 1291 (M.D. Fla. 2009) (citing *Charles v. Fla. Foreclosure Placement Ctr., LLC, 988 So. 2d 1157, 1159-60 (Fla. 3d DCA 2008))*. AstroTel's civil conspiracy claim fails because, under the facts and circumstances alleged in the Amended Complaint, it cannot meet the first element—an agreement between two or more parties.

The defendants in this case include Verizon Communications, Inc. and Verizon Florida, LLC. (Doc. # 9 at ¶ 2). As previously explained, Verizon Florida is a subsidiary of Verizon Communications. (Id.). ***HN27***[] Pursuant to the intra-corporate conspiracy doctrine, alleged agreements between an employee and the company the employee works for cannot form the basis for a civil conspiracy claim. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*(holding that "[t]he officers of a single firm are not separate economic actors pursuing separate economic interests, **[*26]** so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals").

This doctrine also applies to a parent-subsidiary relationship: "there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor [and] the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise." *Id. at 770-71*. [8] Therefore, the Court dismisses Count 11, civil conspiracy, without prejudice and with leave to amend.

12. Count 12 - Unjust Enrichment

AstroTel alleges that Verizon unjustly enriched itself by accumulating profits from unfairly appropriated customers. (Doc. # 9 at ¶¶ 125-27).

> ***HN29***[] To state a claim **[*27]** for unjust enrichment, a plaintiff must plead the following elements: 1) the plaintiff has conferred a benefit on the defendant; 2) the defendant has knowledge of the benefit; 3) the defendant has accepted or retained the benefit conferred; and 4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it.

Baptista v. JP Morgan Chase Bank, N.A., 640 F.3d 1194, 1198 at n.3 (11th Cir. 2011). AstroTel fails to plead facts sufficient to meet the first element of unjust enrichment. The Amended Complaint contains no allegation of a benefit conferred from AstroTel to Verizon but instead, business profits obtained from customers "unjustly appropriated" from AstroTel. (Doc. # 9 at ¶¶ 125-27). AstroTel has not conferred a benefit on Verizon under these facts.

In addition, it should be noted that ***HN30***[] "Liability in unjust enrichment has nothing to do with fault." *Tilton v. Playboy Entm't Grp., Inc., 8:05-cv-692-T-30TGW, 2007 U.S. Dist. LEXIS 1393, 2007 WL 80858, at *3 (M.D. Fla. Jan. 8, 2007)* (citations omitted). Indeed, an unjust enrichment claim "should be premised on circumstances under which it would be inequitable for the defendant to retain the benefit **[*28]** without paying for it." Id. In other words:

> [t]he law of unjust enrichment is concerned solely with enrichments that are unjust independently of wrongs and contracts. When the plaintiff relies on a breach of a contract to supply the "unjustness" of the defendant's holdings, the right on which he or she relies arises from the breach of the contract, not from an unjust

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[8] At this juncture, the Court is not certain as to whether Verizon Florida LLC is a wholly owned subsidiary. ***HN28***[] If it is wholly owned by Verizon Communications, the intra-corporate conspiracy doctrine cannot be overcome. However, if is a not a wholly owned subsidiary, AstroTel may be able to plead factors showing "separateness of [the] subsidiary from its parent company" in order to overcome the doctrine. *Copperweld, 467 U.S. at 772, at n. 18*.

> enrichment; analogously, when the plaintiff relies on a wrong to supply the "unjust factor," the causative event is a wrongful enrichment rather than an unjust enrichment.

Flint v. ABB, Inc., 337 F.3d 1326, 1330 n.2 (11th Cir. 2003). "The paradigm examples of unjust enrichment are mistaken transfers." *Guyana Tel. & Tel. Co., Ltd. v. Melbourne Intern. Commc'ns, Ltd., 329 F.3d 1241, 1245 n.3 (11th Cir. 2003)*. "Where a plaintiff predicates their unjust enrichment claim on wrongful conduct of a defendant, then the plaintiff's right of recovery, if any, arises from the wrong of the alleged tort rather than unjust enrichment." *Tilton, 2007 U.S. Dist. LEXIS 1393, 2007 WL 80858, at *3*.

Here, AstroTel's unjust enrichment claim is not based on a mistake by which Verizon unjustifiably came to hold AstroTel's property and should be required to return it. Rather, **[*29]** AstroTel's claim is based upon Verizon's alleged wrongful conduct. In essence, AstroTel has not "conferred" any benefit on Verizon, but instead has had a benefit taken away from it by Verizon's alleged wrongful conduct. ***HN31***[] "As soon as a claimant relies on a wrong to supply the unjust factor, the right on which he relies arises from that wrong, not from unjust enrichment." *Guyana, 329 F.3d at 1245 n.3*. Thus, AstroTel's right of recovery, if any, for the alleged wrongful conduct of Verizon arises in tort or statutory law, which, if proven, might entitle AstroTel to damages, rather than unjust enrichment. Since the law of unjust enrichment is concerned solely with enrichments that are unjust independent of alleged wrongs, AstroTel's unjust enrichment claim must be dismissed.

Accordingly, the Court dismisses Count 12 of the Amended Complaint without prejudice and with leave to amend.

13. <u>Count 13 - Equitable Accounting</u>

AstroTel requests an equitable accounting of "the charges that Verizon contends [AstroTel] owes, the amount of overcharges by Verizon, or individualized charges pertaining to particular network facilities." (Doc. # 9 at ¶ 130). ***HN32***[] To successfully plead a claim for equitable accounting **[*30]** under Florida law, a plaintiff must allege that (1) a fiduciary relationship or complex transaction exists, and (2) a remedy at law would be inadequate. *Zaki Kulaibee Establishment v. McFlicker, 788 F. Supp. 2d 1363, 1370 (S.D. Fla. 2011)*.

AstroTel failed to plead the existence of a fiduciary relationship.

> ***HN33***[] A fiduciary relationship may be either express or implied. Express fiduciary relationships are created by contract, such as principal/agent, or can be created by legal proceedings in the case of a guardian/ward. A fiduciary relationship which is implied in law is based on the circumstances surrounding the transaction and the relationship of the parties and may be found when "confidence is reposed by one party and a trust accepted by the other."

Maxwell v. First United Bank, 782 So. 2d 931, 932 (Fla. 4th DCA 2001)(internal citations omitted). The Amended Complaint does not describe such a relationship. In addition, while the transaction at issue may be sufficiently complex to warrant an equitable accounting, AstroTel has not demonstrated that a remedy at law would be inadequate. Count 13 of the Amended Complaint, for equitable accounting, is accordingly dismissed without prejudice and **[*31]** with leave to amend.

Accordingly, it is

ORDERED, ADJUDGED, and **DECREED**:

(1) The Motion to Dismiss is **GRANTED** without prejudice with respect to Counts 4-6, 8, and 11-13 of the Amended Complaint. The Motion to Dismiss is otherwise denied.

(2) AstroTel may file a Second Amended Complaint by May 15, 2012.

DONE and **ORDERED** in Chambers in Tampa, Florida, this <u>4th</u> day of May 2012.

/s/ Virginia M. Hernandez Covington

VIRGINIA M. HERNANDEZ COVINGTON

UNITED STATES DISTRICT JUDGE

LexisNexis®

Liu v. Amerco

United States Court of Appeals for the First Circuit

May 4, 2012, Decided

No. 11-2053

Reporter
677 F.3d 489 *; 2012 U.S. App. LEXIS 9172 **; 2012-1 Trade Cas. (CCH) P77,919; 2012 WL 1560170

MARCIA MEI-LEE LIU, individually and on behalf of a class of all others similarly situated, Plaintiff, Appellant, v. AMERCO; U-HAUL INTERNATIONAL, INC., Defendants, Appellees.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. George A. O'Toole, Jr., U.S. District Judge.

Mei-Lee Liu v. Amerco, 2011 U.S. Dist. LEXIS 93641 (D. Mass., Aug. 22, 2011)

Core Terms

rentals, prices, truck, competitor, rates, damages, percent, conspire, collude, regional manager, increased price, district court, fix prices, consumers, increases, one-way

LexisNexis® Headnotes

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN1[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

Section 5 of the Federal Trade Commission Act (FTC Act), *15 U.S.C.S. § 45(a)(1)*, forbids unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN2[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

Mass. Gen. Laws ch. 93A, like § 5 of the Federal Trade Commission Act (FTC Act), *15 U.S.C.S. § 45(a)(1)*, prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce, *Mass. Gen. Laws ch. 93A, § 2(a)*, but also provides a right of action to consumers and permits class actions. *Mass. Gen. Laws ch. 93A, § 9*.

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

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

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

Questions of law are reviewed de novo.

Civil Procedure > Special Proceedings > Class Actions > Class Action Fairness Act

HN4[] **Class Actions, Class Action Fairness Act**

Spielman holds that the plaintiff's own attorney's fees canbe included in a Mass. Gen. Laws ch. 93A claim but not those of the class; but Spielman was not dealing with the Class Action Fairness Act which looks to aggregated class damages to meet the $5 million threshold.

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

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

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

Price fixing is a per se offense, entailing both criminal and civil liability under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

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

Criminal Law & Procedure > ... > Inchoate Crimes > Solicitation > Elements

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

HN6[] **Sherman Act, Scope**

Section 1 of the Sherman Act, , *15 U.S.C.S. § 1*, does not condemn an attempt to conspire, nor a solicitation to conspire; there is no general federal attempt statute; and the general solicitation statute, *18 U.S.C.S. § 2*, is violated only if the underlying crime is completed. The federal mail and wire fraud statutes, *18 U.S.C.S. §§ 1341 et seq.*, have sometimes been deployed against attempted price-fixing, but have no civil-remedy provisions.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN7[] Scope, Monopolization Offenses

Section 2 of the Sherman Antitrust Act, 15 U.S.C.S. § 2, does cover attempts to monopolize.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN8[] Deceptive & Unfair Trade Practices, Federal Trade Commission Act

While an unsuccessful attempt at price fixing is not a violation of § 1 of the Sherman Act, § 5 of the Federal Trade Commission Act, 15 U.S.C.S. § 45(a)(1), embraces unilateral acts by one defendant; a proposal to engage in horizontal price fixing is dangerous merely because of its potential to cause harm to consumers if the invitation is accepted.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN9[] Deceptive & Unfair Trade Practices, Federal Trade Commission Act

Under 75 Fed. Reg. at 35034, invitations to collude increase the risk of anticompetitive harm to consumers, and as such, can violate § 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C.S. § 45(a)(1).

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

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

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN10[] Deceptive & Unfair Trade Practices, Federal Trade Commission Act

See Mass. Gen. Laws ch. 93A, § 2(b).

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

HN11[] Deceptive & Unfair Trade Practices, State Regulation

Assuming consumer harm were proved, the United States Court of Appeals for the First Circuit would expect Massachusetts courts to follow Fedral Trade Commission precedent that sensibly holds unlawful pernicious conduct with a clear potential for harm and no redeeming value whatever.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN12[] **Sherman Act, Scope**

Pure parallel pricing gambits in markets with few competitors are not easily regulated and are not automatically condemned under the Sherman Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN13[] **Cartels & Horizontal Restraints, Price Fixing**

A spurned attempt to fix prices standing alone would--because spurned--cause no direct harm to consumers.

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

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

HN14[] **Sherman Act, Scope**

Causation of damages is required for a chapter 93A claim.

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

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

HN15[] **Motions to Dismiss, Failure to State Claim**

Twombly and Iqbal require that facts and not mere generalities be set forth in a complaint, but only enough facts to make the claim plausible, and at this stage reasonable inferences are taken in favor of the pleader. The place to test factual assertions for deficiencies and against conflicting evidence is at summary judgment or trial.

Counsel: Charles E. Tompkins with whom Ian J. McLoughlin, Robert E. Ditzion and Shapiro Haber & Urmy LLP were on brief for appellant.

G. Patrick Watson with whom David A. Zetoony, Bryan Cave, LLP, W. Scott O'Connell and Nixon Peabody, LLP were on brief for appellees.

Judges: Before Boudin, Lipez and Thompson, Circuit Judges.

Opinion by: BOUDIN

Opinion

[*490] BOUDIN, Circuit Judge. On July 21, 2010, Marcia Liu filed a complaint in federal district court in Massachusetts charging Amerco, Inc. and its wholly owned subsidiary U-Haul International, Inc. **[*491]** --collectively "U-Haul"--with violating Massachusetts General Laws ch. 93A. The complaint asserted that U-Haul had engaged in what was in substance an attempted price-fixing scheme and the complaint sought damages on behalf of both Liu and a large class of persons who rented U-Haul vehicles for certain trips within a specified period.

Ordinarily, when a seller of goods or services attempts to fix prices with a competitor but fails in that endeavor, no consumer is damaged; but Liu's complaint alleged peculiar facts not uncovered by Liu but recounted in documents **[**2]** stemming from an investigation by the Federal Trade Commission ("FTC"); the documents included the summary of a proposed consent order between U-Haul and the agency made public in the month before Liu filed her own law suit. *Federal Trade Commission, U-Haul Int'l, Inc. and AMERCO, 75 Fed. Reg. 35033, 35034 (June 21, 2010)* (hereinafter "FTC Summary").

According to the FTC complaint and the summary of the proposed consent order, in 2006 Edward Shoen--the chairman and president of Amerco and the chairman and chief executive officer of U-Haul--planned and took steps to implement a scheme to collude with U-Haul's major competitors--Avis Budget Group, Inc. ("Budget") and Penske Truck Leasing Co., L.P. ("Penske")--to raise prices in the market for one-way truck rentals. As summarized by the FTC, the initial strategy was straightforward:

> Mr. Shoen instructed U-Haul regional managers to raise rates for truck rentals, and then contact Budget to inform Budget of U-Haul's conditional rate increase and encourage Budget to follow, or U-Haul's rates would be reduced to the original level.
>
> At about the same time, Mr. Shoen also instructed local U-Haul dealers to communicate with their counterparts at **[**3]** Budget and Penske, with the purpose of re-enforcing the message that U-Haul had raised its rates, and competitors' rates should be raised to match the increased U-Haul rates.

FTC Summary, 75 Fed. Reg. at 35034.

According to the FTC, this "plan" was communicated to U-Haul's regional managers and local dealers in memoranda sent by Shoen in October and November of 2006.[1] The memoranda even included suggested talking points for managers making calls to competitors. The FTC recounted evidence from a U-Haul regional manager in Tampa, Florida, who corroborated the existence of the memoranda, confirmed that he acted in conformity with the plan as described, and wrote a follow-up email to U-Haul's senior executives describing his actions to implement the plan. *In re U-Haul Int'l, Inc., 2010 FTC LEXIS 61, 2010 WL 2966779 at *3*.

The FTC also set forth comments made by Shoen during an earnings conference call with analysts that took place on February 7, 2008. Shoen was allegedly aware that Budget would monitor the call, so he announced U-Haul's unilateral price increase and said that U-Haul would keep its prices at the elevated level if Budget responded in kind with rates that were **[*492]** within 3 to 5 percent of U-Haul's.[2] The FTC made no findings as to the consequences of the direct or indirect attempts, concluding that the overtures were unlawful regardless of whether the parties

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[1] The FTC complaint quoted specific portions of the memoranda. For example: "Budget continues in some markets to undercut us on One-Way rates. Either get below them or go up to a fair rate. Whatever you do, LET BUDGET KNOW. Contact a large Budget Dealer and tell them. Contact their company store and let the manager know . . . My direction is either get up to a fair rate or get down below the **[**4]** competitor. EITHER WAY, LET THEM KNOW." *In re U-Haul Int'l, Inc., 2010 FTC LEXIS 61, 2010 WL 2966779, at *2-3 (F.T.C. July 14, 2010)*.

[2] Specific examples of the comments included: "we're very, very much trying to function a price leader [sic] and not give away [market] share"; "me trying to get us to exercise price leadership every time we get what we consider to be an opportunity, it's another indicator to [Budget] as to, hey, don't throw the money away"; "[i]f [Budget] cave[s] on prices the net effect is we got less money"; "if [Budget] perceive[s] **[**5]** that we'll let them come up a little bit [on price], I remain optimistic they'll come up, and it has a profound effect on us." *In re U-Haul Int'l, Inc., 2010 FTC LEXIS 61, 2010 WL 2966779 at *4-5*.

reached and successfully implemented an agreement to collude on prices. FTC Summary, 75 Fed. Reg. at 35034-35.

The FTC concluded that U-Haul's "particularly egregious conduct," FTC Summary, 75 Fed. Reg. at 35035, violated **HN1**[] Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a)(1), which forbids "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." The proposed consent order provided injunctive relief designed to prevent U-Haul "from inviting collusion and from entering into or implementing a collusive scheme." FTC Summary, 75 Fed. Reg. at 35035. U-Haul consented to the relief sought, but did not admit either to the conduct or to the violation. In re U-Haul Int'l, Inc., 2010 FTC LEXIS 61, 2010 WL 2966779 at *20-21.

Liu's suit was a follow-on action brought after a proposed government consent decree--fairly common in antitrust cases; but, as the FTC Act contains no private right of action and the Sherman Act--which does create such a right--is of doubtful application to a failed attempt to conspire on prices, see note 4, below, Liu's suit rested **[**6]** instead on chapter 93A. **HN2**[] Chapter 93A, like section 5, prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce," Mass. Gen. Laws ch. 93A, § 2(a), but also provides a right of action to consumers and permits class actions. Id. § 9.

Liu alleged that U-Haul's "intentional and purposeful anticompetitive acts"--pertinently, the invitations to collude and U-Haul's price increases incident to those invitations--caused her to pay at least 10 percent more for two one-way truck rentals than she would have absent U-Haul's unlawful action. Chapter 93A is limited to transactions connected to Massachusetts, § 1(b); Liu's proposed class included "[a]ll persons who purchased one-way truck rentals from [U-Haul] for transportation to, from or within . . . Massachusetts between September 2006 and September 2008."

U-Haul filed a motion to dismiss for failure to state a claim, Fed. R. Civ. P. 12(b)(6), which the district court granted in a short written opinion. The district court assumed arguendo that an invitation to collude was actionable under chapter 93A; but it found that Liu had failed plausibly to allege injury, noting that she had **[**7]** failed to "set forth any facts about her own transactions, such as what she paid . . . or what available competitors' rates were at the time." Liu v. Amerco, No. 10-11221, 2011 U.S. Dist. LEXIS 93641 at *2 (D. Mass. Aug. 22, 2011).

Liu has now appealed, contending that her complaint did set forth a claim under chapter 93A and that it adequately alleged injury and should have survived the motion to dismiss. **HN3**[] Both issues raise questions of law that are reviewed de novo. Poirier v. Mass. Dep't of Corr., 558 F.3d 92, 94 (1st Cir. 2009); United States v. Troy, 618 F.3d 27, 35 (1st Cir. 2010). But **[*493]** we begin by noting sua sponte, as we are required to do, an unaddressed question as to the district court's subject matter jurisdiction.

Diversity of citizenship exists between Liu and the defendants, but there is no likelihood that damages for her two rentals would meet the ordinary requirement for diversity cases that the amount in controversy exceed $75,000. 28 U.S.C. § 1332(a). However, the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), provides an alternative basis for jurisdiction so long as (1) minimal diversity exists (as it does here) and (2) the amount in controversy for aggregated claims of the whole **[**8]** class exceeds $5 million. Id.

Liu has limited her class to rentals to, from or within Massachusetts during the period in which U-Haul prices were allegedly elevated. Questioned by the court at argument, Liu contended that the minimum statutory damages under chapter 93A--$25 per incident (which could potentially be trebled under that statute to $75, Mass. Gen. Laws ch. 93A, § 9(3)-(3A))--would exceed the minimum $5 million figure given the thousands of U-Haul rentals to, from and within Massachusetts that would likely be encompassed by the two year period.[3]

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[3] Whether prospective attorneys' fees would be included is a question we need not resolve. **HN4**[] Spielman v. Genzyme Corp., 251 F.3d 1, 7 (1st Cir. 2001), held that the plaintiff's own fees could be included in a chapter 93A claim but not those of the class; but Spielman was not dealing there with CAFA which looks to aggregated class damages to meet the $5 million threshold.

Given the good faith representations by Liu's counsel, which have not been challenged, see *Coventry Sewage Assocs. v. Dworkin Realty Co., 71 F.3d 1, 5-6 (1st Cir. 1995)*, we find the jurisdiction to exist. Further, the statutory damages are merely a minimum under chapter **[**9]** 93A; conceivably some of the class member rentals were for larger sums; and the 10 percent estimate of damages was seemingly a floor figure rather than a ceiling. It is not clear to a legal certainty that the amount in controversy is less than $5 million. *Id. at 6*. So we proceed to the merits.

The district court's dismissal rested solely on the lack of an adequate allegation of harm--the full, albeit brief, holding is quoted below--but defendants, while agreeing with the court that injury was inadequately alleged, also suggest that the allegations of wrongdoing fail to state a cognizable claim under chapter 93A. We decide both issues in the interest of judicial economy, see *New Hampshire Motor Transp. Ass'n. v. Flynn, 751 F.2d 43, 52 (1st Cir. 1984)* (Breyer, J.), and begin with the question of whether the alleged acts violate chapter 93A.

As alleged in the complaint, U-Haul is the largest U.S. provider of one-way truck rentals with about 54 percent of the market; Budget is their largest competitor, bringing their joint share to about 70 percent. But market size and definition would not matter under the antitrust laws if U-Haul's alleged proposal to fix prices had been accepted: U-Haul **[**10]** and Budget compete in truck rentals, and ***HN5***[] price fixing is a per se offense, *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223-24, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*, entailing both criminal and civil liability under section 1 of the Sherman Act, *15 U.S.C. § 1*.

HN6[] *Section 1* of the Sherman Act, however, does not condemn an attempt to conspire,[4] nor a solicitation to conspire, **[*494]** compare *18 U.S.C. § 373* (solicitation to commit a crime of violence); there is no general federal attempt statute; and the general solicitation statute, *18 U.S.C. § 2*, is violated only if the underlying crime is completed. *United States v. Korab, 893 F.2d 212, 213 (9th Cir. 1989)*. The federal mail and wire fraud statutes, *18 U.S.C. §§ 1341 et seq.*, have sometimes been deployed against attempted price-fixing, e.g. *United States v. Ames Sintering Co., 927 F.2d 232 (6th Cir. 1990)*, but have no civil-remedy provisions.

But ***HN8***[] while such an unsuccessful attempt is not a violation of *section 1* of the Sherman Act, section 5 of the FTC Act, *15 U.S.C. § 45(a)(1)*, embraces unilateral acts by one defendant, *FTC v. Brown Shoe Co., 384 U.S. 316, 322, 86 S. Ct. 1501, 16 L. Ed. 2d 587 (1966)*; a proposal to engage in horizontal price fixing is dangerous merely because of its potential to cause harm to consumers if the invitation is accepted; and the FTC's complaint in this case makes clear that it has adopted such a theory.[5] Nothing said by defendants suggests any obvious flaw in that position.

Chapter 93A's relevant language parallels that of section 5, and the Massachusetts legislature in chapter 93A provided that ***HN10***[] "[i]t is the intent of the legislature that in construing [the Act] . . . courts will be guided by the interpretations given **[**12]** by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act . . . ." *Mass. Gen. Laws ch. 93A, § 2(b)*. The courts have been thus guided. *In re TJX Cos. Retail Sec. Breach Litig., 564 F.3d 489, 495-97 (1st Cir. 2009)*; *Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53, 762 N.E.2d 303, 309 (Mass. 2002)*.

Defendants say that there is no Massachusetts decision finding that an unsuccessful attempt to fix prices violates chapter 93A; but naturally precedent is scarce since an unsuccessful attempt rarely causes damages. ***HN11***[] Assuming consumer harm were proved (a quite separate question), we would expect Massachusetts courts to follow FTC precedent that sensibly holds unlawful pernicious conduct with a clear potential for harm and no

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[4] ***HN7***[] Section 2 of the Sherman Antitrust Act, *15 U.S.C. § 2*, does cover "attempt[s] to monopolize"; and one circuit court did treat a failed attempt to conspire in a two-carrier market as attempt at "shared" monopolization, *United States v. Am. Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984)*--a debatable approach. VI Areeda ***Antitrust Law*** ¶ 1407 , at 36-39 (1986) **[**11]** .

[5] ***HN9***[] *FTC Summary, 75 Fed. Reg. at 35034* ("[I]nvitations to collude increase the risk of anticompetitive harm to consumers, and as such, can violate Section 5 of the FTC Act."); see also *id. at 35034 n.3* (listing prior FTC actions based on invitations to collude); In re Valassis Commc'ns, Inc., 2006 WL 1367833 (F.T.C. Apr. 19, 2006); *In re Stone Container Corp., 125 F.T.C. 853, 854 (1998)*.

redeeming value whatever. *In re TJX, 564 F.3d at 497*. If U-Haul did what is alleged, its conduct perfectly fits this paradigm.[6]

The **[**13]** alleged conduct is not mere oligopolistic pricing in which a unilateral price increase is made by a dominant player in the hope that competitors will follow with matching increases. ***HN12***[] Pure parallel pricing gambits in markets with few competitors are not easily regulated and are not automatically condemned under the Sherman Act. *Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*; see generally, VI Areeda, ***Antitrust Law*** ¶¶ 1432-33. What is alleged here are express proposals to a competitor **[*495]** to raise prices, which are unambiguous, more dangerous, and serve no proper purpose.

HN13[] A spurned attempt to fix prices standing alone would--because spurned--cause no direct harm to consumers. But here Liu alleged conduct that did not consist merely of unrequited proposals; it included as part of the plan unilateral increases by U-Haul as an indicator of its intentions and a target for increases by competitors. As alleged, the increases were part of an orchestrated illegal effort to conspire with Budget to raise prices, tainting the U-Haul increases even if Budget failed to follow them.

And if such harm did occur, recovery would not be barred by any notion that the harm was **[**14]** outside of the zone of interests which the statute was meant to protect. Cf. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. The very reason for chapter 93A to encompass a failed attempt to fix prices is because of the threat that the attempt could result in price increases. If Liu is correct, the attempt to conspire did result in just such harm.

Rule v. Fort Dodge Animal Health, Inc., 607 F.3d 250 (1st Cir. 2010), cited to us by U-Haul, did not involve an attempt to conspire with a competitor to raise prices; it concerned undisclosed risks. There, the defendant sold a medicine to prevent canine heartworms and, so far as anyone knows, the medicine did provide such protection to the plaintiff's dog. *Id. at 251-52*. The plaintiff's chapter 93A claim was that the medicine also had an undisclosed capacity to cause harm to the dog, although it was conceded that the medicine had not caused any harm to the plaintiff's dog. Id.

We concluded that no economic damage had been inflicted on the plaintiff under chapter 93A since plaintiff had gotten the protection sought and had suffered no detriment from the concealed **[**15]** latent defect. *Rule, 607 F.3d at 254-55*. In Rule, disclosure of the defect would not have lowered the price, but would instead have eliminated the product. *Id. at 253*. Here, by contrast, plaintiff has alleged that the defendants' attempted price fixing scheme directly raised the price charged by U-Haul and paid by Liu--economic damage by any test.

This brings us to the question whether Liu properly pled enough detail to show damages. The district judge, as already noted, rested his dismissal on the ground that Liu "has failed plausibly to allege an injury." *Liu, No. 10-11221, 2011 U.S. Dist. LEXIS 93641 at *2*. The court recognized that Liu had claimed to have undertaken two U-Haul rentals--one from New York to Massachusetts in 2007 and the other an intra-Massachusetts trip in 2008--but then explained why the court deemed this inadequate:

> The plaintiff does not set forth any facts about her own transactions, such as what she paid for her one-way truck rentals or what available competitors' rates were at the time. Even if U-Haul had committed an actionable wrong that had a price-raising effect generally on the national market, the basic facts about the plaintiff's individual transactions are necessary to **[**16]** judge whether she was in fact harmed by those general phenomena. Whether she overpaid, and whether such overpayment was caused by U-Haul's unrequited attempts to collude with Avis Budget Group, Inc., is left entirely to conjecture.

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[6] U-Haul argues that Liu must satisfy the FTC's "consumer injury test" to state a claim for unfairness under Chapter 93A. The test is limited to consumer unfairness claims and does not govern Liu's claim based on an alleged unfair method of competition. See FTC Policy Statement on Unfairness appended to *In re Int'l Harvester Co., 104 F.T.C. 949, 1070-76 (1984)*.

*2011 U.S. Dist. LEXIS 93641at *2*.

HN14[] Causation of damages is required for a chapter 93A claim, *Hershenow v.* ***[*496]*** *Enterprise Rent-A-Car Co., 445 Mass. 790, 840 N.E.2d 526, 532-33 (Mass. 2006)*; and Liu might (as the district court implied) have compared her rental price with that of Budget for comparable service if she knew what Budget was then charging. But a comparison is not the only way to show injury; and here Liu--relying on the FTC's allegations--asserted that U-Haul had raised its own prices and that these "price increases were themselves an essential element of the unlawful effort to collude."

The FTC had already pointed to evidence that Shoen "instructed U-Haul regional managers to raise rates for truck rentals, and then contact Budget to inform Budget of U-Haul's conditional rate increase and encourage Budget to follow," *FTC Summary, 75 Fed. Reg. at 35034*, and "also instructed local U-Haul dealers to communicate with their counterparts at Budget and Penske, with the purpose of re-enforcing the **[**17]** message that U-Haul had raised its rates, and competitors' rates should be raised to match the increased U-Haul rates." Id. These factual assertions were backed by references to specific documents uncovered in the FTC investigation.

The FTC's aim to achieve injunctive relief did not depend on proving price effects, and it pointed to only one written admission of impact: the regional manager in Florida, already mentioned, who reassured senior executives in writing that he had implemented the plan. But one may infer that managers and dealers generally did what the head of the company instructed.[7] If this is disputed, the matter can be resolved by evidence of U-Haul's managers and staff in Massachusetts and a review of its records of price changes there.

Additionally, the complaint (1) incorporates a graph of truck **[**18]** rental prices, of which U-Haul is described as a driver because of its large market share, showing a substantial jump of over 40 percent in the index from September 2006 to September 2008 followed by a substantial drop; and (2) describes a study comparing truck rental prices and car rental prices for the same period indicating that truck rental prices markedly diverge upward when compared to car rentals during the two year period of Liu's complaint.

Attributing the greater divergence to U-Haul's actions, Liu says that the economic analysis in the study suggests an overcharge of at least 10 percent. This exercise provides some further grounding for Liu's claim that U-Haul's representatives did increase prices in response to Shoen's directive and that prices remained at a super-competitive level for a considerable period and until natural market forces compelled U-Haul to roll them back. Taken with Shoen's instructions, this is hardly a complaint lacking in evidence of damage to Liu.

U-Haul's brief raises fair questions about the power of the analysis--for example, arguing that the indices used for truck rentals are not specific to U-Haul and clearly include rental of buses, truck tractors **[**19]** and semi-trailers in addition to the self-drive trucks mainly deployed by U-Haul and Budget. And U-Haul says it is unclear, and unproved, that passenger car rentals are a good yardstick for comparison, noting that input costs and demand **[*497]** may well vary as between the two industries.

HN15[] *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* and *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, require that facts and not mere generalities be set forth in a complaint, but only enough facts to make the claim plausible, and at this stage reasonable inferences are taken in favor of the pleader. *SEC v. Tambone, 597 F.3d 436, 441 (1st Cir. 2010)*. The place to test factual assertions for deficiencies and against conflicting evidence is at summary judgment or trial; Liu's complaint is not "threadbare or speculative." *Penalbert-Rosa v. Fortuno-Burset, 631 F.3d 592, 595 (1st Cir. 2011)*.

Of course, the underlying FTC allegations themselves remain to be proved: the consent decree is neither an adjudication nor an admission by U-Haul. But Liu's complaint does recite specific facts that make her claim plausible; and while damages to Liu are surely modest, class actions for damages that are significant only when

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[7] A manager might well have balked at calling Budget if the knowledge that price-fixing is a federal felony carrying a jail sentence has spread beyond lawyers. But managers could easily not understand that merely raising prices would be a basis for civil actions under section 5 and chapter 93A if the increases were part of Shoen's plan that the increases be accompanied by calls.

aggregated **[**20]** for the class are common. See *Skirchak v. Dynamics Research Corp., 508 F.3d 49, 58 (1st Cir. 2007)*. Whether this is a suitable case for a class action is not before us.

The judgment of the district court is vacated and the matter remanded for further proceedings consistent with this decision. Liu is entitled to costs on the appeal.

It is so ordered.

O'Brien v. Leegin Creative Leather Prods.

Supreme Court of Kansas

May 4, 2012, Opinion Filed

No. 101,000

Reporter

294 Kan. 318 *; 277 P.3d 1062 **; 2012 Kan. LEXIS 246 ***; 2012-1 Trade Cas. (CCH) P77,884; 2012 WL 1563976

SUE O'BRIEN, individually and on behalf of a class of similarly situated individuals, Appellants/Cross-appellees, v. LEEGIN CREATIVE LEATHER PRODUCTS, INC., Appellee/Cross-appellant.

Subsequent History: Appeal after remand at, Remanded by *O'Brien v. Leegin Creative Leather Prods., 2014 Kan. App. Unpub. LEXIS 221 (Kan. Ct. App., Apr. 4, 2014)*

Prior History: [*1]** Appeal from Sedgwick District Court; WILLIAM SIOUX WOOLLEY, RICHARD T. BALLINGER, and JEFFREY E. GOERING, judges.

Disposition: Reversed and remanded.

Core Terms

retailers, prices, price-fixing, products, pricing policy, damages, district judge, antitrust, consumers, luggage, discounting, summary judgment, vertical, statute of limitations, horizontal, full consideration, accessories, treble damages, combinations, manufacture, provisions, practices, rule of reason, commodity, parties, cases, district court, transportation, cross-appeal, contracts

LexisNexis® Headnotes

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

HN1[] **Trade Practices & Unfair Competition, State Regulation**

The Supreme Court of Kansas has observed generally that the Kansas Restraint of Trade Act, *Kan. Stat. Ann. § 50-101 et seq.*, is broad in scope but that the bulk of its provisions have not been meaningfully interpreted by Kansas courts.

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

Governments > Legislation > Interpretation

Governments > Courts > Judicial Precedent

HN2[] Trade Practices & Unfair Competition, State Regulation

While cases interpreting federal antitrust statutes may be persuasive authority for any state court interpreting its antitrust laws, such authority is not binding upon any court in Kansas interpreting Kansas antitrust laws.

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

Constitutional Law > Separation of Powers

Governments > Courts > Authority to Adjudicate

Governments > State & Territorial Governments > Legislatures

HN3[] Trade Practices & Unfair Competition, State Regulation

In relation to price-fixing practices specifically, the Supreme Court of Kansas concluded more than 50 years ago that it may not substitute its judgment for that of the legislature as to whether price fixing is good or bad for the economic life of the state. It is the role of the legislature, not the Court, to set antitrust policy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN4[] Vertical Restraints, Price Fixing

Price-fixing may be either vertical or horizontal. Vertical price-fixing involves participants at different rungs of the distribution ladder, e.g., a wholesaler and a retailer. Horizontal price-fixing involves participants who are at the same rung of the distribution ladder, e.g., two or more retailers.

Civil Procedure > Trials > Bench Trials

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

HN5[] Trials, Bench Trials

When neither party challenges the district court's findings of fact on appeal, they become conclusive for appellate review purposes.

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

HN6[] Entitlement as Matter of Law, Appropriateness

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN7[] **Summary Judgment, Evidentiary Considerations**

The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the summary judgment ruling is sought.

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

HN8[] **Burdens of Proof, Nonmovant Persuasion & Proof**

When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN9[] **Summary Judgment, Entitlement as Matter of Law**

On appeal, the Supreme Court of Kansas applies the same rules and where it finds reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.

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

HN10[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment should not be used to prevent the necessary examination of conflicting testimony and credibility in the crucible of a trial.

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

Governments > Legislation > Interpretation

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

HN11[] **Standards of Review, De Novo Review**

Statutory interpretation raises a question of law over which the Supreme Court of Kansas has unlimited review.

Governments > Legislation > Interpretation

HN12[] **Legislation, Interpretation**

The most fundamental rule of statutory interpretation is that the intent of the legislature governs if that intent can be ascertained. An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. When a statute is plain and unambiguous, the court must give effect to its express language, rather than determine what the law should or should not be. The court will not speculate on the legislative intent and will not read the statute to add something not readily found in it. If the statute's language is clear, there is no need to resort to statutory construction.

Governments > Legislation > Interpretation

HN13[] Legislation, Interpretation

Only if the statute's language or text is unclear or ambiguous does the court employ canons of construction, legislative history, or other background considerations to divine the legislature's intent and construe the statute accordingly.

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

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN14[] Standards of Review, Abuse of Discretion

Trial judges are afforded substantial discretion in determining whether a class should be certified. The amount and degree of judicial discretion will vary depending on the character of the question presented for determination. In general, when a discretionary decision is made within the legal standards and takes the proper factors into account in the proper way, the trial court's decision is protected even if not wise. However, abuse is found when the trial court has gone outside the framework of legal standards or statutory limitations, or when it fails to properly consider the factors on that issue given by the higher courts to guide the discretionary determination.

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

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN15[] Standards of Review, Abuse of Discretion

While the trial court has substantial discretion in determining whether a class should be certified, the provisions of *Kan. Stat. Ann. § 60-223* must be applied and rigorously analyzed. In conducting its analysis, the trial court should consider evidence when submitted by the parties and make those factual determinations necessary to a determination of whether the prerequisites for a class action are met. The presence of individual questions, while tending to diminish the weight of class facts, does not necessarily defeat a prima facie showing the class prerequisites are satisfied or mean that there has been an abuse of discretion in certifying the class.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN16[] Regulated Practices, Price Fixing & Restraints of Trade

See *Kan. Stat. Ann. § 50-101*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN17[] Regulated Practices, Price Fixing & Restraints of Trade

Kan. Stat. Ann. § 50-102 denies all persons within the state the right to form or be in any manner interested, either directly or indirectly, as principal, agent, representative, consignee or otherwise, in any trust as defined in Kan. Stat. Ann. § 50-101.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN18[] Regulated Practices, Price Fixing & Restraints of Trade

See Kan. Stat. Ann. § 50-112.

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

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

HN19[] Private Actions, Standing

See Kan. Stat. Ann. § 50-108.

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

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

HN20[] Private Actions, Purchasers

See Kan. Stat. Ann. § 50-115.

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

HN21[] Private Actions, State Regulation

See Kan. Stat. Ann. § 50-147.

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

HN22[] Private Actions, State Regulation

See Kan. Stat. Ann. § 50-161.

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

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

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

HN23[] State Regulation, Claims

The concept of antitrust injury invoked in the district court comes from federal antitrust jurisprudence. Essentially, it equates to the Kansas concept of causation, or the requirement that a plaintiff's theory of damages correspond to an economic effect that the statute or case law rule invoked as the basis for liability aims to prevent.

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

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

HN24[] State Regulation, Claims

Under the plain language of *Kan. Stat. Ann. § 50-101*, there are several optional theories under which a Kansas Restraint of Trade Act, *Kan. Stat. Ann. § 50-101 et seq.*, plaintiff may proceed. Under the most forgiving of those theories, a plaintiff must prove the existence of a trust for the purpose to fix any standard or figure, whereby price to the public shall be, in any manner, controlled or established. *Kan. Stat. Ann. § 50-101* Fourth. As defined in *§ 50-101*, to establish the existence of a trust, a plaintiff need only show a combination of capital, skill, or acts, by two or more persons. A plaintiff need not show a relationship rising to the level of an agreement. Furthermore, it is enough to demonstrate that the combination is for the purpose to fix prices; a plaintiff does not have to show that the combination actually succeeds in increasing prices. "For the purpose" contemplates a subjective standard, one that requires examination of the intent behind a defendant's behavior.

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

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

HN25[] State Regulation, Claims

Under the plain language of *Kan. Stat. Ann. § 50-112*, there are alternate theories under which a Kansas Restraint of Trade Act, *Kan. Stat. Ann. § 50-101 et seq.*, plaintiff may proceed: A plaintiff may prove the existence of an arrangement, contract, agreement, trust, or combination designed to advance, reduce, or control price, or one that tends to advance, reduce, or control price. Mere arrangements between persons are within the scope of the statute; again, a plaintiff does not have to show a relationship rising to the level of an agreement. In addition, it is enough to show that the arrangement is designed to or tends to control prices; again, a plaintiff does not have to show that the arrangement actually succeeds in increasing prices. Like "for the purpose" in *Kan. Stat. Ann. § 50-101*, the phrase "designed to" contemplates a subjective standard. On the other hand, "tend to" contemplates an objective standard, one that requires examination of the defendant's behavior to discern whether it would reasonably be expected to produce a particular result, regardless of the defendant's intention.

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

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

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

HN26[] **State Regulation, Claims**

Under the plain language of *Kan. Stat. Ann. §§ 50-108*, *50-115*, and *50-161*, a plaintiff must show that the plaintiff was injured or damaged by the defendant's forbidden behavior.

Evidence > Admissibility > Circumstantial & Direct Evidence

HN27[] **Admissibility, Circumstantial & Direct Evidence**

Circumstantial evidence can serve as proof of the elements of a theory of liability even though other reasonable theories are not excluded by such evidence.

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

Evidence > Admissibility > Circumstantial & Direct Evidence

HN28[] **State Regulation, Claims**

Neither the Kansas Restraint of Trade Act, *Kan. Stat. Ann. § 50-101 et seq.*, nor the Supreme Court of Kansas's limited caselaw interpreting it requires concrete evidence to prove injury or damage in the form of a benchmark analysis to avoid summary judgment on antitrust injury.

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

HN29[] **State Regulation, Claims**

Neither *Kan. Stat. Ann. §§ 50-101* nor *50-112* mentions reasonableness or a rule of reason. Rather, *Kan. Stat. Ann. § 50-101(d)* provides that any such combinations are hereby declared to be against public policy, unlawful and void, and *§ 50-102* denies the right to form or to be in any manner interested, either directly or indirectly, as principal, agent, representative, consignee or otherwise, in any trust as defined in *§ 50-101*. *Section 50-112* provides that all arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles are hereby declared to be against public policy, unlawful and void.

Governments > Legislation > Interpretation

HN30[] **Legislation, Interpretation**

Federal precedents interpreting, construing, and applying federal statutes have little or no precedential weight when the task is interpretation and application of a clear and dissimilar Kansas statute.

Governments > Courts > Judicial Precedent

HN31[] **Courts, Judicial Precedent**

Although stare decisis is not an inexorable command, the Supreme Court of Kansas does not lightly overrule its prior cases.

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

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

HN32[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Careful examination of Supreme Court of Kansas precedent demonstrates that the reasonableness rubric they instituted had and has nothing to do with evaluation of an alleged price-fixing arrangement.

Governments > Legislation > Interpretation

HN33[] **Legislation, Interpretation**

Under the pattern for interpretation of statutes that the Supreme Court of Kansas has now firmly established, it is loathe to read unwritten elements into otherwise clear legislative language. The Court takes the legislature at its word, unless there is ambiguity, because the legislature, unlike the judiciary, is one of the branches of government charged with development of public policy on behalf of the electorate and because the Court's deference to clear statutory language leads to long-term predictability and stability in Kansas law.

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

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

HN34[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

As *Kan. Stat. Ann. §§ 50-101* and *50-112* now read, the proper approach is not to determine whether the restraint is reasonable in view of all of the facts and circumstances, or to attempt to distinguish between restraints with anticompetitive effect and restraints that stimulate competition. The clear statutory language of *§§ 50-101* and *50-112* leaves no room for such an approach. The simple, per se rule of *Mills v. Cleveland, 87 Kan. 549, 125 P. 58*, *United Artists Corp. v. Mills, 135 Kan. 655, 11 P.2d 1025*, and *Joslin v. Steffen Ice & Ice Cream Co., 143 Kan. 409, 54 P.2d 941*, survives. The reasonableness rubric of *Heckard v. Park, 164 Kan. 216, 223-24, 188 P.2d 926*, and *Okerberg v. Crable, 185 Kan. 211, 217, 341 P.2d 966*, is overruled.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

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

HN35[] **Vertical Restraints, Price Fixing**

The governing Kansas Restraint of Trade Act, *Kan. Stat. Ann. § 50-101 et seq.*, provisions, *Kan. Stat. Ann. §§ 50-101* and *50-112*, neither differentiate between vertical and horizontal price-fixing nor outline a particular approach to a dual-distribution situation. Rather, they forbid all price-fixing combinations or arrangements, regardless of the applicable label.

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

HN36[] Private Actions, State Regulation

For persons injured or damaged by price-fixing prohibited under *Kan. Stat. Ann. §§ 50-101* and *50-112*, recovery of damages sustained, full consideration damages, and treble damages are permitted. *Kan. Stat. Ann. §§ 50-108*, *50-115*, and *50-161(b)*.

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

HN37[] Private Actions, State Regulation

The Kansas Restraint of Trade Act (KRTA), *Kan. Stat. Ann. § 50-101 et seq.*, explicitly establishes a cause of action for individuals to sue and recover general damages as well as specific types of damages. *Kan. Stat. Ann. §§ 50-102*, *50-108*, *50-115*, and *50-161*. It thus creates not only a new procedure for relief, but also new substantive rights. In addition, the Supreme Court of Kansas notes that the remedies for persons under the KRTA are separate and distinct from the civil penalties the attorney general is empowered to seek. *Kan. Stat. Ann. § 50-103(a)(5)*.

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

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

HN38[] Trade Practices & Unfair Competition, State Regulation

In the words of *Kan. Stat. Ann. § 60-512(2)*, an action based on the Kansas Restraint of Trade Act (KRTA), *Kan. Stat. Ann. § 50-101 et seq.*, is upon a liability created by statute. Likewise, an action based on the KRTA qualifies for the one-word description of *Kan. Stat. Ann. § 60-514(c)*: It is statutory.

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

Governments > Legislation > Statute of Limitations > Time Limitations

HN39[] State Regulation, Claims

The Supreme Court of Kansas holds that neither a purchaser's claim for full consideration damages nor a claim for treble damages qualifies as an action for a statutory penalty or forfeiture. They are both subject to the three-year statute of limitations under *Kan. Stat. Ann. § 60-512(2)*.

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN40[] State Regulation, Claims

Kan. Stat. Ann. §§ 50-101 and *50-112* prohibit more than agreements to fix prices. But even a combination under *§ 50-101* must be by two or more persons, and an arrangement under *§ 50-112* must be between persons.

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN41[] **State Regulation, Claims**

Because *Kan. Stat. Ann. § 50-112* and *15 U.S.C.S. § 1* of the Sherman Act share the "between persons" language, and the language of *Kan. Stat. Ann. § 50-101* is equivalent, the Supreme Court of Kansas looka to interpreting United States Supreme Court precedent for assistance in understanding what, short of an express agreement, qualifies as more than merely unilateral behavior.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN42[] **Sherman Act, Claims**

In case law, the United States Supreme Court ruled that, under *15 U.S.C.S. § 1* of the Sherman Act, a price-fixing case must include evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. There must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective, and neither communication between a manufacturer and its retailers nor the existence of complaints about discounting would be enough alone for a plaintiff in a price-fixing action to sustain its burden of proof. The Court acknowledged that evidence of complaints about discounting can be probative; however, there must be additional evidence of unlawful conduct.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN43[] **Class Actions, Prerequisites for Class Action**

Class actions are governed by *Kan. Stat. Ann. § 60-223*, which was modeled after and has traditionally been interpreted like *Fed. R. Civ. P. 23*.

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN44[] **Class Actions, Appellate Review**

Under judicial precedent, the Supreme Court of Kansas does not judge the propriety of a class certification by hindsight but rather to ensure that the district judge applied and rigorously analyzed the requirements of *Kan. Stat. Ann. § 60-223* in its decision to certify the class. If a district judge evaluates the proper factors, his or her decision will be granted deference on appeal.

Civil Procedure > Trials > Bench Trials

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN45[] **Trials, Bench Trials**

The Supreme Court of Kansas determined that *Kan. Stat. Ann. § 60-252(a)* and *Kan. Sup. Ct. R. 165*, which require that a district court judge find, and either orally or in writing state, the controlling facts and the judge's conclusions of law thereon and state the controlling facts required by *Kan. Stat. Ann. § 60-252*, and the legal principles controlling the decision, apply to a district judge's class certification decision. Generally litigants and their counsel bear the responsibility of objecting to inadequate findings of fact and conclusions of law to give the trial court the opportunity to correct them, and in the absence of an objection, omissions in findings will not be considered on appeal. Where no objection is made, the Supreme Court will presume the trial court found all facts necessary to support its judgment. However, the Supreme Court may still consider a remand if the lack of specific findings precludes meaningful review.

Syllabus

BY THE COURT

1. Cases interpreting federal antitrust statutes may be persuasive authority for any state court interpreting its antitrust laws, but such authority is not binding upon any court in Kansas interpreting Kansas antitrust statutes.

2. Vertical price-fixing involves participants at different rungs of the distribution ladder, e.g., a wholesaler and a retailer. Horizontal price-fixing involves participants who are at the same rung of the distribution ladder, e.g., two or more retailers.

3. Under the plain language of *K.S.A. 50-101*, there are several optional theories under which a Kansas restraint of trade plaintiff may proceed. Under the most forgiving of those theories, a plaintiff must prove the existence of a trust "for . . . the . . . purpose[] . . . [t]o fix any standard or figure, whereby . . . price to the public shall be, in any manner, controlled or established." *K.S.A. 50-101* Fourth. As defined in *K.S.A. 50-101*, to establish the existence of a trust, a plaintiff need only show a "combination of capital, skill, or acts, by two or more **[***2]** persons." A plaintiff need not show a relationship rising to the level of an agreement. Furthermore, it is enough to demonstrate that the combination is for the purpose to fix prices; a plaintiff does not have to show that the combination actually succeeds in increasing prices. The phrase "for the purpose" contemplates a subjective standard, one that requires examination of the intent behind a defendant's behavior.

4. Under the plain language of *K.S.A. 50-112*, there are alternate theories under which a Kansas restraint of trade plaintiff may proceed: A plaintiff may prove the existence of an arrangement, contract, agreement, trust, or combination between persons designed to advance, reduce, or control price, or one that tends to advance, reduce, or control price. Mere arrangements between persons are within the scope of the statute; a plaintiff does not have to show a relationship rising to the level of an agreement. In addition, it is enough to show that the arrangement is designed to or tends to control prices; a plaintiff does not have to show that the arrangement actually succeeds in increasing prices. Like "for the purpose" in *K.S.A. 50-101*, the phrase "designed to" contemplates **[***3]** a subjective standard. On the other hand, "tend to" contemplates an objective standard, one that requires examination of the defendant's behavior to discern whether it would reasonably be expected to produce a particular result, regardless of the defendant's intention.

5. The concept of "antitrust injury" from federal antitrust jurisprudence essentially equates to the Kansas concept of causation.

6. In this case, the named plaintiff and class have come forward with enough evidence that the defendant's pricing policy and written applications and agreements were for the purpose of fixing prices or designed to control prices, that they tended to control prices, and that the named plaintiff and class members were injured or damaged to survive defendant's summary judgment motion.

7. The "rule of reason" of federal antitrust jurisprudence does not apply to lawsuits under the Kansas Restraint of Trade Act. *K.S.A. 50-101*, *K.S.A. 50-102*, and *K.S.A. 50-112* forbid all vertical and horizontal price-fixing by two or more persons or between persons. Contrary holdings in *Okerberg v. Crable, 185 Kan. 211, 341 P.2d 966 (1959)*, and *Heckard v. Park, 164 Kan. 216, 188 P.2d 926 (1948)*—decided during the period **[***4]** when the Kansas Fair Trade Act, R.S. 1937, 50-301 et seq., was in effect—are overruled.

8. The Kansas Restraint of Trade Act does not differentiate between vertical and horizontal price-fixing or outline a particular approach to a dual-distribution situation. In this case, named plaintiff and the class have alleged both vertical and horizontal price-fixing, and they are free to pursue the alternative theories as long as they are supported by the evidence.

9. The 3-year statute of limitations in *K.S.A. 60-512(2)* controls both full consideration and treble damages claims under the Kansas Restraint of Trade Act.

10. *K.S.A. 50-101* and *K.S.A. 50-112* do not demand that a defendant in a price-fixing case have had an explicit written agreement with the other person with whom the defendant engages in the unlawful behavior. However, more than unilateral behavior by the defendant is required. In this case, named plaintiff and the class have marshaled sufficient evidence to avoid summary judgment with respect to purchases made at stores other than those subject to explicit applications and agreements.

11. An appellate court reviews a district judge's decision to certify a class action under *K.S.A. 60-223* **[***5]** to ensure that the judge has applied and rigorously analyzed the requirements of the statute. In this case, the district judge's findings of fact and legal conclusions are inadequate to support meaningful appellate review of the predominance factor for certification. A pending motion for decertification will be ripe for decision on remand to the district court, and the judge and the parties will have another opportunity to make and preserve a record sufficient for any eventual appellate review.

Counsel: Robert W. Coykendall, of Morris, Laing, Evans, Brock & Kennedy, Chartered, of Wichita, argued the cause, and Will B. Wohlford and John W. Johnson, of the same firm, were with him on the briefs for appellants/cross-appellees.

James M. Armstrong, of Foulston Siefkin LLP, of Wichita, argued the cause, and Timothy B. Mustaine and Jeffrey A. Jordan, of the same firm, were with him on the briefs for appellee/cross-appellant.

Kristafer R. Ailslieger, deputy solicitor general, Clay Britton, assistant solicitor general, and Lynette Bakker, assistant attorney general, were on the brief for amicus curiae State of Kansas.

Rex A. Sharp, of Gunderson, Sharp & Walke L.L.P., of Prairie Village, was on the brief **[***6]** for amicus curiae Quin Jackson.

Judges: BEIER, J. MALONE, J., assigned. [1]

Opinion by: BEIER

Opinion

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[1] REPORTER'S NOTE: Pursuant to the authority vested in the Supreme Court by K.S.A. 20-3002(c), Judge Thomas E. Malone, of the Kansas Court of Appeals, was appointed to hear case No. 101,000 to fill the vacancy on the court created by the retirement of Chief Justice McFarland.

[*320] **[**1067]** The opinion of the court was delivered by

BEIER, J.: This appeal and cross-appeal concern a dispute over retail pricing practices by a fashion accessories company.

Named plaintiff Sue O'Brien and a class of similarly situated consumers (O'Brien) sued the maker of Brighton handbags, other accessories, and luggage, defendant Leegin Creative Leather Products, Inc. (Brighton), alleging violations of the Kansas Restraint of Trade Act (KRTA), *K.S.A. 50-101 et seq.* We understand O'Brien to contend that Brighton's practices as a wholesale supplier and retailer constituted illegal price-fixing in violation of *K.S.A. 50-101* and *K.S.A. 50-112*, entitling her and other class members to recovery under *K.S.A. 50-108*, *K.S.A. 50-115*, *K.S.A. 50-147*, and *K.S.A. 50-161*.

[*321] Brighton moved for summary judgment in the district court. In the alternative, it sought partial summary **[***7]** judgment and moved to decertify the class. District Judge Jeffrey E. Goering granted Brighton's motion for summary judgment, granted its motion for partial summary judgment in part, and did not reach the issue of decertification.

O'Brien appealed, and Brighton cross-appealed. We transferred this matter from our Court of Appeals on O'Brien's unopposed motion. We reverse and remand to the district court for further proceedings consistent with the rulings below.

ISSUES

We have reformulated and reorganized the questions presented by the parties for ease and flow of analysis. The six questions are:

(1) Did the district judge correctly interpret the KRTA on the issue of "antitrust injury"?

(2) Did the district judge err in relying on a "rule of reason" to evaluate whether there has been a violation of the KRTA?

(3) Does this case involve a claim for horizontal price-fixing as well as vertical price-fixing, and, if so, was summary judgment on that claim properly granted by the district judge?

(4) Did the district judge identify the correct statute of limitations applicable to a treble damages claim and to a full consideration claim under the KRTA?

(5) Did the district judge correctly determine that **[***8]** an explicit written agreement with each retailer was not a necessary prerequisite to liability under the KRTA?

(6) Did the district judge properly evaluate predominance when granting class certification?

INTRODUCTION

Before we set forth the pertinent factual and procedural background, a brief review of basic principles governing the relationship between Kansas and federal ***antitrust law*** and the types of price-fixing that can occur is in order.

Although there are federal antitrust statutes, e.g., the Sherman Act, *15 U.S.C. § 1 (2006) et seq.*, and a large body of interpreting **[*322]** caselaw, ***antitrust law*** has traditionally **[**1068]** been the province of the states. *McShares, Inc. v. Barry, 266 Kan. 479, 488-89, 970 P.2d 1005, cert. denied 526 U.S. 1158, 119 S. Ct. 2048, 144 L. Ed. 2d 215 (1998)* (citing *California v. ARC America Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 [1989])*. In addition, we have noted in the past that federal ***antitrust law*** is intended to supplement the remedies available under Kansas law, not to replace Kansas antitrust provisions. *266 Kan. at 488-89*.

Kansas' ***antitrust law*** under the KRTA, originally enacted in 1897, remains largely undeveloped; very few cases have reached this court. See *Bergstrom v. Noah, 266 Kan. 829, 843, 974 P.2d 520 (1999)*. **[***9]** ***HN1***[] We have observed generally that the KRTA is broad in scope but that the bulk of its provisions have not been meaningfully interpreted by Kansas courts. *266 Kan. at 843*.

While the KRTA and federal antitrust statutes share some similarities, they are not, in fact, the same. *266 Kan. at 844*. Thus, ***HN2***[] "[w]hile . . . cases [interpreting federal antitrust statutes] may be persuasive authority for any state court interpreting its antitrust laws, such authority is not binding upon any court in Kansas interpreting Kansas antitrust laws." *266 Kan. at 845*.

HN3[] In relation to price-fixing practices specifically, this court concluded more than 50 years ago that it "may not substitute [its] judgment for that of the legislature as to whether price fixing is good or bad for the economic life of the state." *Quality Oil Co. v. du Pont & Co., 182 Kan. 488, 495, 322 P.2d 731 (1958)*. It is the role of the legislature, not this court, to set antitrust policy.

This case concerns allegations that defendant engaged in price-fixing. ***HN4***[] Price-fixing may be either "vertical" or "horizontal." Vertical price-fixing involves participants at different rungs of the distribution ladder, *e.g.*, a wholesaler and a retailer. Horizontal **[***10]** price-fixing involves participants who are at the same rung of the distribution ladder, *e.g.*, two or more retailers. See Black's Law Dictionary 1227-28 (8th ed. 2004).

FACTUAL AND PROCEDURAL BACKGROUND

The bulk of the following facts are taken from District Judge Goering's findings of uncontroverted fact. ***HN5***[] Neither party challenges **[*323]** these facts on this appeal, making them conclusive for our purposes. See *McShares, Inc., 266 Kan. at 480*.

Brighton's Business

Brighton is a designer, manufacturer, and retailer of fashion accessories and luggage. It primarily markets its accessories to independent retailers, but it also maintains retail stores of its own called "Brighton Collectibles." The first Brighton Collectibles store opened in 1999, and there are now more than 100 stores nationwide. A substantial portion of Brighton's profits come from its own retail stores.

Brighton's Pricing Practices

Since April 1997, Brighton has provided its retailers with copies of its suggested pricing and promotional policy. Brighton's policy calls for retailers to sell Brighton products at "keystone," which is an amount equal to twice wholesale plus a small amount that varies by product. Under the policy, retailers **[***11]** may discount out-of-season products and products that are not selling well that the retailer will not reorder. Brighton ships its products to its retailers with tags displaying the manufacturer's suggested retail price (MSRP). For at least 1 year, Brighton required its retailers to initial and sign an acknowledgement that a violation of its pricing policy was grounds for dismissal.

According to Jerry Kohl, Brighton's owner and president, Brighton's pricing policy was not adopted to thwart competition from other manufacturers of similar products. When asked if he had thought about how the pricing policy affected the profitability of retail sales of the Brighton line, Kohl responded that he had not thought about it. Further, Laura Young, Brighton's second-in-command, said that prices were set without regard to retailers' profits. Brighton admits that its pricing policy was not created in **[**1069]** response to any problem with retailers failing to provide desired service to customers. It has made certain of its decisions about its pricing policies after consulting with its retailers, such as when "birthday club" discounting was approved.

[*324] Many retailers of Brighton products have advertised discounts **[***12]** of Brighton products, but it is unclear which, if any, of these advertisements violated Brighton's pricing policy. Young stated in her affidavit:

> "Since the promulgation of the universal retail price policy, Brighton has never undertaken any systematic, comprehensive effort aimed at determining whether its retailers are following that policy. But Brighton from time

to time has acquired information from various sources (*e.g.*, consumers, other retailers, advertisements, and Brighton's sales force), to the effect that some Brighton retailers are or might be violating the suggested retail price policy, and Brighton has occasionally enforced that policy against retailers in states other than Kansas by refusing to deal with retailers believed to have intentionally violated Brighton's policy."

Kohl also testified in his deposition that Brighton sometimes becomes aware of retailers selling products at prices other than the MSRP. Kohl further testified that Brighton keeps reports documenting customer inquiries, including those about Brighton's pricing policies. Kohl testified:

"Q: . . . And one of the things you do with the reports is keeping [sic] track of whether or not the particular retailer **[***13]** is complying with the pricing policy of [Brighton]?
"A: Well, that's a big stretch. I surely wouldn't call it that. We keep comments regardless of what they might be, everything from talk to Joe about a handbag was damaged. So we keep comments that people give us.
"Q: Those comments include whether or not the retail customer of [Brighton]'s is discounting or is not following the pricing policy; is that a fair statement?
"A: Well, again, I wouldn't put it the way you did. You know, there are times when there's comments about pricing policies, but to say they include them implies that it's a regular situation. And the answer is no, it isn't.
"Q: Well, if a retailer was abiding by the pricing policy, there wouldn't be any need to put information like that in an inquiry report.
"A: That's correct.
"Q: And your point is most of the retailers comply with the retail pricing policies of [Brighton]?
"A: As far as I know, yes.
"Q: And those who don't, when you find out about it, are terminated, correct?

"A" "Those who don't and who are aware of our pricing policy and is [sic] willfully disregarding our pricing policy, yes, they are terminated or I should say put on hold until we make a decision on what **[***14]** we're going to do."

In the past, Brighton has rejected at least one promotion for violating its retail price maintenance policy. When rejecting the promotion, a proposed shoe trade-in, Young stated in an email:

[*325] ". . . . Did someone tell you it was ok to do this?
"The reason I ask is this will spread like cancer . . . one person does it . . . sells more shoes than normal. And they and you tell more people and before you know it the world will be holding their own shoe trade in.

"It cannot be an individual store authorize [*sic*] event. We have a very clear SRP (Suggested Retail Pricing Policy) and this would be in violation of it. . . .
"SO, please no matter what/who said its ok, it's not."

Young also expressed the following in another email:

"[W]hen one store begins to lure customers in with an incentive for purchasing . . . the next store thinks they need to 'one up' the competition, and then the third customer needs to 'two up them both' and so on . . . and after a while it's out of control. What happens is the customers then get confused on if they need to wait for the best offer to purchase Brighton.

[1070]** "Our Suggested Retail Pricing and Promotional Policy basically was designed to create an **[***15]** environment for the consumer to shop with confidence that they were being treated fairly. We have always wanted consumers to be able to feel that wherever Brighton is sold—authorized dealers—they can buy now! And not worry if they're getting the 'best deal.'"

One of O'Brien's experts was Gregory T. Gundlach, Professor of Marketing and Senior Fellow at the American Antitrust Institute. He asserted in his prepared report that there was no evidence that a cartel existed among Brighton's retailers in Kansas or elsewhere and that there was no evidence that Brighton's pricing policy was instituted by Brighton at the request of its retailers. Gundlach also concluded, however, that Brighton engaged in vertical price-fixing and in horizontal price-fixing. Gundlach further concluded that Brighton's price-fixing necessarily raised the price at which consumers may purchase its products. In addition, Gundlach concluded that Brighton's price-fixing limited price competition between retailers and that, as a result of the suppression of competition, consumers were denied potential savings.

Gundlach also opined that the higher prices faced by consumers were not offset by benefits to competition or to **[***16]** consumers, stating that no facts supported various theories advanced by Brighton's experts to support a pro-competitive explanation of the company's price-fixing. According to him, the more compelling scenario was that Brighton's price-fixing shielded its own stores and those of its **[*326]** retailers from competition by more efficient forms of retailing to the detriment of consumers.

Christopher Charles Pflaum, Ph.D., an economist specializing in business and financial economics and the other expert for the plaintiff class, testified about class certification and the measure of damages.

Brighton's Heart Store and Luggage Applications

Since 1998, Brighton has offered a "Heart Store" program to retailers, which offers incentives for retailers to expand their business with Brighton. In exchange for these incentives, Heart Stores are expected to maintain certain levels of Brighton inventory, to display Brighton products in a dedicated section of the store, and to service Brighton products regardless of where they were purchased.

A retailer becomes a Heart Store by signing an application, which is then approved by Brighton. Less than 5 percent of Brighton's retailers are Heart Stores.

Applications for **[***17]** Heart Store status must be submitted each calendar year. The Heart Store applications for the years 2001 and 2002 included language that the applicant would maintain minimum inventory, showcase Brighton products in dedicated spaces, "[s]ell Brighton products for the suggested price every day, 365 days a year," and "close out markdown styles you do not plan to reorder." The Heart Store applications for 2003 and later do not include that language, but they do include a statement that "Brighton reserves the right to withdraw Heart Store benefits from any store that does not represent Brighton in a positive and quality manner."

To sell Brighton luggage, a separate agreement must be signed by the retailer. As with the Heart Stores, a retailer must apply to become a Brighton luggage retailer. Luggage retailers must maintain a certain inventory of products. About 5 percent of Brighton retailers sell Brighton luggage.

The application to sell Brighton luggage for calendar year 2003 included language that the applicant agreed to display a certain number of pieces and agreed to "sell the luggage at the suggested **[*327]** retail price." The luggage applications for prior and subsequent years did not include **[***18]** such language.

Brighton never made any express or explicit promise to enforce its retail pricing policy against other Brighton retailers as an incentive for a retailer to become a Heart Store or luggage store.

Brighton in Kansas

In the relevant time period for this lawsuit, after April 12, 2001, Brighton has sold to more than 100 independent retailers in Kansas. **[**1071]** Most of Brighton's retailers in the state are small boutiques or specialty stores, but Brighton also sells to certain department stores and specialty chains. The independent retailers typically carry products from both Brighton and other brands. There is only one Brighton Collectibles store in Kansas; it opened in December 2006.

O'Brien, the class representative, testified that she owns numerous other brands of accessories and that she made purchases of these accessories in both department stores and specialty stores. O'Brien testified that she shops in all different types of retail establishments.

Several of Brighton's Kansas retailers have sworn that they generally sell at the MSRP and do not discount unless an item is out of season or selling poorly. Further, the retailers swore that this is true for both Brighton and non-Brighton **[***19]** products.

Ten Brighton retailers in Kansas who submitted affidavits in this case have sworn that they generally price products at keystone. These retailers also swore that their pricing of Brighton products would have been the same in the absence of Brighton's pricing policy. Four Kansas Brighton retailers have stated in affidavits that they voluntarily follow Brighton's pricing policies and that they had no agreement with Brighton to sell Brighton products at the suggested retail price.

Since adopting its pricing policy, Brighton has not determined that any Kansas retailer violated the policy and has not refused to deal with or taken other adverse action against any Kansas retailer for an actual or suspected violation. However, Brighton did follow up on a report that one of its Kansas retailers may have been discounting. **[*328]** It concluded that the reported discounting had not occurred.

Six independent retailers in Kansas submitted Heart Store applications for the years 2001 and 2002, and Brighton accepted the six as Heart Stores for those years. Three Kansas Heart Stores, as well as three other Brighton Kansas retailers, submitted luggage applications for 2003 and were accepted as luggage **[***20]** stores for that year.

The Accessories Market

Products of a quality and price similar to Brighton's are sold in department stores, specialty chains, and over the Internet. According to figures arrived at by using Accessories magazine, an industry trade publication relied on by the experts on both sides, the value of retail sales of Brighton's products in 2005 was approximately $357 million. Accessories magazine reports that the total amount of retail sales in the accessories industry in 2005 was $30.2 billion. Based on these figures, Brighton's sales accounted for less than 2 percent of total sales in the accessories market in 2005. Accessories magazine also reported that 2005 retail sales of accessories in specialty boutiques totaled $4.1 billion. If all of Brighton's sales had occurred in specialty boutiques, which was not the case, Brighton's retail sales would constitute 6.2 percent of the sales in specialty boutiques in 2005. From 2001 to 2004, Brighton's estimated sales as a percentage of retail sales were in the 1 percent to 2 percent range; and Brighton's estimated sales as a percentage of specialty boutique sales were in the 5 percent to 7 percent range.

Gundlach drew conclusions **[***21]** about the relevant market and Brighton's market dominance. He defined the relevant market for this case as women's accessories distributed through specialty boutique dealers. He further defined boutique retailers as those who generally are independent and provide an intimate experience for shoppers. Gundlach recognized that Brighton seeks to focus its retail distribution on small, independent specialty retailers or boutique retailers. He also determined that the specific characteristics of consumers who shop often in boutique retail outlets are important to understanding whether products generally distributed **[*329]** through boutique retailers compete with products not distributed through boutique retailers. Gundlach concluded that these characteristics are important in defining the market in this case. In addition to his analysis of the relevant market, Gundlach also concluded that Brighton was the dominant vendor in women's accessories distributed through specialty boutique retailers. He **[**1072]** stated that Brighton's dominant power was derived from its extensive retail distribution network, its broad product lines, and its differentiated product.

This Lawsuit

The class in this case consists of named **[***22]** plaintiff O'Brien and "[a]ll persons who, in the period from January 1, 1997, . . . to the date of trial, have purchased any Brighton product from any Brighton retailer."

In the petition that launched this litigation, an earlier named plaintiff alleged that Brighton engaged in pricing practices prohibited by *K.S.A. 50-101*, *K.S.A. 50-102*, and *K.S.A. 50-112*. Specifically, plaintiff alleged that "[t]he arrangements made between [Brighton] and its retailer dealers are made with the purpose of controlling the price of Brighton goods to the customer, and are prohibited trust arrangements outlawed in Kansas."

Plaintiff further alleged that plaintiff and the class were entitled to damages pursuant to *K.S.A. 50-108*, *K.S.A. 50-137*, and *K.S.A. 50-161*, including full consideration damages, treble damages, and attorneys fees and costs. We note that the statutory citations on damages appear to be in error in two respects. First, *K.S.A. 50-115* is omitted, even though it is the support for the full consideration claim. Second, *K.S.A. 50-137* does not apply, as it deals exclusively with unlawful restraints by grain dealers. It is obvious that the citation was intended to be *K.S.A. 50-147* instead. Neither **[***23]** of these errors appears to have confused the parties, so we will address the class damages claims on this appeal as though the petition's citation errors did not occur.

The district judge held that O'Brien's claims that Brighton's resale price maintenance (RPM) agreements and RPM policy violate the KRTA were to be evaluated under a "rule of reason" framework. **[*330]** The district judge cited both *K.S.A. 50-101* and *K.S.A. 50-112* in this portion of his summary judgment decision, but he failed to address the statutory language in either statute or any potential differences between the two provisions. Although the district judge ruled that genuine issues of material fact remained on whether Brighton's RPM policy or agreements were unreasonable, the district judge also ruled that O'Brien would be unable to prove antitrust injury. The judge therefore granted Brighton's summary judgment motion.

Judge Goering also determined that O'Brien did not make out a claim of horizontal price-fixing. District Judge William Sioux Woolley held that O'Brien's claim for treble damages was subject to a 1-year statute of limitations, while O'Brien's full consideration claim was subject to a 3-year statute of limitations. **[***24]** Judge Goering did not reach Brighton's motion to decertify the class.

On this appeal by O'Brien and cross-appeal by Brighton, in addition to the parties' briefs, we have received and reviewed *amici* briefs from the State of Kansas and from Quin Jackson, a plaintiff in a separate Kansas antitrust class action. Brighton submitted briefs responding to the *amici* briefs, which we have also considered.

DISCUSSION

Three standards of appellate review are influential in this case.

First is our familiar standard for summary judgment:

> ***HN6***[] "Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. ***HN7***[] The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. ***HN8***[] When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material **[***25]** to the conclusive issues in the case. ***HN9***[] On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. [Citations omitted.]" *Shamberg, Johnson & **[**1073] [**1074]** Bergman, Chtd. v. Oliver, 289 Kan. 891, 900, 220 P.3d 333 (2009)*.

[*331] We have also emphasized that ***HN10***[] ""[s]ummary judgment should not be used to prevent the necessary examination of conflicting testimony and credibility in the crucible of a trial.'" [Citations omitted.]" *Esquivel v. Watters, 286 Kan. 292, 296, 183 P.3d 847 (2008)*.

The second relevant standard of review affects interpretation of statutes, such as the KRTA. ***HN11***[] Statutory interpretation raises a question of law over which this court has unlimited review. *State v. Arnett, 290 Kan. 41, 47, 223 P.3d 780 (2010)*. ***HN12***[] The most fundamental rule is that the intent of the legislature governs if that intent can be ascertained. *290 Kan. at 47*. An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *State v. Raschke, 289 Kan. 911, 914, 219 P.3d 481 (2009)*.

"When a statute is plain and unambiguous, we must give **[***26]** effect to its express language, rather than determine what the law should or should not be. We will not speculate on the legislative intent and will not read the statute to add something not readily found in it. If the statute's language is clear, there is no need to resort to statutory construction. [Citations omitted.]" *Graham v. Dokter Trucking Group, 284 Kan. 547, 554, 161 P.3d 695 (2007)*.

HN13[] Only if the statute's language or text is unclear or ambiguous does the court employ canons of construction, legislative history, or other background considerations to divine the legislature's intent and construe the statute accordingly. *State v. Trautloff, 289 Kan. 793, 796, 217 P.3d 15 (2009)*.

Our third relevant standard of review applies to questions about class action certification:

HN14[] "'Trial judges are afforded substantial discretion in determining whether a class should be certified.' [Citation omitted.] . . . '"[T]he amount and degree of judicial discretion will vary depending on the character of the question presented for determination."' [Citations omitted.] . . . In general, when a discretionary decision is made within the legal standards and takes the proper factors into account in the **[***27]** proper way, the [trial court's] decision is protected even if not wise. [Citation omitted.] . . . However, 'abuse is found when the trial court has gone outside the framework of legal standards or statutory limitations, or when it fails to properly consider the factors on that issue given by the higher courts to guide the discretionary determination.' [Citations omitted.]" *Dragon v. Vanguard Industries, Inc., 277 Kan. 776, 779, 89 P.3d 908 (2004)*.

[*332] ***HN15***[] "While the trial court has substantial discretion in determining whether a class should be certified, the provisions of *K.S.A . . . 60-223* must be applied and rigorously analyzed." *277 Kan. at 780*. In conducting its analysis, the trial court "should consider evidence when submitted by the parties and make those factual determinations necessary to a determination of whether the prerequisites for a class action are met." *277 Kan. at 783*. "[T]he presence of individual questions, while tending to diminish the weight of class facts, does not necessarily defeat a prima facie showing the class prerequisites are satisfied, [citation omitted,] or mean that there has been an abuse of discretion in certifying the class. [Citation omitted.]" *277 Kan. at 793*.

KRTA ***[***28]*** *Provisions*

K.S.A. 50-101, one of the KRTA sections setting out elements of O'Brien's cause of action, provides in pertinent part:

HN16[] "A trust is a combination of capital, skill, or acts, by two or more persons, for either, any or all of the following purposes:

. . . .

"*Second*. To increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance.

. . . .

"*Fourth*. To fix any standard or figure, whereby such person's price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state.

"*Fifth*. To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which such person shall: (a) Bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure;
(b) agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure;

(c) in any manner establish or settle the price of any article or commodity or transportation **[***29]** between them or themselves and others to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity; or
(d) agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that such person's price in any manner is affected. Any such combinations are hereby declared to be against public policy, unlawful and void."

[*333] ***HN17***[] *K.S.A. 50-102* denies "[a]ll persons within this state" the right to form "or be in any manner interested, either directly or indirectly, as principal, agent, representative, consignee or otherwise," in any trust as defined in *K.S.A. 50-101*.

K.S.A. 50-112, the KRTA section setting out elements of what appears to be O'Brien's alternative statutory cause of action, provides in pertinent part:

HN18[] "All arrangements, contracts, agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic **[***30]** raw material, . . . , and all arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles, . . ., are hereby declared to be against public policy, unlawful and void."

K.S.A. 50-108 provides for a private right of action against those who violate *K.S.A. 50-101* and *K.S.A. 50-102*:

HN19[] "[A]ny person that may be damaged by any such agreement, trusts or combinations described in *K.S.A. 50-101* and *50-102*, and amendments thereto, may sue for and recover in any court of competent jurisdiction in this state, of any person operating such trust or combination, such damages sustained, together with reasonable attorney fees."

K.S.A. 50-115 does likewise but applies to *K.S.A. 50-112*:

HN20[] "[A]ny person injured or damaged by any such arrangement, contract, agreement, trust or combination, described in *K.S.A. 50-112* and *50-113*, and amendments thereto, may sue for and recover in any court of competent jurisdiction in this state, of any person, the full consideration or sum paid by such person for any goods, wares, merchandise and articles included in or advanced **[***31]** or controlled in price by such combination . . . ."

K.S.A. 50-147 speaks to the cumulative nature of rights and remedies under the KRTA:

HN21[] "The rights and remedies given by this act shall be construed as cumulative of all other laws in force in this state, and shall not affect, change or repeal any other remedies or rights now existing in this state for the enforcement, payment or collection of fines, penalties and forfeitures."

K.S.A. 50-161 defines certain terms, again authorizes a private right of action, and discusses remedies:

[*334] ***HN22***[] "(a) As used in this section, the term 'person' means any individual, corporation, partnership, firm, company or other association of persons . . . .

"(b) . . . [A]ny person who may be damaged or injured by any agreement, monopoly, trust, conspiracy or combination which is declared unlawful by any of the acts contained in chapter 50 of the Kansas Statutes Annotated, relating to unlawful acts, agreements, monopolies, trusts, conspiracies **[**1075]** or combinations in restraint of trade, shall have a cause of action against any person causing such damage or injury. Such action may be brought by any person who is injured in such person's business or property by reason of anything **[***32]** forbidden or declared unlawful by this act, regardless of whether such injured person dealt directly or

> indirectly with the defendant. The plaintiff in any action commenced hereunder in the district court of the county wherein such plaintiff resides, or the district court of the county of the defendant's principal place of business, may sue for and recover treble the damages sustained. In addition, any person who is threatened with injury or additional injury by reason of any person's violation of such acts may commence an action in such district court to enjoin any such violation, and any damages suffered may be sued for and recovered in the same action in addition to injunctive relief . . . .
> "(c) . . . The remedies provided herein shall be alternative and in addition to any other remedies now provided by law."

Antitrust Injury

In this case, the district judge concluded that O'Brien was vulnerable to summary judgment in favor of Brighton because "[p]laintiff has to have some concrete evidence that she personally paid higher prices for Brighton products as a result of Defendant's RPM Policy" and, viewing the evidence in the record in the light most favorable to O'Brien, "[p]laintiff **[***33]** has not demonstrated that she paid higher prices for the Defendant's products than she would have paid absent Defendant's RPM policy." Thus, in the district judge's view, O'Brien was unable to prove "antitrust injury."

HN23[] The concept of antitrust injury invoked in the district court comes from federal antitrust jurisprudence. See, *e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* ("Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."). Essentially, it equates to the Kansas concept **[*335]** of causation, or the "require[ment] that a plaintiff's theory of damages . . . correspond to an economic effect that the statute or case law rule invoked as the basis for liability aims to prevent." See Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 Antitrust L.J. 697, 698 (2003).

HN24[] Under the plain language of *K.S.A. 50-101*, there are several optional theories **[***34]** under which a KRTA plaintiff may proceed. Under the most forgiving of those theories, a plaintiff must prove the existence of a trust "for . . . the . . . purpose[]" [t]o fix any standard or figure, whereby . . . price to the public shall be, in any manner, controlled or established." *K.S.A. 50-101 Fourth*. As defined in *K.S.A. 50-101*, to establish the existence of a trust, a plaintiff need only show a "combination of capital, skill, or acts, by two or more persons." A plaintiff need not show a relationship rising to the level of an agreement. Furthermore, it is enough to demonstrate that the combination is "for the . . . purpose[] . . . [t]o fix prices; a plaintiff does not have to show that the combination actually succeeds in increasing prices. "For the purpose" contemplates a subjective standard, one that requires examination of the intent behind a defendant's behavior.

HN25[] Under the plain language of *K.S.A. 50-112*, there are alternate theories under which a KRTA plaintiff may proceed: A plaintiff may prove the existence of an arrangement, contract, agreement, trust, or combination "designed to" advance, reduce, or control price, or one that "tend[s] to" advance, reduce, or control price. **[***35]** Mere arrangements between persons are within the scope of the statute; again, a plaintiff does not have to show a relationship rising to the level of an agreement. In addition, it is enough to show that the arrangement is "designed to" or "tends to" control prices; again, a plaintiff does not have to show that the arrangement actually succeeds in increasing prices. Like "for the purpose" in *K.S.A. 50-101*, the phrase "designed to" contemplates **[**1076]** a subjective standard. On the other hand, "tend to" contemplates an objective standard, one that requires examination of the defendant's behavior to discern whether it would reasonably be expected to produce a particular result, regardless of the defendant's intention.

[*336] In addition, ***HN26***[] under the plain language of *K.S.A. 50-108*, *K.S.A. 50-115*, and *K.S.A. 50-161*, a plaintiff must show that the plaintiff was injured or damaged by the defendant's forbidden behavior.

The **[***36]** language in Brighton's pricing policy and written Heart Store and luggage store applications and agreements is probative on whether Brighton's pricing policy and pricing agreements were for the purpose of fixing prices or designed to control prices and on whether they tended to control prices.

Brighton's 1997 "Brighton Retail Pricing and Promotional Policy" sets the "Suggested Brighton Retail Pricing" for each Brighton product. Although limited discounting is permitted by the policy for items that will not sell and that the retailer will not reorder, the policy explicitly states that Brighton "stand[s] firm on [its] Suggested Retail Prices" and that "[e]xceptions are not favored, should not be assumed, and will be granted only in extraordinary circumstances as determined independently by Brighton." The policy also states that "[c]onsumers are confused by the ever popular sale, sale, sale, etc.," *i.e.*, discounting by retailers, and that one purpose of the policy is to seek to reassure customers that prices are always "consistent." Pricing policies promulgated for subsequent years are nearly identical.

The language of Brighton's pricing policy certainly is subject to an inference that **[***37]** it was for the purpose of fixing prices and was designed to and tended to control the prices of Brighton's goods. While some discounting is allowed under the policy, it is permitted only under terms set by Brighton. Moreover, discounting is intended to be the exception rather than the rule, and discounting approval must be granted in advance by Brighton. Ensuring that prices are the same each day and at each store where Brighton goods are sold is a part of Brighton's business strategy to build consumer confidence by letting the customers know that they do not need to hunt for deals.

Further, for the relevant years of 2001 and 2002, Brighton's Heart Store applications included an explicit agreement between Brighton and its retailers that retailers agree to "[s]ell Brighton products for the suggested price every day, 365 days a year." The Heart Store agreements also allowed retailers to close out styles **[*337]** they would not reorder, but advertising of such closeouts was not permitted. No other discounting appears to have been permissible under the Heart Store agreements.

The 2003 luggage application is similar. It required the same agreement by retailers to sell at the price suggested by Brighton, **[***38]** stating that applicants "also agree that you will sell the luggage at the suggested retail price." The luggage agreement did not appear to allow for any discounting.

Both Heart Store and luggage store applications required applicants' signatures.

The Heart Store and luggage applications explicitly required retailers who wished to qualify for Heart Store or luggage store status to sell Brighton products at the same amount each and every day. The language of the agreements gives an even stronger indication that they were "for . . . the . . . purpose[] . . .[t]o fix any standard or figure, whereby . . . price to the public shall be, in any manner, controlled or established," "designed to . . . control the price or the cost . . . to the consumer of any such products or articles," and would "tend to advance, reduce or control the price or the cost to the . . . consumer" by explicitly limiting discounting.

Evidence of Brighton's enforcement practices also is relevant to Brighton's subjective intention, intention logically necessary if the plaintiff's theory is that Brighton's arrangements were "for . . . the . . . purpose[]" or "designed to" fix prices. O'Brien came forward with probative evidence **[***39]** of Brighton's enforcement of its pricing policy.

Although Brighton insisted that it has "never undertaken any systematic, comprehensive effort aimed at determining whether its retailers are following th[e] [suggested **[**1077]** retail price] policy," it does maintain a file titled "Pending Pricing Issues," in which it keeps complaints from retailers and customers, as well as advertisements offering discounts of Brighton products. In addition, it maintained a specific file on a particular Kansas retailer. It contains one entry stating that Brighton received a tip on the retailer's discounting and a later entry stating that, after a Brighton representative visited the store, it determined that no discounting was occurring. Also, logs produced by Brighton show a notation that one of Brighton's **[*338]** Kansas retailers reported another for discounting; the log also shows that a Brighton representative would be notified of the report.

In addition to tracking potential violations, Brighton's management actively discouraged departures from Brighton's pricing policy and pricing agreements. On this point, Young emphatically rejected a retailer's proposed promotional event, reminding the retailer of the pricing **[***40]** policy and stating that the rejected promotion was to be avoided because it would "spread like cancer." Kohl said that Brighton would rather retailers not pursue such promotions because "the other retailers in the area feel they have to compete and before long [it's] chaos." Kohl also said that "[t]hose who don't [follow the pricing policies] and who are aware of our pricing policy . . . are terminated."

The above-described evidence of Brighton's enforcement practices is circumstantial support for O'Brien's assertion that Brighton's written pricing policy and written pricing agreements were "for. . . the . . . purpose[]" or "designed to" at least control, if not advance, the prices at which defendant's products were sold to consumers and that they "tend[ed] to" do the same. If controlling prices was not at least part of Brighton's intent, then enforcement would be unnecessary.

It is true that Brighton attempted to counter O'Brien's evidence on purpose or design and tendency with testimony from certain Kansas retailers who would charge the same price for Brighton products regardless of Brighton's pricing policy. But such evidence makes summary judgment less appropriate, not more. It translates **[***41]** to the existence of a genuine issue of material fact on a dispositive issue—here, one of the essential components of O'Brien's cause of action.

To avoid summary judgment, however, O'Brien must also come forward with evidence that the class has been injured or damaged by Brighton's pricing combination or arrangement. See *K.S.A. 50-108* ("damaged"); *K.S.A. 50-115* ("injured or damaged"); *K.S.A. 50-161* ("damaged or injured").

The district judge followed Brighton's lead and established a "concrete evidence" standard for injury, requiring O'Brien to prove **[*339]** actual Brighton consumer purchases at prices higher than they would have been absent Brighton's unlawful pricing practices. Again, the district judge based his decision on federal law.

The district judge cited federal antitrust cases for the proposition that market studies are the proper bases for determining whether prices have been higher because of a defendant's alleged violation of the antitrust laws. See *American Seed Co., Inc. v. Monsanto Co., 238 F.R.D. 394, 400 (D. Del. 2006)*; *Weisfeld v. Sun Chemical Corp., 210 F.R.D. 136, 144 (D. N.J. 2002)*; *In re Aluminum Phosphide Antitrust Litigation, 905 F. Supp. 1457, 1462 (D. Kan. 1995)*. The **[***42]** federal cases strongly favor this approach, although they appear to stop short of stating that a market study is the *only* way to demonstrate a difference in prices. See, *e.g., In re Aluminum Phosphide Antitrust Litigation, 905 F. Supp. at 1462* ("In order for plaintiffs to make a submissible case on damages, they must provide evidence which would allow the jury to compare actual prices during the conspiracy period with reasonably estimated prices that would have prevailed during that same period, absent the conspiracy."); Proving Antitrust Damages: Legal and Economic Issues, Section of ***Antitrust Law***, American Bar Association, pp. 31-39 (1996).

Brighton argued, in particular, for use of what is known as a "benchmark analysis" under federal law, positing that this was the only way O'Brien could show cognizable injury. Under this approach, O'Brien would have needed: (1) to conduct a benchmark **[**1078]** analysis comparing the actual retail prices of Brighton products before and after Brighton allegedly crossed the line between a lawful pricing policy and unlawful pricing agreements, (2) to compare the prices of Brighton accessories against the prices of similar accessories from manufacturers who did **[***43]** not impose price restraints, or (3) to collect affidavits from Kansas retailers who were prevented from discounting. In Brighton's view, the methodology and opinion of Gundlach, based on academic theory and economic literature rather than an empirical analysis of the Kansas market, was not a suitable substitute. In addition, O'Brien's other expert, Pflaum, was inadequate because he was "asked to simply assume the fact of injury" in order to calculate damages. This same expert admitted **[*340]** that, absent defendant's conduct, "there could be [the] possibility" that prices would increase and some class members might have paid more, and it was not his testimony that every Brighton retailer would lower prices. Brighton also relied upon its affidavits from certain Brighton retailers in Kansas who swore that their pricing practices would be the same absent Brighton's policy.

O'Brien argued to this court that the language of Brighton's written pricing policy, its written pricing agreements, and its enforcement practices—plus the testimony of Gundlach—created a genuine issue of material fact on injury and thus precluded summary judgment. Gundlach opined that Brighton's practices fixed the prices of **[***44]** Brighton's products, which severely limited discounting, and he observed that retailers who willfully failed to comply with the pricing arrangement were terminated or their shipments put on hold. He further concluded that, as a result, Brighton's price-fixing limited price competition by retailers selling Brighton goods. Gundlach based his conclusions on information from Brighton regarding its practices, a survey of "authoritative opinion" on the effects of vertical price-fixing in general, and "empirical evidence" of the impact of price-fixing documented by other scholars, studies that were not specific to Brighton.

Brighton's demand that O'Brien come forward with proof of injury or damage in the form of a benchmark analysis sets too high a bar. It over-interprets federal law, which, at best, is persuasive rather than controlling. It also is contrary to this court's usual posture of hospitality to circumstantial evidence. See *Dieker v. Case Corp., 276 Kan. 141, 160, 73 P.3d 133 (2003)* (***HN27***[] circumstantial evidence can serve as proof of the elements of a theory of liability even though other reasonable theories are not excluded by such evidence). ***HN28***[] Neither the KRTA nor our limited caselaw **[***45]** interpreting it, see, *e.g., Bergstrom v. Noah, 266 Kan. 829, 974 P.2d 520 (1999)*; *United Artists Corp. v. Mills, 135 Kan. 655, 11 P.2d 1025 (1932)*; *Mills v. Ordnance Co., 113 Kan. 479, 215 P. 314 (1923)*; requires this particular form of "concrete evidence" to avoid summary judgment on antitrust injury. O'Brien has directed the court's attention to adequate circumstantial evidence that consumers actually paid prices for Brighton goods inflated by its pricing combinations or **[*341]** arrangements with retailers, and the district judge erred in ruling otherwise. Summary judgment in favor of Brighton based on the nonexistence of "antitrust injury" as a matter of law must be reversed.

"Rule of Reason" Violation Standard

Brighton's next line of defense—raised as a contingent issue in the appeal of the plaintiff class—is its insistence that only price-fixing that violates a "rule of reason" can subject it to liability under the KRTA. In essence, Brighton argues that the district judge's decision to grant it summary judgment can be upheld as right for the wrong reason. See, *e.g., State v. Robinson, 293 Kan. 1002, 1025, 270 P.3d 1183 (2012)*. We must therefore reach the merits of this issue.

As with the **[***46]** issue of antitrust injury, Brighton references federal law, in particular, the United States Supreme Court's employment of "rule of reason" analysis in an earlier case involving at least some of the same pricing practices at issue here, *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*.

In *Leegin*, a case brought under the Sherman Act, *15 U.S.C. 1 et seq.*, by PSKS, Inc., operator of Kay's Kloset, a Texas women's apparel store, the Court stated that the goal **[**1079]** of the required federal rule of reason is to distinguish between "restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *551 U.S. at 886*.

The district judge in this case followed Brighton half as far as it would have had him go. He accepted Brighton's argument that reasonableness or a rule of reason sets the standard for violation of the KRTA, invoking language in two Kansas restraint-of-trade cases: *Heckard v. Park, 164 Kan. 216, 223-24, 188 P.2d 926 (1948)* ("The real question is never whether there is any restraint of trade but always whether the restraint is reasonable in **[***47]** view of all the facts and circumstances and whether it is inimical to the public welfare."), and *Okerberg v. Crable, 185 Kan. 211, 217, 341 P.2d 966 (1959)* (quoting same language from *Heckard*). But he stopped **[*342]** short of granting summary judgment on this issue to Brighton because he believed there were genuine issues of material fact on whether Brighton's pricing policies could pass muster under a reasonableness standard. Brighton challenges this part of the district judge's ruling on its cross-appeal—arguing that O'Brien cannot show that it had market power within a properly defined market or that its pricing practices had anticompetitive effects. We need reach these cross-appeal issues only if we first agree with the district judge's decision that reasonableness sets the standard for when price-fixing violates the KRTA.

HN29[] Neither *K.S.A. 50-101* nor *K.S.A. 50-112* mentions reasonableness or a rule of reason. Rather, *K.S.A. 50-101(d)* provides that "[a]*ny* such combinations are hereby declared to be against public policy, unlawful and void," (emphasis added) and *K.S.A. 50-102* denies "the right to form or to be in any manner interested, either directly or indirectly, as principal, agent, representative, **[***48]** consignee or otherwise, in any trust as defined in *K.S.A. 50-*

101. K.S.A. 50-112 provides that "[a]*ll* arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles . . . are hereby declared to be against public policy, unlawful and void." (Emphasis added.)

This clear statutory language draws a bright line. The question is therefore whether *Heckard* and *Okerberg* or federal antitrust rulings invoking a rule of reason compel its erosion.

We address the federal antitrust rulings first and briefly: We conclude that they compel nothing. O'Brien is correct in arguing that ***HN30***[] federal precedents interpreting, construing, and applying federal statutes have little or no precedential weight when the task is interpretation and application of a clear and dissimilar Kansas statute. See Bergstrom, 266 Kan. at 845 (Kansas courts not bound by federal approach in interpreting antitrust laws); see also State v. Sellers, 292 Kan. 346, 357, 253 P.3d 20, 28 (2011) (court will give effect to plain language of unambiguous statute); State v. Raschke, 289 Kan. 911, 914, 219 P.3d 481 (2009) **[***49]** (court must first attempt to ascertain legislative intent through statutory language enacted, giving **[*343]** common words ordinary meanings); Graham v. Dokter Trucking Group, 284 Kan. 547, 554, 161 P.3d 695 (2007) ("If the statute's language is clear, there is no need to resort to statutory construction."). Brighton's scholarly exegesis on the holdings and reasoning of federal cases, though impressive, is inapposite.

Pronouncements in our Kansas precedents are another matter. ***HN31***[] Although stare decisis is not an "inexorable command," see Hall v. Dillon Companies, Inc., 286 Kan. 777, 787, 189 P.3d 508 (2008) (doctrine of stare decisis does not compel perpetuation of incorrect analysis of the law); see also Bergstrom v. Spears Manufacturing Co., 289 Kan. 605, 610, 214 P.3d 676 (2009) (citing Coleman v. Swift-Eckrich, 281 Kan. 381, 388, 130 P.3d 111 [2006] ["This court is not inexorably bound by precedent; it will reject rules that were originally erroneous or are no longer sound."]), we do not lightly overrule this court's prior cases. See Rhoten v. Dickson, 290 Kan. 92, 112, 223 P.3d 786 (2010) (court of last resort will follow rule of law established in earlier cases unless clearly convinced rule **[***50]** was originally erroneous, no **[**1080]** longer sound because of changing conditions, more good than harm will come by departing from precedent). Thus it is necessary for us to conduct a careful examination of the development of the antitrust violation standard in Kansas to discern whether any reasonableness gloss that has been read into the KRTA is first, sound, and, second, applicable to the vertical or horizontal price-fixing claims here.

The first case to address vertical price-fixing in our state was 1923's Mills v. Ordnance Co., 113 Kan. 479, 215 P. 314. In that case, this court considered a contract for the purchase of tractors that required the purchaser to maintain the seller's list prices when reselling the tractors to consumers. This qualified as a vertical price-fixing agreement, although the opinion did not use that description. At the time, the governing provision was Section 6409 of the General Statutes of 1915, the legislative ancestor of today's K.S.A. 50-101. Section 6409 provided in part:

> "A **[***51]** trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes:
> . . . .
>
> **[*344]** "*Fifth*, To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure; or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure; or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity; or by which they shall agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its price may in any manner be **[***52]** affected. And any such combinations are hereby declared to be against public policy, unlawful and void." (L. 1897, ch. 265, sec. 1.)

This court held that the tractors purchase contract violated Section 6409 and was therefore unenforceable:

> "[The parties] tried to have the contract apply to a restricted territory and apparently attempted to give to the plaintiff the exclusive right to sell tractors in that territory. In doing so, the parties fixed the price at which the tractors should be sold by the plaintiff after they had been purchased from the defendant. They could not make such a contract because it violated the law of this state." *Mills, 113 Kan. at 481*.

Nine years later, this court decided *United Artists Corp. v. Mills, 135 Kan. 655, 11 P.2d 1025*, another vertical price-fixing case. By that time, the Revised Statutes of 1923 had replaced the General Statutes of 1915, see *State, ex rel., v. Davis, Governor, 116 Kan. 663, 229 P. 757 (1924)*; and R.S. 1923, 50-101, the predecessor to today's *K.S.A. 50-101*, precisely mirrored Section 6409, as quoted above.

This court examined a contract between a photoplay distributor and exhibitor, which included a provision requiring the exhibitor to charge a minimum **[***53]** admission fee to customers, and concluded that the provision "plainly . . . violate[d] the inhibition against price[-]fixing contained in . . . R.S. 50-101." *United Artists Corp., 135 Kan. at 656*.

In 1936, this court again refused to enforce a contract that included a vertical price-fixing agreement, this time concerning ice, in *Joslin v. Steffen Ice & Ice Cream Co., 143 Kan. 409, 54 P.2d 941* **[*345]** *(1936)*. Again, we relied on R.S. 1923, 50-101, as well as R.S. 1923, 50-112, which provided that

> "all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the **[**1081]** product, manufacture or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorneys' or doctors' fees, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance, **[***54]** or which tend to advance or control the rate of interest for the loan or use of money to the borrower, or any other services, are hereby declared to be against public policy, unlawful and void." (L. 1889, ch. 257, sec. 1.)

We concluded: "A manufacturer of ice may fix the price at which he may sell his product, but the law will not permit him and his buyer to agree as to the price the latter will charge when he in turn sells that product to third parties." *143 Kan. at 411*. The vertical price-fixing arrangement in the ice contract was "in plain violation" of the statutes. *143 Kan. at 411-12* (citing *Mills, 113 Kan. at 481*).

The following year, the legislature enacted the Kansas Fair Trade Act (KFTA), R.S. 1937, 50-310 *et seq.* See *Quality Oil Co. v. du Pont & Co., 182 Kan. 488, 493, 322 P.2d 731 (1958)* (citing to KFTA in L. 1937, ch. 165, secs. 1-10). It specifically permitted contracts controlling resale prices, G.S. 1949, 50-302, and explicitly authorized private suits to punish deviation from them. G.S. 1949, 50-306. Such suits could be brought against not only a reseller who was party to the newly legal price-fixing contract, but also against a third-party retailer who had never agreed **[***55]** to the price control. G.S. 1949, 50-306; see *Quality Oil, 182 Kan. at 493-94* (discussing KFTA provisions).

In 1958, this court struck down the third-party provision as "statutory price[-] fixing by compulsion," in conflict with the Kansas Constitution. *Quality Oil, 182 Kan. at 495-96*. This court stated:

> "[W]e conclude the nonsigner clause of the Fair Trade Act is an unconstitutional attempt to delegate legislative power to private persons in violation of *Art. 2, § 1 of the Kansas Constitution.* The statute, beyond permitting voluntary contracts or agreements between a trade-mark owner and a retailer to fix a minimum resale **[*346]** price binding upon the signing retailer, gives legislative sanction to the trade-mark owner to fix minimum resale prices binding upon nonsigners.
>
> . . . .

". . . The legislature is powerless to clothe a private person with power to fix minimum resale prices, binding upon all who acquire and sell his trade-mark commodity with whom he has no direct contractual relation. An attempt to confer such power is an attempt to delegate legislature power, which is futile." 182 Kan. at 495-96.

The legislature repealed the KFTA in 1963. This repeal, in theory, returned Kansas to the **[***56]** simple, per se rule developed by *Mills, United Artists*, and *Joslin*: Vertical price-fixing arrangements again were *always* impermissible in Kansas. None of the pre-KFTA cases or the statutory provisions they applied had imposed a threshold judicial evaluation of the reasonableness of the subject contract's trade restraint before a violation preventing enforcement could be recognized.

If anything about that simple, per se rule changed between 1937 and 1963, that is, while the KFTA was in effect, it had to have changed because of *Heckard* and *Okerberg*, the only two relevant cases decided during the period.

In 1948's *Heckard*, Bessie B. Heckard and singer Lucile Jeannie Park entered into a vocal training contract. Under the contract, Park agreed to certain restrictive covenants, including: "[n]ot to employ or accept tutelage from any musical instructor without plaintiff's written consent"; "[t]o engage plaintiff's services as defendant's exclusive manager and agent"; and "[t]o pay plaintiff 10% of all, if any, professional earnings equal or exceeding $100.00 per week which defendant might obtain during, but only during, the next seven years following the execution of the written agreement." **[***57]** 164 Kan. at 221 ***[**1082]*** . Heckard sued Park for an accounting and for specific performance of the written contract under G.S. 1935, 50-101 and G.S. 1935, 50-112, which were identical in all relevant respects to today's K.S.A. 50-101 and K.S.A. 50-112. There was no allegation that the contract contained any vertical price-fixing provisions.

This court held in favor of Heckard and said that "[t]he real question is never whether there is any restraint of trade but always **[*347]** whether the restraint is reasonable in view of all the facts and circumstances and whether it is inimical to the public welfare." 164 Kan. at 223-24. Because the court viewed the contract as reasonable under all of the circumstances, it could be enforced despite the covenants. 164 Kan. at 224 (citing Mills v. Cleveland, 87 Kan. 549, 125 P. 58 [1912] [contract "limiting the right of a physician to practice a specialty and limiting his right to sell or disclose certain formulas used in such practice" upheld as valid because "reasonable[] under all the circumstances"]; Kent Oil Co. v. Waddill, 127 Kan. 704, 274 P. 1113 [1929] [contract limiting former employee "not to engage in that kind of work [for which employee was employed] for **[***58]** himself or any other person within the city for a period of two years after the termination of the employment" upheld as reasonable; order granting temporary restraining order to enforce the contract affirmed]; Berkey v. Smith, 138 Kan. 792, 796, 28 P.2d 763 [1934] [contract in which apprentice "promise[d] not to enter into competition with undertaker within radius of ten miles in consideration of undertaker's instructing apprentice in art of embalming and funeral directing" upheld as reasonable; injunction affirmed]; Southwest Kan. Oil & G. Co. v. Argus P. L. Co., 141 Kan. 287, 39 P.2d 906 [1935] [reasoning that "[a] bargain in restraint of trade is illegal, not if there is restraint, but if the restraint be unreasonable" and upholding "[c]ontract whereby producers agreed to sell, at fixed price, and distributor to buy, all gas produced from producers' well up to requirements of distributor"]).

In 1959's *Okerberg*, this court upheld contracts regulating milk routes against an antitrust challenge under G.S. 1949, 50-101 and G.S. 1949, 50-112. 185 Kan. at 219. The contracts set territories, required approval from a committee of the milk producers for route changes, required haulers to **[***59]** serve all producers within their territories who sold to a specific creamery, protected haulers against encroachment on their routes, and provided for sale or transfer of tank hauling rights. 185 Kan. at 218-19. Vertical price-fixing was not in issue.

We quoted *Heckard* with approval, treating reasonableness as a threshold inquiry when an antitrust violation was alleged, and examined **[*348]** "'fundamental elements of common fairness in view of the facts and circumstances of the parties.'" 185 Kan. at 217 (quoting Heckard, 164 Kan. at 224). As with the vocal training contract in *Heckard*, because this court viewed the *Okerberg* milk route contracts as reasonable, they also were enforceable. The contracts' limiting effect on the parties' market behavior did not make them illegal under the ostensibly governing statutes. 185 Kan. at 219.

HN32[] Careful examination of *Heckard* and *Okerberg* demonstrates that the "reasonableness" rubric they instituted had and has nothing to do with evaluation of an alleged price-fixing arrangement. This is also true of the cases upon which *Heckard*, and, in turn *Okerberg*, relied. The restraints of trade at issue—for example, covenants not to compete and a requirements contract—are **[***60]** factually and legally distinct from the vertical and horizontal price-fixing alleged in this case under K.S.A. 50-101 and K.S.A. 50-112.

There is another, more basic reason not to apply the reasonableness rubric of *Heckard* and *Okerberg* to this price-fixing case: **HN33**[] Under the pattern for interpretation of statutes that this court has now firmly established, we are loathe to read unwritten elements into otherwise clear legislative language. See State v. Arnett, 290 Kan. 41, 47, 223 P.3d 780 (2010) ("'The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted.'"). We take the legislature at its word, unless there is ambiguity, because the **[**1083]** legislature, unlike the judiciary, is one of the branches of government charged with development of public policy on behalf of the electorate and because our deference to clear statutory language leads to long-term predictability and stability in Kansas law. See Quality Oil, 182 Kan. at 495 (decision on whether K.S.A. 50-112 reflects sound economic policy not the court's to make). This means that, if the *Heckard* and *Okerberg* contracts were to come before us now, it is all but certain we would not append **[***61]** a requirement that an antitrust plaintiff demonstrate the unreasonableness of a defendant's trade restraint to show a statutory violation, because the clear language of the governing statutes does not require it. See K.S.A. 50-101 ("[a]*ny* such combinations are hereby declared to be against public policy, unlawful and void.") (Emphasis added.); K.S.A. 50-112 ("[a]ll arrangements, **[*349]** contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles . . . are hereby declared to be against public policy, unlawful and void.") (Emphasis added.). If the legislature had wanted to make such a showing part of an antitrust action, it certainly was capable of doing so. In the absence of the policy message such a legislative addition would send, we have no confidence in the soundness of the *Heckard* language—"The real question is never whether there is any restraint of trade, but always whether the restraint is reasonable in view of all the facts and circumstances and whether it is inimical to the public welfare"—at the time it was written and today.

HN34[] As K.S.A. 50-101 **[***62]** and K.S.A. 50-112 now read, the proper approach is not to determine "whether the restraint is reasonable in view of all of the facts and circumstances," or to attempt to distinguish between restraints with anticompetitive effect and restraints that stimulate competition. *Cf.* Heckard, 164 Kan. at 223-24; Leegin, 551 U.S. at 886. The clear statutory language of K.S.A. 50-101 and K.S.A. 50-112 leaves no room for such an approach. The simple, per se rule of Mills, United Artists, and Joslin survives. The reasonableness rubric of Heckard and Okerberg is overruled.

Because we decide that reasonableness does not set the antitrust violation standard in Kansas, we need not reach Brighton's cross-appeal arguments that O'Brien's claims are blocked by the rule of reason.

Horizontal Price-fixing

O'Brien has also contended that Brighton's ownership of stores that sell Brighton products qualifies it as a competitor to the retailers with which it entered into pricing agreements; this, in turn, would support a claim for horizontal price-fixing. Brighton has one retail store in Kansas and more than 100 such stores nationwide. Brighton has countered that its status as a dual-distributor, *i.e.*, both a wholesale **[***63]** supplier and a retailer of its own products, does not support a horizontal price-fixing claim because dual-distribution systems are treated as vertical arrangements under federal law.

[*350] On appeal, Brighton has asserted that O'Brien raised any challenge to the district judge's rejection of any horizontal price-fixing claim too late to preserve it for our review. Our review of the record and briefs in this matter indicates otherwise, and we therefore consider the merits of the challenge.

The district judge concluded in a one-paragraph footnote to his Memorandum Decision on summary judgment that "the claims made do not involve horizontal price-fixing." He reasoned that the Heart Store agreements at issue were between Brighton as the wholesale supplier of Brighton products and its retailers, and that the RPM policy set forth the relationship between Brighton as the wholesale supplier of Brighton products and its retailers. In other words, both had vertical rather than horizontal structure and impact.

We have not previously evaluated a dual distribution price-fixing case. ***HN35***[] The governing KRTA provisions, *K.S.A. 50-101* and *K.S.A. 50-112*, neither differentiate between vertical and horizontal price-fixing **[***64]** nor outline a particular approach to a dual-distribution situation. Rather, as fully discussed above, they **[**1084]** forbid all price-fixing combinations or arrangements, regardless of the applicable label. Were this case in federal court, flawless labeling would have more bite, because horizontal price-fixing is still subject to a per se prohibition while vertical price-fixing—held to include dual-distribution situations by every circuit to examine the question—is analyzed under the rule of reason. See *Leegin, 551 U.S. at 893* (vertical price-fixing subject to rule of reason analysis); *AT&T Corp. v. JMC Telecom, LLC, 470 F.3d 525, 531 (3d Cir. 2006)* (dual-distribution treated like vertical price-fixing); *EEC v. Toshiba America Consumer Products, Inc., 129 F.3d 240, 243 (2d Cir. 1997)* (same); *Smalley & Co. v. Emerson & Cuming, Inc., 13 F.3d 366, 368 (10th Cir. 1993)* (same); *Illinois Corporate Travel v. American Airlines, 889 F.2d 751, 753 (7th Cir. 1989)* (same); *International Logistics Group v. Chrysler Corp., 884 F.2d 904, 906 (6th Cir. 1989)* (same); *Ryko Mfg. Co. v. Eden Services, 823 F.2d 1215, 1230 (8th Cir. 1987)* (same); *Donald B. Rice Tire Co. v. Michelin Tire Corp., 638 F.2d 15, 16 (4th Cir. 1981)* **[***65]** (same); compare *Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1004-1007 (5th Cir. **[*351]** 1981)* (same); *Glacier Optical, Inc. v. Optique du Monde, 1995 U.S. App. LEXIS 1108, 1995 WL 21565 (9th Cir. 1995)* (unpublished opinion) (same).

Because this state court case arises under the KRTA rather than federal law, the rule of reason does not apply. To the extent O'Brien's horizontal price-fixing claim rests on conduct identical to that supporting her vertical price-fixing claim, horizontal price-fixing is an alternative theory of liability. Proof of an alternative theory does not entitle a plaintiff to additional damages, but it gives a factfinder another way to get to judgment in the plaintiff's favor. O'Brien, like any civil plaintiff, could pursue an alternative theory of liability if it is supported by evidence. The district judge erred in ruling that the class "claims do not involve horizontal price-fixing." They do. Because the district judge did not, evidently, reach the next question of whether O'Brien has come forward with enough evidence to avoid summary judgment on horizontal price-fixing, we do not reach it either.

Statute of Limitations on Full Consideration and Treble Damages Claims

HN36[] For persons **[***66]** injured or damaged by price-fixing prohibited under *K.S.A. 50-101* and *K.S.A. 50-112*, recovery of damages sustained, full consideration damages, and treble damages are permitted. See *K.S.A. 50-108* (applying to *K.S.A. 50-101*; "such damages sustained"); *K.S.A. 50-115* (applying to *K.S.A. 50-112*; "full consideration or sum paid"); *K.S.A. 50-161(b)* (applying to all of KRTA; "treble the damages sustained," "any damages suffered"); see also *K.S.A. 50-147* ("The rights and remedies given by this act shall be construed as cumulative of all other laws in force in this state, and shall not affect, change or repeal any other remedies or rights now existing in this state for the enforcement, payment or collection of fines, penalties and forfeitures."). The parties disagree on the applicable statute of limitations and the attendant downward pressure it may exert on any eventual full consideration or treble damages award. We now address the merits of this disagreement.

O'Brien argues in favor of application of the 3-year statute of limitations in *K.S.A. 60-512(2)*. It provides that "[a]n action upon a liability created by a statute other than a penalty or forfeiture" **[*352]** must be brought in 3 years. O'Brien **[***67]** argues that both the full consideration and the treble damages provisions are civil remedies, not penalties, designed to encourage consumers to exercise their rights under the KRTA.

Brighton advocates for application of the 1-year statute of limitations in *K.S.A. 60-514(c)*, which governs "[a]n action upon statutory penalty or forfeiture." Brighton argues that both the full consideration and treble damages provisions are statutory penalties because they award more than actual damages and are cumulative with actual damages.

We also note as an initial matter that *amicus* Quin Jackson, in addition to supporting O'Brien's argument for application of the 3-year statute of limitations, states that the discovery rule of *K.S.A. 60-510* applies and that "fraudulent concealment and other tolling **[**1085]** issues may be raised as well." Neither of the parties has ever made an issue of either the discovery rule or any tolling doctrine, and we therefore do not address their merit or lack of merit. See State ex rel. Six v. Kansas Lottery, 286 Kan. 557, 561, 186 P.3d 183 (2008) (court will not address arguments raised only by nonparty *amici curiae*).

District Judge Woolley split the baby. He ruled that the full consideration **[***68]** claim under K.S.A. 50-115 was not a claim for a penalty and was, therefore, subject to the 3-year statute of limitations under K.S.A. 60-512(2). He also ruled that the treble damages claim under K.S.A. 50-161 was a claim for a penalty and was, therefore, governed by the 1-year statute of limitations under K.S.A. 60-514(c).

HN37[] The KRTA explicitly established a cause of action for individuals to sue and recover general "damages" as well as specific types of damages. See K.S.A. 50-102; K.S.A. 50-108; K.S.A. 50-115; K.S.A. 50-161. It thus creates not only a new procedure for relief, but also new substantive rights. See Wright v. Kansas Water Office, 255 Kan. 990, 997, 881 P.2d 567 (1994); see also Four B Corp. v. Daicel Chemical Industries, Ltd., 253 F. Supp. 2d 1147, 1155-56 (D. Kan. 2003) (concluding plaintiff's antitrust claims under Kansas law arise out of antitrust statute). In addition, we note that the remedies for persons under the KRTA are separate and distinct from the civil **[*353]** penalties the attorney general is empowered to seek. See K.S.A. 50-103(a)(5); see also K.S.A. 50-160(a) ("The commission of any act or practice declared to be a violation of the Kansas restraint of trade act **[***69]** shall render the violator liable to the state for the payment of a civil penalty in a sum set by the court of not less than $100 nor more than $5,000 for each day such violation shall have occurred."); K.S.A. 50-160(b) ("Any person who willfully violates the terms of any court order issued pursuant to the Kansas restraint of trade act shall forfeit and pay a civil penalty of not more than $10,000 per violation, in addition to other penalties that may be imposed by the court . . . . [T]he district court issuing an order shall retain jurisdiction, and in such cases, the attorney general may petition for recovery of civil penalties.").

HN38[] In the words of K.S.A. 60-512(2), an action based on the KRTA is "upon a liability created by statute." See Alexander v. Certified Master Builders Corp., 268 Kan. 812, 821, 1 P.3d 899 (2000) (quoting Wright, 255 Kan. at 997) (liability '"created by statute'" when '"liability for resultant damages would not arise but for the statute'"). Likewise, an action based on the KRTA qualifies for the one-word description of K.S.A. 60-514(c): It is "statutory." The rest of the relevant language from the two statutes of limitation requires construction. See Brennan v. Kansas Insurance Guaranty Ass'n, 293 Kan. 446, 450, 264 P.3d 102 (2011) **[***70]** (when legislative intent not clear from statutory language court moves to applying canons of construction or legislative history). Although an action seeking a "penalty or forfeiture" is plainly excluded by K.S.A. 60-512(2) and plainly included by K.S.A. 60-514(c), "penalty or forfeiture" is not clearly defined. And we have not previously construed "penalty or forfeiture" as applied to either full consideration damages or treble damages under the KRTA. In the only one of our cases in which the KRTA statute of limitations was in issue, we did not decide the question because the plaintiff's action would have been barred by either limitations provision under consideration. McCue v. Franklin, 156 Kan. 1, 131 P.2d 704 (1942).

Judge Carlos Murguia of the federal District of Kansas did reach the issue of the statute of limitations applicable to the KRTA treble damages remedy in Four B Corp., 253 F. Supp. 2d at 1155-56, **[*354]** deciding the 3-year statute of limitations in K.S.A. 60-512(2) applied. Judge Murguia cited this court's decision in Alexander, 268 Kan. at 820, in support of the proposition that "[a] claim which arises from a statute does not automatically constitute a 'penalty' or 'forfeiture' **[***71]** so as to trigger a one-year statute of limitations period, even if a plaintiff is entitled to recover more than his actual damages." Four B Corp., 253 F. Supp. 2d at 1154-55. The question of which statute of limitations should apply to KRTA full consideration **[**1086]** damages was not before the court in Four B Corp.

In an action brought under the Kansas Consumer Protection Act (KCPA), we stated that "in many instances where a statute gives accumulative damages to the party grieved, it is not a penal action." Alexander, 268 Kan. at 824 (citing Huntington v. Attrill, 146 U.S. 657, 667-69, 13 S. Ct. 224, 36 L. Ed. 1123 [1892]). We observed that under the KCPA a consumer had the option to seek either damages or a civil penalty, not both. 268 Kan. at 823. But we said that the key question was whether a statutory provision was more remedial or punitive in nature. 268 Kan. at 823.

In *Alexander*, we examined the KCPA statutory scheme and concluded that "the KCPA provides a private remedy to consumers in the hope that they will enforce the KCPA as 'private attorneys general,'" and that consumer suits allowed individuals to gain "reimbursement for the private wrong done." *268 Kan. at 822, 824*. We ultimately **[***72]** determined that both an action seeking a civil penalty and one seeking actual damages should be subject to the 3-year statute of limitations because treating the two differently would frustrate the intent of the statute to create an effective remedy for Kansas consumers. *268 Kan. at 823-24*. We said that a 1-year statute of limitations would be appropriate "if the legislature had provided for a separate penalty in addition to a damage recovery." *268 Kan. at 824*.

As Brighton has noted, both the full consideration damages and treble damages recoverable under the KRTA would exceed actual damages, and it makes sense to subject both provisions to the same statute of limitations analysis. See *268 Kan. at 824* (under KCPA, applying "two different statutes of limitation would force the consumer to file within 1 year, or find his or her options for recovery **[*355]** reduced to merely actual damages"). But, otherwise, we regard O'Brien's statute of limitations argument as generally more consistent with our reasoning in *Alexander*.

The 3-year statute of limitations in *K.S.A. 60-512(2)* gives a greater incentive to consumers to exercise their statutory rights by bringing private actions under the KRTA. Like **[***73]** the KCPA, the KRTA enables individuals to gain "reimbursement for the private wrong done." See *268 Kan. at 824*. Also like the KCPA, the KRTA's provisions allowing private suits permit consumers to act as "'private attorneys general'" to enforce the provisions of the statute and prevent further wrongdoing. See *268 Kan. at 822*. We also are persuaded that both full consideration damages and treble damages under the KRTA are "more remedial in nature than punitive." See *268 Kan. at 823*. They are chiefly, if handsomely, designed to compensate an individual who has been injured by a trade restraint, while the Attorney General is explicitly empowered to seek civil penalties to punish a violation on behalf of the rest of the citizens of the state. *K.S.A. 50-103(a)(5)*; *K.S.A. 50-160*.

HN39[] We therefore hold that neither O'Brien's claim for full consideration damages nor her claim for treble damages qualifies as an action for a statutory penalty or forfeiture. They are both subject to the 3-year statute of limitations under *K.S.A. 60-512(2)*. This holding compels us to affirm the district judge's partial summary judgment ruling on the question of full consideration damages and to reverse his summary **[***74]** judgment ruling on the question of treble damages.

Necessity of Explicit Written Agreement

Brighton argues on its cross-appeal that it was entitled to partial summary judgment against O'Brien on any purchases made at Kansas retailers that were not Heart Stores in 2001or 2002 and/or luggage stores in 2003, that is, for any purchases made at all but nine Kansas stores during the specified years. Brighton asserts that the KRTA, like federal law, demands that a plaintiff alleging vertical price-fixing come forward with proof of "agreement and concerted action" between each specific retailer and Brighton. In its view, the evidence O'Brien has gathered cannot possibly demonstrate **[*356]** that there was the necessary meeting of the minds between Brighton and the overwhelming majority of Kansas retailers subject only to Brighton's **[**1087]** pricing policy and not designated a Heart Store nor authorized to sell luggage.

O'Brien responds that the written agreements between Brighton and nine of its Kansas retailers were merely the clearest evidence of a larger, unwritten price-fixing arrangement between Brighton and all of its Kansas retailers. She urges us to consider all of her evidence and the reasonable inferences **[***75]** a jury may be permitted to draw from it in context, arguing there is plenty in the record to enable her to escape summary judgment on the issue of whether Brighton acted unilaterally or in unlawful conjunction with its Kansas retailers.

Judge Goering denied partial summary judgment to Brighton on this issue. He determined that "[t]he KRTA requires concerted action by two or more persons or entities to fix prices," without citation to a specific KRTA provision. The district judge reasoned that O'Brien established the existence of a genuine issue of material fact on the scope of any arrangement or agreement. He noted, in particular, evidence of Brighton's enforcement practices and the dispute between the parties over the purpose of Brighton's RPM policy.

As we observed above, ***HN40***[] *K.S.A. 50-101* and *K.S.A. 50-112* prohibit more than "agreements" to fix prices. But even a "combination" under *K.S.A. 50-101* must be "by two or more persons" and an "arrangement" under *K.S.A. 50-112* must be "between persons." Both requirements demand something more than merely a unilateral pricing policy adopted by a wholesale supplier in the position of Brighton.

HN41[] Because *K.S.A. 50-112* and *§ 1* of the Sherman Act share **[***76]** the "between persons" language, and the language of *K.S.A. 50-101* is equivalent, we look to interpreting United States Supreme Court precedent for assistance in understanding what, short of an express agreement, qualifies as more than merely unilateral behavior. Has O'Brien mustered enough evidence to avoid summary judgment on those purchases made at Brighton retailers who were not parties to Heart Store or luggage store applications or agreements?

[*357] ***HN42***[] In *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 763, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*, the Court ruled that, under *§ 1* of the Sherman Act, a price-fixing case must include "evidence that tends to exclude the possibility of independent action by the manufacturer and distributor." "[T]here must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective," and neither communication between a manufacturer and its retailers nor the existence of complaints about discounting would be enough alone for a plaintiff in a price-fixing action to sustain its burden of proof. *465 U.S. at 768*. The Court **[***77]** acknowledged that evidence of complaints about discounting can be probative; however, there must be additional evidence of unlawful conduct. *465 U.S. at 764*.

In this case, Brighton emphasizes evidence from several retailers who said that they independently decided to charge the suggested price for Brighton products. It reminds us that Brighton's officers testified that Brighton had not actually terminated any Kansas retailer for a pricing policy violation and that Brighton had not made explicit promises to Heart Stores or luggage stores that it would enforce its pricing policy against other retailers.

But the record contains ample conflicting evidence in support of O'Brien's claim that an unlawful pricing arrangement existed between Brighton and Kansas retailers beyond the nine Heart Stores and/or luggage sellers.

Brighton's pricing policy was distributed to all retailers. And for at least 1 year, Brighton required all of them to initial an acknowledgment stating that violation of the policy was grounds for dismissal. Brighton's owner testified that the company "require[d] everybody to charge the same price." Unauthorized promotions were not allowed because they would "spread like cancer." **[***78]** Brighton maintained a "Pending Pricing Issues" file, and it conducted investigations into at least two Kansas retailers suspected of discounting. One of those investigations was launched when one retailer who was not a **[**1088]** Heart Store or luggage seller reported another in the same category.

[*358] All of this evidence provides relevant context for the written agreements Brighton entered into with Heart Stores and luggage sellers and at least circumstantially supports a reasonable inference of more than a unilateral policy or action by Brighton.

This evidence also is reminiscent of that before the United States Supreme Court in *Monsanto Co.* In that case, a manager testified that the company advised distributors who were discounting that they were in danger of receiving less than their desired amount of company product. A company representative contacted a distributor's parent company, which then told the subsidiary distributor to comply with the pricing plan. The Court recognized such evidence as "relevant and persuasive as to a meeting of minds." *465 U.S. at 765*. In addition, one distributor sent a newsletter to his customers, in which he discussed the company's efforts to "'get [t]he "marketplace **[***79]** in order"'" and emphasized the company's efforts to maintain minimum prices. *465 U.S. at 765-66*.

The Court ultimately stated in *Monsanto Co.* that it was reasonable to conclude that the termination of a noncomplying distributor was pursuant to a pricing agreement rather than unilateral pricing policy because it was "necessary for competing distributors contemplating compliance with suggested prices to know that those who do not comply will be terminated." *465 U.S. at 767*. The Court decided that the plaintiff had marshaled enough evidence to raise a jury issue. *465 U.S. at 768*.

We reach a similar conclusion here. There is more than enough evidence in the record before us to hold that the district judge was correct in denying Brighton partial summary judgment on the issue of whether there was an unlawful combination "by two or more persons" under K.S.A. 50-101 or an arrangement "between persons" under K.S.A. 50-112 with an effect on the prices paid for purchases at retailers other than Heart Stores and luggage sellers. This is not a case in which the plaintiff can show only a unilateral pricing policy or action. A genuine issue of material fact remains for trial, and weighing of evidence **[***80]** by this court or by the district judge reviewing a summary judgment motion would be improper. See *Underhill v. Thompson, 37 Kan. App. 2d 870, 878, 158 P.3d 987*, *rev. denied 285 Kan. 1177 (2007)*.

[*359] *Certification of the Plaintiff Class*

The last issue raised in Brighton's cross-appeal concerns class certification. We address its status to provide guidance to the district court on remand.

HN43[] Class actions are governed by K.S.A. 60-223, which was modeled after and has traditionally been interpreted like Fed. R. Civ. Proc. 23. *Dragon v. Vanguard Industries, Inc., 277 Kan. 776, 778, 89 P.3d 908 (2004)* (*Dragon I*). The class in this case is composed of named plaintiff O'Brien and "[a]ll persons who . . . from January 1, 1997, . . . to the date of trial, have purchased any Brighton product from any Brighton retailer."

At the time this case was filed, K.S.A. 60-223(b)(3), the subsection of the statute that is relevant here, stated that a class should be certified if

> "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient **[***81]** adjudication of the controversy. The matters pertinent to the findings include: (A) The interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

District Judge Richard T. Ballinger ordered certification of the class, Brighton filed an interlocutory appeal challenging that certification. The appeal was denied by the Court of Appeals without explanation. **[**1089]** Brighton also moved to decertify the class in the district court, but, given Judge Goering's summary judgment ruling in favor of Brighton on antitrust injury, the judge never ruled on the motion to decertify.

On its cross-appeal, Brighton challenges only Judge Ballinger's analysis of K.S.A. 60-223(b)(3), the predominance requirement. It seeks a ruling from us that the district judge abused his discretion in certifying the class.

Brighton makes two arguments: (1) O'Brien and **[***82]** the class lack a method of common proof for showing injury, *i.e.*, payment of a **[*360]** price higher than the price that would have been paid absent an unlawful restraint; and (2) O'Brien and the class lack a common method of proof for showing each Kansas retailer entered into an illegal arrangement with Brighton.

In response to Brighton's first point, O'Brien asserts that there is common proof that every purchase was made at a fixed price in a distorted market. In response to Brighton's second point, O'Brien asserts that there is common proof of Brighton's written agreements, its pricing policy, and its monitoring and enforcement activities—all of which, taken together, establish the extent of the arrangement.

HN44[] Under *Dragon I*, we do not judge "'the propriety of a class certification by hindsight'" but rather to ensure that the district judge applied and "'rigorous[ly] analy[zed]'" the requirements of K.S.A. 60-223 in its decision to certify the class. *277 Kan. at 780*; see also *Critchfield Physical Therapy v. Taranto Group, Inc., 293 Kan. 285, 292, 263 P.3d 767 (2011)*. If a district judge evaluates the proper factors, his or her decision will be granted deference on appeal. See *277 Kan. at 779*.

Here, **[***83]** the district judge incorporated the transcript of the oral argument on the motion for class certification into his decision in this case. During the oral argument, the judge stated that he had reviewed all of the documents filed by the parties, and he concluded that "the requirements of *223(a)(1) through 4* are clearly met" because "[t]here's no factual issue. The legal issues are really common, whether or not there is one person or there are a thousand people who have bought belts from [Brighton]." Specifically regarding the factors to be considered on predominance, the judge said:

> "The interest of the members, the extent and nature of the litigation controversy, the desirable concentration in the litigation, certainly the judicial economy comes into play in there, too, but of course that's not determinative, and the difficulties likely to be encountered in the management of the class action, those are all considerations and clearly tend to show that a class action is appropriate in this case."

[*361] In his journal entry, the judge repeated that he had

> "considered and carefully examined the evidence in relation to:
>
> "(A) the interest of members of the class in individually controlling the prosecution **[***84]** or defense of separate actions;
> "(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> "(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and]
> "(D) the difficulties likely to be encountered in the management of the class action."

But, as at oral argument, the judge did not make factual findings or explain how he had considered or applied the statutory factors to arrive at his legal conclusions. He said merely that he had reached its ultimate conclusions regarding predominance "in light of the evidence."

After the district judge's certification ruling, we handed down our decision in *Dragon v. Vanguard Industries, 282 Kan. 349, 144 P.3d 1279 (2006)* (*Dragon II.*). In that case, ***HN45***[] we determined that *K.S.A. 60-252(a)* and *Supreme Court Rule 165* (2011 Kan. Ct. R. Annot. 246)—which require that a district court judge "find, and either orally or in writing state, the controlling facts and the judge's conclusions of law thereon" and "state the controlling facts required by *K.S.A. 60-252*, and the legal principles controlling the decision"—apply to a district **[**1090]** judge's class **[***85]** certification decision. *282 Kan. at 356*. Generally litigants and their counsel bear the responsibility of objecting to inadequate findings of fact and conclusions of law

> "to give the trial court the opportunity to correct them, and in the absence of an objection, omissions in findings will not be considered on appeal. [Citation omitted.] Where no objection is made, this court will presume the trial court found all facts necessary to support its judgment. However, this court may still consider a remand if the lack of specific findings precludes meaningful review. [Citation omitted.]" *Dragon II, 282 Kan. at 356*.

In this case, it does not appear that Brighton objected specifically to inadequate findings and conclusions on certification, but it did attempt to pursue a timely interlocutory appeal. When the Court of Appeals rebuffed that effort, Brighton filed a motion to decertify **[*362]** the class. And it included the predominance issue in its prophylactic cross-appeal.

Because Brighton made a consistent effort to keep its challenge to certification alive, both in the district court and before this court, and because the district judge's insufficient factual findings and legal conclusions preclude **[***86]** meaningful appellate review of class certification at this procedural juncture, we merely observe that Brighton's motion to decertify the class remains pending. It will, on remand, be ripe for decision. When that motion is heard and decided, the parties and the district judge will have the opportunity to ensure creation of a record adequate to support any future appropriate appellate review.

CONCLUSION

After a thorough review of the record and the parties' extensive arguments on this appeal and cross-appeal, we hold that the district judge erred in his demand for proof of a "concrete injury" in this price-fixing case under *K.S.A.*

50-101 and K.S.A. 50-112. This holding requires reversal of the district judge's summary judgment in favor of defendant Brighton, and this case must be remanded to district court.

Brighton also was not entitled to summary judgment under a "rule of reason," which is not applied in a price-fixing action brought under K.S.A. 50-101 and K.S.A. 50-112 of the KRTA.

The **[***87]** district judge erred in ruling that the claims of the plaintiff class do not involve horizontal price-fixing. The named plaintiff and class have made an alternative allegation of unlawful horizontal restraint.

We affirm in part and reverse in part on the district judge's statute of limitations rulings. The limitations provision applicable to the class claims for both full consideration damages and treble damages is the 3-year statute of K.S.A. 60-512(2).

We hold that the district judge correctly determined that a genuine issue of material fact remained for trial on the issue of whether there was an unlawful combination or arrangement under K.S.A. 50-101 and K.S.A. 50-112 between Brighton and its retailers who had no express agreements as Heart Stores or luggage sellers.

[*363] And, finally, the insufficiency of the district judge's findings of fact and conclusions of law on class certification preclude meaningful appellate review of the predominance issue raised in Brighton's cross-appeal. On remand, Brighton's motion to decertify the class will be ripe for decision under the guidance of this court's opinions in Dragon I, 277 Kan. at 778-93, and Dragon II, 282 Kan. at 360-64.

Reversed and remanded **[***88]** to the district court for further proceedings consistent with this opinion.

MALONE, J., assigned. [1]

End of Document

[1] **REPORTER'S NOTE:** Pursuant to the authority vested in the Supreme Court by K.S.A. 20-3002(c), Judge Thomas E. Malone, of the Kansas Court of Appeals, was appointed to hear case No. 101,000 to fill the vacancy on the court created by the retirement of Chief Justice McFarland.

Mercer v. Am. Brokers Conduit

United States District Court for the Central District of California

May 9, 2012, Decided; May 9, 2012, Filed

EDCV 11-1831 PSG (SPx)

Reporter

2012 U.S. Dist. LEXIS 199675 *

Jeanine Mercer v. American Brokers Conduit, et al.

Core Terms

notice, trust deed, modification, preliminary injunction, foreclosure, foreclosure sale, allegations, default, merits, declaratory relief, trustee sale, likelihood of success, accounting, recorded, Permanent, documents, modification agreement, cause of action, quiet title, pleaded, motion to dismiss, non-judicial, declaration, foreclose, mailed, offers, fails, notice of default, conclusory, enjoining

Counsel: **[*1]** Attorneys for Plaintiffs: NOT Present.

Attorneys for Defendants: NOT Present.

Judges: Honorable Philip S. Gutierrez, United States District Judge.

Opinion by: Philip S. Gutierrez

Opinion

CIVIL MINUTES - GENERAL

Proceedings: (In Chambers) Order DENYING preliminary injunction, GRANTING motion to dismiss, and ORDERING Plaintiff to SHOW CAUSE RE DISMISSAL pursuant to *Federal Rule of Civil Procedure 4(m)*

Before the Court are Plaintiff Jeanine Mercer's motion for preliminary injunction and Defendants' motion to dismiss. The Court finds the matters appropriate for decision without oral argument. *See* *Fed. R. Civ. P. 78*; *L.R. 7-15*. Having read and considered the moving and opposing papers, the motion for preliminary injunction is DENIED and the motion to dismiss is GRANTED.

I. Background

This is a wrongful foreclosure case. Plaintiff Jeanine Mercer ("Plaintiff") is the owner of a piece of real property located in Ontario, California (the "Subject Property"). Plaintiff seeks to enjoin Defendants American Brokers Conduit ("AB Conduit"), Mortgage Electronic Registration Systems, Inc. ("MERS"), Residential Credit Solutions, Inc. ("RCS"), National Default Servicing Corporation ("NDSC"), and Ticor Title (collectively, "Defendants") from conducting a nonjudicial foreclosure sale of the Subject Property. **[*2]** In turn, Defendants RCS, MERS, and NDSC move to dismiss Plaintiff's First Amended Complaint ("FAC") for failure to state a claim.[1]

On July 12, 2007, Plaintiff refinanced the Subject Property with a loan she obtained from AB Conduit in the amount of $322,500.00 secured by a Deed of Trust. *See Compl.*, Ex. 1. The Deed of Trust names AB Conduit as Lender, Ticor Title as Trustee, and MERS as nominee beneficiary. *See id.* At the time the Deed of Trust was recorded, and as reflected on that document, the Assessor Parcel Number ("APN") for the Subject Property was APN 0218-351-38. *See id.* ¶ 15. Sometime between 2004 and 2009, the San Bernardino County Assessor changed the APN to 1083-211-07. *See Garber Decl.*, Exs. C, D. Accordingly, APN 1083-211-07 is reflected on the Corporation Assignment of the Deed of Trust, Notice of Default, and Notice of Trustee's Sale, but not on the original granting documents. *See id.*, Exs. B, C - H.

RCS acquired the servicing rights under Plaintiff's Loan in October 2010.[2] *PI Mot.* 4:19-20; *see Garber Decl.*, Ex. M. On or about November 2, 2010, Plaintiff fell behind on her payments. *See Compl.* ¶ 16. On November 22, RCS offered Plaintiff a Modification **[*3]** Trial Period Plan ("Trial Plan") providing for payments of $1888.15 per month from December 2010 through May 2011, which Plaintiff accepted. *See PI Opp.* 5:1-2; *Garber Decl.*, Ex. N; *Compl.* ¶ 17, Ex. 5. Plaintiff, however, was not able to meet the financial commitments of the Trial Plan and stopped making payment in April 2011 because an injury at work forced her to expend all of her sick pay and vacation pay. *See Garber Decl.*, Ex. O; *Compl.* ¶ 18. In response to Plaintiff's request for further assistance with her loan, RCS granted her a second loan modification plan that extended payments of $1900.09 per month from June 2011 through May 2013, with 295 monthly payments in the amount of 2073.46 due thereafter. *See Compl.* ¶ 19. However, Plaintiff was unable to meet this commitment due to her reduced salary, and chose to reject this offer and submit a new loan modification application. *See id.* ¶ 20. Plaintiff informed RCS that her return-to-work date was anticipated for November 2011. *Id.*

On June 30, 2011, MERS, as nominee for AB Conduit, the original beneficiary, granted, assigned and transferred to RCS all beneficial interest in the Deed of Trust by means of a Corporate Assignment of Deed **[*4]** of Trust recorded on July 7, 2011. *See Compl.* ¶ 22, Ex. 2. Because Plaintiff had not cured her default, NDSC, as agent for RCS, issued a Notice of Trustee's Sale setting a November 1 sale date. *Todd Decl.* ¶¶ 5-6; Exs. A, B; *Compl.* ¶ 26. RCS and Plaintiff continued to communicate regarding reaching a third loan modification agreement to stop the foreclosure proceedings. *See Compl.* ¶ 23. As late as October 2011, RCS informed Plaintiff that a Permanent Loan Modification would still be viable if Plaintiff could provide two current paystubs. *See id.* Instead, Plaintiff obtained a temporary restraining order to halt the foreclosure sale. *See PI Opp.* 6:6-7; *Garber Decl.*, Ex. S. Plaintiff contends RCS acted in bad faith by "failing to allow the requisite time to pass" so that Plaintiff could gather the necessary verification of income. *See Compl.* ¶ 30.

Plaintiff filed a verified complaint on October 14, 2011, stating claims for breach of contract, violation of *California Business and Professions Code § 17200*, quiet title, an accounting, and declaratory relief. *See* Dkt. # 1. On December 13, 2011, Plaintiff moved for a preliminary injunction enjoining the foreclosure sale for "two to three months maximum," representing the time it would purportedly **[*5]** take Plaintiff to return to full employment and

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[1] Remaining Defendants AB Conduit, Ticor Title, and American Home Mortgage Servicing Inc. have not appeared in this action and the Notice of Removal states that they have not been served with the summons and complaint. *See* Dkt. # 1. Plaintiff's complaint was filed on October 17, 2011. No proof of service of summons and complaint against these Defendants has been filed. *Federal Rule of Civil Procedure 4(m)* provides that "[i]f a defendant is not served within 120 days after the complaint is filed the court - on motion or on its own after notice to the plaintiff - must dismiss the action without prejudice against that defendant or order that service be made within a specified time." Accordingly, Plaintiff is ORDERED TO SHOW CAUSE in writing why this action should not be dismissed without prejudice against Ticor Title, AB Conduit and American Home Mortgaging Service Inc. Plaintiff shall file proof of service of summons and complaint evidencing that Defendants were served within *Rule 4(m)*'s 120-day window or show good cause for her failure to do so. *See Fed. R. Civ. P. 4(m)*. Plaintiff's response is due no later than **May 23, 2012**.

[2] On June 30, 2011, MERS, as nominee for AB Conduit, executed the Corporate Assignment of the Deed of Trust (the "Assignment") resulting in the assignment of all beneficial interest under the Deed of Trust to RCS. Garber Decl. ¶ 6.

obtain the documentation necessary for a permanent loan modification. *See PI Mot.* 12:18-24. On January 9, 2012, RCS approved Plaintiff for a third permanent loan modification agreement, this time for payments totaling $1,591.78 per month, which Plaintiff again rejected on January 21, 2012. *See Garber Decl.* ¶¶ 28, 29, Ex. T. Moving Defendants seek dismissal with prejudice on the grounds that the Complaint does not, and the record before the Court indicates that Plaintiff cannot, state any viable claims for relief against Defendants.

II. Legal Standard

A. Preliminary Injunction

A preliminary injunction is an "extraordinary and drastic remedy." *Munaf v. Geren, 553 U.S. 674, 689-90, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008)* (quotation marks and citation omitted). A party seeking a preliminary injunction must make a "clear showing" of each of the following elements: (1) a likelihood of success on the merits, (2) a likelihood of irreparable injury to the plaintiff if injunctive relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) an advancement of the public interest. *See Winter v. Natural Res. Def. Council, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*. A preliminary injunction may also be appropriate "when a plaintiff demonstrates that serious questions going to the merits **[*6]** were raised and the balance of hardships tips sharply in the plaintiff's favor," so long as the other *Winter* factors are met. *See Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134-35 (9th Cir. 2011)* (citation and modification omitted) (allowing for a post-*Winter* "sliding scale" analysis in preliminary injunction inquiries where "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another").

B. 12(b)(6)

Under *Federal Rule of Civil Procedure 12(b)(6)*, a defendant may move to dismiss a cause of action if the plaintiff fails to state a claim upon which relief can be granted. In evaluating the sufficiency of a complaint under *Rule 12(b)(6)*, the courts must be mindful that the Federal Rules of Civil Procedure require that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. Nevertheless, the U.S. Supreme Court has instructed that "a complaint that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*.

In resolving a *Rule 12(b)(6)* motion, the Court must first accept as true all non-conclusory, factual allegations made in the complaint. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)*. Based upon these allegations, the Court must draw all reasonable inferences **[*7]** in favor of the plaintiff. *See Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 949 (9th Cir. 2009)*. After accepting as true all non-conclusory allegations and drawing all reasonable inferences in favor of the plaintiff, the Court must then determine whether the complaint alleges a plausible claim to relief. *See Iqbal, 129 S. Ct. at 1950*. In determining whether the alleged facts cross the threshold from the possible to the plausible, the Court is required "to draw on its judicial experience and common sense." *Id.* "*Rule 8* marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.*

III. Discussion

As set forth below, the Court finds that Plaintiff fails to show a likelihood of success on, or raise "serious questions" going to, the merits of her claims. To the contrary, the record before the Court strongly suggests that Plaintiff's claims fail on the merits. Because the Court's analysis of Plaintiff's likelihood of success overlaps with its determination of whether the Complaint states any claims upon which relief may be granted, for the reasons set forth in that section, the Court also grants Defendants' motion to dismiss. Before evaluating **[*8]** Plaintiff's likelihood of success on her individual claims and the other *Winter* factors, the Court disposes of several threshold theories common to multiple causes of action.

A. The Tender Requirement Applies To This Case

Under California law, in action to set aside a trustee's sale, a plaintiff must demonstrate that he has made a valid and viable tender offer of payment of the indebtedness. *Pantoja v. Countrywide Home Loans, Inc., 640 F. Supp. 2d 1177, 1183 (N.D. Cal. 2009)*. "Although Plaintiff seeks to enjoin an impending foreclose sale, rather than set aside a foreclosure sale, her failure to allege tender is likewise fatal to her claims insofar as each claim seeks to avoid a foreclosure sale." *Arroyo v. Aurora Bank, FSB, et al., No. EDCV 11-2063-DOC (JEMx), 2012 U.S. Dist. LEXIS 5477, 2012 WL 137854, at *1 (C.D. Cal. Jan. 18, 2012)*. Neither the Complaint nor Plaintiff's moving papers contains an unconditional offer to tender the full amount of her indebtedness. Rather, Plaintiff alleges only that she "is prepared to tender payment by means of a new loan or a loan modification." *See Compl.* ¶ 54. An offer to tender "payment" in some unspecified amount "by means of a new loan or a loan modification" that Defendants are not obligated to provide under the terms of the Deed of Trust is not an unconditional offer to tender the full amount of Plaintiff's **[*9]** indebtedness. *See* *Singh v. Wells Fargo Bank, No. 1:10-CV-1659 AWI SMS, 2012 U.S. Dist. LEXIS 28015, 2012 WL 691705, at * (E.D. Cal., Mar. 2, 2012)* ("A tender is an offer of performance made with the intent to extinguish the obligation. A tender must be one of full performance and must be unconditional to be valid. Offering to make the payments specified by the Permanent Modification is insufficient.") (internal quotations and citations omitted); *Garber Decl.*, Ex. B.

Nor does this case present any equitable considerations that have been held to justify a waiver of the tender requirement. *See* *Onofrio v. Rice, 55 Cal. App. 4th 413, 424, 64 Cal. Rptr. 2d 74 (1997)* ("tender may not be required where it would be inequitable to do so"). "In most cases where a plaintiff seeks to reverse a foreclosure sale, the plaintiff is in default on the mortgage." *Singh, 2012 U.S. Dist. LEXIS 28015, 2012 WL 691705, at *9* (citing *Karlsen v. American Sav. & Loan Assn., 15 Cal. App. 3d 112, 115, 92 Cal. Rptr. 851 (1971))*. The tender rule "is premised upon the equitable maxim that a court of equity will not order that a useless act be performed." *Arnolds Mgmt. Corp. v. Eischen, 158 Cal. App. 3d 575, 579, 205 Cal. Rptr. 15 (1984)*. Plaintiff admits that she is in default on the original loan and failed to make the payments as required by her first loan modification agreement. She also admits that she rejected a second permanent loan modification offer in May 2011, and evidence submitted by RCS in opposing the motion for a preliminary **[*10]** injunctions shows that she was offered a third permanent loan modification on January 9, 2012, by which time Plaintiff should have returned to full time employment and secured the requisite documentation according to the allegations in her Complaint. Nonetheless, Plaintiff also rejected this offer on January 21, 2012. *See Garber Decl.* ¶¶ 28, 29, Ex. T. The Complaint pleads no facts to support a plausible dispute as to the outstanding balance due on the loan or the amount of Plaintiff's default under the Deed of Trust and the original loan modification agreement. Rather, the Complaint merely avers that the sale is void "ab initio resulting in no tender being required as it is inequitable to do so" because RCS purportedly lacks standing to foreclose. *See Compl.* ¶ 50. "Under [these] circumstances, returning the property to a plaintiff leaves the plaintiff in default. Thus, the dispute between the parties is not resolved as a plaintiff who recovers the property is likely to continue missing mortgage payments; he/she is likely to lose the property at a later date in a second foreclosure proceeding." *Singh, 2012 U.S. Dist. LEXIS 28015, 2012 WL 691705, at *9*.

Given Plaintiff's admitted default under the Deed of Trust and the loan modification agreement **[*11]** and her rejection of two subsequent offers, Plaintiff's failure to unconditionally allege a present ability to tender her indebtedness shows that enjoining the foreclosure sale would be a useless act. Thus, Plaintiff's failure to allege tender alone bars her request for injunctive relief and to quiet her title to the Subject Property. *See* *Shimpones v. Stickney, 219 Cal. 637, 649, 28 P.2d 673 (1934)* ("It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured.").

B. The APN on the Foreclosure Notices Were Correct

Plaintiff also attacks Defendant's standing to foreclose and their compliance with California's statutory non-judicial foreclosure procedures because the APN on the recorded documents differs from the APN on the original grant deed. According to Plaintiff, because the Assignment refers to a different APN than the original grant deed, the Assignment "is not and cannot be the same property at issue since each property only has one APN number []." *PI Mot.* 3: 15-16.

The record before the Court makes clear that the APN on the foreclosure notices is accurate and refers to the Subject Property. The documents provided by Defendants, which include copies of the 2004 and 2009 San

Bernardino **[*12]** County Assessor's Parcel Maps and a printout of the current property information taken from the San Bernardino County Auditor-Controller/Treasurer/Tax Collector website, show that the San Bernardino County Assessor's Office simply changed the APN on the Subject Property from 0218-315-38 to 1083-211-07 sometime between 2004 and 2009. *See Garber Decl.*, Exs. C, D. Thus, Plaintiff's argument that the foreclosure notices refer to a different property is without merit. Moreover, even assuming the APN was incorrect, the Court is not aware of any legal authority enjoining an impending foreclosure sale due to a discrepancy relating to an assessor parcel number. *California Civil Code § 2924, et seq.* covers "every aspect" of the foreclosure process and the requirements it sets forth are "intended to be exhaustive." *See* *Nool v. HomeQ Servicing, 653 F. Supp. 2d 1047, 1053 (E.D. Cal. 2009)* (citing *I.E. Assoc. v. Safeco Title Ins. Co., 39 Cal. 3d 281, 285, 216 Cal. Rptr. 438, 702 P.2d 596 (1985)*; *Moeller v. Lien, 25 Cal. App. 4th 822, 834, 30 Cal. Rptr. 2d 777 (1994))*. This framework does not require that APNs be included on foreclosure-related documents. Accordingly, even if the APNs on the recorded documents were erroneous, Plaintiff's claim would still be without merit.

C. Defendants Acted in Good Faith

Contrary to Plaintiff's conclusory assertion that Defendants acted in bad faith "during negotiation of alternatives to foreclosure and in failing to postpone the trustee's **[*13]** sale . . .," the allegations elsewhere in the Complaint and the record before the Court demonstrates that Defendants engaged in multiple good faith attempts to renegotiate Plaintiff's payment schedule, which they were not obligated to do under the terms of the Deed of Trust. *Reply* 7:17-18. As Defendants point out, RCS offered Plaintiff a modification to her payment schedule on November 22, 2010, May 4, 2011, and January 9, 2012. The first two offers provided for reduced fixed interest and monthly payments of approximately $1,900.00, while the third modification offer reduced the monthly payments to $1,591.78 for a significant period of time. Nonetheless, Plaintiff either was unable to make the payments or rejected each of RCS's loan modification proposals. Accordingly, Plaintiff's bad faith claim is without merit.

D. Defendants Complied With Notice Requirements

As succinctly summarized in *Knapp v. Doherty, 123 Cal. App. 4th 76, 88-89, 20 Cal. Rptr. 3d 1 (2004)*, the procedural requirements for a non-judicial foreclosure sale are as follows:

> Upon default by the trustor under a deed of trust containing a power of sale, the beneficiary may declare default and proceed with a nonjudicial foreclosure sale. The foreclosure process is commenced by the recording of **[*14]** a notice of default and election to sell by the trustee. After the notice of default is recorded, the trustee must wait three calendar months before proceeding with the sale. After the 3-month period has elapsed, a notice of sale must be published, posted and mailed 20 days before the sale and recorded 14 days before the sale.

Knapp, 123 Cal. App. 4th at 88-89 (citations, alterations, and quotations omitted).

In *Knapp*, the court emphasized that *section 2924 et seq.* does not require actual receipt by a trustor of a notice of default or notice of sale, but that the statutory framework only "mandates certain procedural requirements reasonably calculated to inform those who may be affected by a foreclosure sale and who have requested notice in the statutory manner that a default has occurred and a foreclosure sale is imminent." *See* *123 Cal. App. 4th at 88-89* ("The trustor need not receive *actual notice* of the trustee's sale so long as notice is provided to the trustor that is in compliance with the statute.") (emphasis in original).

Defendants submit "affidavits of mailing" and other relevant declarations as evidence that it satisfied the requirements of *section 2924*. *See Todd Decl.* ¶¶ 5, 6; Exs. A-B. NDSC, as agent for RCS, recorded a notice of default on July 7, 2011. *See Garber* ***[*15]*** *Decl.*, Ex. F. A notice of Trustee's sale was recorded on October 11, 2011, more than three months later. *See Graber Decl.*, Ex. G. An affidavit of mailing reflects that Defendant mailed a copy of the notice of trustee's Sale to Plaintiff via certified registered mail on October 11, 2011 and posted the Notice of Trustee's Sale on the front door of the property on October 10. *See Todd* Decl. ¶¶ 5-6; Exs. A, B. The Trustee's sale was set for November 2, 2011, exactly 20 days after the Notice was mailed and recorded and 21 days after it was posted. Under these circumstances, the Court concludes that Plaintiff's claim that Defendants violated the notice requirements of Civil Code *§ 2924, et seq.* lacks merit.

E. RCS's Standing to Foreclose

Plaintiff attacks RCS's standing to foreclose on the grounds that the Corporate Assignment of Deed of Trust is invalid for three reasons. First, Plaintiff points to the fact that the APN on the recorded Corporate Assignment differs from that on the Deed of Trust. For reasons discussed *supra*, this argument is meritless. Second, Plaintiff offers the bare assertion that "Heath Carpenter [as] Vice President of RCS is not MERS' assistant secretary and fraudulently assigned the **[*16]** beneficial interest to his own company RCS." *See PI Mot.* 9:6-10. Plaintiff presents no facts or evidence to support her conclusory allegation that Mr. Carpenter was not authorized to execute the Assignment on behalf of MERS, nor any authority to suggest that an agent authorized to execute an Assignment on behalf of an Assignor cannot also be employed by the Assignee. Defendants submit evidence under penalty of perjury that this is what transpired. *See Garber Decl.* ¶¶ 7-8; *Brown v. U.S. Bankcorp, No. CV 11-6125 CAS (PJWx), 2012 U.S. Dist. LEXIS 26226, 2012 WL 665900, at *4 (C.D. Cal., Feb. 27, 2012)* (dismissing with prejudice declaratory relief claim premised on conclusory assertion that the assignment of the deed of trust "was invalid because it was not assigned by an employee of [] the beneficiary").

Finally, Plaintiff contends that MERS, as a mere "nominee" beneficiary under the Deed of Trust, lacked the authority to execute the Corporate Assignment. *See PI Mot.* 10:20-12:12. Applying the California Court of Appeals recent decision in *Gomes v. Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149, 1155, 121 Cal. Rptr. 3d 819 (2011)*, courts in this judicial district have recognized that "a plaintiff cannot challenge a named beneficiary's authority to initiate a non-judicial foreclosure under *Cal. Civ. Code § 2924(a)*." *See, e.g., Aguirre v. Cal-Western Reconveyance Corp., No. CV 11-6911 CAS (AGRx), 2012 U.S. Dist. LEXIS 12060, 2012 WL 273753, at *6 (C.D. Cal. Jan. 30, 2012)* (citing *Gomes* ***[*17]*** and holding that "as a named beneficiary, MERS was authorized to assign the mortgage to Aurora"). This is because the "recognition of the right to bring a lawsuit to determine a nominee's authorization to proceed with foreclosure on behalf of the noteholder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures." *Gomes, 192 Cal. App. 4th at 1155*. Here, the Deed of Trust named MERS as a beneficiary and acknowledges that "MERS...has the right [to] foreclose and sell the Property." *See Garber Decl.*, Ex. B. Accordingly, Plaintiff's assertion that MERS lacked authority to initiate foreclosure fails as a matter of law. *See Gomes, 192 Cal. App. 4th at 1155*. In any event, Plaintiff cannot credibly claim any injury resulting from the allegedly improper execution of the Corporate Assignment, as by law the recorded Assignment operated as constructive notice to Plaintiff regarding its contents, *see Cal. Civ. Code § 2934*, and if Mr. Carpenter or MERS "indeed lacked authority to make the assignment, the true victim was not plaintiff but the original lender...." *See Fontenot v. Wells Fargo, 198 Cal. App. 4th 256, 272, 129 Cal. Rptr. 3d 467 (2011)*.

Having concluded the above theories are deficiently pleaded and without merit, the Court turns to a claim-by-claim **[*18]** evaluation of Plaintiff's likelihood of success on the merits.

F. Likelihood of Success on the Merits

1. Breach of Contract

To state a claim for breach of contract under California law, a plaintiff must allege: (1) the existence of a contract between the parties; (2) the plaintiff's performance or excuse for nonperformance; (3) the defendant's breach of contract (failure to perform); and (4) resulting damages. *Kaui Scuba Center, Inc. v. PADI Americas, Inc., No. SACV 10-1579 DOC (MANx), 2011 U.S. Dist. LEXIS 75704, 2011 WL 2711177, at *4 (C.D. Cal. July 13, 2011)* (citing *Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1367, 108 Cal. Rptr. 3d 682 (2010)*. The Complaint lumps all five defendants together and contains only a conclusory averment that Defendants "alone, and with others, breached the terms of the loan agreement between the Plaintiff and the said Defendants by reason of the conduct described in the following causes of action." *See Compl.* ¶ 35. Under *Iqbal*, such "threadbare recitals of a cause of action's elements, supported by mere conclusory statements" are insufficient. *See 129 S.Ct. at 1940*. More importantly, there is no allegation with respect to Plaintiff's performance under the Deed of Trust, and the allegations pleaded elsewhere in the Complaint and in Plaintiff's own supporting declaration demonstrate that it was Plaintiff who breached its terms. Specifically, **[*19]** Plaintiff alleges and declares that she became unable to make her payments beginning in November 2010. *See Compl.* ¶ 17; *Mercer PI Decl.* ¶ 4. Further, she admits she also breached the terms of the Permanent Loan Modification. *See Compl.* ¶ 18; *Mercer PI Decl.* ¶ 6. Accordingly, the Court concludes that the Complaint fails to state a claim for breach of contract and that Plaintiff has not shown any likelihood of success on the merits.

2. UCL

The UCL prohibits any "unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising," as well as any act prohibited by California's false advertising statute. *See Ariz. Cartridge Remanufacturers Ass'n v. Lexmark Int'l, Inc., 421 F.3d 981, 985 (9th Cir. 2005)* (*quoting Cal. Bus. & Prof. Code § 17200*). An "unlawful" business act under *§ 17200* is any business practice that is prohibited by law, whether "civil or criminal, statutory or judicially made . . . , federal, state or local." *McKell v. Washington Mutual, Inc., 142 Cal. App. 4th 1457, 1474, 49 Cal. Rptr. 3d 227 (2006)* (citations omitted). A business act is "unfair" under *§ 17200* "if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits," *see id. at 1473*, or if it "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its **[*20]** effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Byars v. SCME Mortgage Bankers, Inc., 109 Cal. App. 4th 1134, 1147, 135 Cal. Rptr. 2d 796 (2003)*. Finally, a "fraudulent" business practice under *§ 17200* is "one which is likely to deceive the public," and "may be based on representations to the public which are untrue, and also those which may be accurate on some level, but will nonetheless tend to mislead or deceive." *See id. at 1471*. UCL claims based on fraud are subject to the heightened pleading requirements of *Rule 9(b)*. *See Kearns v. Ford Motor Co., 567 F.3d 1120, 1124-25 (9th Cir. 2009)*. Plaintiffs must plead "the who, what, when, where, and how of the alleged fraudulent conduct" and explain "why [a] statement or omission complained of was false and misleading." *In re Actimmune Mktg. Litig., 2009 U.S. Dist. LEXIS 103408, 2009 WL 3740648, at *13 (N.D. Cal. Nov. 6, 2009)*.

Plaintiff's UCL claim is deficiently pleaded because it relies on many of the same meritless or erroneous theories discussed above. *See FAC* ¶¶ 40, 42-45; *PI Mot.* 9:23-25, 10:1-19. To recap, the Court has already concluded that Plaintiff's argument as it relates to assessor parcel numbers is erroneous and that Plaintiff's argument concerning Defendants use of an unauthorized agent is insufficiently pleaded. As these are the only factual allegations pleaded in support of Plaintiff's UCL claim, the Court concludes that Plaintiff **[*21]** fails to state a UCL and that this claim is not likely to succeed on the merits.

3. Quiet Title

Plaintiff seeks to quiet title in her home. In order to state a claim for quiet title, the complaint must be verified and include (1) a legal description of the property and its street address or common designation; (2) the title of the plaintiff and the basis of the title; (3) the adverse claims to the title of the plaintiff; (4) the date as of which the determination is sought; and (5) a prayer for the determination of the title of the plaintiff against the adverse claims. Cal. Civ. Code § 761.020. A plaintiff "shall name as defendants in the action the persons having adverse claims to the title of the plaintiff against which a determination is sought." *Id.* § 762.010. In an action to quiet title, the plaintiff must stand on the strength of his or her own title and not the weaknesses of the defendant's title. *Millyard v. Faus, 268 Cal. App. 2d 76, 82, 73 Cal. Rptr. 697 (1968)*; *Deerinck v. Heritage Plaza Mortg. Inc., 2012 U.S. Dist. LEXIS 45728, 2012 WL 1085520, at * 8 (E.D. Cal. Mar. 30, 2012)*. Finally, "[i]t is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured." *See Shimpones v. Stickney, 219 Cal. 637, 649, 28 P.2d 673 (1934)*; *accord Rabago v. Deutsche Bank. Nat. Trust Co., No. 5:10-CV-1917-JST (DTBx), 2011 U.S. Dist. LEXIS 60262, 2011 WL 2173811, at *5 (C.D. Cal. June 1, 2011)*.

As discussed *supra*, Plaintiff's failure to unconditionally allege tender requires dismissal of her quiet **[*22]** title claim and precludes a showing of likelihood of success on the merits. Moreover, Plaintiff's quiet title claim is based on her assertion that "Defendants have no right, title, estate, lien, or interest in the property," and not on the strength of her own title. *See Compl.* ¶ 49. Accordingly, Plaintiff's quiet title claim is dismissed and does not support issuance of a preliminary injunction.

4. Accounting

Under California law, an accounting "is not an independent cause of action but merely a type of remedy and an equitable remedy at that." Wise v. Wells Fargo Bank, N.A., 850 F. Supp. 2d 1047, 2012 WL 1058887, at *6 (C.D. Cal. 2012) (quoting Batt v. City & County of San Francisco, 155 Cal. App. 4th 65, 82, 65 Cal. Rptr. 3d 716 (2007)). An accounting may be brought to compel a defendant to account to a plaintiff for money where (1) a fiduciary duty exists; or (2) where no fiduciary duty exists but "the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable." *Id.* (quoting Civic Western Corp. v. Zila Industries, Inc., 66 Cal. App. 3d 1, 14, 135 Cal. Rptr. 915 (1977) ("A suit for an accounting will not lie where it appears from the complaint that none is necessary or that there is an adequate remedy at law."); *accord* Barajas v. Countrywide Home Loans, Inc., No. CV 10-07961 DDP (AGRx), 2012 U.S. Dist. LEXIS 24237, 2012 WL 628007, at *7 (C.D. Cal. Feb. 24, 2012) ("An action for an accounting is not available where the plaintiff alleges the right to recover a sum **[*23]** certain or a sum that can be made certain by calculation.").

The Complaint and Plaintiff's moving papers fail to establish either ground for seeking an accounting. Plaintiff alleges only that "[a]ny amount of money still owed to Defendants named herein[,] is unknown to Plaintiff and cannot be determined without an accounting." *See Compl.* ¶ 54. It is well established in California that a financial institution owes no fiduciary duty to borrowers when the institution's involvement in the loan transaction does not exceed the scope of its role as a lender of money. *See* Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal. App. 3d 1089, 1096, 283 Cal. Rptr. 53 (1991); *accord* Oaks Mgmt. Corp. v. Superior Court of San Diego Cnty., 145 Cal. App. 4th 453, 466, 51 Cal. Rptr. 3d 561 (2006) ("a loan transaction is at arms-length and there is no fiduciary relationship between the borrower and lender."). In addition, the monetary balance at issue is readily ascertainable. The Complaint pleads no facts to the contrary, and, as Defendants point out, the Notice of Default states the amount of delinquency and the Notice of Trustee's Sale states the unpaid principal balance. *See PI Opp.* 23:10-16, Exs. F, H. Accordingly, the Court concludes that Plaintiff's accounting claim fails as a matter of pleading and, in all likelihood, on the merits as well.

5. Declaratory Relief

Plaintiff's fifth and final cause of action **[*24]** is for declaratory relief. Plaintiff alleges a declaration is necessary to resolve "the disputes regarding the loan, and default, the entry of default, any violations of the laws of the State of California and the rights and liabilities of all of the parties involved in the matters alleged in this complaint." *See Compl.* ¶ 56. This cause of action is defective on multiple levels.

First, as the name suggests, declaratory relief is a form of relief and not an independent cause of action. *See* Santos v. Countrywide Home Loans, No. 2:09-02642-WBS-DAD, 2009 U.S. Dist. LEXIS 103453, 2009 U.S. Dist. LEXIS 103453, at *13 (E.D. Cal. Nov. 6, 2009). As such, a claim for declaratory relief is improper where, as here, the claim merely replicates other substantive causes of action asserted in the pleading. *See* Lai v. Quality Loan Service Corp., No. 2:10-cv-02308 PSG, 2010 U.S. Dist. LEXIS 97121, 2010 WL 3419179, at *3 (C.D. Cal. Aug. 26, 2010) ("The object of [declaratory relief] is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for determination of identical issues.") (internal quotations omitted). Second, the Court has rejected each of the theories upon which Plaintiff seeks a declaration. Finally, Plaintiff's declaratory relief claim fails on the addition ground that Plaintiff fails to allege tender. *See e.g.,* ***[*25]*** Rodriguez v. Litton Loan Servicing LP, No. 2:09-cv-00029-MCEDAD, 2009 U.S. Dist. LEXIS 43143, 2009 WL 1326339, at *7 (E.D. Cal. 2009) (dismissing claim for declaratory relief when "Plaintiff failed to [] allege his willingess and ability to tender the loan proceeds."). Accordingly, Plaintiff fails to plead a cognizable claim for declaratory relief.

In sum, the complaint fails to state any viable claims, and Plaintiff has failed to show a likelihood of success on or even raise "serious questions" going to the merits. Although it "is well-established that the loss of an interest in real property constitutes an irreparable injury," *see* Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust, 636 F.3d 1150, 1159 (9th Cir. 2011), Plaintiff's failure to state any viable claims or show that serious questions go to the merits warrants dismissal and denial of the preliminary injunction. *See* Arroryo v. Aurora Bank, FSB, No. EDCV 11-2063-DOC (JEMx), 2012 U.S. Dist. LEXIS 5477, 2012 WL 137854, at *3 (C.D. Cal., Jan. 18, 2012) (noting that if a plaintiff "cannot state a valid claim [] or show even some likelihood of prevailing, the impending foreclosure sale will be an unfortunate result, but not an inequitable one.").

The Court also concludes that the balance of the hardships does not strongly favor Plaintiff and that an injunction would not be in the public interest. First, Plaintiff's Loan is only paid through January 2011; thus, Plaintiff is more than one **[*26]** year delinquent. Second, despite owing nearly $330,499.56 as of September 9, 2011 and representing that she needed only a few months to secure the requisite loan modification documents, Plaintiff did not accept RCS's January 2012 Permanent Loan Modification agreement when it was offered to her. *See Garber Decl.*, Exs. U, T; *PI Opp.* 6:7-11. Finally, Plaintiff has continued living at the Subject Property without making any payments to Defendants for the last year. *Opp.* 25:8-10. Given RCS's numerous good faith efforts to reach a satisfactory loan modification agreement with Plaintiff and her ongoing inability to make payments toward her sizeable debt, the Court concludes that further postponing Defendants' lawful relief is not in the public interest and offers nothing to tip the balance in favor of Plaintiff. *See Alcaraz v. Wachovia Mortg. FSB, 592 F. Supp. 2d 1296, 1306 (E.D. Cal. 2009)*.

IV. Conclusion

In conclusion, Plaintiff's motion for a preliminary injunction is DENIED and the temporary restraining order issued by the state court is DISSOLVED. Defendants' motion to dismiss is GRANTED. The Court is mindful that in granting a motion to dismiss, leave to amend should be given unless it appears that doing so would be futile. *See Deveraturda v. Globe Aviation Sec. Servs., 454 F.3d 1043, 1049-50 (9th Cir.2006)*. Accordingly, the Court grants **[*27]** Plaintiff leave to amend her Complaint. Plaintiff shall file an amended complaint by no later than **May 30, 2012**. Plaintiff shall file a response to the Court's Order to Show Cause regarding dismissal pursuant to *Federal Rule of Civil Procedure 4(m)* by no later than **May 23, 2012**.

IT IS SO ORDERED.

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Motorola Mobility v. Ct Miami

United States District Court for the Southern District of Florida

May 10, 2012, Decided; May 11, 2012, Entered on Docket

CASE NO: 11-23753-CV-COOKE/TURNOFF

Reporter

2012 U.S. Dist. LEXIS 202815 *

MOTOROLA MOBILITY, INC., Plaintiff, vs. CT MIAMI, LLC, a Florida limited liability company, Defendant.

Subsequent History: Adopted by, Dismissed by, in part *Motorola Mobility v. Ct Miami, 2012 U.S. Dist. LEXIS 202816 (S.D. Fla., June 13, 2012)*

Core Terms

allegations, Antitrust, Distributor, deceptive, prices, motion to dismiss, good faith, Sherman Act, Counterclaim, undersigned, Products, unfair, fair dealing, parties

Counsel: **[*1]** For Motorola Mobililty, Inc., a Delaware corporation, Plaintiff, Counter Defendant: John Moses Barkett, Maria Camila Tobon, LEAD ATTORNEYS, Sergio Edward Pagliery, Shook Hardy & Bacon, Miami, FL USA; Mark L. Durbin, LEAD ATTORNEY, PRO HAC VICE, Edwards Wildman Palmer, LLP, Chicago, IL USA; Simeon Daniel Brier, LEAD ATTORNEY, Cozen O'Connor, Miami, FL USA.

For Ct Miami, Llc, a Florida corporation, Defendant, Counter Claimant: Carolina Yael Sznajderman, GURSKY RAGAN, P.A., Miami, FL USA; Bernard Lewis Egozi, Egozi & Bennett PA, Aventura, FL USA.

Judges: WILLIAM C. TURNOFF, UNITED STATES MAGISTRATE JUDGE.

Opinion by: WILLIAM C. TURNOFF

Opinion

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court upon Plaintiff/Counter-Defendant Motorola Mobility Inc.'s ("Motorola") Motion to Dismiss Defendant/Counter-Plaintiff, CT Miami, LLC's ("CT") Amended Counterclaim **[DE16]**, and an Order of Referral entered by the Honorable Marcia G. Cooke on February 28, 2012. **[DE26]**. A hearing on this Motion took place before the undersigned on April 23, 2012.

Upon review of the Motion **[DE16]**, the Response **[DE21]**, the Reply **[DE24]**, the court file, hearing argument from counsel, and being otherwise duly advised in the premises, the undersigned **[*2]** makes the following findings.

Background

This action was filed by Motorola against CT on October 7, 2011. **[DE1]**. The Complaint alleges, among other things, breach of contract in connection the purchase of cellular phone handsets, and outstanding invoices in the amount of $2,171,700. Id. CT is an international distributor of cellular telephones headquartered in Miami, Florida. **[DE15, 8]**. CT entered into a Distribution Agreement ("Agreement") with Motorola's predecessor in interest[1] on, or about, December 11, 2009. Compl. **[DE1-3,Ex. A]**. Pursuant to the Agreement, "Motorola engaged CT as an authorized non-exclusive distributor" of its cellular handset kits in certain countries in Latin America. Id. at ¶ 1.1.

In response to the Complaint, CT has lodged several antitrust allegations against Motorola. Am. Countercl. **[DE15]**. Specifically, CT filed a three count counterclaim[2] against Motorola, alleging, *inter alia*, Count I-Violation of the Florida Antitrust Act of 1980, Count II - Violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"); and Count III - Breach of the Covenant of Good Faith and Fair Dealing. Am. Counterclaim. Id.

CT's main claim is that Motorola **[*3]** discriminated against it when it sold products to other distributors at prices lower than those charged to CT. Id. Specifically, CT alleges that Motorola "offered and sold identical [p]roducts to other companies in Asia, namely, Niti International Ltd. and Electrade . . . at prices significantly lower than those it was charging CT pursuant to Motorola's 'then current price list.'" Id. at ¶ 15.

Instant Motion

The instant Motion was filed on January 17, 2012. **[DE16]**. In the Motion, Motorola argues, among other things, that CT fails to meet the heightened pleading standard under the Twombly case, discussed further *infra*. In this connection, Motorola argues that CT makes only " bare assertions that Motorola engaged in price discrimination and that it condoned transshipment by other distributors" in violation of the Agreement. Id. That, without more, says Motorola, is insufficient to survive a motion to dismiss under Rule 12(b)(6), under either Florida's Antitrust Act, or FDUTPA. Id. Motorola also challenges CT's claim for Breach of Covenant of Good Faith and Fair Dealing. CT, of course, opposes the Motion.

Legal Standard

When considering a Rule 12(b)(6) motion to dismiss, the Court must accept a plaintiff's factual **[*4]** allegations as true and construe them broadly, in the light most favorable to the plaintiff. See *Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1295 (11th Cir. 2007)*; *Cottone v. Jenne, 326 F.3d 1352, 1355 (11th Cir. 2003)*. In reviewing the motion, the Court "may only examine the four corners of the complaint and not matters outside the complaint without converting the motion to dismiss to a motion for summary judgment." *Caravello v. American Airlines, 315 F. Supp. 2d 1346, 1348 (S.D. Fla. 2004)*; see also *St. George v. Pinellas County, 285 F.3d 1334, 1337 (11th Cir. 2002)*. Generally speaking, all that is required is a short and plain statement of the claim showing that the pleader is entitled to relief. See *United States v. Baxter International, Inc., 345 F.3d 866, 880 (11th Cir. 2003)*.

The Supreme Court expanded on the liberal pleading requirements in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In so doing, the Court explained that a complaint must offer more than a "formulaic recitation of the elements of a cause of action." Id. Nevertheless, "it remains black-letter law today that in the ordinary case, a complaint need not provide detailed factual allegations in order to withstand 12(b)(6) scrutiny." *Caytrans BBC, LLC v. Equipment Rental & Contractors Corp., 2009 U.S. Dist. LEXIS 23953, 2009 WL 857554, at *2 (S.D. Ala. Mar. 25, 2009)*(citing *Wilchombe v. TeeVee Toons, Inc., 555 F.3d 949, 958 (11th Cir. 2009)*. Twombly neither eliminated nor marginalized those permissive, liberal rules. *Caytrans, 2009 U.S. Dist. LEXIS 23953, 2009 WL 857554, at *2*. Twombly simply noted that the factual allegations in a complaint "must be enough to raise a right to relief above the speculative level on the **[*5]** assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1261 (11th Cir.*

[1] The Agreement was entered into by Motorola Inc. and Motorola Industrial, Ltda. (collectively "Motorola") and CT. **[DE1-3, Ex.A]**.

[2] For present purposes, the currently operative pleading is CT's Amended Counterclaim. **[DE15]**.

2009)(citing Twombly, 550 U.S. at 555)(internal citations and emphasis omitted). In sum, the post-Twombly rules of pleading do not require heightened fact specific pleading, but only enough to state a claim to relief that is plausible on its face.

Analysis

State Law Claims

Florida's Antitrust Act of 1980, *Fla. Stat. § 542.18*, states in relevant part, "Every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful." *Fla. Stat. § 542.18*. In this regard, Motorola argues that CT has failed to state a claim under Florida's Antitrust Act of 1980, because it has not alleged a conspiracy between Motorola and the purported competitors.

CT, on the other hand, contends that it need not make such allegations. Applying the law to the facts of this case, the undersigned disagrees.

In interpreting the Florida's Antitrust Act, existing case law holds that a court must rely on the body of federal case law interpreting the Sherman Act. *Vitacost.com, Inc. v. Gaia Herbs, Inc., 2007 U.S. Dist. LEXIS 22266, 2007 WL 951768, *2 (S.D. Fla. Mar. 28, 2007)*(quoting *All Care Nursing Serv. v. High Tech Staffing Servs., 135 F. 3d. 740, 746 (11th Cir. 1998)*. The Florida legislature has, in effect, adopted as the law of Florida the body of ***antitrust law*** developed by the federal courts under the Sherman Act. *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc., 457 So. 2d 1028, 1032 (Fla. 2d Dist. Ct.App. 1984)*. In other words, *§542.18* is analogous to *§ 1* of the Sherman **[*6]** Act. *All Care Nursing Serv., 135 F.3d at 745, n.11 (11th Cir. 1998)*. Thus, for present purposes, the Sherman Act is applicable to CT's state antitrust claims.

Section 1 of the Sherman Act states in pertinent part, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." *15 U.S.C. § 1*. The threshold element of a *section 1* claim is "concerted activity." *JES Properties, Inc. v. USA Equestrian, Inc., 2005 U.S. Dist. LEXIS 43122, 2005 WL 1126665, *12 (M.D. Fla. 2005)*. Unilateral conduct is insufficient. *Cooperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)*.

Here, as correctly noted by Motorola, CT fails to allege facts suggesting the existence of an agreement or conspiracy on the part of Motorola and other distributors. Accordingly, pursuant to *§542.18*, which, as noted above, mirrors the Sherman Act, and case law interpreting same, the undersigned finds that CT has failed to state a claim under Florida's Antitrust Act of 1980. Accordingly, it is hereby RESPECTFULLY RECOMMENDED that CT's Florida Antitrust claims be DISMISSED.

FDUTPA Claims

In order to state a claim for damages under FDUTPA, one must allege: (1) a deceptive act or unfair practice; (2) causation; and (3) damages. *Gavron v. Weather Shield Mfg., Inc., 819 F. Supp.2d 1297 (S.D. Fla. 2011)*(quoting *Rollins v. Butland, 951 So.2d 860, 869 (Fla. 2d Dist. Ct. App. 2006)*. A deceptive act occurs when "there is a representation, omission, or practice that is likely to mislead." *PNR, Inc. v. Beacon Prop. Mgmt., Inc., 842 So.2d 773, 777 (Fla. 2003)*. In other words, **[*7]** FDUTPA focuses on whether an act is deceptive, not whether a defendant knew that the allegedly violative conduct was occurring. Gavron, 819 F. Supp. at 1302 (citing *Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1368 (11th Cir. 1988)*.

Here, CT makes the following allegations,

> 30. By engaging in horizontal discrimination and openly and knowingly condoning violative transhipping by the Competing Companies, Motorola has engaged in deceptive and unfair trade practice[s] and has also violated

> laws that proscribe unfair methods of competition or unfair, deceptive or unconscionable acts or practices, including the Florida Antitrust Act of 1980.

Am. Countercl. **[DE15, ¶ 30]**.

> 31. As a result of Motorola's deceptive and unfair trade practices and violations of these laws, CT has suffered actual damages including, but not limited to, the difference in price afforded to the Competing Companies for the identical Products known to be subject to transshipment into CT's territory, and the loss of revenue CT incurred by having to ultimately sell its Products at well below market pricing during the flood of Product caused by the violative transshipments.

Id. at ¶ 31.

> 32. Motorola's price discrimination practices against CT were international, wanton, malicious, wilful, and made with a reckless disregard **[*8]** for CT's rights.

Id. at ¶32.

Applying the law to the facts alleged in the Amended Counterclaim, the undersigned finds that CT has plead sufficiently, at this stage in the litigation, to survive a motion to dismiss. The undersigned makes no findings as to the merits of CT claim, or whether it will ultimately prevail in this litigation. Upon careful consideration, however, the Court finds that these matters are better addressed by way of summary judgment motions after the appropriate discovery. Accordingly, it is **RESPECTFULLY RECOMMENDED** that Motorola's Motion be **DENIED** as to CT's FDUTPA claims.

Covenant of Good Faith and Fair Dealing

For purposes of this issue, the parties concede that Delaware law applies. The parties likewise agree that under Delaware law "the implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." *Wilgus v. Salt Pond Inv. Co., 498 A.2d 151, 159 (Del. Ch. 1985)*. The parties, however, disagree as to whether the allegations raised by CT are sufficient.

Here, CT's claim is based largely on § 7.2 of the Agreement, which states:

> 7.2 Prices stated on the Distributor's Purchase **[*9]** Orders shall conform to Motorola's then current price list for Distributor Managed Accounts, such shall be made available to Distributor as soon as reasonably possible.

Compl. **[DE1-3, Ex. A, § 7.2]**.

In the Counterclaim CT alleges as follows,

> 35. In connection with the performance of its obligations under the Distribution Agreement, Motorola had a duty to act in good faith and to deal fairly with CT.

Am. Countercl. **[DE15, ¶ 35]**.

> 36. Pursuant to 7.2 of the Distribution Agreement, Motorola was required to provide a "then current" price list to CT as soon as reasonably possible identifying the prices to be charged to Distributor Managed Accounts . . .

Id. at ¶ 36.

> 37. Motorola breached 7.2 of the Distribution Agreement when it failed to provide CT a current price list for CT's customers in the Territory, and engaged in horizontal price discrimination by providing a different price list to the Competing Companies with full knowledge that the Competing Companies were transshipping the Products into CT's Territory.

Id. at ¶ 37.

> 38. Motorola breached its duty of good faith and fair dealing when it condoned and continues to condone the sale of Motorola's Products into the Territory for the Competing Companies **[*10]** at lower prices than those offered to CT, rendering it impossible for CT to compete when its own customers are able to pay much lower prices than what CT is being charged by Motorola for the same products.

Id. at ¶ 38.

> 39. This conduct has caused damage to CT's reputation in the industry.

Id. at ¶ 39.

> 40. As a result of Motorola's breach of its duty of good faith and fair dealing, CT has suffered damages including, but not limited to, the loss of business, sales, profits, and the loss of goodwill.

Id. at ¶40.

Upon careful review, and taking as we must, the allegations as true, the Court finds that the Counterclaim is sufficiently plead to survive a motion to dismiss. Again, as noted *supra*, in this Court's view, these matters may be better suited for resolution by way of a summary judgment motion.

Consistent with the above, it is **RESPECTFULLY RECOMMENDED** that Plaintiff's Motion **[DE16]** be **GRANTED-IN-PART** and **DENIED-IN-PART**.

Pursuant to *28 U.S.C. § 636(b)(1)(C)*, the parties may file written objections to this Report and Recommendation with the Honorable Marcia G. Cooke, United States District Judge, within fourteen (14) days of receipt. Failure to file timely objections shall bar the parties from attacking on appeal **[*11]** any factual findings contained herein. *RTC v. Hallmark Builders, Inc., 996 F.2d 1144, 1149*, reh'g denied, *7 F.3d 242* (1 1 th Cir. 1993); *LoConte v. Duggar, 847 F.2d 745 (11th Cir. 1988)*, cert. denied, *488 U.S. 958, 109 S. Ct. 397 (1988)*.

RESPECTFULLY RECOMMENDED in Chambers a Miami, Florida on this 10 day of May 2012.

/s/ William C. Turnoff

WILLIAM C. TURNOFF

UNITED STATES MAGISTRATE JUDGE

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In re Wellbutrin XL Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

May 11, 2012, Decided; May 11, 2012, Filed

CIVIL ACTION NO. 08-2431 (direct); NO. 08-2433 (indirect)

Reporter

2012 U.S. Dist. LEXIS 66312 *; 2012-1 Trade Cas. (CCH) P77,920; 2012 WL 1657740

IN RE: WELLBUTRIN XL ANTITRUST LITIGATION

Subsequent History: Later proceeding at *In re Wellbutrin XL Antitrust Litig., 2014 U.S. Dist. LEXIS 182123 (E.D. Pa., Jan. 16, 2014)*

Prior History: *Biovail Labs. Int'l SRl v. Impax Labs., 433 F. Supp. 2d 501, 2006 U.S. Dist. LEXIS 32465 (E.D. Pa., 2006)*
Biovail Labs. Int'l SRL v. Abrika LLLP, 2006 U.S. Dist. LEXIS 24447 (S.D.N.Y., Apr. 27, 2006)
In re Wellbutrin XL Antitrust Litig., 282 F.R.D. 126, 2011 U.S. Dist. LEXIS 90697 (E.D. Pa., 2011)
Biovail Labs., Inc. v. Anchen Pharms., Inc., 2006 U.S. Dist. LEXIS 37996 (C.D. Cal., Feb. 8, 2006)

Core Terms

GSK, citizen's petition, generic, bioequivalence, metabolites, lawsuit, bupropion, tablet, dissolution, patent, baseless, requests, testing, stabilizer, profile, dose, immunity, hydrochloride, drift, infringement, sham, antitrust, dumping, specification, hydrochloric acid, coating, delayed, medium, manufacturer, notice

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN1[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The Federal Food, Drug, and Cosmetic Act, *21 U.S.C.S. §§ 301-392*, provides that the Food and Drug Administration (FDA) must approve all drugs before they may be introduced into interstate commerce. Companies seeking to market drugs may file applications for approval under one of two procedures. Under the first procedure, the applicant files a New Drug Application (NDA), which must contain examples of the proposed labeling for the drug as well as clinical data demonstrating the drug's safety and efficacy. Among other things, the NDA must also contain the patent number and expiration date of any patent that claims either the drug or a method of using the drug if a claim of patent infringement could reasonably be asserted. The FDA publishes the names of approved drugs and their associated patents in what is commonly known as the Orange Book. *21 U.S.C.S. § 355(b)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN2[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The United States Congress established the second new drug approval procedure in 1984 with the Drug Price Competition and Patent Term Restoration Act (the Hatch-Waxman Act). Pub. L. No. 98-417, 98 Stat. 1585 (1984). Under the Hatch-Waxman Act, companies seeking to manufacture and market a generic version of a previously approved pioneer drug (known as the listed drug) need not file an New Drug Application. Instead, they are permitted to file an Abbreviated New Drug Application (ANDA). The ANDA permits the applicant to rely on the safety and efficacy data for the listed drug if the applicant can show that the generic product is bioequivalent to the listed drug. *21 U.S.C.S. § 355(j)(2)(A)(iv)*, *(j)(8)(B)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN3[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

As part of the Abbreviated New Drug Application process, a generic manufacturer must make one of four certifications regarding each patent associated in the Orange Book with the listed drug: (I) that the patent information has not been filed; (II) that the patent has expired; (III) that the patent is set to expire; or (IV) that the patent is invalid or will not be infringed by the generic drug. This fourth certification is known as a paragraph IV certification. *21 U.S.C.S. § 355(j)(2)(A)(vii)(IV)*. A generic manufacturer that files a paragraph IV certification must give notice to the patent holder and provide a detailed statement of the factual and legal basis of the opinion of the applicant that the patent is invalid or will not be infringed. *§ 355(j)(2)(B)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Infringement Actions > General Overview

HN4[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The Hatch-Waxman Act provides that if the patent holder files an infringement suit within 45 days after receiving notice, the patent holder benefits from a statutory stay on Food and Drug Administration (FDA) approval of the Abbreviated New Drug Application (ANDA) for a period of 30 months or until the resolution of the infringement suit, whichever is shorter. *21 U.S.C.S. § 355(j)(5)(B)(iii)*. The first generic company to file an ANDA containing a paragraph IV certification (the first filer) also receives an exclusivity period of 180 days during which the FDA may not approve any later-filed paragraph IV ANDA based on the same New Drug Application. *§ 355(j)(5)(B)(iv)*. The 180-day period begins to run from (1) the date that the first filer begins to market its drug or (2) the date of a final judgment that the patent is invalid or not infringed, whichever is earlier. *§ 355(j)(5)(B)(iv)*, *(D)*.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Adjudication > General Overview

HN5[] **Administrative Law, Agency Rulemaking**

Federal regulations provide that an interested person may petition the Food and Drug Administration (FDA) to issue, amend, or revoke a regulation or order, or to take or refrain from taking any other form of administrative action. *21 C.F.R. § 10.25*. A citizen petition must describe the FDA action requested, include a statement of the factual and legal grounds on which the petitioner relies, and certify that the petition includes all information and views on which the petition relies, and that it includes representative data and information known to the petitioner which are unfavorable to the petition. *21 C.F.R. § 10.30(a)*. Within 180 days of receiving the petition, the FDA must furnish a response to the petitioner either approving, denying, or providing a tentative response that indicates why the agency has been unable to reach a decision on the petition. *§ 10.30(e)(2)*.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN6[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

A party who petitions the government for redress is generally immune from antitrust liability. Under what is known as the Noerr-Pennington doctrine, the *First Amendment* protects the right to petition all types of government entities, including the right to bring legitimate disputes to the courts for judicial resolution. Noerr-Pennington immunity, however, is not absolute. It is subject to a sham exception for activities that are a mere sham to cover an attempt to interfere directly with the business relationships of a competitor. The sham exception is applicable not only to lawsuits but also to administrative petitions. In Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., the United States Supreme Court set forth a two-tiered definition of the sham exception. The first prong is concerned with the objective merit of the lawsuit or petition at issue, and the second focuses on the antitrust defendants' subjective intentions.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Evidence > Burdens of Proof > Allocation

HN7[] **Noerr-Pennington Doctrine, Sham Exception**

Under the first prong of the sham exception test to the Noerr-Pennington doctrine, the party invoking the sham exception must show that the defendants' conduct is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Put another way, if an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. The existence of probable cause to institute proceedings is an absolute defense to antitrust liability. Loss on the merits of the underlying proceeding, although instructive, is not determinative on the issue of objective baselessness. The United States Supreme Court specifically warned courts to resist the understandable temptation to engage in post hoc reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation. Where there is no dispute over the predicate facts of the underlying legal proceeding, a court may decide probable cause as a matter of law.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN8[] **Noerr-Pennington Doctrine, Sham Exception**

Only if an action is objectively baseless may a court proceed to the second prong of the sham exception definition to the Noerr-Pennington doctrine. Under the subjective second prong, a court should examine whether the baseless suit or petition conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Infringement Actions > General Overview

HN9[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

An infringement inquiry triggered by an Abbreviated New Drug Application (ANDA) filing is focused on the product that is likely to be sold following Food and Drug Administration approval. Because the potentially infringing drug has not yet been marketed when the patent holder files suit, the inquiry is a hypothetical one that asks the fact finder to determine whether the drug that will be sold upon approval of the ANDA will infringe the asserted patent. Thus, because drug manufacturers are bound by strict statutory provisions to sell only those products that comport with the ANDA's description of the drug, an ANDA specification defining a proposed generic drug in a manner that directly addresses the issue of infringement will control the infringement inquiry.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Infringement Actions > General Overview

HN10[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The infringement provision of the Hatch-Waxman Act, *35 U.S.C.S. § 271(e)(2)(A)*, states that it is an act of infringement to submit an Abbreviated New Drug Application that describes a drug claimed in a patent. Thus, the patent holder may sue before the product goes to market.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN11[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The Food and Drug Administration regulations require Abbreviated New Drug Application (ANDA) applicants to include a list of all components used in the manufacture of the drug product, regardless of whether they appear in the drug product, as well as a statement of the composition of the drug product. *21 C.F.R. § 314.50*. ANDA applicants must also identify and characterize the inactive ingredients in the proposed drug product. *§ 314.94(a)(9)(ii)*.

Evidence > Inferences & Presumptions > Presumptions

Patent Law > Infringement Actions > Claim Interpretation > Construction Preferences

Patent Law > ... > Specifications > Description Requirement > General Overview

Patent Law > Infringement Actions > Claim Interpretation > Scope of Claim

HN12[] Inferences & Presumptions, Presumptions

It is a bedrock principle of patent law that the claims of a patent define the invention to which the patentee is entitled the right to exclude. It is also well-settled that in interpreting an asserted claim, courts look first to intrinsic evidence - e.g., the patent itself, including the language of the claims, the specification, and the prosecution history. There is a heavy presumption that claim terms mean what they say and have the ordinary meaning that would be attributed to those words by persons skilled in the relevant art. When intrinsic evidence unambiguously describes the scope of a patented invention, reliance on extrinsic evidence is improper. Trial testimony regarding the meaning of a claim cannot vary the meaning of a claim that is established either by the claim itself or by the claim as correctly understood by reference to the specification and the file history. Nevertheless, extrinsic evidence such as expert testimony can help the court determine what a person of ordinary skill in the art would understand claim terms to mean.

Patent Law > Infringement Actions > Claim Interpretation > Construction Preferences

Patent Law > Claims & Specifications > General Overview

HN13[] Claim Interpretation, Construction Preferences

When a claim term has an accepted scientific meaning, that meaning is generally not subject to restriction to the specific examples in the specification. It is established that as a general rule claims of a patent are not limited to the preferred embodiment or to the examples listed within the patent specification.

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

Evidence > Burdens of Proof > Allocation

HN14[] Regulated Practices, Private Actions

The elements of an antitrust claim are (1) a violation of the antitrust laws; (2) individual injury resulting from that violation; and (3) measurable damages. It is not necessary to show with total certainty the exact amount of damages sustained, just that the defendants' anti-competitive acts caused the antitrust injury suffered by the plaintiff.

Patent Law > Infringement Actions > Claim Interpretation > Construction Preferences

HN15[] Claim Interpretation, Construction Preferences

The starting point for any claim construction must be the claims themselves.

Evidence > Inferences & Presumptions > Presumptions

Patent Law > Infringement Actions > Claim Interpretation > Construction Preferences

HN16[] Inferences & Presumptions, Presumptions

When different words or phrases are used in separate claims, a difference in meaning is presumed. Differences among claims can also be a useful guide in understanding the meaning of particular claim terms.

Patent Law > Infringement Actions > Claim Interpretation > Construction Preferences

Patent Law > Claims & Specifications > General Overview

HN17[] **Claim Interpretation, Construction Preferences**

Claims must be read in view of the specification, of which they are a part. However, the distinction between using the specification to interpret the meaning of a claim and importing limitations from the specification into the claim can be a difficult one to apply in practice.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN18[] **Noerr-Pennington Doctrine, Sham Exception**

In the context of the sham exception test to the Noerr-Pennington doctrine, a successful effort to influence governmental action certainly cannot be characterized as a sham. Thus, a winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN19[] **Noerr-Pennington Doctrine, Sham Exception**

The Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc. (PRE) standard for objective baselessness is a forward-looking standard from the point in time when the suit or petition was filed. In setting forth the standard, the United States Supreme Court used the language of expectancy: The lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. To examine post hoc whether it was the petition that caused the government to reach a certain outcome would be contrary to the forward-looking language in PRE.

Administrative Law > Agency Adjudication > General Overview

HN20[] **Administrative Law, Agency Adjudication**

See *21 C.F.R. § 10.35 (2005)*.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

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

HN21[] **Scope, Exemptions**

The Sherman Act does not prohibit an anticompetitive restraint imposed by a state as an act of government. This so-called Parker or state action immunity protects the states' act of governing and expresses the principle that the antitrust laws regulate business, not politics. The doctrine is grounded in principles of federalism and respect for state sovereignty, and relies heavily on the clarity of the state's goals and actions. Conflicts similar to those created by state regulation and policy can arise in the context of federal regulation. Some statutes explicitly preclude application of ***antitrust law***. Where statutes are silent, however, courts must determine whether they implicitly preclude application of the antitrust laws, which determination turns on the relation between the antitrust laws and the regulatory program set forth, and the specific conduct at issue.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > Legislation > Expiration, Repeal & Suspension

HN22[] **Antitrust & Trade Law, Exemptions & Immunities**

Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a plain repugnancy between the antitrust and regulatory provisions will repeal be implied. Absent express immunity conferred by the United States Congress, immunity will be implied only if Congress has clearly supplanted the antitrust laws and their model of competition with a differing competitive regime, defined by particularized competitive standards and enforced by an administrative agency, and has thereby purged an otherwise obvious antitrust violation of its illegality.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN23[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The Hatch-Waxman Act, Food and Drug Administration (FDA) regulations, and FDA guidance only require generics to prove bioequivalence to the reference listed drug. *21 U.S.C.S. § 355(j)(2)*, *(8)*; *21 C.F.R. § 314.94*.

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

Evidence > Burdens of Proof > Allocation

HN24[] **Regulated Practices, Private Actions**

An antitrust plaintiff must prove a causal connection between the antitrust violation and actual damages suffered.

Antitrust & Trade Law > Sherman Act > Claims

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

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Evidence > Inferences & Presumptions > Inferences

HN25[] **Sherman Act, Claims**

Antitrust co-conspirators are jointly and severally liable for all damages caused by the conspiracy to which they were a party. Both a conspiracy claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, and a conspiracy to monopolize claim under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, require the existence of agreement or concerted action. To show agreement or concerted action, antitrust plaintiffs must produce evidence allowing a jury to reasonably infer a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement. Direct proof of an express agreement is not required, but ***antitrust law*** limits the range of permissible inferences from ambiguous evidence. Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To withstand a motion for summary judgment, a plaintiff must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. The plaintiff must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed them.

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

Evidence > Inferences & Presumptions > Inferences

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN26[] **Conspiracy to Monopolize, Elements**

Courts generally reject conspiracy claims that seek to infer an agreement from communications despite a lack of independent evidence tending to show an agreement and in the face of uncontradicted testimony that only informational exchanges took place. Furthermore, proof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place.

Counsel: [*1] For ROCHESTER DRUG CO-OPERATIVE, INC., ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff: DAVID F. SORENSEN, LEAD ATTORNEY, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; ERIC L. CRAMER, LEAD ATTORNEY, BERGER & MONTAGUE, PC, PHILADELPHIA, PA; PETER R. KOHN, LEAD ATTORNEY, FARUQI & FARUQI, LLP, JENKINTOWN, PA; ANDREW COYNE CURLEY, BERGER & MONTAGUE PC, PHILADELPHIA, PA; ARCHANA TAMOSHUNAS, BRETT CEBULASH, TAUS CEBULASH & LANDAU LLP, NEW YORK, NY; BARRY S. TAUS, PRO HAC VICE, TAUS CEBULASH LANDAU LLP, NEW YORK, NY; CAITLIN G. COSLETT, BERGER MONTAGUE PC, PHILADELPHIA, PA; DANIEL C. SIMONS, BERGER AND MONTAGUE P.C., PHILADELPHIA, PA; DAVID S. NALVEN, THOMAS M. SOBOL, HAGENS BERMAN SOBOL SHAPIRO LLP, CAMBRIDGE, MA; JOHN W. DON BARRETT, PRO HAC VICE, DON BARRETT PA, LEXINGTON, MS; JOSEPH F. RODA, RODA & NAST PC, LANCASTER, PA.

For PROFESSIONAL DRUG COMPANY, INC., Plaintiff: ANDREW COYNE CURLEY, BERGER & MONTAGUE PC, PHILADELPHIA, PA; ARCHANA TAMOSHUNAS, TAUS CEBULASH & LANDAU LLP, NEW YORK, NY; BARRY S. TAUS, PRO HAC VICE, TAUS CEBULASH LANDAU LLP, NEW YORK, NY; BRIAN KELLY HERRINGTON, DON BARRETT, BARRETT LAW OFFICES, LEXINGTON, MS; CAITLIN G. COSLETT, NICHOLAS URBAN, BERGER **[*2]** MONTAGUE PC, PHILADELPHIA, PA; DAVID S. NALVEN, THOMAS M. SOBOL, HAGENS BERMAN SOBOL SHAPIRO LLP, CAMBRIDGE, MA; DAVID F. SORENSEN, LEAD ATTORNEY, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; JAN R. BARTELLI, PRO HAC VICE, NEW YORK, NY; JOSEPH F. RODA, RODA & NAST PC, LANCASTER, PA.

For BIOVAIL CORPORATION, BIOVAIL LABORATORIES, INC., BIOVAIL LABORATORIES INTERNATIONAL SRL, Defendants: ANDREA MARIE DEVRIES, DANIEL J. BOLAND, PEPPER HAMILTON LLP, PHILADELPHIA, PA; ANDREW D. LAZEROW, ASHLEY E. BASS, DANIELLE S. BARBOUR, DAVID J. SHAW, HENRY B. LIU, JASON C. RAOFIELD, PRO HAC VICE, COVINGTON & BURLING LLP, WASHINGTON, DC; DAVID F. SORENSEN, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; JOHN W. NIELDS, JR., THOMAS A. ISAACSON, COVINGTON & BURLING LLP, WASHINGTON, DC; THOMAS E. ZEMAITIS, PEPPER, HAMILTON & SCHEETZ, PHILADELPHIA, PA.

For SMITHKLINE BEECHAM CORP., Defendant: EDWARD D. ROGERS, LEAD ATTORNEY, BALLARD, SPAHR, ANDREWS AND INGERSOLL, PHILA, PA; LESLIE E. JOHN, LEAD ATTORNEY, JESSICA MOLTISANTI ANTHONY, JOB MICHAEL ITZKOWITZ, BALLARD SPAHR ANDREWS & INGERSOLL LLP, PHILADELPHIA, PA; STEPHEN J. KASTENBERG, LEAD ATTORNEY, JASON A. LECKERMAN, BALLARD SPAHR ANDREWS & INGERSOLL, PHILADELPHIA, **[*3]** PA; ARTHUR MAKADON, SUSANNA R. GREENBERG, BALLARD SPAHR ANDREWS & INGERSOLL, PHILA, PA; DANIEL J. BOLAND, PEPPER HAMILTON LLP, PHILADELPHIA, PA; DAVID F. SORENSEN, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; MARGARET OSBORNE PADILLA, BALLARD SPAHR LLP, PHILADELPHIA, PA; TAIMARIE NICOLE ADAMS, PHILADELPHIA, PA.

For GLAXOSMITHKLINE, PLC, Defendant: LESLIE E. JOHN, LEAD ATTORNEY, JESSICA MOLTISANTI ANTHONY, JOB MICHAEL ITZKOWITZ, BALLARD SPAHR ANDREWS & INGERSOLL LLP, PHILADELPHIA, PA; STEPHEN J. KASTENBERG, LEAD ATTORNEY, JASON A. LECKERMAN, BALLARD SPAHR ANDREWS & INGERSOLL, PHILADELPHIA, PA; ARTHUR MAKADON, SUSANNA R. GREENBERG, BALLARD SPAHR ANDREWS & INGERSOLL, PHILA, PA; DANIEL J. BOLAND, PEPPER HAMILTON LLP, PHILADELPHIA, PA; DAVID F. SORENSEN, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; MARGARET OSBORNE PADILLA, BALLARD SPAHR LLP, PHILADELPHIA, PA; TAIMARIE NICOLE ADAMS, PHILADELPHIA, PA; THOMAS E. ZEMAITIS, PEPPER, HAMILTON & SCHEETZ, PHILADELPHIA, PA.

For ABRIKA, LLLP, ABRIKA PHARMACEUTICALS, INC., ABRIKA PHARMACEUTICALS, LLLP, Movants: RICHARD P. MCELROY, MEDIA, PA.

Judges: MARY A. McLAUGHLIN, J.

Opinion by: MARY A. McLAUGHLIN

Opinion

MEMORANDUM

McLaughlin, J.

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MEMORANDUM

McLaughlin, **[*4]** J.

Wellbutrin XL is a once-a-day antidepressant containing the active pharmaceutical ingredient bupropion hydrochloride. It is produced by Biovail Corporation, Biovail Laboratories, Inc., and Biovail Laboratories International SRL [1] (together, "Biovail"), and distributed by SmithKline Beecham Corporation and GlaxoSmithKline, PLC (together, "GSK"). The plaintiffs, direct and indirect purchasers of Wellbutrin XL, have sued Biovail and GSK for illegally conspiring to prevent generic versions of Wellbutrin XL from entering the American market by filing sham patent infringement lawsuits and a citizen petition with the Food and Drug Administration ("FDA"), and entering into agreements with generic companies to settle the lawsuits.

Biovail and GSK now each move for summary judgment, arguing that their conduct is protected from antitrust liability under the Noerr-Pennington doctrine, and that the settlement **[*5]** agreements are not independently actionable. GSK also argues that it had no involvement in some of the allegedly anticompetitive conduct and, therefore, cannot be held conspiratorially liable for it. The Court will grant the motions as to the four lawsuits and the citizen petition, and defer decision as to the settlement agreements until a future date.

I. Legal and Factual Background[2]

A. The Drug Approval Process and Regulatory Framework

HN1[] The Federal Food, Drug, and Cosmetic Act, *21 U.S.C. §§ 301-92* ("FDCA"), provides that the Food and Drug Administration ("FDA") must approve all drugs before they may be introduced into interstate commerce. Companies **[*6]** seeking to market drugs may file applications for approval under one of two procedures.

Under the first procedure, the applicant files a New Drug Application ("NDA"), which must contain examples of the proposed labeling for the drug as well as clinical data demonstrating the drug's safety and efficacy. Among other things, the NDA must also contain the patent number and expiration date of any patent that claims either the drug or a method of using the drug if "a claim of patent infringement could reasonably be asserted." The FDA publishes the names of approved drugs and their associated patents in what is commonly known as the "Orange Book." *21 U.S.C. § 355(b)*.

HN2[] Congress established the second new drug approval procedure in 1984 with the Drug Price Competition and Patent Term Restoration Act (the "Hatch-Waxman Act"). Pub. L. No. 98-417, 98 Stat. 1585 (1984). Under the Hatch-Waxman Act, companies seeking to manufacture and market a generic version of a previously approved pioneer drug (known as the "listed drug") need not file an NDA. Instead, they are permitted to file an Abbreviated New Drug Application ("ANDA"). The ANDA permits the applicant to rely on the safety and efficacy data for **[*7]** the listed drug if the applicant can show that the generic product is "bioequivalent" to the listed drug. *21 U.S.C. §§ 355(j)(2)(A)(iv)*, *(j)(8)(B)*.

HN3[] As part of the ANDA process, a generic manufacturer must make one of four certifications regarding each patent associated in the Orange Book with the listed drug: (I) that the patent information has not been filed; (II) that the patent has expired; (III) that the patent is set to expire; or (IV) that the patent is invalid or will not be infringed by

[1] The Biovail defendants have changed their names or corporate structures following a merger. See Notice of Change of Names of Biovail Defs. (08-cv-2431 ECF No. 407; 08-cv-2433 ECF No. 375). For the sake of continuity, the Court will continue to refer to these defendants collectively as "Biovail."

[2] The facts here are undisputed unless otherwise noted. The Court will frequently cite to the following documents: Biovail Stmt. (ECF No. 413/ECF No. 381); GSK Stmt. (ECF No. 411/ECF No. 379); Pls.' Stmt. Resp. (ECF No. 431/ECF No. 394); Pls.' Stmt. (ECF No. 430/ECF No. 393). Where the Court refers to ECF numbers in this memorandum, the first number listed corresponds to the docket entry in 08-cv-2431, and the second corresponds to 08-cv-2433. The Court will cite Biovail exhibits as "BX," GSK exhibits as "GX," and plaintiffs' exhibits as "PX."

the generic drug. This fourth certification is known as a "paragraph IV certification." *21 U.S.C. § 355(j)(2)(A)(vii)(IV)*. A generic manufacturer that files a paragraph IV certification must give notice to the patent holder and provide a "detailed statement of the factual and legal basis of the opinion of the applicant that the patent is invalid or will not be infringed." *21 U.S.C. § 355(j)(2)(B)*.

HN4[] The Hatch-Waxman Act provides that if the patent holder files an infringement suit within 45 days after receiving notice, the patent holder benefits from a statutory stay on FDA approval of the ANDA for a period of 30 months or until the resolution of the infringement suit, whichever is shorter. *21 U.S.C. § 355(j)(5)(B)(iii)*. **[*8]** The first generic company to file an ANDA containing a paragraph IV certification (the "first filer") also receives an "exclusivity" period of 180 days during which the FDA may not approve any later-filed paragraph IV ANDA based on the same NDA. Id. *§ 355(j)(5)(B)(iv)*. The 180-day period begins to run from (1) the date that the first filer begins to market its drug or (2) the date of a final judgment that the patent is invalid or not infringed, whichever is earlier. Id. *§§ 355(j)(5)(B)(iv)*, *355(j)(5)(D)*.

B. The Citizen Petition Process

HN5[] Federal regulations provide that an interested person may petition the FDA to "issue, amend, or revoke a regulation or order, or to take or refrain from taking any other form of administrative action." *21 C.F.R. § 10.25*. A citizen petition must describe the FDA action requested, include a statement of the factual and legal grounds on which the petitioner relies, and certify that the petition includes "all information and views on which the petition relies, and that it includes representative data and information known to the petitioner which are unfavorable to the petition." *21 C.F.R. § 10.30(a)*. Within 180 days of receiving the petition, the FDA must **[*9]** furnish a response to the petitioner either approving, denying, or providing a tentative response that indicates why the agency has been unable to reach a decision on the petition. [3] Id. *§ 10.30(e)(2)*.

C. Wellbutrin IR, Wellbutrin SR, and Wellbutrin XL

Buproprion hydrochloride, an active pharmaceutical ingredient for treating depression, was first approved by the FDA for the treatment of major depressive disorder in 1985 in an immediate release formulation known by its branded name, Wellbutrin IR. Wellbutrin IR provides for rapid release of the active ingredient and is taken three times a day. The FDA approved Wellbutrin IR on the basis of human clinical trials that demonstrated the safety and efficacy of buproprion **[*10]** hydrochloride and set the maximum recommended daily dose at 450 mg/day. Clinical data indicated an increase in seizure risk above that recommended daily dose. Biovail Stmt. ¶¶ 77-78; Pls.' Stmt. Resp. ¶¶ 77-78; GSK Stmt. ¶ 1; Pls.' Stmt. Resp. ¶ 1.

The next bupropion hydrochloride product to reach the market was the sustained release Wellbutrin SR, which is taken twice a day. Wellbutrin SR was approved on the basis of bioequivalence to Wellbutrin IR. The maximum recommended daily dose for Wellbutrin SR is also 450 mg/day. Biovail Stmt. ¶ 79; Pls.' Stmt. Resp. ¶ 79.

Biovail acquired the rights to two U.S. patents covering extended release formulations of bupropion hydrochloride: U.S. Patent No. 6,096,341 (the "'341 patent") and U.S. Patent No. 6,143,327 (the "'327 patent"). Both patents are set to expire on October 30, 2018. GSK Stmt. ¶ 3; Pls.' Stmt. Resp. ¶ 3.

Previous patents had covered bupropion hydrochloride tablets that contained "stabilizers," which are ingredients that prevent bupropion hydrochloride from degrading. Biovail Stmt. ¶ 1; Pls.' Stmt. Resp. ¶ 1. The '341 patent's summary of the invention, however, describes a controlled release tablet comprising:

> (i) a core comprising **[*11]** bupropion hydrochloride and conventional excipients, free of stabilizer; and

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[3] In 2007, Congress amended the FDCA to provide that the FDA shall not delay approval of an ANDA on account of a pending citizen petition unless the FDA determines that "a delay is necessary to protect the public health." Food & Drug Administration Amendments Act of 2007, Pub. L. No. 110-85, § 914, 121 Stat. 823, 954 (2007) (codified as amended at *21 U.S.C. § 355(q)(1)(A)(ii)*). The 2007 amendments occurred after Biovail filed its citizen petition and are not applicable to this case.

(ii) a coating consisting essentially of a water-insoluble, water-permeable film-forming polymer, a plasticizer and a water-soluble polymer.

'341 Patent (BX 1) (emphasis added).

On October 26, 2001, Biovail and GSK entered into an agreement to develop a once-a-day extended release bupropion hydrochloride tablet that practiced the '341 patent. The extended release formulation, brand-named Wellbutrin XL, would be taken once a day and allow for the continuous and slow release of bupropion hydrochloride into the bloodstream over time. In August 2002, GSK filed an NDA for Wellbutrin XL and included the '341 and '327 patents for listing in the Orange Book. The FDA approved the NDA for Wellbutrin XL in August 2003 on the basis of bioequivalence to Wellbutrin IR and SR. Thereafter, GSK began to market the drug to great commercial success. As with Wellbutrin IR and SR, the recommended daily dose for Wellbutrin XL was 450 mg/day, although the adult target dose is 300 mg/day. Biovail Stmt. ¶¶ 2, 80; Pls.' Stmt. Resp. ¶¶ 2, 80; GSK Stmt. ¶ 7; Pls.' Stmt. Resp. ¶ 7.

D. *Noerr-Pennington* Immunity and the Sham Exception

HN6[] A party **[*12]** who petitions the government for redress is generally immune from antitrust liability. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc. ("PRE"), 508 U.S. 49, 56, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*; *Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 122 (3d Cir. 1999)*. Under what is known as the Noerr-Pennington doctrine, the *First Amendment* protects the right to petition all types of government entities, including the right to bring legitimate disputes to the courts for judicial resolution. *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 136, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; *California Motor Transp. Co. v. Trucking Unltd., 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*.

Noerr-Pennington immunity, however, is not absolute. It is subject to a "sham" exception for activities that are a "mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor." *PRE, 508 U.S. at 56* (citing *Noerr, 365 U.S. at 144*). The sham exception is applicable not only to lawsuits but also to administrative petitions. [4] *Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 123 (3d Cir. 1999)*; *In re: DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 686 (2d Cir. 2009)*. **[*13]** In *PRE*, the Supreme Court set forth a two-tiered definition of the sham exception. The first prong is concerned with the objective merit of the lawsuit or petition at issue, and the second focuses on the antitrust defendants' subjective intentions.

HN7[] Under the first prong of the test, the party invoking the sham exception, here the plaintiffs, must show that the defendants' conduct is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *PRE, 508 U.S. at 60*. Put another way, "[i]f an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim

[4] The Third Circuit has applied the sham exception to petitions to the Department of Commerce and the U.S. International Trade Commission. *Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 123 (3d Cir. 1999)*. However, it does not appear to have decided whether the sham exception applies to FDA citizen petitions.

Biovail does not dispute that the sham exception applies to its citizen petition. See Biovail Br. 47. The Court therefore does not address the argument considered and rejected by the court in In re Prograf Antitrust Litigation that the sham exception to Noerr-Pennington immunity is unavailable in the FDA citizen petition context. See *In re Prograf Antitrust Litig., No. 11-md-2242, 2012 U.S. Dist. LEXIS 12053, 2012 WL 293850, at *5 (D. Mass. Feb. 1, 2012)*. In that case, the antitrust defendant cited Kottle v. Nw. Kidney Centers for the proposition that the sham exception does not apply because the FDA resembles a political entity more than a judicial body. See *Kottle v. Nw. Kidney Ctrs., 146 F.3d 1056, 1062 (9th Cir. 1998)* **[*14]** ("Only when administrative officials must follow rules is it meaningful to ask whether a petition before an agency was 'objectively baseless' . . . ."). The Prograf court rejected the application of *Kottle. 2012 U.S. Dist. LEXIS 12053, 2012 WL 293850, at *5*; see also *In re Flonase Antitrust Litig., 795 F. Supp. 2d 300, 310 n.11 (E.D. Pa. 2011)*.

premised on the sham exception must fail." Id. The existence of probable cause to institute proceedings is an absolute defense to antitrust liability. [5] *Cheminor Drugs, 168 F.3d at 122* (citing *PRE, 508 U.S. at 62-63*).

Loss on the merits of the underlying proceeding, although instructive, is not determinative on the issue of objective baselessness. See *PRE, 508 U.S. at 65* (holding that a copyright action in which the party lost on summary judgment was not sham litigation); *FilmTec Corp. v. Hydranautics, 67 F.3d 931, 937 (Fed. Cir. 1995)*. The PRE Court specifically warned courts to "resist the understandable temptation to engage in post hoc reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation." *508 U.S. at 61 n.5* (internal citations and quotation marks omitted). Where there is no dispute over the predicate facts **[*16]** of the underlying legal proceeding, a court may decide probable cause as a matter of law. *PRE, 508 U.S. at 63*.

HN8[] Only if an action is objectively baseless may a court proceed to the second prong of the sham exception definition. Under the subjective second prong, a court should examine whether the baseless suit or petition "conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process - as opposed to the outcome of that process - as an anticompetitive weapon." *PRE, 508 U.S. at 61* (internal quotation marks and citations omitted).

E. Standard of Proof as to Objective Baselessness

The parties dispute whether the plaintiffs must establish objective baselessness using a preponderance of the evidence standard or a clear and convincing evidence standard. The Court of Appeals for the Federal Circuit has not published a decision that explicitly sets forth the standard of proof for showing that a lawsuit or petition was objectively baseless in the sham exception context. [6]

In C.R. Bard, Inc. v. M3 Sys., Inc., the Federal Circuit cited with approval Handgards, a Ninth Circuit case that required clear and convincing evidence of bad faith to invoke the sham exception. *157 F.3d 1340, 1368-69 (Fed. Cir. 1998)* (citing *Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282 (9th Cir. 1984))*.ca However, Handgards predates PRE's division of the sham exception inquiry into objective and subjective prongs, and C.R. Bard did not explicitly adopt the clear and convincing evidence standard for the objective baselessness prong. The only Federal Circuit decision to do so in the Noerr-Pennington context is unpublished. *Mitek Surgical Prods., Inc. v. Arthrex, Inc., 230 F.3d 1383 (Fed. Cir. 2000)* (unpublished table disposition).

Nevertheless, the Federal Circuit has imposed a clear and convincing evidence standard in other contexts where the parties must establish objective baselessness **[*18]** under PRE. See, e.g., *800 Adept, Inc. v. Murex Sec. Ltd., 539 F.3d 1354, 1370 (Fed. Cir. 2008)*; *Dominant Semiconductors Sdn. Bhd. v. OSRAM GmbH, 524 F.3d 1254, 1263-64 (Fed. Cir. 2008)*. The issue in those cases was whether state tort claims against patent holders were preempted by federal patent law. Preemption turned on whether the patent holder acted in "bad faith" in the publication or enforcement of its patent. Part of the bad faith analysis required clear and convincing evidence that the patent holder's infringement allegations were objectively baseless, as defined in PRE. *Murex, 539 F.3d at 1369-70*.

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[5] The Supreme Court compared the notion of probable cause here to the same notion in the common law tort of wrongful civil proceedings, frequently called "malicious prosecution." *PRE, 508 U.S. at 62, 62 n.7*. **[*15]** In PRE, the Court also cited the standard from *Federal Rule of Civil Procedure 11* in finding that the defendant's copyright action was "warranted by existing law" or, at the very least, "based on an objectively good faith argument for the extension, modification, or reversal of existing law." *Id. at 65*. Justice Souter's concurrence cautioned, however, against "transplanting every substantive nuance and procedural quirk of the common-law tort of wrongful civil proceedings into federal ***antitrust law***." *Id. at 67* (Souter J., concurring).

[6] "Whether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question **[*17]** of Federal Circuit law." *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068 (Fed. Cir. 1998)*; see also *Honeywell Int'l Inc. v. Univ. Avionics Sys. Corp., 488 F.3d 982, 1000-01 (Fed. Cir. 2007)*; *In re Wellbutrin SR Antitrust Litig., No. 05-396, 2006 U.S. Dist. LEXIS 9687, 2006 WL 616292, at *11 (E.D. Pa. Mar. 9, 2006)*.

The Federal Circuit has not clarified in a published decision whether the clear and convincing evidence standard required to show objective baselessness in preemption cases also applies in the sham exception context. However, both the unpublished Mitek table disposition and other district court decisions suggest that a clear and convincing evidence standard of proof may be appropriate. [7] See *Teva Pharms. USA, Inc. v. Abbott Labs., 580 F. Supp. 2d 345, 362 (D. Del. 2008)* (requiring clear and convincing evidence of objective baselessness); *In re Relafen Antitrust Litig., 346 F. Supp. 2d 349, 360 (D. Mass. 2004)* **[*19]** (same). Nevertheless, the Court need not decide in this case whether a clear and convincing evidence or a preponderance of the evidence standard is the proper standard in the context of a sham exception claim because the Court's decision on summary judgment would be the same under either standard.

II. Overview

Between September 2004 and May 2005, four different generic companies - Anchen, Abrika, Impax, and Watson - filed ANDAs with the FDA, each seeking approval of a generic version of Wellbutrin XL. In each case, Biovail filed a lawsuit against the generic company, claiming infringement of the '341 patent. [8] With respect to most of the generic products, the lawsuits were filed within 45 days of receiving the generic companies' paragraph IV notices, thus triggering the 30-month statutory stay on ANDA approval. GSK joined Biovail in the lawsuits against Anchen and Abrika, but later withdrew. Biovail Stmt. ¶ 2; Pls.' Stmt. Resp. ¶ 2; GSK Stmt. ¶ 9; Pls.' Stmt. Resp. ¶ 9.

On December **[*21]** 20, 2005, Biovail filed a citizen petition (the "Citizen Petition") with the FDA. GSK did not join the filing. The FDA issued its final response granting in part and denying in part Biovail's Citizen Petition on December 14, 2006, the same day that it approved Anchen's ANDA. Citizen Petition (BX 96); FDA Final Resp. (BX 108); Anchen Approval Ltr. (GX 42). Shortly thereafter, the defendants reached a series of agreements with Anchen, Impax, Watson, and another generic pharmaceutical company, Teva Pharmaceuticals, that settled or otherwise disposed of the Anchen, Impax, and Watson patent infringement lawsuits and set a schedule for generic entry. Biovail also separately settled the Abrika lawsuit.

The plaintiffs allege that the defendants' lawsuits and the Citizen Petition constituted an illegal conspiracy to delay entry of generic versions of Wellbutrin XL in violation of the Sherman Antitrust Act. The defendants contend that their conduct is immune from antitrust liability under the Noerr-Pennington **[*22]** doctrine. The plaintiffs also contend that the agreements disposing of some of the lawsuits independently violated the antitrust laws, even if the lawsuits themselves were not sham litigation.

The Court will grant the defendants' motions for summary judgment as to the four patent infringement lawsuits and the Citizen Petition because they do not fall within the sham exception to *Noerr-Pennington* immunity. The Court does not decide today whether the settlement agreements independently violated the antitrust laws, as that issue is still being briefed. The Court will omit the settlement agreements from the recitation of facts and discussion of law below.

III. Biovail's Conduct

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[7] The plaintiffs argue that the proper burden of proof is the preponderance of the evidence standard for civil cases, but cite only one case, which predates PRE, in support of this proposition. See *Litton Sys., Inc. v. Am. Tel. & Tel. Co., 700 F.2d 785, 813 (2d Cir. 1983)* ("We see no reason to impose any higher burden of proof on the antitrust plaintiff asserting sham than would ordinarily be applicable in any civil issue."). To the extent that non-Federal Circuit law from before PRE is relevant, the Court notes that case law from other circuits adopted a clear and convincing evidence standard. See *Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1288 (9th Cir. 1984)* (requiring clear and convincing evidence of bad faith prosecution of patent suit); *MCI Commc'ns. Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1155 (7th Cir. 1983)* (approving jury instructions that emphasized the clear and convincing **[*20]** evidence standard, on account of the *First Amendment* concerns at issue).

[8] The Orange Book also listed the '327 patent as covering Wellbutrin XL. Infringement of the '327 patent was asserted in the Anchen, Abrika, and Watson lawsuits, but claims relating to the '327 patent were eventually dropped from each of the cases. See BX 12 (Anchen); BX 13 (Abrika); BX 14 (Watson). The Court does not understand the plaintiffs to be challenging conduct relating to the '327 patent as a violation of the antitrust laws.

A. The *Anchen* Lawsuit

1. Facts as to *Anchen*

On September 21, 2004, Anchen Pharmaceuticals, Inc. filed an ANDA with the FDA, seeking permission to sell a generic version of Wellbutrin XL. Anchen provided Biovail and GSK with its paragraph IV notice by cover letter dated November 12, 2004, claiming that its product did not infringe the '341 patent. Anchen's paragraph IV notice claimed non-infringement because its "tablet core contains a stabilizing amount of hydrochloric acid" and hence was not "free of stabilizer," the **[*23]** term used in the '341 patent. Anchen also provided selected portions of its ANDA to Biovail and GSK. Biovail Stmt. ¶¶ 3-5; Pls.' Stmt. Resp. ¶¶ 3-5.

Anchen's ANDA did not quantify the amount of hydrochloric acid in its product on a per unit basis. The ANDA described a product that used hydrochloric acid as a "stabilizing agent" in the manufacturing process, but stated that the acid was "evaporated during processing" and indicated a "-" under the column designated "MG PER TABLET." Similarly, the percentage of hydrochloric acid was listed as "-" and ingredients other than hydrochloric acid were shown in the ANDA to add up to 100.0% of the finished product. See Biovail Br. Exs. A, B. A list in the ANDA that compared the Anchen product to Wellbutrin XL did not include hydrochloric acid as an ingredient in Anchen's product. Biovail Br. Ex. C.

On November 16, 2004, four days after Anchen sent its paragraph IV notice, Stan Hull, senior vice president of GSK, emailed Carol Chapuis, a Biovail vice president, proclaiming the "need to get aligned on our main messages and position" regarding the ANDA. Ms. Chapuis's response referenced a Joint Steering Committee meeting to expand on the topics that **[*24]** Mr. Hull mentioned. PX 380.

Shortly after receiving Anchen's paragraph IV notice, Biovail and GSK reached a Common Interest Agreement with respect to their common legal interest in potential infringement of the '341 and '327 patents by Anchen or filers of additional ANDAs and paragraph IV notices, and regarding any litigation in response thereto. The Common Interest Agreement related to the paragraph IV certifications of Anchen, Abrika, and Impax, and to the Anchen and Abrika lawsuits. Stip. of Parties Concerning Defs.' Common Interest Claims ¶ 1 (ECF No. 363/ECF No. 347).

On December 21, 2004, within 45 days of receiving Anchen's paragraph IV notice, Biovail and GSK jointly initiated a patent infringement action against Anchen in the Central District of California. The lawsuit triggered the 30-month statutory stay under Hatch-Waxman. The case was assigned to the Honorable James V. Selna. Anchen answered the complaint, denying infringement and asserting counterclaims for non-infringement and invalidity. Biovail Stmt. ¶¶ 8-9; Pls.' Stmt. Resp. ¶¶ 8-9; Anchen Compl. (BX 2). After GSK moved to withdraw as a plaintiff, the Anchen court approved the parties' stipulation of GSK's withdrawal **[*25]** from the suit on April 25, 2005. Biovail continued the lawsuit following GSK's withdrawal. GSK Stmt. ¶¶ 43, 44; Pls.' Stmt. Resp. ¶¶ 43, 44.

During the claim construction portion of the litigation, Biovail argued that in the '341 patent, the term "free of stabilizer" should be construed to mean that "the core lacks an effective stabilizing amount of an organic or inorganic acid capable of inhibiting the degradation of bupropion hydrochloride . . . ." Biovail Prelim. Cl. Constr. Br. 9 (BX 17). By contrast, Anchen argued that the term "free of stabilizer" should mean "not united with, attached to, combined with, or mixed with . . . any substance or agent that tends to prevent changes to the chemical or physical integrity of the tablet, or enhances the ability of the tablet to maintain protection against microbiological contamination." Anchen Opening Cl. Constr. Br. 11-12 (BX 18).

On February 8, 2006, Judge Selna issued a Claim Construction Order finding that "free of stabilizer" meant that "the core is free of any substance or agent that tends to prevent changes to the chemical integrity of the tablet." Am. Order on Cl. Constr. Hr'g 5 (PX 182). See also Order Clarifying Court's Cl. Constr. **[*26]** 2 (BX 19). Regarding Biovail's claim construction argument, Judge Selna's order stated:

> Biovail's proposed definition of "stabilizer" is not found anywhere in the '341 patent, and actually contradicts the summary of the invention.

Am. Order on Cl. Constr. Hr'g 9 (PX 182).

Following Judge Selna's ruling on claim construction, the parties filed cross-motions for summary judgment. Judge Selna issued a tentative minute order denying Anchen's motion, finding a genuine issue of material fact regarding whether Anchen's ANDA directly addressed the infringement inquiry. Biovail Stmt. ¶¶ 19, 21; Pls.' Stmt. Resp. ¶¶ 19, 21; Tentative Summ. J. Order (BX 34).

However, after oral argument, Judge Selna granted Anchen's motion for summary judgment on August 1, 2006. Judge Selna denied Biovail's motion for reconsideration, then entered judgment on August 25, 2006. Biovail appealed to the Federal Circuit, challenging both the claim construction and summary judgment orders. Biovail Stmt. ¶¶ 22-24; Pls.' Stmt. Resp. ¶¶ 22-24; PX 216.

Following full briefing and after holding oral argument on September 5, 2007, the Federal Circuit granted Biovail's motion to withdraw its appeal on June 11, 2008. Order Granting **[*27]** Mot. to Withdraw (BX 38).

2. Analysis as to *Anchen*

The Anchen lawsuit centered around the term "free of stabilizer," which appears in each claim in the '341 patent. See '341 Patent (BX 1). Anchen argued for a plain reading of the term and contended that its generic product did not infringe the '341 patent because it contains hydrochloric acid, a commonly used stabilizer. Biovail argued on claim construction that "stabilizer" should be construed to have a functional component. Separately, Biovail argued that Anchen's ANDA described and sought approval to market a product that did not contain a stabilizer, and that Biovail was entitled to rely on the representations in the ANDA. The Court finds that the plaintiffs have not met their burden of showing that the Anchen lawsuit was objectively baseless.

a. Claim Construction

On the claim construction question, Biovail put forth a colorable argument in the underlying proceeding that "stabilizer" should have been construed as a functional term - something that actually stabilizes the tablet. First, as a matter of plain meaning, the Court does not find Biovail's argument that a stabilizer ordinarily means something that actually provides stability **[*28]** to be unreasonable. Second, the Manual of Patent Examining Procedure provides for the patentability of functional limitations, which it defines as "an attempt to define something by what it does, rather than by what it is." MPEP § 2173.05(g) (BX 117). Various courts, including the Federal Circuit, have read patent terms containing the suffix "-er" to contain a functional limitation. For example, in Kim v. ConAgra Foods, Inc., the Federal Circuit interpreted "potassium bromate replacer" as a composition that actually replaces, or performs the same function as potassium bromate. *465 F.3d 1312, 1318 (Fed. Cir. 2006)*. See also, e.g., Allergan, Inc. v. Watson Labs., Inc., No. 09-511 (D. Del. Dec. 8, 2010), Cl. Constr. Order 3 n.10 (BX 118) (interpreting "release controlling polymer" to mean that the polymer must actually function to control the rate of release); *Profile Prods. LLC v. Encap, LLC, No. 09-92, 2009 U.S. Dist. LEXIS 60282, at *11 (W.D. Wis. July 15, 2009)* (requiring a "binder" to "actually bind" as opposed to merely having the ability to bind). Thus, the '341 patent attempted to distinguish itself from two prior patents because those earlier formulations "require[d] a stabilizer **[*29]** to achieve sufficient stability," whereas the '341 patent did not. '341 Patent col. 1 ll. 22-24 (BX 1) (emphasis added).

Based on the above, the Court cannot say that it was objectively baseless to argue on claim construction that a stabilizer must actually function to stabilize the tablet as opposed to merely having the ability to stabilize. The Anchen court (and, later, the Abrika and Impax courts) eventually rejected Biovail's proposed claim construction. The court instead construed "free of stabilizer" to mean that "the core is free of any substance or agent that tends to prevent changes to the chemical integrity of the tablet." Am. Order on Cl. Constr. Hr'g 5 (BX 182). However, although the outcome is instructive, the Court does not find it determinative in this case. See *PRE, 508 U.S. at 65*.

b. Anchen's ANDA

More importantly, Biovail had a colorable legal argument that (1) Biovail was entitled to rely on the representations in the ANDA when initiating suit, and that (2) Anchen had an obligation under FDA regulations and guidance to quantify even residual amounts of HCl if the ingredient tended to stabilize the final tablet.

HN9[] An infringement inquiry triggered by an ANDA filing is focused **[*30]** on the product that is likely to be sold following FDA approval. Because the potentially infringing drug has not yet been marketed when the patent holder files suit, [9] the inquiry is a hypothetical one that asks the fact finder to determine whether the drug that will be sold upon approval of the ANDA will infringe the asserted patent. *Bayer AG v. Elan Pharm. Research Corp., 212 F.3d 1241, 1248-49 (Fed. Cir. 2000)*. Thus, "[b]ecause drug manufacturers are bound by strict statutory provisions to sell only those products that comport with the ANDA's description of the drug, an ANDA specification defining a proposed generic drug in a manner that directly addresses the issue of infringement will control the infringement inquiry." *Abbott Labs. v. TorPharm, Inc., 300 F.3d 1367, 1373 (Fed. Cir. 2002)*; see also *Glaxo, Inc. v. Novopharm, Ltd., 110 F.3d 1562, 1569 (Fed. Cir. 1997)* (inquiry is "properly grounded in the ANDA application and the extensive materials typically submitted in its support"). In Anchen, whether the ANDA directly addressed the issue of infringement turned on whether Anchen was required to quantify hydrochloric acid in its ANDA.

HN11[] FDA regulations require ANDA applicants to include a list of all components used in the manufacture of the drug product, regardless of whether they appear in the drug product, as well as a statement of the composition of the drug product. *21 C.F.R. § 314.50*. ANDA applicants must also "identify and characterize the inactive ingredients in the proposed drug product." Id. *§ 314.94(a)(9)(ii)*. In 2003, the FDA issued a "Guidance for Industry" that states:

> The function (i.e., role) of each component in the formulation should be stated. Components that are used in the manufacture of the drug product and do not appear in the finished drug product except at residual levels (e.g., some solvents) should be identified as processing agents.
>
> The target amount of each component by definite weight or other measure should be provided on a per unit basis.

2003 FDA Guidance 8 (BX 25). Thus, in its pre-NDA submission to the FDA, the brand manufacturers of the original Wellbutrin IR had quantified a target amount **[*32]** per tablet of 0.5 mg of hydrochloric acid in the 50 mg formulation and 1.0 mg in the 100 mg formulation of Wellbutrin IR. BX 132 at GSKWXL0054379-80. Similarly, the NDA submitted for Wellbutrin SR indicated a target amount per tablet of 16.20 mg of cysteine hydrochloride, a different kind of acid stabilizer. BX 131 at GSKWXL0072506.

The instruction to quantify the target amount of each component does not apply, however, to "processing agents." 2003 FDA Guidance 9 (BX 25). The FDA guidance does not clearly define "processing agent." Biovail presented expert testimony that processing agents are components that appear in the finished tablet only at residual levels and have no function to perform in the finished tablet. See Fleischer WBXL Rpt. ¶ 14 (BX 24); Lin Rpt. ¶¶ 11, 17 (BX 27). The plaintiffs do not expressly set forth their own definition of "processing agent" or explain why hydrochloric acid is a processing agent. However, citing expert testimony from both sides, the plaintiffs argue that the FDA only wants to know whether a drug is stable, and that the FDA does not require stabilizing agents present in such small trace amounts to be quantified. Kaplan Dep. 48-49 (PX 147) ("FDA **[*33]** policy is such that if the ingredient is not more than one percent it need not be quantified."); Lin Dep. 67-68 (PX 148).

The Court need not decide in this case whether the FDA rules, regulations, and the 2003 guidance required Anchen to quantify the amount of hydrochloric acid on a per unit basis -only whether it was objectively baseless to argue that they did. Notwithstanding the expert testimony cited by the plaintiffs regarding FDA policy, the text of the 2003 guidance itself is not inconsistent with Dr. Fleischer's and Biovail's definition of a processing agent. 2003 FDA Guidance 8 (BX 25). The guidance states that "[t]he function . . . of each component in the formulation should be stated," but qualifies that "[c]omponents that are used in the manufacture of the drug product and do not appear in the finished drug product except at residual levels . . . should be identified as processing agents." Id. One plausible reading of this language is that processing agents have no function to perform in the final tablet, because if they did, the function would need to be stated. Therefore, it was not objectively baseless to contend that if hydrochloric acid

[9] ***HN10***[] The infringement provision of the Hatch-Waxman **[*31]** Act, *35 U.S.C. § 271(e)(2)(A)*, states that it is an act of infringement to submit an ANDA that describes a drug claimed in a patent. Thus, the patent holder may sue before the product goes to market.

tended to stabilize the chemical **[*34]** integrity of the final product, it was not a "processing agent" and, thus, needed to be quantified on a per unit basis. [10]

Anchen's ANDA, as set forth in the facts, did not quantify hydrochloric acid on a per unit basis. The plaintiffs point out that it is industry convention to use a symbol such as "-" or "**" to signify that a component remains in the final pharmaceutical product in a residual, non-zero, but **[*35]** non-numerically quantified amount. Pls.' Br. 46-47. But industry convention would be inapposite if a court sided with Biovail on its argument that Anchen was required to numerically quantify any hydrochloric acid in the product.

Thus, Biovail had at least a colorable legal argument in Anchen that under Abbott Laboratories and the applicable FDA regulations and policy, Anchen's ANDA controlled the infringement inquiry and suggested that the Anchen product was not "free of stabilizer," as ultimately defined by Judge Selna on claim construction. The Court finds that Anchen does not fit the profile of objectively baseless sham litigation.

B. The *Watson* Lawsuit

1. Facts as to *Watson*

Watson Pharmaceuticals filed an ANDA with the FDA on May 19, 2005, seeking permission to sell a generic version of the 150 mg Wellbutrin XL. Watson later requested permission for the 300 mg Wellbutrin XL as well. Watson provided its paragraph IV notices to Biovail and GSK on July 21, 2005 and July 27, 2005, claiming non-infringement. As with Anchen, Watson claimed that its generic product "will contain a stabilizer, namely hydrochloric acid." Biovail Stmt. ¶¶ 72-73; Pls.' Stmt. Resp. ¶¶ 72-73.

Watson's ANDA, like **[*36]** Anchen's, did not quantify the amount of hydrochloric acid in its product on a per unit basis. Although diluted hydrochloric acid is identified as a "stabilizer," the ANDA indicated a "-" under the column designated "AMOUNT PER TABLET." The composition statement in the ANDA indicated that "[w]ater is removed during processing." Similarly, the percentage of hydrochloric acid was listed as "-" and ingredients other than hydrochloric acid were shown in the ANDA to add up to 100.0% of the finished product. A list in the ANDA that compared the generic product to Wellbutrin XL did not include hydrochloric acid as an ingredient in Watson's product. BX 88. Biovail's counsel signed an offer of confidential access with Watson for access to certain portions of Watson's ANDA. PX 320.

On September 6, 2005, Biovail filed a patent infringement suit against Watson in the Southern District of New York. The Honorable Kenneth M. Karas was assigned to the case. On February 26, 2007, while discovery was ongoing, and before reaching the claim construction stage, the Watson lawsuit settled. Biovail Stmt. ¶¶ 74, 76; Pls.' Stmt. Resp. ¶¶ 74, 76.

2. Analysis as to *Watson*

The Watson case, like Anchen, centered **[*37]** around the issue of whether Watson's generic product was "free of stabilizer," according to Watson's representations in the ANDA. Watson and Biovail made the same legal arguments in Watson as Anchen and Biovail did in Anchen. Because the Court finds that the plaintiffs have not met their burden of showing objective baselessness as to Anchen, the Court concludes that the plaintiffs have also not met their burden with respect to Watson.

C. The *Abrika*Lawsuit

1. Facts as to *Abrika*

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[10] The Court notes that although Judge Selna later changed his mind, his minute order on summary judgment had tentatively found a genuine issue as to what the FDA's ANDA requirements were as to Anchen. Tentative Summ. J. Order 13-17 (BX 34).

Similarly, although the Court of Appeals did not have the opportunity to opine on the Anchen case, the panel at oral argument repeatedly asked Anchen's counsel questions about whether the FDA required hydrochloric acid to be listed and quantified if it tended to stabilize the product. See, e.g., Biovail Reply Ex. D at 16-17.

On September 23, 2004, Abrika Pharmaceuticals, LLLP filed an ANDA with the FDA, seeking permission to sell a generic version of the 150 mg formulation of Wellbutrin XL. On October 1, 2004, Abrika amended its ANDA to seek permission for the 300 mg formulation of Wellbutrin XL as well. Abrika sent its paragraph IV certification to Biovail and GSK on November 12, 2004. The paragraph IV certification informed the defendants that Abrika's product exhibited a different dissolution profile from the one claimed in the '341 patent when tested in 0.1N HCl. Biovail Stmt. ¶¶ 53-55; Pls.' Stmt. Resp. ¶¶ 53-55; Abrika Para. IV Notice 2 (PX 232).

Prior to filing suit, Biovail requested but did not receive access to Abrika's ANDA. **[*38]** On December 21, 2004, Biovail and GSK filed a patent infringement action against Abrika in the Southern District of Florida. The Honorable Cecilia M. Altonaga was assigned to the case. Biovail Stmt. ¶ 56; Pls.' Stmt. Resp. ¶ 56. As in Anchen, GSK later moved to withdraw as a plaintiff in Abrika, which motion the court approved on April 20, 2005. Biovail continued to litigate the case following GSK's withdrawal. GSK Stmt. ¶¶ 28, 31; Pls.' Stmt. Resp. ¶¶ 28, 31.

Abrika's main claim of non-infringement was that its product did not meet the specified dissolution profile in the '341 patent. A dissolution profile is derived from a dissolution test, which involves adding the drug product to a water-based dissolution medium. The dissolution profile will vary depending on the medium and test selected. Because Abrika's product contains what is called an "enteric" coating, it does not dissolve in acidic mediums such as hydrochloric acid (abbreviated as "HCl"). Abrika's product is designed not to dissolve in the acidic stomach, but in the more neutral environment of the small intestine. Biovail Stmt. ¶¶ 58-59, 61; Pls.' Stmt. Resp. ¶¶ 58-59, 61. The claim language in the '341 patent relating to **[*39]** the dissolution profile did not specify or reference the test conditions used to obtain the covered profile.

On claim construction, Abrika argued that the relevant dissolution medium to use for dissolution profile testing was 0.1N HCl (in which its enteric-coated product does not dissolve) because that medium was the only one mentioned in the patent examples. Thus, Abrika's paragraph IV certifications only provided dissolution profile results obtained using the 0.1N HCl medium. Biovail Stmt. ¶ 62; Pls.' Stmt. Resp. ¶ 62; BX 64; BX 65.

Biovail argued, however, that a proper dissolution medium to use for testing should mimic what occurs in the human body. Thus, Biovail contended, enteric-coated products such as Abrika's drug should be tested under procedures specified in the United States Pharmacopeia ("USP"), a compendium that describes industry standard methods for the testing of pharmaceutical products. The USP's dissolution test for enteric-coated products is called the "pH switch test." BX 76 at 1791. It is undisputed that Abrika provided testing to the FDA that showed that its product fell within the dissolution profile of the '341 patent if tested using the USP's pH switch test. **[*40]** Biovail Stmt. ¶¶ 62-63, 66, 68; Pls.' Stmt. Resp. ¶¶ 62-63, 66, 68; Kaplan Dep. 148 (PX 147).

The proper medium for dissolution profile testing was not a disputed issue in either the Anchen or Impax litigation. Anchen and Impax argued in those suits that the "dissolution profile" claim limitation was indefinite. Both the Anchen and Impax courts adopted Biovail's proposed USP-based construction of the term "dissolution profile." Biovail Stmt. ¶ 64; Anchen Cl. Constr. Order 14 (BX 114); Impax Cl. Constr. Order 34 (BX 53).

Judge Altonaga disagreed with those courts and adopted Abrika's proposed construction of the term "dissolution profile." Abrika Cl. Constr. Order 15-16 (BX 79). Judge Altonaga found that Abrika's construction "better reflects the disclosures in the specification and more closely conforms to the patentee's own expressed description of his invention." Id. at 26. Regarding Biovail's proposed construction, Judge Altonaga wrote:

> Given the clear guidance of the specification and prosecution history, it is evident that Biovail's construction of the disputed "dissolution profile" limitation is impermissibly broad. Biovail's broad construction of the disputed term finds no support **[*41]** in the intrinsic record.

Id. at 25. In addition, as in Anchen and Impax, Judge Altonaga sided with the generic company on the "free of stabilizer" issue. Id. at 28-29.

The parties settled the Abrika lawsuit in July 2007, prior to any other court decisions in the case, including summary judgment. Biovail Stmt. ¶ 69; Pls.' Stmt. Resp. ¶ 69.

2. Analysis as to *Abrika*

The defendants make two separate arguments as to why they are entitled to summary judgment as to the Abrika litigation. First, they contend that the suit was not objectively baseless. Second, they argue that the filing of the suit had no impact on the date when Abrika entered the market. Whether the Abrika suit was objectively baseless is a close question, but it is one that the Court need not decide in this case because this suit did not cause the delay in the entry of the Abrika generic product to the market.

a. Objective Baselessness

The issue in the Abrika litigation was whether Abrika's generic product met the dissolution profile in the '341 patent, which answer turned on the claim construction question of what dissolution medium should be used to obtain the dissolution profile. Abrika maintained that testing should be conducted **[*42]** in an acidic medium (0.1N HCl), as set forth in examples in the patent specification and according to prosecution history. Biovail and GSK contended that the USP-based pH switch test applied since Abrika's product was enteric-coated. The Court declines to find at this juncture that the defendants' position on claim construction was objectively baseless.

The defendants argue as a preliminary matter that in the Hatch-Waxman context, they had a reasonable basis to institute suit against Abrika because Abrika did not provide pre-filing access to its ANDA. Biovail Br. 41 (citing *Hoffmann La Roche, Inc. v. Invamed Inc., 213 F.3d 1359 (Fed. Cir. 2000))*. They contend that they had to sue to confirm that Abrika's product had an enteric coating and that the product infringed the '341 patent if tested using the pH switch test. This argument only holds weight, however, if this Court agrees that the defendants could reasonably expect success on the merits of their claim construction argument as to the term "dissolution profile." The Court therefore considers whether dissolution testing in a 0.1N HCl medium is the only reasonable construction of "dissolution profile."

HN12[] It is a "bedrock principle of patent **[*43]** law that the claims of a patent define the invention to which the patentee is entitled the right to exclude." *Phillips v. AWH Corp., 415 F.3d 1303, 1312 (Fed. Cir. 2005)* (en banc) (internal quotation marks and citation omitted). It is also well-settled that in interpreting an asserted claim, courts look first to intrinsic evidence - e.g., the patent itself, including the language of the claims, the specification, and the prosecution history. *Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed. Cir. 1996)*. There is a heavy presumption that claim terms mean what they say and have the ordinary meaning that would be attributed to those words by persons skilled in the relevant art. *Resonate Inc. v. Alteon Websys., Inc., 338 F.3d 1360, 1364 (Fed. Cir. 2003)*. "When intrinsic evidence unambiguously describes the scope of a patented invention, reliance on extrinsic evidence is improper." *Biovail Corp. Int'l v. Andrx Pharms., Inc., 239 F.3d 1297, 1300 (Fed. Cir. 2001)*; see also *J.T. Eaton & Co., Inc. v. Atl. Paste & Glue Co., 106 F.3d 1563, 1570 (Fed. Cir. 1997)* ("[T]rial testimony regarding the meaning of a claim cannot vary the meaning of a claim that is established either by the claim **[*44]** itself or by the claim as correctly understood by reference to the specification and the file history."). Nevertheless, extrinsic evidence such as expert testimony can help the court determine what a person of ordinary skill in the art would understand claim terms to mean. *Phillips, 415 F.3d at 1319*.

In Abrika, the claims in the '341 patent in which the dissolution profile limitations appear do not specify the appropriate testing conditions. See, e.g., '341 Patent cl. 1 (BX 1). The examples in the patent specification all either state that the dissolution profile was obtained using the hydrochloric acid medium, or reference the example that did. However, none of the examples specifically concern an enteric-coated product. See, e.g., id., col. 5 ll. 12-13, col. 8 l. 14. As the Abrika court recognized, the construction of the "dissolution profile" claim limitation thus required walking the "fine line between reading a claim in light of the specification, and reading a limitation into the claim from the specification." Abrika Cl. Constr. Order 14 (BX 79) (citing *Phillips, 415 F.3d at 1323*). The claim construction analysis also implicated the principle that

> ***HN13***[] When a claim term has an accepted **[*45]** scientific meaning, that meaning is generally not subject to restriction to the specific examples in the specification. It is established that as a general rule claims of a patent are not limited to the preferred embodiment . . . or to the examples listed within the patent specification.

Glaxo Wellcome Inc. v. Andrx Pharms., Inc., 344 F.3d 1226, 1233 (Fed. Cir. 2003).

The plaintiffs here rely chiefly on two cases in which the Court of Appeals for the Federal Circuit evaluated claim language that covered a particular test result but was silent on the appropriate testing methodology. In each case, the Federal Circuit examined intrinsic evidence to determine what methodology to use to obtain the claimed test result. In Genentech, the disputed claim term was a numerical figure, "500,000 IU/mg," which measurement varied depending on the assay used for measurement. *Genentech, Inc. v. Wellcome Found. Ltd., 29 F.3d 1555 (Fed. Cir. 1994)*. As here, the claim language itself was silent on the appropriate assay for measurement. The Genentech court looked at intrinsic evidence - specifically, the patent's prosecution history, which revealed that the 500,000 figure was obtained using a "bovine fibrin **[*46]** plate assay." *Id. at 1562-63*.

Similarly, in J.T. Eaton, the disputed claim limitation surrounded an adhesive that had to withstand "plastic flow temperature above 120 degrees < F." *J.T. Eaton & Co. v. Atl. Paste & Glue Co., 106 F.3d 1563, 1565 (Fed. Cir. 1997)*. The expert witnesses disagreed over the length of time the product needed to be tested at 120 degree heat. In its analysis, the Federal Circuit looked to the patent's prosecution history rather than to conflicting expert testimony to find the testing conditions that were used during the patent reexamination process. *Id. at 1570*. In doing so, the court stated: "trial testimony regarding the meaning of a claim cannot vary the meaning of a claim that is established either by the claim itself or by the claim as correctly understood by reference to the specification and the file history." Id.

In the instant case, two forms of intrinsic evidence support the contention that the '341 patent only claimed the dissolution profile as tested in a hydrochloric acid medium. First, as noted above, the examples in the specification all recite 0.1N HCl testing conditions. [11] Second, the patent prosecution history reveals that the patentee explained **[*47]** to the patent office that unlike prior art, which was "silent on the dissolution medium and conditions that are used," "[t]he dissolution medium and conditions that are used in the invention is . . . disclosed in example 1, page 8. (It corresponds to gastric juice.)" '341 Patent File History, Amendment 6 (Aug. 11, 1999) (PX 7).

Nevertheless, the defendants have a colorable legal argument that *Genentech* and *J.T. Eaton* are distinguishable, and that plain meaning supports their claim construction. In those cases, the dispositive claim limitation was a "term unknown to those of ordinary skill in the art at the time the patent application was filed." *J.T. Eaton, 106 F.3d at 1570*. By contrast, here, the defendants have pointed to non-conflicting expert testimony that persons skilled in the art would know to consult the USP to determine the proper dissolution medium. As noted above, the Federal Circuit has instructed that extrinsic evidence can help the court determine what a person of ordinary skill in the **[*48]** art would understand claim terms to mean. *Phillips, 415 F.3d at 1319*.

Glaxo Wellcome is instructive. In that case, the issue on claim construction was whether the claim was limited to the grade and weight of hydroxypropyl methylcellulose (HPMC), a release agent, that was set forth in the specification examples. Because the properties and usage of HPMC to control release were "well known" and patentability of the agent turned on characteristics other than its grade or weight, the court found that the claim terms were not limited to the grade and weight recited in the specification examples. *344 F.3d at 1233*.

Similarly, the plaintiffs in this case do not dispute that the USP is the industry standard compendium for methods of dissolution testing of pharmaceutical products. Biovail Stmt. ¶ 66; Pls.' Stmt. Resp. ¶ 66. The USP's pH switch test applies

> [w]here the label states that an article is enteric-coated, and a dissolution or disintegration test that does not specifically state that it is to be applied to enteric-coated articles is included in the individual monograph . . . unless otherwise specified in the individual monograph.

BX 76 at 1791. The 0.1N HCl examples in the '341 patent did **[*49]** not concern enteric-coated articles or otherwise specify that the 0.1N HCl medium applied to enteric-coated products. The plaintiff's expert, Dr. Kaplan, conceded

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[11] Although there are scattered references in the '341 patent to the USP, they do not relate to the dissolution profile testing conditions. See, e.g., '341 Patent col. 3, ll. 28-31 (BX 1).

that dissolution testing is typically done under conditions that mimic or attempt to mimic what will happen to the drug when ingested. Kaplan Dep. 144 (BX 72). Furthermore, Dr. Kaplan admitted that since an enteric-coated product such as the Abrika product is designed not to dissolve in the acidic stomach, "one of ordinary skill in the art typically employs the dissolution testing methodology described above as a pH-switch protocol." [12] Kaplan Rpt. ¶ 99 (July 20, 2011) (BX 121). See also Kaplan Dep. 145 (BX 72).

Given the above, the Court cannot say as a matter of law that the defendants' USP-based claim construction was objectively baseless. The plaintiffs are correct that courts generally consider intrinsic evidence such as the specification and prosecution history before extrinsic evidence such as expert testimony. *Vitronics, 90 F.3d at 1582*. However, **[*50]** based on the undisputed expert testimony about the testing protocol typically employed to test enteric-coated products, and the stature of the USP in the scientific community, the Court is not persuaded that it was unreasonable to argue that those skilled in the art would interpret "dissolution profile" to incorporate the USP-based pH switch test as a matter of plain meaning.

Furthermore, it is not clear to this Court that the intrinsic evidence unambiguously describes the scope of the invention such that reliance on extrinsic evidence is improper. *Andrx, 239 F.3d at 1300*. The specification examples say nothing regarding conditions for enteric-coated tablets, and the patentee's reference to "gastric juice" in the prosecution history could reasonably be interpreted to reference the fact that the dissolution medium disclosed in the specification corresponds to tablets that dissolve in the stomach. Cf. Kaplan Dep. 144 (BX 72) (dissolution testing generally attempts to mimic what actually happens to tablets).

The defendants' position finds further support in the fact that both the Anchen and Impax courts adopted Biovail's argument that reliance on the USP to determine the proper dissolution **[*51]** test was proper. Anchen Cl. Constr. Order 14 (BX 114); Impax Cl. Constr. Order 34 (BX 53). The plaintiffs protest that those courts were not actually confronted with the same claim construction arguments as in Abrika. But one of the plaintiffs' arguments in this case is that construing "dissolution profile" without reference to the test conditions set forth in the specification examples results in indefiniteness. Pls.' Br. 63-64. The Anchen and Impax courts each considered the generic companies' argument that Biovail's USP-based dissolution test rendered the claim indefinite. The Anchen court found reliance on the USP to be proper and not indefinite. Anchen Cl. Constr. Order 14 (BX 114). Similarly, the Impax court agreed that one skilled in the art would look to the USP to determine the appropriate dissolution medium, while deferring the question of indefiniteness. Impax Cl. Constr. Order 35 (BX 53).

The Court is therefore not inclined to hold that the Abrika lawsuit was not reasonably calculated to elicit a favorable outcome. Nevertheless, for the reasons below, the Court need not ultimately decide whether the Abrika suit was objectively baseless.

b. Delay

The Court finds that the plaintiffs **[*52]** cannot survive summary judgment as to the Abrika suit because they have not shown that this suit caused any delay in Abrika's entry into the market.

HN14[] The elements of an antitrust claim are (1) a violation of the antitrust laws; (2) individual injury resulting from that violation; and (3) measurable damages. *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008)*. It is not necessary to show with total certainty the exact amount of damages sustained, just that the defendants' anti-competitive acts caused the antitrust injury suffered by the plaintiff. *Rossi v. Std. Roofing, Inc., 156 F.3d 452, 483-84 (3d Cir. 1998)*; *Sound Ship Bldg. Corp. v. Bethlehem Steel Co., 533 F.2d 96, 98-99 (3d Cir. 1976)* (affirming grant of summary judgment because plaintiff failed to show required causal link between the antitrust transgression and damages suffered).

In this case, the purported antitrust violation is that the Abrika lawsuit was sham litigation that delayed the entry of Abrika's generic product into the market and caused purchasers to pay higher prices. The Hatch-Waxman stay on

[12] Thus, Abrika used the pH switch test as part of its quality control parameters for its enteric-coated product in its ANDA submission. Kaplan Rpt. ¶ 99 (July 20, 2011) (BX 121).

Abrika's product ended 30 months after the initiation of the Abrika lawsuit, or June 21, 2007. Biovail **[*53]** Stmt. ¶ 71; Pls.' Stmt. ¶ 71. Yet, as the plaintiffs stipulated, absent all of the conduct challenged by the plaintiffs, Abrika would have begun selling its generic products on August 18, 2008. ECF No. 343/ECF No. 335. It is undisputed that Abrika did not actually receive approval for its 300 mg product until August 18, 2008, and that Abrika's 150 mg product did not receive final approval until December 1, 2008. Id. The plaintiffs' expert conceded that "[t]he sole reason that Abrika did not receive [final approval] for its 150 mg dosage strength on August 15, 2008 was . . . the then-unexpired 180-day [first-to-file] marketing exclusivity of another applicant (Anchen)." Blume Rpt. ¶ 102 (BX 87) (internal quotation marks omitted). Plaintiffs thus appear to concede that the Abrika lawsuit itself did not delay the entry of the Abrika generic product.

The plaintiffs' only response in opposition is to argue that the defendants' conduct caused delay in Abrika's FDA approval because they sued Anchen, the first filer. In doing so, defendants triggered a 30-month stay for ANDA approval for Anchen, on top of the 180-day exclusivity period for Anchen as the first-filing generic. Pls.' Br. 72. But **[*54]** Anchen's 180-day exclusivity period is a creature of statute, and this Court has already found above that the Anchen lawsuit was not objectively baseless (and hence entitled to Noerr-Pennington immunity). *21 U.S.C. § 355(j)(5)(B)(iv)*. The plaintiffs' response pertains to whether the *Anchen* lawsuit caused the plaintiffs' injury, not the Abrika lawsuit. The plaintiffs have not adduced any facts to show that independently of the Anchen lawsuit, the Abrika lawsuit caused any delay or damages. Thus, even if the Court were to conclude that the Abrika suit was objectively baseless, the plaintiffs' inability to show causation of injury warrants summary judgment in defendants' favor as to the Abrika litigation.

D. The *Impax*Lawsuit

1. Facts as to *Impax*

On November 30, 2004, Impax filed an ANDA with the FDA seeking permission to sell a generic version of the 150 mg formulation of Wellbutrin XL. Impax later amended its ANDA to request permission for a 300 mg strength tablet as well. On January 20, 2005, and January 24, 2005, Impax provided paragraph IV notices to Biovail and GSK, claiming non-infringement. The notices stated that Impax's product "is not a tablet in which the delayed release of a **[*55]** drug is obtained by a controlled release coating (as required by every claim of the '341 patent)." Biovail Stmt. ¶¶ 26, 29-30; Pls.' Stmt. Resp. ¶¶ 26, 29-30; BX 40 at 2; BX 43 at 3.

On March 7, 2005, Biovail filed a patent infringement action against Impax in the Eastern District of Pennsylvania, alleging that Impax's 150 mg generic product infringed the '341 patent. The Honorable Anita J. Brody was assigned to the case. Impax Compl. (BX 44). A month later, Biovail amended its complaint to assert infringement against Impax's 300 mg generic product as well. Since Biovail did not file its infringement claim against the 300 mg product within the 45-day period prescribed by the Hatch-Waxman Act, Biovail only received a 30-month stay on ANDA approval for Impax's 150 mg product. Biovail Stmt. ¶¶ 31, 33; Pls.' Stmt. Resp. ¶¶ 31, 33.

The parties submitted extensive briefing concerning proper construction of the '341 patent. As in the Anchen lawsuit, the parties disputed the proper construction of "free of stabilizer." The key disputed term, however, was "delayed release tablet." Biovail argued that the phrase did not need to be construed, but if it did, the term should mean "a tablet that exhibits **[*56]** [a particular dissolution profile]" and should not be construed to require a controlled release coating. Biovail Stmt. ¶¶ 35, 37-38; Pls.' Stmt. Resp. ¶¶ 35, 37-38.

Impax's position was that "delayed release tablet" should be construed to mean "a tablet comprising a core which includes bupropion hydrochloride and conventional excipients and a coating designed to achieve a controlled release of bupropion hydrochloride, said coating comprising a water-insoluble, water-permeable film-forming polymer, together with a plasticizer and a water-soluble polymer." Impax Cl. Constr. Br. 10 (BX 50). In other words, Impax requested a claim construction that addressed "both the structure (a core and a coating comprising specific components) and the functional characteristics (the coating controls the release of the active ingredient) of the claimed delayed release tablet." Id.

On May 23, 2006, Judge Brody issued an order on claim construction. As to the term "delayed release tablet," Judge Brody found that although the proper construction of the term was a "close question," Impax's proposed construction was ultimately the correct one when read in light of the patent's specification. Impax Cl. Constr. **[*57]** Order 16, 17 (BX 53). Regarding the term "free of stabilizer," Judge Brody agreed with the Anchen court and rejected Biovail's proposed functional construction. Id. at 28.

Judge Brody denied reconsideration of the claim construction order on August 11, 2006. Shortly thereafter, Impax filed a motion for summary judgment of non-infringement. However, on March 6, 2007, before Judge Brody had a chance to rule on the motion, the parties agreed to settle and dismiss their claims. Biovail Stmt. ¶¶ 48-51; Pls.' Stmt. Resp. ¶¶ 48-51; Joint Stip. of Dismiss. (BX 60).

2. Analysis as to *Impax*

The central issue in the Impax litigation was whether the term "delayed release tablet" should be construed to cover only tablets with the delayed release mechanism in the coating, or whether it should be construed to cover any tablet that exhibited the specified dissolution profile. The plaintiffs do not dispute that if the Impax court had accepted Biovail's construction of "delayed release tablet," Impax's generic product would have infringed the '341 patent. The Court finds that the plaintiffs have not met their burden of showing that the Impax lawsuit was objectively baseless sham litigation.

HN15[] "The starting **[*58]** point for any claim construction must be the claims themselves." *Pitney Bowes, Inc. v. Hewlett-Packard Co., 182 F.3d 1298, 1305 (Fed. Cir. 1999)*. It is a "bedrock principle" of patent law that "the claims of a patent define the invention to which the patentee is entitled the right to exclude." *Phillips v. AWH Corp., 415 F.3d 1303, 1312 (Fed. Cir. 2005)*. The majority of the claims in the '341 patent explicitly limit coverage to tablets with a particular release mechanism in the coating. For example, Claim 1 claims a delayed release tablet comprising: (1) a core comprising bupropion hydrochloride and excipients and (2) "a coating consisting essentially of a water-insoluble, water-permeable film-forming polymer, a plasticizer and a water-soluble polymer" that exhibits a specified dissolution profile. '341 patent cl. 1 (BX 1); see also, e.g., id. cls. 26, 28.

By contrast, Claim 30 notably omits the language describing the coating. Claim 30 reads as follows:

> A bupropion hydrochloride delayed release tablet free of stabilizer and free of pore-forming agent, exhibiting a dissolution profile such that after 1 hour, from 0 up to 30% of the bupropion hydrochloride is released, after 4 hours, from **[*59]** 10 to 60% of the bupropion hydrochloride is released, after 6 hours, from 20 to 70% of the bupropion hydrochloride is released, after 8 hours, more than 40% of the bupropion hydrochloride is released.

'341 patent cl. 30 (BX 1) (emphasis added). The Federal Circuit has articulated that ***HN16***[] "[w]hen different words or phrases are used in separate claims, a difference in meaning is presumed." *Nystrom v. TREX Co., Inc., 424 F.3d 1136, 1143 (Fed. Cir. 2005)*. See also *Phillips, 415 F.3d at 1314* ("Differences among claims can also be a useful guide in understanding the meaning of particular claim terms."). Under the claim interpretation principle set forth in Nystrom, this Court cannot say that it was baseless to argue that the omission of the coating language from Claim 30 meant that its coverage was not limited to tablets with the release mechanism in the coating.

The plaintiffs contend that Claim 30's reference to "free of pore-forming agent" only makes sense if Claim 30 required a coating, because pore-forming agents only relate to a coating. Pls.' Br. 77. But under Biovail's proposed claim construction, Claim 30 covers any delayed release tablet that exhibits the specified dissolution profile, **[*60]** whether the release mechanism is in the coating or elsewhere. The appearance of the phrase "free of pore-forming agent" therefore does not control the inquiry.

Biovail's reading of Claim 30 also finds support in the plain meaning of the claim language as understood by one of ordinary skill in the art. See *Bell Atl. Network Servs., Inc. v. Covad Commc'ns Grp., 262 F.3d 1258, 1268 (Fed. Cir. 2001)* (noting a heavy presumption in favor of ordinary meaning). As the trial judge in Impax recognized, the parties agreed that "one skilled in the art would understand a 'delayed release tablet' to be any tablet that does not release its active ingredient immediately." Impax Cl. Constr. Order 14-15 (BX 53). The plain meaning of "delayed release tablet," in other words, does not include a controlled release coating.

Impax's claim construction in the underlying suit relied on the principle that **HN17**[] claims "must be read in view of the specification, of which they are a part." *Phillips, 415 F.3d at 1315*. As many courts have observed, however, the distinction between using the specification to interpret the meaning of a claim and importing limitations from the specification into the claim can be a difficult **[*61]** one to apply in practice. See, e.g., *Phillips, 415 F.3d at 1323*; Impax Cl. Constr. Order 40 (BX 53).

The "Summary of the Invention" of the '341 patent states that

> The invention . . . provides a new bupropion hydrochloride controlled release composition under the form of a tablet free of stabilizer of any kind . . . . Also, the controlled release is obtained thanks to a semi-permeable release coating, free of (monomeric) pore-forming agent. The tablets of the invention exhibit specific dissolution profiles.

'341 Patent col. 1, ll. 53-59 (BX 1). The "Detailed Description of the Invention" also states that "[t]he invention consists in a tablet comprising a core and a coating." Id. col. 1, ll. 66-67. The plaintiffs argue that, read in light of the specification, "delayed release tablet" can only be construed to include the coating. Given the competing plain meaning of the term "delayed release tablet" and the omission of coating language from Claim 30, however, the Court is not persuaded that Biovail's proposed claim construction was objectively baseless.

Judge Brody ultimately found that Impax's proposed construction of "delayed release tablet" aligned most naturally with the patent's description **[*62]** of the invention in the specification. However, the Court finds it significant that Judge Brody regarded this dispositive question as a "close question," noting that "both parties' positions were ably presented in their briefs and at oral argument." Impax Cl. Constr. Order 16 (BX 53)(emphasis added). Judge Brody went to considerable lengths to reject Biovail's claim construction in the underlying infringement suit. Such a litigation history simply does not fit the profile of objectively baseless litigation. See *GP Indus., Inc. v. Eran Indus., Inc., 500 F.3d 1369, 1375 (Fed. Cir. 2007)*.

E. The Citizen Petition

1. Facts

On December 20, 2005, Biovail filed a Citizen Petition with the FDA. The Citizen Petition requested that the FDA require any ANDA for a generic version of Wellbutrin XL to satisfy the following four criteria:

> (1) All bioequivalence trials should calculate and evaluate parameters based on concentrations of the parent drug and active metabolites [hereinafter the "metabolites evaluation request"];
>
> (2) Any generic formulation should be shown to be bioequivalent to Wellbutrin XL, sustained release and immediate release bupropion [hereinafter the "bioequivalence drift request"];
>
> (3) **[*63]** The bioequivalence studies should be conducted at steady-state evaluating the performance of the dosage form based on AUC, Cmax, Cmin [hereinafter the "steady-state request"]; and
>
> (4) Data using the FDA's approach for evaluating the effect of alcohol on the performance of the controlled-release dosage form should be required to ensure the absence of "dose dumping" [hereinafter the "dose dumping request"].

Biovail Stmt. ¶ 91; Citizen Pet. 1 (BX 96).

On June 7, 2006, the FDA issued an interim response to Biovail, stating: "FDA has been unable to reach a decision on your petition because it raises complex issues requiring extensive review and analysis by Agency officials . . . . We will respond to your petition as soon as we have reached a decision on your request." Biovail Stmt. ¶ 92; FDA Interim Resp. (BX 107).

Approximately six months later, on December 14, 2006, the FDA issued its final response, stating that the Citizen Petition was granted in part and denied in part, as follows. FDA Final Resp. (BX 108).

Request #1: Metabolites Evaluation Request

Biovail's Citizen Petition requested that all bioequivalence trials of generic versions of Wellbutrin XL measure and evaluate parameters based **[*64]** on concentrations of the parent drug as well as three active metabolites (hydroxy-, threo-and erythro-). The Citizen Petition explained that bupropion hydrochloride is extensively metabolized and that the active metabolites "contribute to both the activity and the toxicity of bupropion formulations, and represent the majority of what circulates in blood following doses of bupropion." Citizen Pet. 4 (BX 96). The petition represented that "[t]he metabolites of bupropion play a very significant role in the clinical performance of Wellbutrin XL and any generic version should demonstrate similar results in order to assure that the generic will provide similar effects." Id. at 7.

The NDA for Wellbutrin XL itself had contained bioequivalence testing data for the parent drug as well as for its three metabolites, for comparison to prior formulations of Wellbutrin. BX 99 at 18-19. In its review of the Wellbutrin XL NDA, the FDA Center for Drug Evaluation and Research stated that "[a]lthough bioequivalence could not be demonstrated for the parent compound . . . consideration should be given to the active metabolites, since they are responsible for more than 90% of the exposure following administration **[*65]** of bupropion." Id. at 1. Thus, the FDA found that "the comparable exposure and the role of the metabolites in the exposure and pharmacologic activity support the approval of the WELLBUTRIN XL formulation." Id.

Prior to Biovail's Citizen Petition, a May 2005 document titled Draft Guidance on Bupropion Hydrochloride had stated that manufacturers of extended release tablets of buproprion hydrochloride should test both bupropion and "[h]ydroxybupropion (active metabolite of bupropion)." The draft guidance contained a notice stating that "once finalized, [it] will represent the [FDA's] current thinking on this topic. It . . . does not operate to bind FDA or the public." 2005 Draft Guidance (PX 732).

In response to Biovail's metabolites evaluation request, the FDA granted the request with respect to the hydroxy-metabolite, finding that it

> contributes meaningfully to the safety and/or efficacy of the drug product. Consequently, we agree that the metabolite, hydroxybupropion, should be measured in bioequivalence testing, and the Agency expects ANDA applicants for generic bupropion HCl extended-release tablets to measure both the parent drug bupropion and the metabolite hydroxybupropion in their **[*66]** BE studies.

FDA Final Resp. 10 (BX 108). However, the FDA denied the request as to the other two (threo- and erythro-) metabolites, finding that "there is currently insufficient scientific evidence upon which we can reasonably determine" whether it is appropriate to measure the other two metabolites. Id. at 9, 10.

The FDA response noted not only the absence of evidence showing the other two metabolites' contribution to the safety and efficacy of Wellbutrin XL, but also evidence to the contrary. The FDA referenced Wellbutrin XL labeling that explained that these two metabolites were "five-fold less potent than bupropion." In addition, the FDA pointed out that

> [an exhibit attached to the Petition] states that erythrohydrobupropion has only a minor contribution to the overall pharmacological activity due to its low potency.

Id. at 10 n.32 (citation and quotation marks omitted) (emphasis added).

Request #2: Bioequivalence Drift Request

The Citizen Petition requested that any generic version of Wellbutrin XL demonstrate bioequivalence to Wellbutrin XL, SR, and IR. The petition cited

> potential for significant variations . . . between a generic version of a RLD [reference listed drug] and the immediate **[*67]** release version of the drug to which the RLD was shown to be bioequivalent. The relevance and accuracy of data regarding seizure incidence and other side effects is open to question if the generic drug has not been shown to be bioequivalent to the same reference that was relied upon for approval of the RLD.

Citizen Pet. 6 (BX 96). In response to this request, the FDA stated:

> [A]n ANDA applicant for generic bupropion HCl extended-release tablets is not required to demonstrate bioequivalence to Wellbturin SR and Wellbturin [IR].
>
> . . . .
>
> The fact that there is equivalency information in the approved labeling of Wellbutrin XL does not, as you claim, require the ANDA applicant to independently demonstrate bioequivalence or equivalence to sustained-release and immediate-release formulations of Wellbutrin in addition to the RLD [Wellbutrin XL].

FDA Final Resp. 6 (BX 108).

Request #3: Steady-State Request

The steady-state request was a derivative request. Biovail asked that the testing it requested for the parent drug and active metabolites and for bioequivalence to Wellbutrin XL, SR, and IR be conducted "at steady-state." Citizen Pet. 1 (BX 96).

In response to the steady-state request as to bioequivalence **[*68]** drift, the FDA stated that the request was "irrelevant" because the FDA did not agree with the bioequivalence drift request. FDA Final Resp. 12 (BX 108). As to the steady-state request regarding the parent drug and metabolites, the FDA stated that "based on our experience and expertise . . . a single-dose study is the preferred approach - not a multiple-dose study." Id.

Request #4: Dose Dumping Request

Dose dumping is the "[u]nintended, rapid drug release in a short period of time of the entire amount or a significant fraction of the drug contained in a modified release dosage form." It can pose a "significant risk to patients, either due to safety issues or diminished efficacy or both." BX 104 at 1. Alcohol can induce dose dumping in some modified release (also known as controlled release) drug products. Biovail Stmt. ¶ 25; Pls.' Stmt. Resp. ¶ 25.

On October 26, 2005, approximately two months before Biovail filed its Citizen Petition, the FDA's Advisory Committee for Pharmaceutical Sciences held a meeting in which doctors presented information about the potential for alcohol-related dose dumping in controlled release formulations. They discussed the need for testing and for a general **[*69]** "regulatory decisional framework to minimize risk of alcohol-induced dose dumping." See PX 92 at 9-35; id. at 21-22. One speaker testified that the Center for Drug Evaluation and Research was conducting ongoing in vitro testing on existing controlled release products to see whether alcohol could undermine the controlled release characteristics of the products. Id. at 13-15.

Although the FDA was investigating alcohol-related dose dumping in controlled release formulations, it is undisputed that as late as November 2005 (one month before the Citizen Petition was filed), the FDA did not require ANDA applicants to submit dose dumping data on all controlled release drugs. Indeed, for Wellbutrin XL, a controlled release drug, the FDA granted tentative approval of Anchen's ANDA on November 14, 2005 without requesting or receiving data on alcohol-related dose dumping. FDA Tentative Approval Ltr. (BX 105). Specifically, the FDA concluded that the Anchen drug was "safe and effective for use as recommended in the submitted labeling" and stated that it was only "unable to grant final approval to your ANDA at this time because of the patent issue." Id.

Biovail filed the Citizen Petition containing **[*70]** the dose dumping test request for generic Wellbutrin XL products on December 20, 2005. Citizen Petition (BX 96). On September 11, 2006, the Deputy Director of the Division of Bioequivalence of the FDA sent a memo to the Citizen Petition docket as well as to several ANDA applicants for generic versions of Wellbutrin XL. The memo referenced Biovail's Citizen Petition and stated that a working group of scientists had "developed an in vitro test to evaluate the potential for dose-dumping in the presence of alcohol (in vitro dose-dumping test)." In early 2006, the Office of Generic Drugs ("OGD") had asked all ANDA applicants for generic versions of Wellbutrin XL to conduct the in vitro dose-dumping study. BX 109; see also BX 110 (Anchen response to OGD request, dated February 23, 2006); BX 111 (FDA deficiency letter to Anchen, requesting in vitro dose-dumping study results, dated July 25, 2006).

In its final response to Biovail's dose dumping test request on December 14, 2006, the FDA stated:

> FDA asked ANDA applicants for generic bupropion HCl extended-release tablets to submit data from in vitro dissolution studies using various concentrations of ethanol in the dissolution medium to evaluate **[*71]** the possible interaction between alcohol and the excipients in both Wellbutrin XL and generic bupropion HCl extended-release tablets. FDA will evaluate the results of the in vitro data submitted by the ANDA applicants and consider these results when determining whether to approve each ANDA.

FDA Final Resp. 13 (BX 108).

2. Analysis

Biovail makes four separate arguments in favor of summary judgment as to the Citizen Petition: (1) First, that because the dose dumping request was granted, and the metabolites evaluation request was granted in part, the entire petition is immunized from antitrust liability under the Noerr-Pennington doctrine; (2) Second, that any competitive harm is immune from antitrust liability because it resulted from government decision; (3) Third, that even if the entire petition is not immunized, the unsuccessful requests were not objectively baseless; and (4) Finally, that even if the unsuccessful requests were objectively baseless, the plaintiffs have not shown that they caused any delay. The Court addresses each argument in turn.

a. Mixed Sham and Non-Sham Petitions

(1) Did the Citizen Petition Contain Successful Requests?

The Court finds that Biovail's dose dumping **[*72]** request and hydroxy- metabolite evaluation request were successful and, thus, non-sham by definition under PRE.

HN18[] "A successful effort to influence governmental action . . . certainly cannot be characterized as a sham." *PRE, 508 U.S. at 58*. Thus, the PRE Court declared that "[a] winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham." *Id. at 61 n.5*. The FDA, in its final response to the Citizen Petition on December 14, 2006, stated that it asked ANDA applicants for generic Wellbutrin XL for dose dumping test data, and would evaluate and consider the results when determining whether to approve each ANDA. FDA Final Resp. 13 (BX 108). Indeed, the record shows that in early 2006, after Biovail filed the Citizen Petition, the FDA had asked ANDA applicants for generic versions of Wellbutrin XL to conduct a dose dumping study. [13] BX 109; see also BX 110 (Anchen response to OGD request, dated February 23, 2006); BX 111 (FDA deficiency letter to Anchen, requesting in vitro dose dumping study results, dated July 25, 2006). The FDA also granted Biovail's request for hydroxy- metabolite testing, noting that it "contributes meaningfully to the safety **[*73]** and/or efficacy of the drug product." FDA Final Resp. 10 (BX 108).

The plaintiffs contend, however, that petitioning the FDA to do something it has already done or to act on an issue about which it is already aware cannot be characterized as successful or objectively reasonable. They argue that PRE requires a causal connection between the petition and the favorable outcome in order for the petition to be objectively reasonable as a matter of law. Pls.' Br. 90. The plaintiffs' reading of PRE goes too far.

PRE does not define success in the context of a citizen petition, but it does state that the petition must be calculated to "elicit" a favorable outcome or to "influence" governmental action. *508 U.S. at 58, 60*. However, this Court does not read *PRE* to have imported concepts of legal and factual causation into the objective baselessness analysis. ***HN19***[] The *PRE* standard for objective baselessness is a forward-looking standard from the point in time when the suit or petition was filed. In setting forth the standard, **[*74]** the Supreme Court used the language of expectancy:

[13] The FDA also requested that GSK conduct dose dumping testing for Wellbutrin XL itself in October 2006. See PX 487 at GSKWXL50373034 (referencing correspondence from October 13, 2006).

> [T]he lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail.

508 U.S. at 60 (emphasis added). To examine post hoc whether it was the petition that caused the government to reach a certain outcome would be contrary to the forward-looking language in PRE. [14]

In support of their proposed causal connection requirement, the plaintiffs rely chiefly on In re Flonase Antitrust Litigation. 795 F. Supp. 2d 300, 315 (E.D. Pa. 2011). [15] In that case, the brand manufacturer requested through a citizen petition that the FDA reconsider its endorsement of something called the geometric mean **[*75]** ratio method. The manufacturer, the antitrust defendant, argued that the FDA's ultimate endorsement of a different method over the geometric mean ratio method implied that its request succeeded on the merits. The Flonase court rejected the argument, finding that "[a]bsent evidence connecting the FDA's change in position to [manufacturer's] criticism, the FDA's action[s] are minimally probative, if probative at all, of the substantive merits of [manufacturer's] criticisms." 795 F. Supp. 2d 300, 315 (E.D. Pa. 2011). Similarly, in Louisiana Wholesale Drug. Co., Inc. v. Sanofi-Aventis, the court stated that "if [plaintiffs] can establish the [defendant] never intended or could reasonably expect to affect FDA labeling policy with respect to the five ANDAs, and filed the Petition solely to delay or impede the approval of generics, Noerr-Pennington immunity will be unavailable." La. Wholesale Drug Co., Inc. v. Sanofi-Aventis, No. 07-7343, 2008 U.S. Dist. LEXIS 3611, 2008 WL 169362, at *5 (S.D.N.Y. Jan. 18, 2008).

Even if Flonase and Louisiana Wholesale Drug were binding case law, this Court does not read them to require a showing of causation. The instant case is also distinguishable in that here, there is evidence connecting the FDA's favorable action to Biovail's Citizen Petition - at least with respect to the dose dumping request. In its September 11, 2006 memorandum to the Citizen Petition docket and to additional ANDA applicants, the FDA specifically referenced the Biovail Citizen Petition when it noted that the Office of Generic Drugs had asked ANDA applicants for dose dumping test data in early 2006. BX 109.

The plaintiffs argue that as a policy matter, the lack of **[*77]** a causal connection requirement is an unworkable standard in that it "allows brand companies to file abusive petitions with impunity, simply by including a request that the FDA adopt a policy or practice that it knows that the FDA has already adopted (or was developing)." Pls.' Br. 101. However, the plaintiffs' position is equally unworkable from a public policy standpoint, especially as applied to policies or procedures still in development. FDA regulations permit the filing of citizen petitions to issue, amend, or revoke a regulation, or to take or refrain from taking any other form of administrative action. 21 C.F.R. § 10.30. The plaintiffs ask this Court to strip citizen petition requests that were granted by the FDA from Noerr-Pennington immunity merely because the FDA was already aware of the concerns discussed therein. But to do so would discourage companies from attempting to shape the development of and contribute to the discourse surrounding FDA policies once the FDA becomes aware of an issue.

In this case, the undisputed facts indicate that the FDA had not yet adopted a policy of requesting dose dumping data before Biovail filed its Citizen Petition. The FDA had held a meeting **[*78]** to discuss the dose dumping problem and to consider developing a "regulatory decisional framework to minimize risk of alcohol-induced dose

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[14] The plaintiffs have not elaborated upon whether, in their view, the petition must be the but-for or proximate cause, or whether the petition must be the sole cause of the favorable outcome, or just one contributing cause. Nor have they cited any case law discussing the proper standard.

[15] In addition, the plaintiffs cite two paragraphs in the report of the defendants' expert, Douglas Sporn, for the proposition that the Citizen Petition had no impact on the FDA's policy and practice regarding **[*76]** alcohol-related dose dumping. Pls.' Br. 100 (citing Sporn Rpt. ¶¶ 94, 95 (PX 80)). But the Court does not read Mr. Sporn's report as an expert admission that the Citizen Petition had no impact on the FDA's policy and practice on dose dumping. Rather, Mr. Sporn appeared to be commenting on the impact of the Citizen Petition as to the timing of FDA action - that is, opining that the Petition did not cause the delay in ANDA approval, which is an element of the plaintiffs' affirmative antitrust case. Sporn Rpt. ¶¶ 94, 95 (PX 80).

dumping." See PX 92 at 9-35; id. at 21-22. But although the FDA was generally aware of dose dumping, it had not specifically required applicants for generic bupropion hydrochloride to submit testing. Indeed, the FDA granted tentative approval to Anchen in November 2005, one month before the Citizen Petition was filed, without requesting or receiving dose dumping data. See FDA Tentative Approval Ltr. (BX 105).

Similarly, the FDA had not issued a final guidance on hydroxy- metabolite testing. The FDA had in place a draft guidance from May 2005 that requested hydroxy- metabolite testing for generic extended release bupropion hydrochloride products. But the draft guidance was non-binding and not final by it own terms:

> This draft guidance, once finalized, will represent the Food and Drug Adminsitration's (FDA's) current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. You can use an alternative approach if the approach satisfies the requirements of the applicable statutes **[*79]** and regulations.

2005 Draft Guidance (PX 732) (emphasis added).

The Court finds that the FDA's awareness about the dangers of dose dumping and the May 2005 draft guidance regarding hydroxy- metabolite testing do not mean that those two requests were not "reasonably calculated to elicit a favorable outcome." The outcomes were not yet set in stone, and even if they were, *21 C.F.R. § 10.30* permits citizen petitions to amend or revoke regulations. To characterize these granted requests as sham requests and eliminate *Noerr-Pennington* immunity merely because the FDA was already aware of the concerns brought up therein would unreasonably curtail the *First Amendment* right to petition the government and influence policy.

(2) Is a Mixed Petition Immune?

Biovail argues that if a citizen petition includes more than one request, the entire petition is not a sham if at least one of the requests has objective merit. The question of whether a single petition containing a mix of sham and non-sham requests merits Noerr-Pennington immunity is an interesting one, but the Court need not decide it in this case.

Biovail cites two cases for the proposition that a single non-sham claim or request keeps the entire **[*80]** lawsuit or petition from being a sham. In the first case, In re Flonase Antitrust Litigation, the court examined a citizen petition that, as here, made multiple requests to the FDA. The Flonase court wrote, without analysis, that "conduct is not a sham if at least one claim in the petition has objective merit." *795 F. Supp. 2d 300, 312 (E.D. Pa. 2011)* (citing *Dentsply Int'l, Inc. v. New Tech. Co., No. 06-272, 1996 U.S. Dist. Lexis 19846 (D. Del. Dec. 19, 1996))*. In other words, "[i]f Plaintiffs cannot show that all of these requests were objectively baseless, they fail to carry their burden under PRE, and the [Citizen] Petition will be protected by Noerr-Pennington immunity." Id. (emphasis added). However, the *Flonase* court was not confronted with a case with mixed sham and non-sham requests.

The second case, Dentsply, was the unpublished case relied upon by the Flonase court. In Dentsply, patent holders brought patent infringement and trade secrets claims against defendants, who in turn filed antitrust counterclaims alleging sham litigation. The court stated that "if plaintiffs prevail on one of their counts [in their lawsuit], the sham aspect of the antitrust counterclaim must fail." **[*81]** *No. 96-272, 1996 U.S. Dist. Lexis 19846, at *9 (D. Del. Dec. 19, 1996)*. "[C]ourts have indicated that litigation will not be considered a 'sham' so long as at least one claim in the lawsuit has objective merit." Id.

The court in In re: Wellbutrin SR Antitrust Litigation disagreed and, in doing so, explained at length why the legal authority on which *Dentsply* relied does not strongly support the proposition that a single meritorious count in a lawsuit will defeat a sham litigation antitrust claim. *749 F. Supp. 2d 260, 263-64 (E.D. Pa. 2010)*. The Court finds the analysis in *Wellbutrin SR* persuasive. In that case, the manufacturer had filed two patent infringement claims based on two separate patents in a single patent suit. In the antitrust case based on the underlying patent suit, Judge Stengel granted summary judgment with respect to one patent, finding that the manufacturer had probable cause to file that infringement claim, but denied summary judgment with respect to the other. Judge Stengel then rejected the manufacturer's argument on a renewed motion for summary judgment that the assertion of at least one non-sham claim immunized the entire lawsuit from antitrust liability under **[*82]** Noerr-Pennington. Judge Stengel held that the one non-sham claim in the lawsuit was "sufficient to cause antitrust damage because it resulted in the continuation of [the manufacturer's] 30 month patent protection stay after the [sham] claim was dismissed." See id. at 266-67.

The parties have not pointed to, and this Court has not found, binding authority on the issue of whether petitions with a mix of sham and non-sham requests can be considered objectively baseless as a whole. This Court is inclined to find that they can. As Judge Stengel pointed out in Wellbutrin SR, it is theoretically possible that a sham claim in a lawsuit or sham request in a petition can cause antitrust damage above and beyond the delay caused by the non-sham claim - i.e., that the injury will exceed the portion of the conduct that is protected by Noerr-Pennington immunity. As a matter of policy, it would create poor incentives if tacking one meritorious claim onto any number of baseless ones that delay adjudication or resolution could automatically immunize the whole lawsuit or petition from antitrust liability as a matter of law.

Nevertheless, as set forth below, the Court need not opine on this question because **[*83]** the plaintiffs have not shown any evidence that the unsuccessful and arguably sham requests in the Citizen Petition actually delayed FDA approval of the generic ANDAs any further than the delay caused by the successful requests.

b. Government Action Immunity

Biovail argues that because the Citizen Petition did not trigger any automatic delay by statute or regulation, any decision to delay action on ANDA approval was the FDA's alone, and injury flowing from such a government decision is immune to private antitrust liability. Biovail Br. 53-54. In support, Biovail cites the applicable federal regulations, which provide:

> ***HN20***[] (d) Neither the filing of a petition for a stay of action nor action taken by an interested person in accordance with any other administrative procedure in this part or in any other section of this chapter, e.g., the filing of a citizen petition under *§ 10.30* . . . , will stay or otherwise delay any administrative action by the Commissioner, including enforcement action of any kind, unless . . . . (1) The Commissioner determines that a stay or delay is in the public interest and stays the action.

21 C.F.R. § 10.35 (2005) (emphasis added). The Court is not persuaded that Biovail's **[*84]** Citizen Petition is immunized from antitrust liability based on any delay that may be attributable to the FDA. Nevertheless, the Court need not ultimately decide this question.

HN21[] The Sherman Act does not prohibit an anticompetitive restraint imposed by a state as an act of government. *Parker v. Brown, 317 U.S. 341, 352, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*; *Noerr, 365 U.S. at 136*. This so-called Parker or state action immunity protects the states' act of governing and expresses the principle that "the antitrust laws regulate business, not politics." *Mass. Sch. of Law. v. ABA, 107 F.3d 1026, 1035 (3d Cir. 1997)*. The doctrine is grounded in principles of federalism and respect for state sovereignty, and relies heavily on the clarity of the state's goals and actions. *Mariana v. Fisher, 338 F.3d 189, 201 (3d Cir. 2003)*; *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc., 263 F.3d 239, 254 (3d Cir. 2001)*.

Conflicts similar to those created by state regulation and policy can arise in the context of federal regulation. Some statutes explicitly preclude application of ***antitrust law***. See *Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 270-71, 127 S. Ct. 2383, 168 L. Ed. 2d 145 (2007)* (listing examples). Where statutes are silent, however, courts must **[*85]** determine whether they implicitly preclude application of the antitrust laws, which determination turns on the relation between the antitrust laws and the regulatory program set forth, and the specific conduct at issue. *Id. at 271*.

Biovail argues that *21 C.F.R. § 10.35 (2005)* exempts it from antitrust liability because it is the FDA Commissioner that determines whether a stay or delay is in the public interest. However, ***HN22***[] "[r]epeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a plain repugnancy between the antitrust and regulatory provisions will repeal be implied." *Gordon v. NYSE, Inc., 422 U.S. 659, 682, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (1975)* (internal quotation marks and citation omitted). See also *United States v. Phila. Nat'l Bank,* *374 U.S. 321, 350-51, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*; *Essential Commnc'ns Sys., Inc. v. Am. Tel. & Tel. Co., 610 F.2d 1114, 1117 (3d Cir. 1979)*. Absent express immunity conferred by Congress, immunity will be implied

> only if Congress has clearly supplanted the antitrust laws and their model of competition with a differing competitive regime, defined by particularized competitive standards and enforced by an administrative agency, and has thereby purged **[*86]** an otherwise obvious antitrust violation of its illegality.

United States v. NASD, Inc., 422 U.S. 694, 742-43, 95 S. Ct. 2427, 45 L. Ed. 2d 486 (1975) (emphasis added). See also *Harrison Aire, Inc. v. Aerostar Int'l, Inc., 316 F. Supp. 2d. 186, 211 (E.D. Pa. 2004)*.

Biovail has not argued that Congress has clearly supplanted the antitrust laws in this case. Nor has Biovail otherwise cited any cases in the pharmaceutical context that find that FDA delay in ANDA approval entitles filers of citizen petitions to immunity from the antitrust laws. Moreover, as a factual matter, Biovail has not linked the delay in this case to any particular FDA decision or action, as opposed to inaction. Biovail points to the FDA's interim response, which states that the "FDA has been unable to reach a decision on [the Citizen Petition] because it raises complex issues requiring extensive review and analysis by Agency officials." FDA Interim Resp. (BX 107). But even if the interim response constitutes an FDA decision to delay, the response hardly rises to the standard set forth in NASD, which confers immunity only if Congress has supplanted federal ***antitrust law*** with a "differing competitive regime." *NASD, 422 U.S. at 722-23*. In any case, the **[*87]** plaintiffs have pointed to testimony indicating that such interim FDA responses are typically boilerplate answers issued before the FDA has even reviewed and considered the petition. The FDA issues such responses to comply with regulations requiring a response to citizen petitions within six months. Morrison CP Rpt. ¶¶ 20-22 (PX 67); *21 C.F.R. § 10.30(e)(2)*. According to the plaintiffs' expert, FDA delay in ANDA approval is commonly a result of FDA backlog, limited resources, and the need to create a record in defense of anticipated litigation by brand companies. Morrison CP Rpt. ¶¶ 20-22 (PX 67); Morrison CP Rebuttal Rpt. ¶ 15 (PX 73).

Lastly, the Court notes that as a policy matter, adopting Biovail's position would essentially mean that no pharmaceutical company could be liable for antitrust injury as a result of a citizen petition - no matter how frivolous - because the FDA is the one delaying ANDA approval. Nevertheless, the Court need not decide whether Biovail is entitled to immunity that produces such sweeping immunity because the plaintiffs have not shown that the unsuccessful requests delayed ANDA approval beyond the delay stemming from the successful requests.

c. The Unsuccessful **[*88]** Requests

Because the Court does not find at this time that the Citizen Petition is immunized by the inclusion of two successful requests or by government action, the Court considers whether the remaining unsuccessful requests were objectively baseless under the *PRE* standard. However, as with the questions examined above, the Court need not ultimately decide whether the unsuccessful requests were objectively baseless because the plaintiffs have not shown that they caused antitrust injury above and beyond the delay caused by the successful, non-sham Citizen Petition requests.

(1) The Metabolites Evaluation Request as to the Other Two Metabolites

Biovail's Citizen Petition requested that the FDA require generic versions of Wellbutrin XL to provide bioequivalence data for the parent drug and all three active metabolites. [16] Citizen Petition 7 (BX 96). Biovail argues that the metabolites evaluation request as to the threo- and erythro- metabolites was reasonable because it is unknown whether bupropion or its active metabolites cause bupropion's antidepressant effect and produce the seizure risk associated with higher dosages of bupropion. Biovail Br. 59-60. Based on the summary judgment record, **[*89]** the Court cannot find at this time that Biovail had probable cause to request that the FDA require generic companies to measure the threo- and erythro- metabolites.

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[16] The Court considered the request as to the hydroxy-metabolite, which the FDA granted, above.

Bioequivalence testing is usually limited to the parent drug - in the case of Wellbutrin XL, bupropion hydrochloride. The applicable FDA guidance on bioequivalence studies recommends testing metabolites only in cases where a metabolite "may be formed as a result of gut wall or other presystemic metabolism" and "contributes meaningfully to safety and/or efficacy." FDA Guidance for Industry, Bioavailability and Bioequivalence Studies for Orally Admin. Drug Prods. 18 (Mar. 2003) (BX 126). In May 2005, the FDA issued a draft guidance on bupropion hydrochloride that recommended testing of the parent drug and the hydroxy-metabolite. The draft guidance was silent as to the threo- and erythro- metabolites. 2005 Draft Guidance (PX 732).

The record shows, at best, a lack of scientific consensus and clarity as to the threo- and erythro- metabolites' contribution to the safety and efficacy of bupropion hydrochloride. Biovail relies chiefly on **[*90]** research conducted by and an expert report prepared by Dr. Sheldon Preskorn. In a 1991 article, Dr. Preskorn wrote that the "mechanism of action responsible for bupropion's antidepressant properties is unknown." Sheldon H. Preskorn, "Should Bupropion Dosage Be Adjusted Based Upon Therapeutic Drug Monitoring?," 27 Psychopharmacology Bull., 637, 637 (1991) (BX 101). The plaintiffs' expert, Dr. Kaplan, agreed that the "role of the metabolites in the overall activity of the drug" is unknown. Kaplan Dep. 388-89 (PX 147). In a later 1998 study, Dr. Preskorn and a colleague concluded:

> In comparing the pharmacological potency of the metabolites with their expected concentrations at therapeutic doses of bupropion, [the hydroxy- and threo- metabolites] would be expected to appear to contribute to bupropions [sic] overall antidepressant effects.

W. Dale Horst & Sheldon H. Preskorn, "Mechanism of Action and Clinical Characteristics of Three Atypical Antidepressants," 51 J. Affective Disorders 237, 241 (1998) (BX 102) (emphasis added). See also Preskorn Rpt. ¶ 34 (BX 125) ("[T]here is evidence that at least the hydroxy and threo metabolites contribute to the effects on norepinephrine and dopamine **[*91]** neurotransmission."). However, as noted in the FDA's final response, Wellbutrin XL's own labeling explained that the threo- and erythro metabolites were "five-fold less potent than bupropion." In addition,

> [an exhibit attached to the Citizen Petition] states that erythrohydrobupropion has only a minor contribution to the overall pharmacological activity due to its low potency.

FDA Final Resp. 10 n.32 (BX 108) (citation and quotation marks omitted) (emphasis added).

On the issue of drug safety, Dr. Preskorn noted that because most studies conducted during the development of bupropion hydrochloride measured only the parent drug and not the metabolites, there was an "inadequate database to establish the relationship between [levels of bupropion and/or its metabolites] and the occurrence of seizures." Preskorn, "Should Bupropion Dosage Be Adjusted," at 641 (BX 101). Nevertheless, Dr. Preskorn concluded in his report that "high levels of bupropion and/or its metabolites are the likely cause of bupropion's seizure risk." Preskorn Rpt. ¶ 35 (BX 125). The plaintiffs' expert, Dr. Kaplan, testified that the role of the metabolites in the bupropion seizure risk is unknown. Kaplan Dep. 388-89 (PX **[*92]** 147).

The record above demonstrates, at best, what appears to be scientific uncertainty as to whether and to what degree the threo- and erythro- metabolites contribute to the efficacy of or detract from the safety of Wellbutrin XL. Biovail argues that since the data is insufficient to determine which of the parent drug and the metabolites (or combination thereof) causes bupropion's antidepressant effect and seizure risk, it was not objectively baseless to ask that generic versions of Wellbutrin XL be required to provide testing data as to the parent drug and all three metabolites. Indeed, the NDA for Wellbutrin XL itself had contained bioequivalence testing data for the parent drug, bupropion, as well as for its three metabolites. BX 99 at 18-19. And the FDA had relied in part on "the comparable exposure and the role of the metabolites in the exposure and pharmacologic activity" in approving the Wellbutrin XL formulation. Id. at 1.

It may be that where there is scientific uncertainty as to the effect that the metabolites have on safety and efficacy, it would be prudent to ask that they be measured and tested. The FDA's subsequent treatment of generic versions of

Wellbutrin XL supports **[*93]** such an outlook. [17] But under the applicable FDA bioequivalence guidance when the Citizen Petition was filed, metabolite testing was only recommended where metabolites contribute meaningfully to safety and/or efficacy. In addition, as noted above, the 2005 FDA draft guidance specific to bupropion hydrochloride recommended testing only as to the parent drug and the hydroxy- metabolite. Biovail did not provide any factual or legal support in its Citizen Petition to deviate from either guidance. Nor did Biovail point to any evidence demonstrating affirmatively that the threo- and erythro- metabolites contribute meaningfully to safety or efficacy; Biovail merely pointed out a lack of clarity on the subject.

Thus, given the relevant FDA guidance and draft guidance, the Court cannot find that Biovail could realistically expect success on the merits of the metabolites evaluation request as to the threo- and erythro- metabolites. Nevertheless, as will be explained below, the Court need not ultimately decide the question of whether this request was objectively baseless.

(2) Bioequivalence Drift Request

The Court understands Biovail's basic argument with respect to bioequivalence drift to be as follows: (1) Wellbutrin IR is the only Wellbutrin formulation proven in human clinical trials to be safe and effective; (2) Wellbutrin XL was bioequivalent to Wellbutrin IR, but studies showed that XL exposed the patient to 11% less bupropion over time than Wellbutrin IR; [18] (3) hypothetically, a generic version of Wellbutrin XL could expose patients to less buproprion over time than XL; (4) hypothetically and mathematically, the compounded effect of the generic product being only mostly equal to Wellbutrin XL, which was only mostly equal to Wellbutrin IR, means that the generic version of XL could potentially not be bioequivalent to IR. Biovail Br. 56-57. **[*95]** The Court cannot find at this time that the bioequivalence drift request in the Citizen Petition was not objectively baseless.

HN23[] The Hatch-Waxman Act, FDA regulations, and FDA guidance only require generics to prove bioequivalence to the reference listed drug ("RLD") - in this case, Wellbutrin XL. See *21 U.S.C. §§ 355(j)(2)*, *(j)(8)*; *21 C.F.R. § 314.94*; FDA Guidance for Indus., Bioavailability and Bioequivalence Studies for Orally Admin. Drug Prods. 2 (Mar. 2003) (BX 126). Biovail argues, however, that the FDA has discretion to establish bioequivalence requirements for any particular drug, and that Wellbutrin's unique approval history rendered the bioequivalence drift request in the Citizen Petition objectively reasonable. Based on the current record, the Court does not find the argument persuasive.

The bioequivalence drift request appears to be purely based on hypothetical postulations and mathematical **[*96]** possibilities, as opposed to clinical evidence. Cf. *Biovail Corp. v. U.S. FDA, 519 F. Supp. 2d 39, 49 (D.D.C. 2007)* (declining to award injunctive relief based on the "speculative nature" of Biovail's allegations and on the basis of "hypothetical mathematics"). Biovail has pointed to no studies or evidence supporting its hypothetical outcome. Most importantly, Biovail does not appear to dispute the plaintiffs' argument that actual bioequivalence data for several of the generic versions of Wellbutrin XL showed no evidence of bioequivalence drift. The plaintiffs claim this data was produced to Biovail in the early stages of the underlying patent lawsuits, and before Biovail filed the Citizen Petition. See Pls.' Br. 94; Kaplan Rpt. ¶ 13 (PX 75); Pls.' Stmt. ¶ 364. Biovail does not counter those facts or make any argument as to why it was realistic to expect the FDA to grant the bioequivalence drift request based on hypothetical arguments in the face of actual data.

Moreover, the plaintiffs have cited a GSK analytical document that states the following:

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[17] In October 2008, the FDA's Division of Bioequivalence wrote to Teva Pharmaceuticals regarding a proposed generic version of 300 mg Wellbutrin XL. In that letter, the FDA recommended measuring the parent compound as well as all three active metabolites in a study for individuals who complained of suffering from adverse events or lack-of-effect when switching from Wellbutrin XL to Teva's generic equivalent. BX 103 at TEVA_WXL00483-84. This information was not available to Biovail at **[*94]** the time the Citizen Petition was filed, however.

[18] See BX 99 at 86 (showing an AUC ratio of 0.89 for Wellbutrin XL as compared with IR). The AUC is a measurement of the extent to which a drug stays in the body and for how long. An AUC ratio of 0.89 for Wellbutrin XL means that XL's AUC is 11% lower than that of IR. Fleischer Rpt. ¶ 13 (BX 124).

Clinical Conclusions:
- No safety issues associated with potentially higher concentrations that may result from [bioequivalence] drift

- No **[*97]** efficacy issues associated with potentially lower concentrations that may result from [bioequivalence] drift

"Wellbutrin XL and Generic Entry" at GSKWXL00086996 (PX 655); see also id. at 0087029 ("No known safety or efficacy concerns from resultant values and dispersion around these values."). In other words, even assuming the existence of bioequivalent drift, GSK concluded that there were no safety or efficacy issues for the generic products. The Court also finds GSK's assessment of industry practice and precedent to be informative. According to GSK:

Industry and Agency Precedents:
- It is common practice in the industry to rely on serial bioequivalence demonstrations to qualify new formulations . . .

- No precedent for successfully arguing against this practice as regulatory standard.

Id. at 0087001 (emphasis added). It is unclear whether Biovail was aware of GSK's positions on the bioequivalence drift argument, and the Court does not impute such knowledge to Biovail in today's decision. Nevertheless, the existence of scientific conclusions from a major pharmaceutical company regarding the lack of clinical ramifications of bioequivalence drift for the safety and efficacy of generic Wellbutrin **[*98]** XL informs the Court's thinking that there was no realistic expectation of success on the merits of the bioequivalence drift request. However, as will be explained below, the Court need not ultimately decide whether the bioequivalence drift request was objectively baseless in this case.

(3) Steady-State Request

The parties agree that the steady-state request was largely derivative of the bioequivalence drift test. See Biovail Br. 59; Pls.' Br. 98. In other words, the baselessness of this request appears to turn largely on whether the underlying bioequivalence requests were baseless. Because the Court need not decide the objective merit of either the metabolites evaluation test or the bioequivalence drift test, the Court does not now consider whether the steady-state request was objectively baseless.

d. Delay

HN24[] An antitrust plaintiff must prove a causal connection between the antitrust violation and actual damages suffered. See *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008)*; *Rossi v. Std. Roofing, Inc., 156 F.3d 452, 483-84 (3d Cir. 1998)*. In this case, the plaintiffs' theory of antitrust injury is that the Citizen Petition delayed ANDA approval, thus postponing **[*99]** generic entry and permitting the brand manufacturers to maintain monopoly prices of Wellbutrin XL. Having found that two of the Citizen Petition requests were successful non-sham requests entitled to *Noerr-Pennington* immunity, however, this Court must examine whether the plaintiffs have put forth evidence of injury attributable to the unsuccessful (and arguably sham) requests.

Martha Bennett, the expert proffered by the plaintiffs to opine on the delay caused by the petition, testified that the FDA could "tackle multiple requests simultaneously rather than sequentially." Bennett Dep. 238 (BX 113). When asked how long the FDA took to resolve the dose dumping issues in the Citizen Petition, Ms. Bennett testified that:

from December of '05 when the petition was submitted to December of '06 when FDA responded to the petition [was] the length of time it took them to resolve those issues.

Id. at 240. As the plaintiffs point out, Ms. Bennett's testimony could reasonably be interpreted as merely stating the obvious - in other words, that the amount of time the FDA took to respond to each of the requests was the amount of time that the FDA took. Nevertheless, the testimony that follows is significant **[*100]** on the issue of delay:

> Q: If the citizen petition had been limited to the dose dumping and metabolite issues, how long would it have taken FDA to resolve it?
> . . . .
> A: I don't know.
> Q: Can you state to any professional certainty that it would have taken any less time than it actually took to resolve the citizen petition?
> A: No. I don't know.

Id. at 242-43. This excerpt speaks directly to the plaintiffs' expert's lack of knowledge as to what delay was attributable to the Citizen Petition independent of the successful, non-sham requests. The plaintiffs have not pointed to any other evidence in the record from which a jury could reasonably conclude that the FDA would have approved the ANDAs earlier if the Citizen Petition had been limited to the successful, non-sham requests. In other words, even if the unsuccessful requests were sham petitions not entitled to Noerr-Pennington immunity, the plaintiffs have not met their burden to show causation of anticompetitive injury. Because the plaintiffs have not raised a genuine issue of material fact as to whether the unsuccessful and allegedly sham requests caused any delay beyond the non-sham requests, the Court grants summary judgment as to the **[*101]** Citizen Petition.

IV. GSK's Conduct

HN25[] Antitrust co-conspirators are jointly and severally liable for all damages caused by the conspiracy to which they were a party. *In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 284 (4th Cir. 2007)* (citation omitted); *Wilson P. Abraham Constr. Corp. v. Texas Industries, Inc., 604 F.2d 897, 904 n.15 (5th Cir. 1979)*. Both a conspiracy claim under *section 1 of the Sherman Act* and a conspiracy to monopolize claim under *section 2 of the Sherman Act* require the existence of agreement or concerted action. See *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 254 (3d Cir. 2010)*. To show agreement or concerted action, antitrust plaintiffs must produce evidence allowing a jury to reasonably infer "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." Id.

Direct proof of an express agreement is not required, but ***antitrust law*** limits the range of permissible inferences from ambiguous evidence. The Supreme Court has held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To withstand a motion **[*102]** for summary judgment, a plaintiff must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *Cosmetic Gallery, Inc. v. Schoeneman Corp., 495 F.3d 46, 51 (3d Cir. 2007)*. The plaintiff must show that "the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [them]." *Matsushita, 475 U.S. at 588*.

Thus, the Third Circuit has observed that ***HN26***[] "courts generally reject conspiracy claims that seek to infer an agreement from communications despite a lack of independent evidence tending to show an agreement and in the face of uncontradicted testimony that only informational exchanges took place." *In re Baby Food Antitrust Litig., 166 F.3d 112, 133 (3d Cir. 1999)*. Furthermore, "[p]roof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place." *Petruzzi's IGA Supermkts. Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1235 (3d Cir. 1993)* (citation omitted).

Here, the plaintiffs have failed to proffer evidence from which a jury **[*103]** may reasonably infer that GSK and Biovail together conspired to delay generic entry by filing the Impax and Watson lawsuits and the Citizen Petition, in light of the competing inference of independent action. In other words, even if the Court were to find that the plaintiffs survive Biovail's motion for summary judgment, the plaintiffs have not met their burden to show that GSK can be held conspiratorially liable for Biovail's conduct as to Impax, Watson, and the Citizen Petition.

A. The *Impax* and *Watson* Lawsuits

1. Facts

GSK was not a party to the Impax or Watson lawsuits, though it received Impax's paragraph IV certification on January 21, 2005 and Watson's in July of 2005. PX 247 (Impax); PX 264 (Watson 150 mg); PX 265 (Watson 300 mg). GSK and Biovail's Common Interest Agreement encompassed Impax's paragraph IV certification. Stip. of Parties Concerning Defs.' Common Interest Claims ¶ 1 (ECF No. 363/ECF No. 347).

Before the Impax lawsuit was filed, GSK's outside counsel communicated directly with Impax regarding their paragraph IV notification and requested access to Impax's ANDA. GSK's outside counsel, Jason Leif, was tasked with reviewing the Impax ANDA and paragraph IV certification, **[*104]** did so, reached a conclusion as to whether the Impax generic would infringe Wellbutrin XL, and communicated that conclusion to GSK. See PX 249; PX 250; PX 251; PX 252; PX 253; PX 254; Leif Dep. 142-44, 151 (PX 137).

GSK and Biovail employees exchanged at least one email regarding Impax's paragraph IV certification. PX 418 (email from GSK to Biovail attaching Impax certification). On February 28, 2005, about a week before the Impax suit was filed, Kenneth Cancellara, Biovail's general counsel, sent an email to GSK's outside counsel, Jason Lief, indicating that

> On the Impax Notice, I [Mr. Cancellara] have not yet heard from GSK (Carol Ash) on a conference call with their expert. I do not want to let the 45-day clock expire without consciously dealing with the issue.

PX 423. Mr. Leif recalled that he did communicate at some point with Biovail's counsel regarding the Impax paragraph IV notice. Id. at 162-63 (PX 137).

As to Watson, Mr. Leif reviewed Watson's paragraph IV notice, reached a conclusion regarding whether the Watson generic infringed Wellbutrin XL, and communicated his conclusion to GSK. However, he testified that he did not recall that there were discussions regarding Watson with **[*105]** either Biovail or its counsel. Leif Dep. 190-92 (PX 137). GSK's then CEO, Jean Pierre Garnier, testified that GSK decided not to sue the newer generics coming on the market (i.e., Impax and Watson). Garnier Dep. 141 (PX 129).

2. Analysis

The facts set forth above relating to GSK's involvement in Impax and Watson do not tend to exclude the possibility that Biovail and GSK acted independently once each received the Impax and Watson paragraph IV notices.

The record is consistent with a theory that GSK independently reviewed the paragraph IV notices and the ANDAs, came to a legal conclusion about infringement, and decided not to sue Impax and Watson. GSK's outside counsel recalled discussions with Biovail's counsel only regarding Impax, and no such discussions regarding Watson. To infer concerted action from the mere existence of the Common Interest Agreement as to the Impax paragraph IV certification and discussions between the defendants' counsel would be an exercise in speculation. See *Warren Distrib. Co. v. InBev USA LLC, No. 07-1053, 2008 U.S. Dist. LEXIS 71320, 2008 WL 4371763, at *4 (D.N.J. Sept. 18, 2008)* ("The fact that a joint defense agreement was signed is not evidence of the conspiracy plaintiffs allege **[*106]** existed."). At best, the above evidence is equally consistent with informational exchange or independent action, which is not enough for the plaintiffs to survive GSK's motion for summary judgment as to these two lawsuits.

B. Biovail's Citizen Petition

1. Facts

a. Bioequivalence Drift

In April 2004, David Stout, GSK's President of U.S. Pharmaceutical Operations, emailed several other GSK employees addressing reports that up to four companies intended to file generic versions of Wellbutrin XL in the next twelve months. In the email, Mr. Stout sketched the outline of a bioequivalence drift argument that later appeared in Biovail's Citizen Petition:

> If one product is approved on a bioequivalence basis, can another product be approved based on bioequivalence to that product or should they have to prove bioequivalence to the standard product. If you are allowed to continue to approve provducts [sic] based on bioequivalence to any other product that has been

> approved on that basis, you could end up with a product that is no where near the standard for which all clinical work was based.
> How do we get these arguments in front of the FDA? Citizens [sic] petition? We need to act fast!

PX 347. In response, **[*107]** David Wheadon, GSK's Senior Vice President of U.S. Regulatory Affairs, said he would "recommend going to FDA and making the public health argument that you outlined." GSK's then CEO, Jean-Pierre Garnier, requested to be copied on the FDA submission. PX 348.

On May 4, 2004, Brian Crombie, the CFO and Senior Vice President of Biovail wrote in an email:

> David stout of gsk in a conference today said that a generic to Wellbutrin XL would have to prove bioequivilence [sic] to a three times a day IR not to XL to get approved and that that would be very challenging. Is that true?

Greg Szpunar, Biovail's head of research and development, responded: "Doesn't make sense to me. If Xl is in the orange book, with no patent, the comparator would be XL." PX 349.

An internal GSK teleconference was scheduled for May 17, 2004 to discuss bioequivalence standards for generic Wellbutrin XL - specifically, whether there are "unique considerations for bupropion that might argue for bioequivalence to IR to reduce 'bioequivalence drift.'" PX 350. GSK's Project Management Board ("PMB"), a governance body chaired by a GSK commercial leader and a research and development team leader, held a meeting in May 2004 to **[*108]** discuss a defense strategy for Wellbutrin XL. Bioequivalence drift was an "urgent agenda item" at the meeting. PX 352.

In an email to Mr. Stout (GSK's President of U.S. Pharmaceutical Operations) dated May 26, 2004, Dan Burch, GSK's Senior Vice President of Neurosciences, wrote: "I will get something organized soon to update you [on the issues raised at the May PMB meeting]. I am going to discuss this with Biovail. Are you or any others outside of JDC team members already in discussions with them about this?" PX 355. On the same day, Mr. Burch emailed a GSK employee to ask "[w]ho is the best person for me to call in Biovail to discuss work around issue?" PX 356.

GSK employees continued to discuss the bioequivalence drift argument internally, and circulated a draft outline for a presentation to GSK's PMB on June 30, 2004. PX 357. On June 22, 2004, a GSK PMB Briefing Document stated the following:

> The team has concluded that there are no safety or efficacy concerns associated with . . . 'bioequivalence drift' . . . .
>
> It is common practice in GSK and the industry to rely on serial bioequivalence demonstrations to qualify new formulations . . . . Finally, we are aware of no precedent for a **[*109]** company successfully arguing against this as a regulatory standard.

PX 368. The briefing document ended with the following proposal: "Not recommending further action at this time." Id. Slides from the internal GSK PMB meeting on June 30, 2004 reflected the above conclusions. PX 369.

At his deposition, Dan Burch (GSK's Senior Vice President of Neurosciences) testified that when he gave the presentation at the GSK PMB meeting, he "knew there was no clinical ground to stand on . . . [and] was just trying to show . . . why we wouldn't even consider this or recommend this." Burch Dep. 152 (PX 121). He cited the lack of clinical support as the primary reason why he did not think GSK should ask the FDA to require generic companies to demonstrate bioequivalence to Wellbutrin IR. Id. at 152-53.

Similarly, Mr. Stout (GSK's President of U.S. Pharmaceutical Operations) testified at his deposition that the bioequivalence drift argument "would not fly at the FDA and, therefore, we had no basis to go the FDA." Stout Dep. 115 (PX 119). Although Mr. Stout could not recall specific discussions, he testified that he was "sure" both that GSK discussed bioequivalence drift with Biovail and that he communicated **[*110]** GSK's conclusions on the bioequivalence drift argument to Eugene Melnyk at Biovail. See id. at 108-09, 135, 253, 258.

In an internal GSK email dated December 9, 2004, a GSK employee provided answers to various questions that Mr. Stout had posed regarding generic versions of Wellbutrin XL. Among them was the following question and answer, which related to the metabolites evaluation request that later appeared in Biovail's Citizen Petition:

> [Question:] Biovail is curious if we have any information on metabolites that might form the basis of a challenge to the standard bioequivalence testing/standards. In other words, is there any reason to believe that a different formulation of Wellbutrin XL might have a different metabolite profile due to differences in absorption patterns, excipients, etc.
>
> . . . .
>
> [Answer:] [F]rom a PK perspective, there isn't any reason to believe that a different formulation will have a different metabolite profile. We've seen this in our own work with Wellbutrin IR, SR and XL, which were all formulated to give bioequivalence of the parent drug, and then shown to be bioequivalent for the (major) metabolites as well.
>
> <u>This information is available internally, but has not **[*111]** been shared with Biovail, and it is our recommendation not to share metabolite data with Biovail.</u>

PX 406 (emphasis added).

On December 1, 2005, several senior GSK managers, including Mr. Burch and Mr. Stout, participated in another internal GSK teleconference with the subject "Wellbutrin XL and Generic [Bioequivalence]." PX 681. Eight days later, an internal GSK email chain referenced a meeting between GSK's David Stout and Biovail's Eugene Melnyk and Doug Squires to occur on December 12, 2005. PX 434. GSK employees were asked if anything needed to be communicated to Mr. Stout regarding the meeting with Biovail. In response, one GSK employee asked: "have they [Biovail] filed a citizens [sic] petition on XL." PX 434. Another internal GSK teleconference regarding "Wellbutrin XL and Generic [Bioequivalence]" occurred on December 16, 2005, again involving GSK senior management like Mr. Burch and Mr. Stout. PX 682.

That same day, on December 16, 2005, Keith Muir, GSK's Director of Clinical Pharmacology, wrote:

> David Stout said that he wanted a Citizen's Petition prepared by the end of next week with a Clin Pharm scientific rationale for more rigorous BE [bioequivalence] requirements for Wellbutrin **[*112]** XL than for Wellbutrin SR. So I will be working on this for the better part of Monday and Tuesday.

PX 436; <u>see also</u> PX 435 (email from Keith Muir with similar text and referencing a draft "1 page summary of the strategy").

Biovail filed its Citizen Petition on December 20, 2005. On December 21, 2005, GSK's legal counsel, Bill Zoffer, sent a letter to Kenneth Cancellara, the Senior Vice-President and Chief Legal Officer at Biovail. The purpose of the letter was to

> confirm the outcome of conversations David Stout of GSK had with Eugene Melnyk and Douglas Squires [of Biovail] on December 12, 2005, and then briefly in follow up on December 13.
>
> Those discussions touched upon Biovail's efforts to explore and develop scientific issues related to appropriate review criteria for prospective generic copies of Wellbutrin XL, and the possibility of principled advocacy with FDA along those lines.
>
> <u>This is to confirm the position that David Stout communicated in the follow up call: GSK does not wish to participate in or be associated with any such Biovail explorations, deliberations, strategizing, decision-making, or ultimate advocacy with FDA</u>.

PX 280 (emphasis added). On December 23, 2005, GSK's Bill **[*113]** Zoffer circulated Biovail's Citizen Petition internally to various GSK team members. PX 438.

In response to Bill Zoffer's letter above, Biovail's Kenneth Cancellara answered by letter on January 9, 2006. Mr. Cancellara disputed Mr. Zoffer's characterizations of the discussions between GSK's David Stout and Biovail's Eugene Melnyk and Douglas Squires:

> [I]t is more accurate to state that Biovail explained to Mr. Stout its obligations to examine emerging scientific issues as they relate to Biovail's current and future products, including Wellbutrin XL. Since Wellbutrin XL is marketed by GSK, you are correct in stating that our two Companies have a shared interest in the overall safety, quality and integrity of the product.
>
> . . . .
>
> Biovail does not seek the participation of GSK's executives or scientists in this examination and did not indicate that such was being sought. Indeed, during Mr. Stout's telephone conference with Dr. Squires, it was Mr. Stout who sought and initiated the interaction between GSK and Biovail scientific and technical staff. This interaction, I understand, has now taken place.

PX 281.

At his deposition, Biovail's Douglas Squires testified:

> Q: Had there been collaboration **[*114]** between GSK and Biovail regarding the Citizen Petition before the Citizen Petition was complete?
>
> A: No, not that I recall.

Squires Dep. 104 (PX 120).

2. Analysis

The facts set forth above regarding GSK and the Citizen Petition are, at the very least, equally consistent - if not more consistent - with a theory that GSK and Biovail independently pursued the filing of a citizen petition with the FDA.

The fact that GSK benefitted from Biovail's Citizen Petition is not, by itself, sufficient to show concerted action. In SigmaPharm, Inc. v. Mutual Pharm. Co., Inc., one company filed a citizen petition requesting that the FDA require certain labeling information from generic competitors that would implicate a method for which the company held a co-exclusive license with another company. The court held that the citizen petition was "non-inculpatory, self-interested action." "That either or both companies would seek to impede competitors does not alone suggest a conspiracy . . ." *SigmaPharm, Inc. v. Mutual Pharm. Co., Inc., 772 F. Supp. 2d 660, 671 (E.D. Pa. 2011)*, aff'd on other grounds, *454 Fed. Appx. 64, 2011 WL 6145370 (3d Cir. 2011)*.

In this case, GSK has pointed to facts suggesting that it independently **[*115]** analyzed the possibility of filing a citizen petition with the FDA, and independently came to the conclusion that there was no clinical basis for the bioequivalence drift argument and the metabolites evaluation request as to the threo-and erythro- metabolites. The evidence suggests that GSK either independently decided not to file a citizen petition, or was in the process of drafting its own separate petition. At one point, a GSK employee queried whether Biovail intended to file a petition, evincing a lack of knowledge as to the existence or contents of Biovail's Citizen Petition. PX 434. One science document even recommended that GSK not share internal GSK information with Biovail. PX 406. GSK also confirmed with Biovail its unwillingness to participate in Biovail's Citizen Petition via letter. PX 280. Furthermore, Biovail's Douglas Squires testified that he did not recall collaboration between GSK and Biovail on the Citizen Petition before it was complete. Squires Dep. 104-05 (PX 120).

In sum, the plaintiffs have not pointed to sufficient evidence to permit a jury to reasonably infer the existence of concerted action in light of all the evidence pointing to independent action by GSK. **[*116]** Therefore, even if the Court did not grant Biovail's motion for summary judgment, the Court would grant GSK's motion for summary judgment as to the Impax and Watson lawsuits as well as the Citizen Petition.

An appropriate order will follow separately.

ORDER

AND NOW, this 11th day of May, 2012, upon consideration of the Biovail Defendants' Motion for Summary Judgment (Docket No. 410 in 08-cv-2431; Docket No. 378 in 08-cv-2433), the GSK Defendants' Motion for

Summary Judgment (Docket No. 411 in 08-cv-2431; Docket No. 379 in 08-cv-2433), the plaintiffs' consolidated opposition thereto, the defendants' replies in support, the plaintiffs' post-hearing submission, and following oral argument on March 20, 2012, IT IS HEREBY ORDERED, for the reasons stated in a memorandum of law bearing today's date, that the defendants' motions are GRANTED IN PART.

The Court does not decide today the motions for summary judgment as to the settlement transaction. The motions are granted as to the patent infringement lawsuits and the citizen petition.

BY THE COURT:

/s/ Mary A. McLaughlin

MARY A. McLAUGHLIN, J.

Cheng v. AIM Sports, Inc.

United States District Court for the Central District of California

May 14, 2012, Decided; May 14, 2012, Filed

CV 10-3814 PSG (PLAx)

Reporter

2012 U.S. Dist. LEXIS 197199 *

Carson Cheng, et al. v. AIM Sports, Inc., et al.

Prior History: *Cheng v. AIM Sports, Inc., 2011 U.S. Dist. LEXIS 11666 (C.D. Cal., Jan. 26, 2011)*

Core Terms

patent, loader, speed, inequitable conduct, summary judgment, patent misuse, summary judgment motion, counterclaims, affirmative defense, deceive, unfair competition, unclean hands, exact copy, deliberately, antitrust, infringer, invented

Counsel: **[*1]** Attorneys for Plaintiff(s): Not Present.

Attorneys for Defendant(s): Not Present.

Judges: The Honorable Philip S. Gutierrez, United States District Judge.

Opinion by: Philip S. Gutierrez

Opinion

CIVIL MINUTES - GENERAL

Proceedings: (In Chambers) Order GRANTING in part and DENYING in part Plaintiffs' Motion for Summary Judgment

Before the Court is Plaintiffs' motion for partial summary judgment. Dkt. # 199. The Court finds the matter appropriate for decision without oral argument. *See* *Fed. R. Civ. P. 78*; *L.R. 7-15*. After considering the supporting and opposing papers, the Court GRANTS in part and DENIES in part the motion for partial summary judgment.

I. Background and Legal Standard

In an order entered on May 11, 2012, the Court set forth the background facts and legal standard relevant to this motion. *See* Dkt. # 332. The Court incorporates that background and legal standard here.

II. Discussion

Plaintiffs seek summary judgment on the counterclaims and affirmative defenses for inequitable conduct, patent misuse, unclean hands, unfair competition, and *Walker Process* antitrust violations. The Court will address each issue in turn.

a. '723 Patent

In an order issued May 11, 2012, the Court granted Defendants' motion for summary judgment on the validity **[*2]** of the '723 Patent. *See* Dkt. # 332. This holding has rendered Plaintiffs' motion for summary judgment on the affirmative defenses and counterclaims related to the '723 Patent MOOT.

b. Inequitable Conduct

Defendants have asserted counterclaims and affirmative defenses on the basis of inequitable conduct committed by Plaintiffs. Dkts. # 21, 22, 25, 50. The doctrine of inequitable conduct is an "equitable defense to patent infringement that, if proved, bars enforcement of a patent." *Therasense, Inc. v. Becton, Dickinson and Co., 649 F.3d 1276, 1285 (Fed. Cir. 2011)* ("*Therasense*"). An inequitable conduct defense asserts that a patentee misrepresented or omitted material information with the intent to deceive the United States Patent Office ("PTO") to issue a patent. *Id. at 1287*. In 2011, the Federal Circuit, sitting en banc, heightened the standards for proving inequitable conduct in the *Therasense* decision. The defense requires a showing of both intent and materiality. *Id. at 1290*. First, "the accused infringer must prove that the patentee acted with the specific intent to deceive the PTO." *Id.* This requires a showing "that the applicant knew of the reference, knew that it was material, and made a deliberate decision to withhold it." *Id.* Second, the accused infringer must show the but-for materiality **[*3]** of the omitted or misrepresented prior art. *Id. at 1291*. The "prior art is but-for material if the PTO would not have allowed a claim had it been aware of the undisclosed prior art." *Id.* Plaintiffs argue Defendants have not produced evidence to satisfy either the intent or materiality prongs of inequitable conduct. *Mot.* 8:22-25.

1. '987 Patent

The Court will first address Defendants' claims of inequitable conduct regarding the '987 Patent. The '987 Patent covers a "speed loader," which is a "magazine loader for ammunition preloaded with a stripper clip." *See Order Construing Patent Claims*, Dkt. # 114, at 5. Defendants claim the speed loader covered by the '987 Patent is an exact copy of a speed loader made by another firearms accessories manufacturer, the Beta Company. *Opp.* 4:10-16. Moreover, Defendants assert Cheng knew about the Beta Company's speed loader before he applied for the '987 Patent. *Id.*

In support of these assertions, Defendants proffer the testimony of Jon Morgan. Morgan and Cheng are listed as the co-inventors of the speed loader on the '987 Patent. *Facts* ¶ 45. Morgan is a former Marine who came up with the design of the speed loader while he was in an Army hospital for treatment from **[*4]** wounds received in Somalia in 1993. *Facts* ¶ 46. Morgan has since realized that he did not invent the speed loader. *Id.* Instead, Morgan believes that while he was under heavy medication in the hospital, he must have seen the Beta Company speed loader being carried by Army soldiers. *Facts* ¶ 48. About ten years later, after leaving the military, Morgan developed a prototype of the speed loader. *Facts* ¶ 49. At this time, Morgan asked Cheng to enter into a joint venture with him to fully develop and market the speed loader. *Facts* ¶ 50. Soon thereafter, Morgan was attending a gun show and saw the Beta Company's speed loader. *Facts* ¶¶ 51, 52. Morgan realized that the speed loader he thought he invented was an exact copy of the Beta Company's speed loader. *Id.*

Morgan told Cheng about the Beta Company's speed loader. *Facts* ¶ 55. Cheng said they should not to be concerned, and that they should move forward with patenting their own speed loader. *Facts* ¶¶ 56, 60. Cheng said that if Morgan was worried about any legal consequences, Morgan could assign ownership of the patent to Cheng. *Id.* Morgan did so, and Cheng proceeded to apply for a patent for the speed loader. *Id.* In his application, Cheng **[*5]** did not disclose the existence of the Beta Company speed loader to the PTO. *Facts* ¶ 62.

As noted above, to prove the intent prong of inequitable conduct, an infringer must demonstrate that the applicant knew of the prior art, knew that it was material, and made a deliberate decision to withhold it from the PTO. *Therasense, 649 F.3d at 1290*. The *Therasense* court also clarified that the intent of an applicant can be inferred from indirect and circumstantial evidence. *Id.* "However, to meet the clear and convincing evidence standard, the specific intent to deceive must be the single most reasonable inference able to be drawn from the evidence." *Id.* (internal quotation marks omitted). If Morgan's testimony is credited, Cheng knew another company had been selling an exact copy of the speed loader for many years. It could be inferred Cheng knew there were potential legal problems with patenting a speed loader that was an exact copy of another company's product, because Cheng convinced Morgan to assign his ownership to Cheng in order to protect Morgan from liability. After taking these precautions, Cheng omitted reference to the Beta Company's speed loader in his application to the PTO. Based on these facts, a finder **[*6]** of fact could find that clear and convincing evidence establishes that the single most reasonable inference to be drawn is that Cheng knew of the Beta Company speed loader, knew it was material to the '987 Patent application, and deliberately withheld this reference from the PTO.

An infringer asserting inequitable conduct must also prove the but-for materiality of the reference withheld. *Therasense, 649 F.3d at 1291*. Information is material to patentability if it "establishes, by itself . . . a prima facie case of unpatentability." *37 C.F.R. § 1.56*. Because Morgan has testified he invented the speed loader ultimately patented by Cheng, and testified that the '987 Patent speed loader is an exact copy of the Beta Company speed loader, there is sufficient evidence to establish the PTO would not have issued the '987 Patent if it had known of the Beta Company speed loader. *See* 35 U.S.C. § 101 ("Whoever invents or discovers any *new* and useful process, machine, manufacture, or composition of matter . . . may obtain a patent therefor . . .") (emphasis added). Furthermore, there is an exception to the materiality requirement in cases of "affirmative egregious misconduct." *Therasense, 649 F.3d at 1292*. This type of misconduct exists where a patentee "deliberately planned and carefully **[*7]** executed" a scheme to defraud the PTO and the courts. *Id.* (internal quotation marks omitted). A reasonable fact finder could also find clear and convincing evidence that Cheng deliberately and carefully executed a plan to mislead the PTO. Cheng's offer to relieve Morgan of any potential liability could reasonably be held to infer that Cheng knew he was deceiving the PTO, but decided to proceed anyways.

For these reasons, summary judgment on the inequitable conduct claims as they relate to the '987 Patent must be DENIED.

2. Other Patents

Defendants also present evidence in support of claims for inequitable conduct regarding the other patents-in-suit. Defendants argue Cheng intentionally deceived the PTO in regards to the '605, '750, '751, and '880 Patents by not disclosing the publication of the New Century catalog. *Opp.* 1:19-2:3; *Facts* ¶¶ 22-44. As for the '455 Patent, Defendants contend Cheng intentionally deceived the PTO by stealing the design for the combo tool claimed in the '455 Patent from Jon Morgan, and then applying to the PTO as the sole inventor of the '455 Patent. *Opp.* 6:8-8:6; *Facts* ¶¶ 63-81.

In addition, the evidence of the inequitable conduct related to the '987 Patent is also potentially **[*8]** relevant to the inequitable conduct claims regarding the other patents-in-suit. *See* *Consol. Aluminum Corp. v. Foseco Intern. Ltd., 910 F.2d 804, 812 (Fed. Cir. 1990)* (finding inequitable conduct as to one patent had an "immediate and necessary relation" to other patents, thereby rendering those patents unenforceable); *Hoffmann-La Roche, Inc. v. Promega Corp, 319 F. Supp. 2d 1011, 1017 (N.D. Cal. 2004)* ("The doctrines of infectious unenforceability and unclean hands have been developed to aid in determining whether an unconscionable act that occurs during the prosecution of one patent has an immediate and necessary relation to the equity sought in the prosecution of another patent.").

However, neither Plaintiffs nor Defendants have addressed the potential of "infectious unenforceability" in their briefs. Plaintiffs have not asserted there is a lack of evidence linking the patents together, and Defendants have not explained how the patents might be related. It would be improper to rule on the potential applicability of the '987 Patent misconduct to the other patents without the benefit of a more complete record, as well as briefing on this issue. *See* *Anderson, 477 U.S. 242, 106 S. Ct. at 2513* ("Neither do we suggest that the trial courts should act other than with caution in granting summary judgment."). Therefore, summary judgment on the issue of inequitable conduct regarding the other patents-in-suit **[*9]** is DENIED.

c. Patent Misuse

In order to assert the defense of patent misuse, a defendant must "show that the patentee has impermissibly broadened the 'physical or temporal scope' of the patent grant with anticompetitive effect." *Virginia Panel Corp. v.*

MAC Panel Co., 133 F.3d 860, 868 (Fed. Cir. 1997). Examples of patent misuse include "tying" the license of a patent to purchase of a separate product or requiring payment of royalties after a patent expires. *Id. at 869*.

In opposition, Defendants' sole statement regarding patent misuse is: "Cheng's fraudulent practice of patenting ideas that are old or belong to others, and thus also the practice of the company he runs, New Century, strongly supports the claims and defenses that Cheng committed patent misuse . . ." *Opp.* 9:18-20. Evidence regarding Plaintiffs' patenting of inventions that are either old or the property of others cannot support a claim of patent misuse, because it does not demonstrate that Plaintiffs sought to impermissibly broaden the scope of their patents. Plaintiffs' motion for summary judgment on this affirmative defense is GRANTED.

d. *Walker Process*

To prove a *Walker Process* claim, Defendants must prove that: (1) Plaintiffs attempted to enforce a patent; (2) the patent issued because of intentional **[*10]** fraud; (3) Plaintiffs' attempted enforcement of the patent threatens competition in a relevant market; (4) Defendants suffered antitrust damages; and (5) all other elements of federal ***antitrust law*** are met. *See* *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 375 F.3d 1341, 1355 (Fed. Cir. 2004)*, *rev'd on other grounds*, *546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006)*. The other elements of federal ***antitrust law*** in the Ninth Circuit are: (1) an agreement or conspiracy; (2) which is intended to harm or unreasonably restrain competition. *See* *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988)*.

In opposition to the motion for summary judgment, Defendants state: "In short, Cheng's conduct detailed above supports Defendants' claims under *Walker Process* . . ." *Opp.* 9:21-22. By merely citing to the misconduct Defendants allege in support of their inequitable conduct claims, Defendants have wholly failed to even attempt to show there is evidence to support the antitrust elements of a *Walker Process* claim. Therefore, Plaintiffs' motion for summary judgment on the *Walker Process* counterclaims is GRANTED.

e. Unclean Hands

"The unclean hands doctrine derives from the equitable maxim that 'he who comes into equity must come with clean hands.'" *Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1097 (9th Cir. 1985)*. Accordingly, a party seeking equitable relief must "have acted fairly and without fraud or deceit as to the controversy in issue." *Id.* ***[*11]*** The Court's holding regarding Defendants' defense of inequitable conduct is equally applicable to the defense of unclean hands. *See* *Consol. Aluminum, 910 F.2d at 812* ("Indeed, what we have termed 'inequitable conduct' is no more than the unclean hands doctrine applied to particular conduct before the PTO."). Therefore, Plaintiffs' motion for summary judgment on the affirmative defense of unclean hands is DENIED.

f. Unfair Competition

Defendants claim Plaintiffs competed unfairly in violation of the Lanham Act, *15 U.S.C. § 1125(a)*, as well as *California Business and Professions Code §§ 17200* and *17500*. Defendants assert these counterclaims for unfair competition are predicated on the claims of inequitable conduct. *Opp.* 9:24-26. In accord with the Court's holding on the inequitable conduct claims, summary judgment on the unfair competition counterclaims is DENIED.

g. Defendants' Discovery Responses

Plaintiffs argue their motion for partial summary judgment should be granted in its entirety because Defendants failed to disclose the factual bases for their counterclaims and affirmative defenses in discovery. *Reply* 2:7-3:13. For the claims and defenses on which the Court denies summary judgment, the Court finds that the description of Defendants' responses to discovery as laid out in Plaintiffs' **[*12]** moving papers adequately stated the bases for these claims and defenses. *See Mot.* 3:3-4:6, 5:2-17. To the extent Plaintiffs believe Defendants have contradicted any discovery responses, Plaintiffs are free to attempt to use such evidence for impeachment purposes. *See* *Fed. R. Civ. P. 33(c)* ("An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.").

III. Conclusion

For the foregoing reasons, Plaintiffs' motion for partial summary judgment is GRANTED in part and DENIED in part. In summary, the motion is:

• DENIED as to the inequitable conduct claims;

• GRANTED as to the patent misuse defense;

• GRANTED as to the *Walker Process* claims;

• DENIED as to the unclean hands defense;

• DENIED as to the unfair competition claims; and

• Deemed MOOT as to the '723 Patent.

IT IS SO ORDERED.

[Favaloro v. Webster Groves](#)

United States District Court for the Eastern District of Missouri, Eastern Division

May 18, 2012, Decided; May 18, 2012, Filed

No. 4:11-CV-2068 (CEJ)

Reporter

2012 U.S. Dist. LEXIS 69784 *; 2012-1 Trade Cas. (CCH) P77,898; 2012 WL 1829883

RICK FAVALORO, [1] Plaintiff, vs. WEBSTER GROVES/SHREWSBURY AREA CHAMBER OF COMMERCE, Defendant.

Core Terms

subject-matter, antitrust, proposed amended complaint, federal jurisdiction, motion to dismiss, motion for leave, advertisements

Counsel: **[*1]** Rick Favaloro, Plaintiff, Pro se, Webster Groves, MO.

For Webster Groves/Shrewsbury Area Chamber of Commerce, Defendant: James D. Bass, LEAD ATTORNEY, Erin E. Guffey, STINSON AND MORRISON, St. Louis, MO.

Judges: CAROL E. JACKSON, UNITED STATES DISTRICT JUDGE.

Opinion by: CAROL E. JACKSON

Opinion

MEMORANDUM AND ORDER

This matter is before the Court on the defendant's motion to dismiss plaintiff's complaint. Plaintiff has filed a response in opposition and has filed a motion for leave to amend the complaint. Defendant opposes plaintiff's request to amend. Both motions have been fully briefed and are ready for disposition.

I. Background

The defendant is an organization comprised of business owners, of which plaintiff is a former member. In his *pro se* complaint, plaintiff alleges that defendant refused to publish business advertisements submitted by plaintiff for inclusion in an annual publication. Plaintiff asserts that defendant engaged in a scheme to defraud by collecting his membership fees while refusing to publish his advertisements, in violation of [18 U.S.C. §§ 1343](#) and [1346](#). Plaintiff

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[1] Plaintiff refers to himself as "Rick Favaloro, J.D.," and states that he is "a licensed Texas attorney with a perfect ethical record," (Doc. #11, p. 2, n. 1). While plaintiff may have a law degree, he is not licensed to practice law in Texas by reason of disbarment. See Favaloro v. Comm'n for Lawyer Discipline, 13 S.W.3d 831 (Tex. App. 2000); State Bar of Texas Lawyer Directory, Richard Favaloro, available at http://www.texasbar.com.

also claims that defendant's cancellation or non-renewal of plaintiff's membership constitutes defamation and a violation of *Mo. Rev. Stat. § 355.211(1)*. **[*2]** [2]

The defendant moves to dismiss the complaint for lack of subject-matter jurisdiction, failure to state a claim, and lack of Article III standing. In response, plaintiff argues that the motion to dismiss is premature because process has not been served on defendant nor has defendant been asked to waive service under *Fed. R. Civ. P. 4 (d)*.

On April 23, 2012, plaintiff filed a motion for leave to file an amended complaint. The proposed amended complaint seeks to add as defendants several individual members of defendant's organization, two of defendant's attorneys—one of whom represents defendant **[*3]** here, Rotary International, the Rotary Club of Webster Groves, several individual officers of the Webster Grover Rotary Club, and an attorney for the Rotary Club. (Doc. #9-1). In the proposed amended complaint, plaintiff asserts the following claims: violation of the Sherman Act and the Clayton Act, *15 U.S.C. § 1, et seq.*, for refusing to publish plaintiff's advertisements (Counts 1-5); violation of *Mo. Rev. Stat. § 355.211* for suspending or terminating plaintiff's Rotary Club and Chamber of Commerce memberships (Counts 6-9); breach of fiduciary duty (Count 10); and defamation (Count 11). In the proposed amended complaint plaintiff also seeks a declaration, pursuant to *28 U.S.C. §§ 2201* and *2202*, that he "has at all relevant times been a member in good standing of the Chamber." Id.

II. Discussion

A. Motion to Dismiss

Initially, the Court finds that defendant's motion to dismiss is not premature as argued by plaintiff. It is true that a court will not normally have jurisdiction over a party prior to service or waiver. See *Murphy Bros., Inc v. Michetti Pipe Stringing, 526 U.S. 344, 350, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999)*. In this case, there was no service nor a request for waiver of service. However, service may be **[*4]** waived by a defendant's appearance in an action. Cf. *Xyrous Communications, LLC v. Bulgarian Telecommunications Co. AD, 2009 U.S. Dist. LEXIS 80620, 74 Fed. R. Serv. 3d 629 (E.D. Va. 2009)*; *Swanson v. City of Hammond, Ind., 411 F. App'x 913, 915-16 (7th Cir. 2011)*. Here, defendant effectively waived service by filing a motion to dismiss under *Rule 12(b), Fed. R. Civ. P.*, that did not challenge the sufficiency of service. See *Fed. R. Civ. P. 12(h)(1)* (a party waives any defense listed in *Rule 12(b)(2)-(5)* by omitting from its first-filed Rule 12 motion, assuming the defense was available at that time). Further, *Fed. R. Civ. P. 12(h)(3)* provides that if "the court determines *at any time* that it lacks subject-matter jurisdiction, the court must dismiss the action." (emphasis added). Thus, the issue of subject-matter jurisdiction is one that must be addressed by the Court, even without a motion by the defendant.

Turning to the merits of defendant's dismissal motion, the Court must first resolve defendant's argument that subject matter jurisdiction is lacking. *Carlson v. Arrowhead Concrete Works, Inc., 445 F.3d 1046 (8th Cir. 2006)*. Subject-matter jurisdiction requires that the party invoking federal jurisdiction "demonstrate **[*5]** an actual, ongoing case or controversy within the meaning of Article III of the Constitution." *Republican Party of Minn. v. Klobuchar, 381 F.3d 785, 789-90 (8th Cir.2004)* (internal quotations omitted). "Standing is always a 'threshold question' in determining whether a federal court may hear a case." *281 Care Committee, 638 F.3d at 627* (citing *Eckles v. City of Corydon, 341 F.3d 762, 767 (8th Cir.2003))*. "A party invoking federal jurisdiction has the burden of establishing that he has

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[2] *Mo. Rev. Stat. § 355.211(1)* provides:

> No member of a public benefit corporation other than a church or convention or association of churches or mutual benefit corporation may be expelled or suspended, and no membership or memberships in such corporations may be terminated or suspended except pursuant to a procedure which is fair and reasonable and is carried out in good faith. In no event shall suspension of a member's right to use amenities, recreational facilities or such other facilities as that member may be entitled to, be considered to be a suspension by any such corporation of such member.

the right to assert his claim in federal court." *281 Care Committee v. Arneson, 638 F.3d 621, 627 (8th Cir. 2011)* (citing *Schanou v. Lancaster Cnty. Sch. Dist. No. 160, 62 F.3d 1040, 1045 (8th Cir.1995))*.

Plaintiff asserts that his claims are based on *18 U.S.C. §§ 1343* [3] and *1346*. [4] Plaintiff's citation to those statutes is insufficient to show that this action arises under federal law. First, *§ 1343* is a criminal statute that does not provide for a private cause of action. See *Wisdom v. First Midwest Bank, 167 F.3d 402 (8th Cir.1999)* (*§ 1343* does not imply private cause of action); *Napper v. Anderson, Henley, Shields, Bradford & Pritchard, 500 F.2d 634 (5th Cir.1974)*. Plaintiff lacks standing to enforce **[*6]** a criminal statute from which no private cause of action is implied. Id.; see also *United States v. Wadena, 152 F.3d 831 (8th Cir.1998)* (noting that only the federal government had standing to enforce *18 U.S.C. § 242*, the criminal equivalent to *42 U.S.C. § 1983*) (citing *Cok v. Cosentino, 876 F.2d 1, 2 (1st Cir. 1989))*. Second, *§ 1346* does not provide for any right or remedy; it merely states a definition for the phrase "scheme or artifice to defraud." As such, neither statute cited by plaintiff is sufficient to invoke federal jurisdiction.

The original complaint does not assert, nor does it appear from the record, that federal jurisdiction over plaintiff's state-law claims arises under *28 U.S.C. § 1332(a)*. As such, plaintiff's state-law claims will also be dismissed without prejudice for lack of subject-matter jurisdiction.

B. Motion for Leave to File Amended Complaint

Rule 15(a), Fed. R. Civ. P., allows for the filing of an amended complaint "only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. "[D]enial of leave to amend a pleading is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated." *Roberson v. Hayti Police Dept., 241 F.3d 992, 995 (8th Cir.2001)*.

Defendant argues that plaintiff's motion for leave to amend should be denied because the proposed amendment would **[*8]** be futile. An amendment is futile if "'the amended [pleading] could not withstand' a motion to dismiss pursuant to *Rule 12, Fed.R.Civ.P.*" *Bakhtiari v. Beyer, No. 4:06-CV-01489, 2008 U.S. Dist. LEXIS 60173, 2008 WL 3200820, *1 (E.D. Mo. 2008)* (citing *In re Senior Cottages of Am., LLC, 482 F.3d 997, 1001 (8th Cir. 2007))*.

The Court agrees that the proposed amended complaint would be futile. The only federal claims asserted in the proposed amended complaint? antitrust violations under the Sherman and Clayton Acts (Counts 1-5)—would not survive a motion under *Fed. R. Civ. P. 12(b)(6)*. Private enforcement of federal ***antitrust law*** under Title 15, United States Code, requires that the plaintiff allege antitrust standing. *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 113, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. This requirement is analyzed under the same pleading standard applicable to a motion under *Rule 12(b)(6), Fed. R. Civ. P.* *Sprint Nextel Corp. v. AT & T Inc., 821 F. Supp. 2d 308, 312 n.1 (D.D.C. 2011)*. Antitrust standing requires allegations which, if true, would demonstrate an antitrust injury, *i.e.*, an injury "of the type the antitrust laws were designed to prevent and that flows from that which makes the

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[3] *18 U.S.C. § 1343* provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than **[*7]** 30 years, or both.

[4] *18 U.S.C. § 1346* provides:

> For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services.

defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl—O—Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* **[*9]** . Clearly, plaintiff's claims that the proposed defendants refused to print his advertisements and canceled his membership are not the sort of conduct the antitrust laws were designed to prevent. Id. (granting summary judgment and denying leave to amend regarding claims against not-for-profit organization of surgeons and its president for refusal to allow plaintiff to participate and advertise at organization events).

The remaining claims in the proposed amended complaint would be dismissed for lack of subject-matter jurisdiction. Plaintiff's cites to *28 U.S.C. §§1332*, *1367*, and *2201*, but neither statute is sufficient to invoke federal jurisdiction here. *Section 1332(a)* requires complete diversity among all adverse parties. *Strawbridge v. Curtiss, 7 U.S. 267, 2 L. Ed. 435 (1806)*. Plaintiff asserts that diversity of citizenship exists because he is a Missouri citizen and Rotary International is an Illinois citizen. His assertion, however, ignores the fact that the other defendants named in the proposed amendment are also citizens of Missouri, thus preventing complete diversity and jurisdiction under *§1332(a)*. Additionally, *28 U.S.C. § 2201* **[*10]** provides for the procedural remedy of declaratory judgment, but does not itself provide a basis for federal jurisdiction. *Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937)*. Finally, because the federal claims plaintiff seeks to assert in the proposed amendment would be dismissed, supplemental jurisdiction over plaintiff's state-law claims is not available under *28 U.S.C. § 1367*.

*****

For the reasons discussed above,

IT IS HEREBY ORDERED that the defendant's motion to dismiss the complaint for lack of subject-matter jurisdiction [Doc. #3] is **granted**.

IT IS FURTHER ORDERED that the plaintiff's motion for leave to file an amended complaint [Doc. #9] is **denied.**

/s/ Carol E. Jackson

CAROL E. JACKSON

UNITED STATES DISTRICT JUDGE

Dated this 18th day of May, 2012.

End of Document

LexisNexis

Oliver v. 3D-3C, LLC

United States District Court for the Northern District of California

May 21, 2012, Decided; May 21, 2012, Filed

No. C 11-01260 JSW

Reporter

2012 U.S. Dist. LEXIS 70615 *; 2012 WL 1835740

DR. DAN OLIVER, JEANNIE OLIVER, JOE SOLO, BERNARD GROSS, SUSAN KEELIN, WALTER KVASNIK, KOU SRIMOUNGHANCH, HUMBERTO GONZALEZ, SAMUEL D. LEGGETT, BRIAN ALBEE, MARY LOUISE FOWLER, JOE SHAW and RHONDA SCHULTZ, on their own behalves and on behalf of all others similarly situated, Plaintiffs, v. 3D-3C, LLC, PANASONIC CORPORATION, PANASONIC CORPORATION OF NORTH AMERICA, TOSHIBA CORPORATION, TOSHIBA AMERICAN ELECTRONIC COMPONENTS, INC., and SANDISK CORPORATION, Defendants.

Subsequent History: Reversed by, Remanded by *Solo v. SD-3C LLC, 751 F.3d 1081, 2014 U.S. App. LEXIS 8972 (9th Cir. Cal., May 14, 2014)*

Prior History: *Oliver v. SD-3C, LLC, 2011 U.S. Dist. LEXIS 164261 (N.D. Cal., Aug. 4, 2011)*

Core Terms

statute of limitations, Cards, antitrust, licensing, fail to state a claim, continuing violation, amended complaint, cause of action, amend

Counsel: **[*1]** For Dr. Dan Oliver, plaintiff on their own behalves and on behalf of all others similary situated, Jeannie Oliver, plaintiff on their own behalves and on behalf of all others similary situated, Plaintiffs: Amanda K. Bonn, Susman Godfrey L.L.P., Los Angeles, CA; Eric J. Mayer, PRO HAC VICE, Joseph S. Grinstein, Max Lalon Tribble, Jr., Susman Godfrey L.L.P., Houston, TX; Issac L. Diel, PRO HAC VICE, Sharp McQueen, Overland Park, KS; Richard S. Taffet, PRO HAC VICE, Bingham McCutchen, New York, NY; Thomas J. Brill, PRO HAC VICE, Overland Park, KS.

For Walter Kvasnik, Joe Solo, Bernard Gross, Plaintiffs: Amanda K. Bonn, Susman Godfrey L.L.P., Los Angeles, CA; Daniel R. Karon, PRO HAC VICE, Goldman Scarlato & Karon, Cleveland, OH; Max Lalon Tribble, Jr., Susman Godfrey L.L.P., Houston, TX.

For Mary Louise Fowler, Kou Srimounghanch, Susan Keelin, Humberto Gonzalez, Rhonda Schultz, Joe Shaw, Brian Albee, Samuel D Leggett, Plaintiffs: Amanda K. Bonn, Susman Godfrey L.L.P., Los Angeles, CA; Max Lalon Tribble, Jr., Susman Godfrey L.L.P., Houston, TX.

For SD-3 LLC, Defendant: Christopher B. Hockett, Neal Alan Potischman, Davis Polk & Wardwell, Menlo Park, CA; Samantha Harper Knox, Davis Polk & Wardwell **[*2]** LLP, Menlo Park, CA.

For Panasonic Corp., Panasonic Corp. of North America, Defendants: Aldo A. Badini, Jeffrey L. Kessler, LEAD ATTORNEYS, James F. Lerner, Kelli L Lanski, Susannah P. Torpey, Winston & Strawn LLP, New York, NY; David S. Turetsky, LEAD ATTORNEY, Dewey and LeBoeuf LLP, Washington, D.C., Washington, DC; Christopher R. Clark, PRO HAC VICE, Christopher Rankin Clark, Dewey & LeBoeuf LLP, New York, NY; Ian L Papendick, PRO HAC VICE, Winston & Strawn LLP, San Francisco, CA.

For Toshiba Corp., Toshiba America Electronic Components, Inc., Defendants: Daniel Murray Wall, Nicole Charlene Valco, Sarah Meyers Ray, LEAD ATTORNEYS, Latham & Watkins LLP, San Francisco, CA; Belinda S. Lee, Latham & Watkins, San Francisco, CA.

For Sandisk Corp., Defendant: Frank Hinman, Rianne Elizabeth Rocca, Sujal Shah, Bingham McCutchen LLP, San Francisco, CA; Richard S. Taffet, Bingham McCutchen, New York, NY; Samantha R Carter, Bingham McCutchen LLP, East Palo Alto, CA.

For Fish & Richardson P.C., David J. Healey, Miscellaneous: Ragesh K. Tangri, Durie Tangri LLP, San Francisco, CA.

Judges: JEFFREY S. WHITE, UNITED STATES DISTRICT JUDGE.

Opinion by: JEFFREY S. WHITE

Opinion

ORDER GRANTING MOTION TO DISMISS WITHOUT LEAVE TO AMEND

Now **[*3]** before the Court is the motion filed by Defendants SD-3C, LLC ("SD-3C"), Panasonic Corporation ("Panasonic"), Panasonic Corporation of North America ("PNA"), Toshiba Corporation ("Toshiba"), Toshiba America Electronic Components, Inc. ("TAEC"), and Sandisk Corp. ("SanDisk") (collectively, "Defendants") to dismiss the First Amended Complaint ("FAC") filed by Plaintiffs. The Court finds that this matter is appropriate for disposition without oral argument and is deemed submitted. *See Civ. L.R. 7-1(b)*. Accordingly, the hearing set for May 25, 2012 is HEREBY VACATED. Having carefully reviewed the parties' papers and considering their arguments and the relevant authority, and good cause appearing, the Court hereby GRANTS Defendants' motion to dismiss.

BACKGROUND

This antitrust action challenges an alleged patent licensing arrangement to control the availability and pricing of Secure Digital Memory Card ("SD Card") technologies and thereby restrain trade. Plaintiffs are indirect purchasers of SD Cards from March 15, 2007 to the present. SD Cards are flash memory cards used in various devices such as digital cameras and cell phones. (FAC ¶¶ 43-46.)

Plaintiffs challenge the standard-setting process **[*4]** created in the late 1990s that resulted in the SD Memory Card Specification ("Specification") and licensing arrangements. (*Id.* ¶¶ 3, 73, 74, 80.) Defendant SD-3C licenses patents and other intellectual property necessary to practice the Specification developed by the Defendants in 1999 and released in 2000. (*Id.* ¶¶ 1,3, 53, 55-59.) According to the allegations in the amended complaint, the violations Plaintiffs challenge occurred "[a]t least as early as August 29, 1999," when Panasonic, SanDisk, and Toshiba agreed to develop the Specification jointly or "at least as early as January 1, 2000," when Defendants publicly announced the establishment of the SD Association, a standard-setting organization responsible for developing subsequent versions of the Specification. (*See id.* ¶¶ 128, 142.)

Plaintiffs contend that, by virtue of a 2003 licensing agreement, companies that wish to make SD Cards and licensed the SD-3C technology would be required to pay a 6% royalty on all SD Cards sold. (*Id.* ¶¶ 3, 62.) In 2006, SD-3D offered an amendment to the 2003 SD Card License, which included a provision that allegedly serves as a "minimum **[*5]** reference price of the calculations of licensees' royalty obligations" under the SD Card License. (*Id.* ¶ 5.)

In addition, Plaintiffs incorporate the allegations in a related and previously dismissed complaint filed in *Samsung Electronics Co., Ltd. v. Panasonic Corp. et al.*, C 10-03098 JSW ("Samsung Action"). (*See* FAC ¶¶ 42.) The second amended complaint in that matter, based on the same facts and specifically incorporated here, was dismissed without leave to amend on January 3, 2012 for failure to state a cognizable claim within the statute of limitations.

Plaintiffs, indirect purchasers of the allegedly price-inflated SD Cards, filed this action on March 15, 2011. On February 21, 2012, Defendants jointly moved to dismiss the complaint.

The Court shall address specific additional facts in the remainder of this Order.

LEGAL STANDARD

A motion to dismiss is proper under *Federal Rule of Civil Procedure 12(b)(6)* where the pleadings fail to state a claim upon which relief can be granted. The complaint is construed in the light most favorable to the non-moving party and all material allegations in the complaint are taken to be true. *Sanders v. Kennedy, 794 F.2d 478, 481 (9th Cir. 1986)*. However, **[*6]** even under the liberal pleading standard of *Federal Rule of Civil Procedure 8(a)(2)*, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citing *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986))*.

Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but must instead allege "enough facts to state a claim to relief that is plausible on its face." *Id. at 570*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 556*). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.... When a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement **[*7]** to relief." *Id.* (quoting *Twombly, 550 U.S. at 556-57*) (internal quotation marks omitted). If the allegations are insufficient to state a claim, a court should grant leave to amend, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990)*; *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 246-47 (9th Cir. 1990)*.

ANALYSIS

A. Antitrust Causes of Action Are Barred by the Statute of Limitations.

Under the Clayton Act, *15 U.S.C. section 15b*, private antitrust claims are subject to a four-year statute of limitations. *See Hennegan v. Pacifico Creative Serv., Inc., 787 F.2d 1299, 1300 (9th Cir. 1986)*. "A civil cause of action under the [antitrust laws] arises at each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time." *AMF, Inc. v. General Motors Corp., 591 F.2d 68, 70 (9th Cir. 1979)* (quoting *Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1270 (9th Cir. 1975)*.

Although generally a cause of action accrues and the statute of limitations begins to run at the time a defendant commits an action that injures plaintiff's business, in the **[*8]** context of a continuing conspiracy, this has been construed to mean that "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." *AMF, Inc. v. General Motors Corp., 591 F.2d 68, 71 (9th Cir. 1979)*. In this way, the continuing violations doctrine can save an otherwise barred claim. In ***antitrust law***, "[a] continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured." *Pace Industries, Inc. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir. 1987)* (citation omitted). It is clear, however, that "a continuation of harm to plaintiffs alone will not keep the cause of action alive without some overt act or continuing conduct of defendants during the limitations period." *Electroglas, Inc. v. Dynatex Corp., 497 F. Supp. 97, 105 (N.D. Cal. 1980)*. [1] "When a continuing violation exists, the limitations period runs from the 'last overt act' by the defendant, which must be (1) a new and independent act that is not merely a reaffirmation of a previous **[*9]** decision that (2) inflicts a 'new and accumulating' injury on the plaintiff." *Red Lion Medical Safety Inc. v. Ohmeda, Inc., 63 F. Supp. 2d 1218, 1223 (E.D. Cal. 1999)* (citing *Pace Industries, 813 F.2d at 238*).

In their First Amended Complaint, Plaintiffs in this action allege the same basic underlying facts as those that were dismissed in the related Samsung Action. Similarly, as this Court found there, Defendants' allegedly unlawful conduct occurred well beyond the statute of limitations period lapsed. According to both complaints, this conduct caused permanent cost differentials **[*10]** at that time. This Court, in the Samsung Action, found that the underlying facts did not create a continuing violation that restarted the statute of limitations period.

In the Ninth Circuit, "[a] cause of action in antitrust accrues each time a plaintiff is injured by an act of the defendant and the statute of limitations runs from the commission of the act." *Pace, 813 F.2d at 237*. Further damages accrued by plaintiffs do not restart the statute of limitations period, even if the injuries are continuing. *See id.* The "statute of limitations is not extended by continued sales at an allegedly monopolistic price because the 'monopolist's simple charging of its profit-maximizing price is a naturally expected consequence of a monopoly and can hardly be said to be [an] independent [act].'" *Kaiser Foundation v. Abbott Laboratories, 2009 U.S. Dist. LEXIS 107512, 2009 WL 3877513, at *7 (C.D. Cal. Oct. 8, 2009)* (quoting II Areeda & Hovenkamp, ***Antitrust Law***, ¶ 320c4, at 298-99 (3d ed. 2007)). The "statute of limitation runs from the time of commission of the act, notwithstanding that high prices may last indefinitely into the future." *See id.*

Plaintiffs contend that, as consumers of SD Cards who did not suffer any injury until **[*11]** they more recently purchased the cards at supra-competitive prices, they cannot have made a claim until defendants actually extracted an excessive price. However, the Court is not persuaded by the distinction between consumers in this action and competitors in the Samsung Action. The statute of limitations, on a continuing violation theory, runs from the time of the last overt act made by the defendant, not from the last purchase made by a potential plaintiff. Should the Court find otherwise, there would essentially be no statute of limitations bar to indirect purchaser claims. As the Areeda treatise explains, if "mere[ly] charging ... a monopoly price constitutes a 'continuing violation' tolling the statute, then we have indefinitely lengthened the statute of limitation." *Id.* (citing Areeda at ¶ 320c, at 286).

Accordingly, the Court finds, based on the same or similar facts underpinning Plaintiffs' claims in this matter and the related and incorporated claims in the Samsung Action, that Plaintiffs' antitrust claims fall outside the statute of limitations period and are therefore dismissed.

B. Remaining Claims Are Barred.

In addition, Plaintiffs' state antitrust claims fall outside the **[*12]** statute of limitations period for all of the same reasons applicable to its federal antitrust claims. *See* *Cal. Bus. & Prof. Code § 16750.1*; *Corwin v. Los Angeles Newspaper Service Bureau, Inc., 4 Cal.3d 842, 852-53, 94 Cal. Rptr. 785, 484 P.2d 953 (1971)* (Cartwright Act interpreted consistently with Sherman Act).

Plaintiffs allege a claim for unfair competition under *California Business and Professions Code § 17200* ("*Section 17200*") which prohibits unfair competition, including "any unlawful, unfair or fraudulent business act or practice." Plaintiff claims to have suffered injury from a competitor's unlawful business act or practice. (FAC ¶¶ 140-152.) An

[1] Any harm that accrues after the tolling of the statute of limitations periods but that is associated with an overt act that occurred prior to the limitations period is not remediable. However, "each separate cause of action that so accrues [during the statute of limitations period] entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338-39, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*.

action based on *Section 17200* "borrows" violations of other laws and treats them as unlawful practices. *Chabner v. United Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000)*.

The "unlawful" prong of *Section 17200* prohibits "any practices forbidden by law, be it civil criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-39, 33 Cal. Rptr. 2d 438 (1994)* (internal quotation omitted). Because the Court has concluded that Plaintiffs have failed to state a claim under any independent law, the Court similarly finds **[*13]** that Plaintiffs have failed to state a claim under *Section 17200* for unlawful business practices and dismisses the claim.

Lastly, because the Court finds that Plaintiffs fail to state a claim under either federal or State law, their last claim for unjust enrichment and disgorgement of profits fails to state a claim for damages.

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' motion to dismiss the entirety of the First Amended Complaint. Having been given previous three chances to amend the complaint in the related matter based on the same set of facts and having dismissed this once-amended complaint based entirely on an issue of law, the Court finds that it is appropriate to dismiss the complaint without leave to amend.

A separate judgment shall issue and the clerk may close the file.

IT IS SO ORDERED.

Dated: May 21, 2012

/s/ Jeffrey S. White

JEFFREY S. WHITE

UNITED STATES DISTRICT JUDGE

Weco Supply Co. v. Sherwin-Williams Co.

United States District Court for the Eastern District of California

May 25, 2012, Decided; May 25, 2012, Filed

1:10-CV-00171 AWI BAM

Reporter

2012 U.S. Dist. LEXIS 73255 *; 2012 WL 1910078

WECO SUPPLY COMPANY, INC., a California corporation, Plaintiff, v. THE SHERWIN-WILLIAMS COMPANY, Defendant. AND RELATED CROSS-ACTION

Subsequent History: Supplemented by, Summary judgment granted by *Weco Supply Co. v. Sherwin-Williams Co., 2012 U.S. Dist. LEXIS 110659 (E.D. Cal., Aug. 6, 2012)*

Prior History: *Weco Supply Co. v. Sherwin-Williams Co., 2012 U.S. Dist. LEXIS 57395 (E.D. Cal., Apr. 24, 2012)*

Core Terms

paint, Jobber, trade secret, Products, unfair, summary judgment, discontinue, contends, prices, end user, good faith, breached, Practices, customers, parties, genuine issue of material fact, best efforts, product line, termination, unfair competition, manufactured, purchasing, covenant, supplier, alleges, contractual obligation, opposing party, fair dealing, undisputed, announced

Counsel: **[*1]** For Weco Supply Company, Inc., a California corporation, Plaintiff, Cross Defendant: Scott D. Laird, LEAD ATTORNEY, Wanger Jones Helsley PC, Fresno, CA.

For Sherwin-Williams Company, an unknown business entity, Defendant, Cross Claimant: Joseph C Owens, LEAD ATTORNEY, Lewis Brisbois Bisgaard & Smith LLP, Los Angeles, CA.

Judges: Anthony W. Ishii, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: Anthony W. Ishii

Opinion

ORDER ON DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES

(Doc. 47)

INTRODUCTION

This is a business dispute between Plaintiff Weco Supply Company, Inc. ("Weco") and Defendant The Sherwin-Williams Company ("Sherwin-Williams"). Weco filed the initial action against Sherwin-Williams in Fresno County Superior Court on December 22, 2009. Sherwin-Williams filed a cross-complaint. On February 2, 2010, Sherwin-Williams removed the action to federal court on the basis of diversity jurisdiction. Sherwin-Williams filed a First

Amended Cross-Complaint ("FACC") on August 3, **[*2]** 2010, and Weco filed a First Amended Complaint ("FAC") on September 3, 2010. Sherwin-Williams now moves for summary judgment on the FAC and FACC or, in the alternative, summary adjudication of issues. See Court's Docket, Doc. No. 47. Weco has filed an opposition to the motion, and Sherwin-Williams has filed a reply. The matter was taken under submission without oral argument. For the reasons set forth below, Sherwin-Williams' motion is granted in part and denied in part.

BACKGROUND[1]

Plaintiff Weco is a California corporation engaged in the business of selling paint and welding supplies. See AMF No. 1. Defendant Sherwin-Williams is an Ohio corporation engaged in the business of manufacturing and distributing paint products. See Notice of Removal; AMF No. 4. For over thirty years, Weco purchased Sherwin-Williams manufactured paint for resale to its customers. See AMF No. 4. In 2002, Weco and Sherwin-Williams entered into a written agreement for the distribution of Sherwin-Williams paint products, referred to as a Direct **[*4]** Jobber Agreement (the "Jobber Agreement"). See UMF No. 1. The Jobber Agreement states "[Weco] shall exercise its best efforts to market the Products to End Users and to promote the goodwill and market reputation of [Sherwin-Williams] and the Products." See UMF No.2; FAC, Ex. A ¶ 2c. Among other things, the Jobber Agreement reserves to Sherwin-Williams the right to "sell Products directly to any jobber and/or any End User in any geographical area including the same geographical area serviced by [Weco]." See UMF No. 4; FAC, Ex. A ¶ 4b. The Jobber Agreement sets forth the following limitation of remedies clause:

> [Sherwin-Williams] shall in no event be be liable to [Weco] or to any other person claiming through [Weco], whether in contract, tort, strict product liability or otherwise, for indirect, special, incidental or consequential damages, loss of profits, demurrage, or penalties arising from any cause whatsoever.

UMF No. 7; FAC, Ex. A ¶ 6b.

Two automotive body shops, Mastercraft and Color Glow, were Weco's key customers. Mastercraft and Color Glow purchased large quantities of Sherwin-Williams' "Western" product line from Weco. See UMF No. 8; AMF No.15. In the year preceding January 2007, **[*5]** Weco purchased more "Western" paint from Sherwin-Williams, than other Sherwin-Williams product line. See DRAMF Nos. 18, 19. Weco also purchased smaller quantities of the Sherwin-Williams "Ultra" product line [2] to sell to Mastercraft and Color Glow. AMF No. 19; Sorensen Decl. ¶ 17; DRAMF No. 18, 19. Sherwin-Williams sold "Western" paint to Weco for 23% off the jobber price, plus an additional 9% off if Weco purchased in bulk. See UMF No. 32. Weco, in turn, sold the Sherwin-Williams "Western" paint to Mastercraft and Color Glow at a profit margin of 15% to 18%. UMF No. 35. Sherwin-Williams was aware of the prices Weco charged Mastercraft and Color Glow, and, as Weco's supplier, it necessarily knew Weco's paint acquisition costs. PRUMF No. 29; Sorensen Decl. ¶ 19. However, Weco undertook efforts to keep its pricing and cost information secret from the general public and its competitors. PRUMF No. 29; Sorensen Decl. ¶ 19.

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[1] "DUMF" refers to the Amended Separate Statement of Undisputed Material Facts and Supporting Evidence in Support of Defendant's Motions for Summary Judgment, or, in the alternative Summary Adjudication of Issues. See Court's Docket, Doc. No. 50. "AMF" refers to Weco's Statement of Additional Disputed Material Facts. See id., Doc. No. 57-1. "PRDUMF" refers to Weco's Response to Sherwin-Williams' Amended Separate Statement of Undisputed Material Facts. See id. "DRAMF" refers to Sherwin-Williams' Response to Weco's Additional Disputed Facts. See id. Doc. No. 60-1. The Court will note any factual disputes where they exist, and, for purposes of summary judgment, will construe any ambiguities in the light most **[*3]** favorable to Weco, the non-moving party. See *Stegall v. Citadel Broad, Inc., 350 F.3d 1061, 1065 (9th Cir. 2003)*.

The Court notes Weco has filed written objections to the Declarations of Harvey Hill, William Turner, and Robert Latunski filed in support of the motion to dismiss. See Court's Docket, No. 57-2. Sherwin-Williams has filed written objections to the Declaration of John Sorensen filed in support of Weco's Opposition. See Court's Docket, Doc. No. 61. To the extent the facts set forth in the declarations are disputed, the Court does not rely on them, and therefore makes no rulings on the evidentiary objections, at the summary judgment stage.

[2] Weco contends the "Ultra" product line is Sherwin-Williams "top-of-the-line" automotive paint and is much more expensive than the "Western" product line. See AMF No. 20; Sorensen Decl. ¶ 7.

From time to time, William Turner, a Sherwin-Williams representative, visited the **[*6]** Mastercraft and Color Glow facilities to provide technical support and sales information. See UMF No. 49; Turner Decl. ¶¶ 3, 20. On these visits, Mr. Turner acted as Weco's supplier, not as a direct seller to Mastercraft and Color Glow. See PRDUMF No. 49; Sorensen Decl.¶ 20. Weco was aware, however, that from time to time, prior to January 2007, Mastercraft and Color Glow purchased some paint directly from the Sherwin-Williams store located in Fresno. See Sorensen Depo. 136:21-137:14.

In or about January 2007, Sherwin-Williams announced it was discontinuing the "Western" paint line and intended to replace it with another line of paint. See UMF Nos. 10, 11; Turner Decl. ¶10; PRUMF No. 11; Sorensen Depo. 100:3-13; 112:17-21. Sherwin-Williams contends its purpose in discontinuing the "Western" product line was to introduce a higher quality paint that was more compliant with California's legal limits on volatile organic compounds ("VOCs"). See UMF No. 13; Latunski Decl. ¶ 7. Weco responded to the announcement by placing a large order [3] for "Western" paint from Sherwin-Williams in late January 2007, in order to meet the continued demand of Mastercraft and Color Glow. See AMF Nos. 29, 30. **[*7]** Weco also met with Mastercraft and Color Glow to inform them that the "Western" product line was being discontinued, and to explore substitute paint lines, including alternative Sherwin-Williams paints, to meet their demand once Weco's supply of "Western" paint was exhausted. See AMF No. 31; Sorensen Decl. ¶ 13; DRAMF No. 31.

Sherwin-Williams contends Weco was attempting to sell Mastercraft and Color Glow other manufacturers' products [4] to replace Sherwin-Williams products. See UMF Nos. 16, 17, 19; Desai Depo. 46:7-49:11; Barcellos Depo. 66:16-67:12. Thereafter, Sherwin-Williams offered to sell paint directly [5] to Mastercraft and Color Glow. See UMF Nos. 20, 21; Turner Decl. ¶ 8. Before Color Glow started purchasing directly from Sherwin-Williams, it provided Sherwin-Williams with a copy of Weco's price list [6] for Sherwin-Williams paint. See UMF No. 28; Desai Depo. 26:21-27:10. The prices Sherwin-Williams offered to Mastercraft and Color Glow were intended to compete with Weco's offer to sell paint manufactured by Matrix. See UMF No. 22; Latunski Decl. ¶ 4; Turner Decl. ¶ **[*8]** 8.

After Sherwin-Williams made the offer to sell directly to Mastercraft and Color Glow, Color **[*9]** Glow agreed to purchase its paint requirements directly from Sherwin-Williams. See UMF No. 25; PRUMF No. 25; Desai Depo. 20:16-22:21. Mastercraft continued to purchase the "Western" line from Weco, but eventually began purchasing directly from Sherwin-Williams for some of its paint needs. See UMF Nos. 26, 27. The prices Sherwin-Williams charged Mastercraft and Color Glow for "Western" paint were less than the prices charged by Weco. See AMF No. 34; DRAMF No. 34. Weco was forced to sell Mastercraft the remaining "Western" paint from the large January 2007 order at the price Sherwin-Williams had quoted to Mastercraft, which cut into Weco's profit margin and caused it to lose business to its former supplier. See PRUMF No. 26; Sorensen Depo. 169:6-9; DRAMF No. 55. Sherwin-Williams maintains the price it offered to Mastercraft and Color Glow preserved a profit margin, and that it earned approximately 4% more than the price sold to Weco. See UMF No. 34; Turner Decl. ¶ 10. Weco disputes this, citing the increased number of deliveries Sherwin-Williams had to make to sell a month's worth of paint directly to Mastercraft and Color Glow, compared with making one delivery of a truck-load quantity **[*10]** to Weco, as well as increased fuel costs and extra employee time. See PRDUMF No. 31; Sorensen Decl. ¶ 16. The owner of

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[3] As discussed below, this order is the subject of Sherwin-Williams' counterclaims. See UMF No. 43; PRUMF No. 43.

[4] Weco disputes this and maintains that, in or about 2006, it offered paint manufactured by Matrix as an alternative to Sherwin-Williams "Ultra" paint line, but only after Mastercraft and Color Glow asked for a more affordable alternative, and only so that it wouldn't lose Mastercraft and Color Glow's premium paint business. See PRUMF No. 19; Sorensen Depo. 156:11-158:7; Sorensen Decl. ¶¶ 8, 9. Weco contends it neither wanted nor attempted to replace Sherwin-Williams "Western" paint with any other paint. See AMF No. 22; Sorensen Decl. ¶¶ 8, 9.

[5] Sherwin-Williams contends it began selling directly in order to preserve Mastercraft and Color Glow's business because it viewed Weco as a competitor once Weco began offering other manufacturers' products. See UMF No. 21. Latunski Decl. ¶¶ 4, 8; Turner Decl. ¶¶ 7-8. Weco disputes this and argues Sherwin-Williams offered to sell to Mastercraft and Color Glow because it wanted to "get rid" of its jobbers, and Weco, in particular. See PRUMF No. 21; Barcellos Depo. 43:11-20.

[6] Weco contends Sherwin-Williams already had this information. See Sorensen Decl. ¶19.

Mastercraft has also testified that since 2009, Sherwin-Williams has been raising its prices by 7-10%. See AMF No. 60; Barcellos Depo. 80:24-81:21.

Weco has not paid for the January 2007 order of "Western" paint, totaling $135,083.27. See UMF No. 43; PRUMF No. 43. The unused inventory from that order remains unsold in Weco's warehouse. See Sorensen Decl. ¶ 24. Weco has offered to return the paint to Sherwin-Williams, but the parties dispute whether the Jobber Agreement obligates Sherwin-Williams to accept the unused paint. See AMF Nos. 56, 57; DRAMF No. 56, 57 ; Sorensen Decl. ¶ 24.

LEGAL STANDARD

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; *Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*; *Poller v. Columbia Broadcast System, 368 U.S. 464, 467, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*; *Southern California Gas Co. v. City of Santa Ana, 336 F.3d 885, 888 (9th Cir. 2003)*. The standard that applies to a motion for summary adjudication of issues **[*11]** is the same as that which applies to a motion for summary judgment. See *Fed.R.Civ.P. 56(a)*, *56(c)*; *Mora v. Chem-Tronics, 16 F. Supp. 2d 1192, 1200 (S.D.Cal.1998)*. Under summary judgment practice, the moving party:

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Miller v. Glenn Miller Productions, Inc., 454 F.3d 975, 987 (9th Cir. 2006)*. A fact is material if it could affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Miller, 454 F.3d at 987*.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 288-89, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*; *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.,210 F.3d 1099, 1103 (9th Cir. 2000)*. **[*12]** The opposing party cannot "'rest upon the mere allegations or denials of [its] pleading' but must instead produce evidence that 'sets forth specific facts showing that there is a genuine issue for trial.'" *Estate of Tucker v. Interscope Records, 515 F.3d 1019, 1030 (9th Cir. 2008)* (quoting *Fed. R. Civ. Pro. 56(e)*); *Miller, 454 F.3d at 987*. In attempting to establish the existence of this factual dispute, the opposing party is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. *Rule 56(e)*; *Matsushita, 475 U.S. at 586 n.11*; *First Nat'l Bank, 391 U.S. at 289*; *Miller, 454 F.3d at 987*. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Cline v. Industrial Maintenance Engineering & Contracting Co., 200 F.3d 1223, 1229 (9th Cir. 2000)*, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Anderson, 477 U.S. 248-49*; *In re Caneva, 550 F.3d 755, 761 (9th Cir. 2008)*; **[*13]** *Lindsey v. SLT Los Angeles, LLC, 447 F.3d 1138, 1144 (9th Cir. 2006)*.

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank, 391 U.S. at 290*; *Giles v. General Motors Acceptance Corp., 494 F.3d 865, 872 (9th Cir. 2007)*. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita, 475 U.S. at 587* (quoting *Fed. R. Civ. P. 56(e)* advisory committee's note on 1963 amendments); *International Union of Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985)*.

In resolving the summary judgment motion, the Court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. *Rule 56(c)*; *Poller, 368 U.S. at 468*; *Price v. Sery, 513 F.3d 962, 965 n.1 (9th Cir. 2008)*; *Lockett v. Catalina Channel Exp., Inc., 496 F.3d 1061, 1064 (9th Cir. 2007)*. "[I]n ruling **[*14]** on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in that party's favor.'" *Hunt v. Cromartie, 526 U.S. 541, 552, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999)* (quoting *Anderson, 477 U.S. at 255*); *Miller, 454 F.3d at 987*; *Stegall v. Citadel Broad, Inc., 350 F.3d 1061, 1065 (9th Cir. 2003)*. Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita, 475 U.S. at 587* (citation omitted).

Additionally, the Court has the discretion in appropriate circumstances to consider materials that are not properly brought to its attention, but the Court is not required to examine the entire file for evidence establishing a genuine issue of material fact where the evidence is not set forth in the opposing papers with adequate references. See *Southern Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 889 (9th Cir. 2003)*; *Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001)*.

DISCUSSION

As **[*15]** a preliminary matter, the Jobber Agreement provides that the validity, interpretation, and performance of the contract is governed by Ohio law. See FAC, Ex. A ¶6e. The parties do not challenge this provision. The Court will therefore apply Ohio law to Weco's breach of contract claims, and to Sherwin-Williams' breach of contract counterclaims. Weco also asserts claims under California's unfair competition, unfair trade practices, and trade secrets laws.

First Amended Complaint

A. Unfair Business Practices - *Cal. Business & Professions Code § 17200 et seq.*

California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code § 17200 et seq.*, provides: "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction." *Cal. Bus. & Prof. Code § 17203*. Unfair competition includes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. . ." Id. *§ 17200*. The California Supreme Court has clarified that:

> When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes *section 17200*, the word "unfair" in that section means **[*16]** conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 187, 973 P.2d 527, 544, 83 Cal .Rptr.2d 548, 565 (Cal. 1999). Under the Cel-Tech test, courts look to the federal antitrust laws to evaluate an unfair competition claim. *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc., 178 F.Supp.2d 1099, 1119 (C.D.Cal. 2001)*. Courts have held that a plaintiff cannot prevail on a claim on UCL claim where the "evidence merely indicates harm to its commercial interests, rather than harm to competition." Id. (citing *Sun Microsystems, Inc. v. Microsoft Corp., 87 F.Supp.2d 992, 1001 (N.D.Cal.2000))*. "[A]n act is deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality." *Id. at 1119*.

The FAC's First Cause of Action alleges Sherwin-Williams used unlawful and unfair business practices by marketing directly **[*17]** to Weco's customers and using inside information to undercut Weco's pricing structure. Weco argues that although the Jobber Agreement reserved to Sherwin-Williams the right to sell to end users, it did not authorize Sherwin-Williams to compete directly with Weco. FAC ¶ 15. Rather, Weco contends the long history between the parties established a supplier/jobber relationship with an implicit understanding that while Sherwin-Williams could sell to a Weco end user in its store, it would not compete directly with Weco in its capacity as a jobber.

Here, although Sherwin-Williams' conduct undoubtedly harmed Weco's commercial interests, a factfinder could not reasonably find that Sherwin-Williams engaged in "unfair competition" under the *Cel-Tech* test. Weco presents no evidence tending to show that Sherwin-Williams' conduct raised the price to consumers, harmed allocative efficiency, or diminished the quality of paint sold. In fact, the prices offered by Sherwin-Williams to Mastercraft and Color Glow were lower than the prices offered by Weco. [11] Although there is some evidence that, since 2009, Sherwin-Williams has increased the prices it charges to Mastercraft, there is no evidence that these **[*18]** prices are above competitive levels. Any implied understanding that Sherwin-Williams could sell to end users in its stores, but not directly, is irrelevant to Weco's UCL claims. "It is well-established that a manufacturer or producer has the right to deal with whom he pleases and to select his customers at will, so long as there is no resultant effect which is violative of antitrust laws." *Ricchetti v. Meister Brau, Inc., 431 F.2d 1211, 1214 (9th Cir. 1970)*. Sherwin-Williams' conduct may have been "unfair" in the colloquial sense of the word, but the Court finds no genuine issue of material fact as to whether it was "unfair" within the meaning of the UCL. The Court therefore grants summary judgment on the First Cause of Action.

B. Unfair Practices - *Cal. Business & Professions Code § 17000 et seq.*

The California Unfair Practices Act prohibits "unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair competition is destroyed or prevented." *Cal. Bus. & Prof. Code § 17001*. Under the Unfair Practices Act,

> The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful.

Id. *§ 17045*. Weco alleges Sherwin-Williams provided Mastercraft and Color Glow with unearned discounts and sales on terms and conditions different from those offered to Weco, with the intent to injure Weco's business. FAC ¶¶ 20-23.

Sherwin-Williams contends **[*20]** the Unfair Practices Act does not prohibit offering a discount to meet competing offers from other distributors. Courts have held that a defendant does not violate *§ 17045* where competition was not injured by the defendant's conduct. See *E&H Wholesale v. Glaser Bros., 158 Cal. App. 3d 728, 738-39, 204 Cal. Rptr. 838 (Cal. App. 1984)*; *Design and Office Concepts, Inc. v. Haworth, Inc., 1996 U.S. Dist. LEXIS 23083, 1996 WL 617308, *4 (N.D.Cal. 1996)* (citing *Diesel Electric Sales & Service, Inc. v. Marco Marine San Diego, Inc., 16 Cal. App. 4th 202, 20 Cal.Rptr.2d 62 (Cal.App. 1993)*. Although Weco contends Sherwin-Williams attempted to put it out of business by selling directly to Mastercraft and Color Glow, it is undisputed that Weco continued to compete with Sherwin-Williams by introducing and selling other manufacturers' paint. As discussed above, Weco has failed to allege facts tending to show harm to overall competition as a result of Sherwin-Williams' actions. Accordingly, the Court grants summary judgment on the Second Cause of Action.

C. Misappropriation of Trade Secrets

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[11] Further, Sherwin-Williams maintains it increased its profit margin by selling directly because the prices it charged to end users were greater than the prices it charged to Weco. Sherwin-Williams offers evidence that the packaging of the product remained the same, and there were no increased delivery costs because Mastercraft and Color Glow were added to an existing delivery route. As discussed above, Weco argues Sherwin-Williams necessarily incurred higher **[*19]** costs due to an increased number of deliveries and the attendant increases in fuel and labor costs. However, there is no evidence that these costs would have been greater than the price Sherwin-Williams charged to Mastercraft and Color Glow.

Weco alleges Sherwin-Williams misappropriated trade secrets in violation of the Uniform Trade Secrets Act, *Cal. Civ. Code § 3426 et seq.* To prove misappropriation of trade **[*21]** secrets, a plaintiff must show:

> (1) the existence of subject matter which is capable of protection as a trade secret; (2) the secret was disclosed to the defendant, ... under circumstances giving rise to a contractual or other legally imposed obligation on the part of the disclosee not to use or disclose the secret to the detriment of the discloser; and (3) if the defendant is an employee or former employee of the plaintiff ... the facts alleged must also show that the public policy in favor of the protection of the complainant's interest in maintaining the secret outweighs the interest of the employee in using his knowledge to support himself in other employment.

Globespan, Inc. v. O'Neill, 151 F.Supp.2d 1229, 1235 (C.D.Cal. 2001) (quoting *Cal Francisco Inv. Corp. v. Vrionis, 14 Cal.App.3d 318, 321-22, 92 Cal.Rptr. 201 (1971))*. *California Civil Code § 3426.1(d)* defines a trade secret as information that:

> (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Cal. Civ. Code § 3426.1(d).

"To **[*22]** find misappropriation, California courts require that the trade secret be used by the Defendant or disclosed by the Defendant to a third party." *Globespan, 151 F.Supp.2d at 1235* (citing *Cal. Civil Code § 3426.1(b)*; *Cal Francisco Inv. Corp., 14 Cal.App.3d at 321, 92 Cal.Rptr. 201*). *California Civil Code § 3426.1(b)* defines misappropriation as:

> (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
> (2) Disclosure or use of a trade secret of another without express or implied consent by a person who:
> (A) Used improper means to acquire knowledge of the trade secret; or
> (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:
> (i) Derived from or through a person who had utilized improper means to acquire it;
> (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
> (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
>
> (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that **[*23]** knowledge of it had been acquired by accident or mistake.

Cal. Civ. Code § 3426.1(b).

Weco alleges the trade secrets at issue are its pricing to end users and cost of acquisition. Although a trade secret must not be generally known to the public or to competitors, a trade secret may be disclosed to others if they are obligated to keep that information secret. See *In re Providian Credit Card Cases, 96 Cal. App. 4th 292, 304, 116 Cal. Rptr. 2d 833 (Cal. App. 2002)*. Weco does not dispute that its cost of purchasing Sherwin-Williams paint and its pricing to end users was known to Sherwin-Williams as its supplier. Rather, Weco contends Sherwin-Williams was obligated to preserve the confidentiality of that information due to its longstanding supplier/jobber relationship and mutual understanding with Weco. However, Weco provides no evidence of this understanding, aside from its own declaration stating that Sherwin-Williams had never before marketed directly to Weco's customers, and their business relationship was "more like a partnership than anything." See Sorensen Decl. ¶ 20. This is insufficient to establish a duty of confidentiality. See *F.T.C. v. Publ'g Clearing House, Inc., 104 F.3d 1168, 1171 (9th Cir.1997)* **[*24]** ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact."). Moreover, Weco cites no legal authority, and the Court can find none, for the proposition that a supplier/jobber relationship independently gives rise to a confidential relationship for the purposes of a trade secrets claim. The undisputed facts show that Weco's pricing to end users and costs of acquisition were not trade secrets within the meaning of the Uniform Trade Secrets Act. The Court therefore grants summary judgment on the Fourth Cause of Action in favor of Sherwin-Williams.

D. Intentional Interference with Prospective Economic Advantage

Under California law, in order to prevail on a claim for intentional interference with prospective economic advantage, a plaintiff must prove the following elements:

> (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) **[*25]** economic harm to the plaintiff proximately caused by the acts of the defendant

Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (Cal. 2003) (quoting *Westside Center Associates v. Safeway Stores 23, Inc., 42 Cal.App.4th 507, 521-522, 49 Cal.Rptr.2d 793 (Cal. App. 1996))*. Further, the plaintiff must show that the defendant "engaged in conduct that was wrongful by some legal measure other than the fact of interference itself. *Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal.4th 376, 393, 902 P.2d 740, 751, 45 Cal.Rptr.2d 436, 447 (Cal. 1995)*. An act is "independently wrongful" only if it is "unlawful," meaning it is "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply, 29 Cal. 4th at 1159*.

Weco argues Sherwin-Williams engaged in unfair competition by using intentional and improper methods of taking business from Weco. However, because Weco's claim relies on a violation of the California UCL, Unfair Practices Act, or Uniform Trade Secrets Act, there is no basis for an independently wrongful act. Accordingly, the Court will grant summary judgment as to the Third Cause of Action.

E. Breach of Contract

Weco **[*26]** contends Sherwin-Williams breached the Jobber Agreement by announcing it would discontinue the "Western" line of paint, and by refusing to repurchase or accept the return of Weco's unused product. Under Ohio law:

> To succeed on a breach-of-contract claim, all of the following elements must be proven: (1) that a binding contract or agreement exists, (2) that the asserting party performed their contractual obligations, (3) that the party against whom the claim is asserted failed to fulfill its contractual obligations without legal excuse, and (4) that the asserting party suffered damages as a result.

Ireton v. JTD Realty Invests., L.L.C., 162 Ohio Misc.2d 1, 16, 2010 Ohio 6692, 944 N.E.2d 1238, 1250 (Ohio Com. Pl. 2010) (citing *Garofalo v. Chicago Title Ins. Co., 104 Ohio App.3d 95, 108, 661 N.E.2d 218 (1995))*. "Ohio has applied the rule that 'contracts must be given a just and reasonable construction in order to carry out the presumed intent of the parties.'" *Butler-Peak v. Cunningham, 138 Ohio App.3d 334, 340, 741 N.E.2d 219, 223 (Ohio App. 2000)* (quoting *E.S. Preston Associates, Inc. v. Preston,, 24 Ohio St.3d 7, 10, 24 Ohio B. 5, 492 N.E.2d 441, 444-445 (Ohio 1986))*.

The parties do not dispute that the Jobber Agreement **[*27]** is a binding contract. Rather, Sherwin-Williams contends Weco breached its contractual obligation to use best efforts to market Sherwin-Williams paint by marketing another manufacturer's paint to Mastercraft and Color Glow. The Jobber Agreement provides that "[Weco] shall exercise its best efforts to market the Products to End Users and to promote the goodwill and market reputation of [Sherwin-Williams] and the Products." See FAC, Ex. A, ¶ 2c. Weco contends it exercised "best efforts" after Sherwin-Williams announced it would discontinue the "Western" product line by purchasing as much "Western" paint as possible in order to continue marketing as much Sherwin-Williams paint as it could. The Jobber Agreement is ambiguous as to what constitutes "best efforts " in Paragraph 2c. Although contract interpretation is generally a question of law, where a contract is ambiguous the parties' intent is a question of fact. See *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC, 138 Ohio App.3d 57, 74, 740 N.E.2d 328 (Ohio App. 2000)*; *U.S. Fid. & Guar. v. Aultman St. Elizabeth Med. Ctr., 129 Ohio App.3d 45, 55, 716 N.E.2d 1201 (Ohio App. 1999)*. The

Court finds there is a genuine issue of material **[*28]** fact as to the parties' intent in Paragraph 2c of the Jobber Agreement.

The Jobber Agreement states that "[Sherwin-Williams] hereby appoints [Weco] as a nonexclusive jobber of these automotive refinish products that are specifically designated on Exhibit A, which is attached hereto and incorporated by reference (collectively referred to herein as the 'Products')." See FAC, Ex. A., ¶ 1a. Exhibit A to the Jobber Agreement lists "Sherwin-Williams Products" and "Western Products," with checkmarks placed next to certain products in each category. See id., Ex. A to Jobber Agreement. Paragraph 3a of the Jobber Agreement provides that Sherwin-Williams "shall maintain an adequate stock of Products to service the needs of [Weco]." See id. ¶ 3a. Weco reads this provision to prohibit Sherwin-Williams from discontinuing the "Western" product line. Sherwin-Williams contends the parties did not intend Paragraph 3a to preclude Sherwin-Williams from discontinuing one product and replacing it with another. [12] However, even construing Paragraph 3a in the light most favorable to Weco, it is undisputed that after Sherwin-Williams announced it would discontinue the "Western" line, Weco was able to place **[*29]** a large order for that paint so it could continue to meet its customers' demands. See AMF No. 29; PRUMF No. 21; Sorensen Decl. ¶¶ 12, 13; Sorensen Depo. 187:24-188:8; Turner Decl. ¶¶ 9-10. Moreover, Weco itself argues that Sherwin-Williams reinstated the "discontinued" paint. [12] See AMF No. 54; Sorensen Decl. ¶ 23. Weco cannot have it both ways. The undisputed facts do not suggest that Sherwin-Williams failed to "maintain an adequate stock of Products to service the needs of [Weco]." See FAC, Ex. A., ¶ 3a. Therefore, a reasonable factfinder could not find that Sherwin-Williams breached the Jobber Agreement by its announcement that it would discontinue the "Western" product line.

Weco also alleges Sherwin-Williams breached the Jobber Agreement by refusing to repurchase or accept the return of Weco's unused product. Weco contends Sherwin-Williams terminated the Jobber Agreement by entering into direct competition with Weco. The Jobber Agreement provides:

> In the event of termination of this Agreement by [Weco] for any reason . . .[Sherwin-Williams] shall have the right, but not the obligation, to repurchase [Weco]'s inventory of unopened and salable packages or cans of Products . . .

Id. ¶ 5d.

> In the event of termination of this Agreement by [Sherwin-Williams] for any reason other than those stated in subsection (i) or (ii) paragraph (d) above, [Weco] may return for a credit all unopened and salable packages of Products **[*31]** except those Products that are deemed unsalable by SW in its sole discretion . . .

Id., ¶ 5e. With respect to termination, the Jobber Agreement provides, "[i]f this Agreement is breached by [Sherwin-Williams] or [Weco], the non-breaching party may terminate this Agreement immediately by sending written notice to the breaching party." FAC. Ex. A, ¶ 5b. Reading Paragraphs 5b and 5e together, the plain language provides that termination in the event of a breach requires written notice by the non-breaching party, and that Weco is only entitled to return products where the agreement is terminated by Sherwin-Williams. Here, there is no evidence of a written notice of termination from either party that would trigger the repurchase provisions in Paragraphs 5d and 5e. The Court therefore finds that Sherwin-Williams' alleged refusal to repurchase or accept the return of Weco's inventory cannot form the basis for a breach of contract claim.

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[12] Sherwin-Williams also contends its decided to discontinue the "Western" line in order to comply with government clean air regulations. Under Ohio law, "[w]here performance of a contractual promise is rendered impossible by the law, nonperformance is excused." *Toledo Police Patrolmen's Assn., Local 10, IUPA v. Toledo, 94 Ohio App.3d 734, 739, 641 N.E.2d 799, 802 (Ohio App. 1994)*. However, there is no evidence that the "Western" paint line violated any specific regulations, only that Sherwin-Williams discontinued **[*30]** the "Western" line to replace it "with higher quality paint lines, which were also more compliant with increasingly stringent limitations on Volatile Organic Compounds, or VOC's." Latunski Decl. ¶ 7. Thus, there is no evidence that it was "impossible" to maintain an adequate stock of the "Western" products to service Weco's needs.

[12] However, it is undisputed that Sherwin-Williams "eventually" discontinued the "Western" line. See UMF No. 44; PRUMF No. 44.

Because there is no genuine issue of material fact as to whether Sherwin-Williams breached the terms of the Jobber Agreement, the Court will grant summary judgment on the Fifth Cause of Action.

F. Breach of the Implied Covenant of Good Faith and Fair Dealing

Weco **[*32]** alleges Sherwin-Williams breached the implied covenant of good faith and fair dealing by discontinuing the "Western" paint line, contacting Weco's customers directly, offering to sell "Western" paint to those customers directly, and then later reversing its decision to discontinue the Western paint line. Weco argues that many aspects of the business relationship between the parties were understood from the parties' history and implied in the Jobber Agreement, including the understanding that Sherwin-Williams would not compete directly with Weco, its jobber. Sherwin-Williams contends Weco cannot prove a breach of the implied covenant of good faith and fair dealing for the same reasons it cannot prove breach of contract. Sherwin-Williams further contends that selling to end users did not breach the implied covenant because Paragraph 4b of the Jobber Agreement expressly reserved to it the right to sell to end users. Finally, Sherwin-Williams maintains the allegation that it reversed its decision to discontinue the Western paint line is factually incorrect. [13]

Under Ohio law, a contract "has an implied covenant of good faith and fair dealing that requires not only honesty but also reasonableness in the enforcement of the contract." *Littlejohn v. Parrish, 163 Ohio App.3d 456, 463 2005 Ohio 4850, 839 N.E.2d 49, 54 (Ohio App. 2005)*.

> As stated by the Restatement Second of Contracts, 'Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.' It also states that bad faith may consist of inaction, or may be the 'abuse of power to specify terms, or interference with or failure to cooperate in the other party's performance.'

Id. "Good faith is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could have not been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties." *Ed Schory & Sons, Inc. v. Soc. Natl. Bank, 75 Ohio St. 3d 433, 443-44, 1996 Ohio 194, 662 N.E.2d 1074 (Ohio 1996))*. **[*34]** Therefore, the Court finds the Jobber Agreement contains an implied duty for the parties to act in good faith and deal reasonably with each other.

In Ohio, breach of the implied covenant of good faith and fair dealing is not a separate tort, but rather is analyzed as a breach of contract claim. In other words, "a party can be found to have breached its contract if it fails to act in good faith." *Littlejohn, 163 Ohio App. 3d at 463, 839 N.E.2d at 54*. There is a genuine issue of material fact as to whether Sherwin-Williams acted in bad faith. Viewing the evidence in the light most favorable to Weco, the non-moving party, a reasonable factfinder could determine that Sherwin-Williams took advantage of Weco, or interfered with Weco's performance of the Jobber Agreement in a way that could not have been contemplated at the time of drafting, by selling directly to Weco's customers. [14] Further, as discussed above, there is also a genuine issue of

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[13] In light of the parties' briefs, the court assumes that under Ohio law summary judgment based on an alleged breach of a contract's **[*33]** express terms does not automatically require dismissal of a breach of contract claim premised on the implied covenant of good faith and fair dealing. In the event Ohio law is to the contrary, the court will give leave to file a supplemental dispositive motion.

[14] To the extent Sherwin-Williams seeks to enforce the limitation of remedies clause **[*35]** with respect to Weco's claim for breach of the implied covenant of good faith and fair dealing, the Court finds that the clause is unconscionable under Ohio law. "Limitation-of-liability clauses are viewed critically, but may be freely bargained for in Ohio and will be enforced 'absent important public policy concerns, unconscionability, or vague and ambiguous terms.'" *Doe v. SexSearch.com, 551 F.3d 412, 419 (6th Cir. 2008)*. The Supreme Court of Ohio has held that "[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Lake Ridge Academy v. Carney, 66 Ohio St. 3d 376, 383, 613 N.E.2d 183 (1993)*. Here, the limitation of liability clause is unreasonably favorable to Sherwin-Williams because it gives Weco no recourse for any wrongful act against it, related to the Jobber Agreement or not, and whether intentional or not. See FAC, Ex. A ¶ 6b. Weco also contends that the Jobber Agreement was not negotiated, and that after twenty-seven years of business, Weco was faced with the decision between signing the

material fact as to whether Weco used "best efforts" to perform its contractual obligations. Therefore, the Court will deny summary judgment as to the Sixth Cause of Action.

First Amended Cross-Complaint

A. Breach of Written Contract

To prove a claim for breach of contract under Ohio law, a party must show: "(1) that a binding contract or agreement exists, (2) that the asserting party performed their contractual obligations, (3) that the party against whom the claim is asserted failed to fulfill its contractual obligations without legal excuse, and (4) that the asserting party suffered damages as a result. See *Ireton v. JTD Realty Invests., L.L.C., 162 Ohio Misc.2d at 16, 944 N.E.2d at 1250*. In the FACC, Sherwin-Williams asserts a breach of contract counterclaim against Weco for failure to pay for paint products delivered. [15] See FACC ¶¶ 4-9. Sherwin-Williams also contends Weco breached the provision of the Jobber Agreement requiring Weco to use "best efforts" to market Sherwin-Williams products. It is undisputed that Weco ordered and received $135,083.27 worth of paint from Sherwin-Williams in January and/or February 2007. Weco does not dispute it has refused to pay for that paint. "When the facts presented **[*37]** in a case are undisputed, whether they constitute a performance or a breach of the contract, is a question of law for the court." *Luntz v. Stern, 135 Ohio St. 225, 237, 20 N.E.2d 241 (Ohio 1939)*. However, because the Court finds there is a genuine factual dispute as to whether Weco used "best efforts" and whether Sherwin-Williams breached the implied covenant of good faith and fair dealing, the Court will deny summary judgment on the FACC.

CONCLUSION AND ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. Sherwin-Williams' Motions for Summary Judgment, or, in the alternative, Summary Adjudication of Issues are GRANTED IN PART and DENIED IN PART.
2. Summary judgment is GRANTED as to the First, Second, Third, Fourth, and Fifth Causes of Action.
3. Summary judgment is DENIED as to the Sixth Cause of Action.

4. Summary judgment **[*38]** on Sherwin-Williams' First Amended Cross-Complaint is DENIED.

IT IS SO ORDERED.

Dated: May 25, 2012

/s/ Anthony W. Ishii

CHIEF UNITED STATES DISTRICT JUDGE

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agreement or risking the loss of its business **[*36]** relationship with Sherwin-Williams. See Sorensen Decl. ¶ 11. For these reasons, the Court finds that the limitation of remedies clause is unenforceable.

[15] The FACC also asserts counterclaims for "Goods Sold and Delivered" and "Account Stated." FACC ¶¶ 10-15. These causes of action are premised on the same facts as the breach of contract counterclaim and also seek payment of the $135,083.27 allegedly due and owing. Sherwin-Williams makes no argument with respect to its counterclaims for misappropriation of trade secrets or unfair competition.

[Nat'l Supermarkets Ass'n v. Am. Express Travel Servs. Co. (In re Am. Express Merchants' Litig.)]

United States Court of Appeals for the Second Circuit

May 29, 2012, Decided

06-1871-cv

Reporter
681 F.3d 139 *; 2012 U.S. App. LEXIS 10815 **; 2012-1 Trade Cas. (CCH) P77,910; 2012 WL 1918412

IN RE: AMERICAN EXPRESS MERCHANTS' LITIGATION, Italian Colors Restaurant, on behalf of itself and all similarly situated persons, National Supermarkets Association, 492 Supermarket Corp., Bunda Starr Corp., Phoung Corp., Plaintiffs-Appellants, -v.- American Express Travel Related Services Company, American Express Company, Defendants-Appellees.

Prior History: [1]** Following disposition of this appeal on February 1, 2012, an active judge of the Court requested a poll on whether to rehear the case in banc. A poll having been conducted and there being no majority favoring in banc review, rehearing in banc is hereby.

[Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchs. Litig.), 667 F.3d 204, 2012 U.S. App. LEXIS 1871 (2d Cir., 2012)]

Disposition: DENIED.

Core Terms

arbitration, arbitration agreement, class action, costs, federal statute, rights, vindicate, damages, unenforceable, class-action, antitrust, statutory right, en banc, enforcing, prosecute, economically feasible, arbitration costs, attorney's fees, substantive law, quotation, reasons, dicta, holds, arbitration clause, antitrust claim, district court, public policy, unconscionability, invalidate, provisions

Counsel: Gary B. Friedman, Tracey Kitzman, Aaron Patton, Warren Parrino, Friedman Law Group LLP, New York, NY, for Plaintiffs-Appellants.

Bruce H. Schneider, Stroock & Stroock & Lavan, LLP, New York, NY, Julia B. Strickland, Stephen J. Newman, Stroock & Stroock & Lavan LLP, Los Angeles, CA, Michael K. Kellogg, Derek T. Ho, Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, Washington, DC, for Defendants-Appellees.

Judges: Rosemary S. Pooler, Circuit Judge, concurs by opinion in the denial of rehearing in banc. Dennis Jacobs, Chief Judge, joined by José A. Cabranes and Debra Ann Livingston, Circuit Judges, dissents by opinion from the denial of rehearing in banc. José A. Cabranes, Circuit Judge, dissents by opinion from the denial of rehearing in banc. Reena Raggi, Circuit Judge, joined by Richard C. Wesley, Circuit Judge, dissents by opinion from the denial of rehearing in banc.

Opinion by: ROSEMARY S. POOLER

Opinion

[*139] **ORDER**

Concur by: ROSEMARY S. POOLER

Concur

ROSEMARY S. POOLER, *Circuit* ***[**2]*** *Judge*, concurring in the denial of rehearing *en banc*:

I respectfully concur in the denial of the rehearing en banc. I write briefly to emphasize that the limited holding in this case is not governed by the Supreme Court's reasoning in *AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 179 L. Ed. 2d 742 (2011). Concepcion* holds that the Federal Arbitration Act ("FAA") preempts state laws hostile to arbitration, and focuses its analysis on preemption issues. In contrast, analysis in *Amex III* rests squarely on a vindication of statutory rights analysis -- an issue untouched in *Concepcion*.

[*140] *Amex III* strives to give full effect to the Supreme Court's teachings that where a contractual agreement functions "as a prospective waiver of a party's right to pursue statutory remedies," then the contractual agreement may not be enforced. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637, n. 19, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)*; *see also* *Green Tree Fin. Corp. Alabama v. Randolph, 531 U.S. 79, 90, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)*. *Amex III* is carefully cabined to hold that this waiver, on this record, is unenforceable. It creates no broad new rights.

While *Concepcion* addresses state contract rights, *Amex III* deals with federal statutory rights -- a **[**3]** significant distinction. In analyzing *Concepcion*, the Court reasoned that although the FAA's saving clause, *9 U.S.C. § 2*, preserves a generally applicable contract defense, "nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *131 S.Ct. at 1748*. The Court reasoned that invalidating a class waiver would allow a party to an arbitration agreement to demand a class-wide arbitration that is not consensual, thereby making arbitration slower, more formal and more costly, and greatly increasing risks to defendants. *Id. at 750-52*. Because its analysis focused wholly on the issue of preemption of state law by federal law, *Concepcion* is silent on the holdings of the Court's earlier cases which enforce arbitration clauses only when those clauses permit parties to effectively vindicate their federal statutory rights.

In stark contrast, *Amex III* raises a different issue: whether the FAA always trumps rights created by a competing federal statute, as opposed to rights existing under a common law of unconscionability. At issue here is not the right to proceed as a class, but the ability to effectively vindicate a federal **[**4]** statutory right that predates the FAA. Vindication of statutory rights analysis is the method of analysis proposed by the Supreme Court in *Mitsubishi* for addressing whether an arbitration clause will be enforced where the dispute implicates a federal statute. *473 U.S. at 637*; *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)*. This analysis is not foreign to our Court. *See, e.g.,* *Brooks v. Travelers Ins. Co., 297 F.3d 167, 168 (2d Cir. 2002)* (analysis of arbitration agreement required finding that agreement "provide[d] adequately for vindication of federal statutory rights"). There is no indication in *Concepcion* that the Supreme Court intended to overrule its previous holdings.

Mitsubishi holds that parties may agree to prosecute statutory rights via arbitration instead of litigation only where "the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum." *473 U.S. at 637*. *Gilmer* reaffirmed that principle. *500 U.S. at 28*. Nearly ten years later, the Supreme Court cited the proposition again, in *Green Tree Fin. Corp., 531 U.S. at 90*; *see also* *14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 129 S. Ct. 1456, 1474, 173 L. Ed. 2d 398 (2009)* (recognizing principle **[**5]** and stating that "a substantive waiver of federally protected civil rights will not be upheld"). Our sister Circuits also engage in a vindication of rights analysis. *See, e.g.,* *Kristian v. Comcast Corp., 446 F.3d 25, 47-48 (1st Cir. 2006)* (severing as unenforceable provision of arbitration agreement limiting availability of treble damages under antitrust statute); *Hadnot v. Bay, Ltd., 344 F.3d 474, 478 n. 14 (5th Cir. 2003)* (severing restriction on available remedies from arbitration agreement after finding that "ban on punitive and exemplary damages is unenforceable **[*141]** in a Title VII case"); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 657-60 (6th Cir. 2003) (en banc) (deciding when cost-sharing deprives employees of substantive statutory rights); Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1234 (10th Cir. 1999) ("an arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum"); Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1060 (11th Cir. 1998) (holding that arbitration agreement which proscribed award of Title VII damages was unenforceable **[**6]** because it was fundamentally at odds with the purposes of Title VII); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1468, 323 U.S. App. D.C. 133 (D.C. Cir. 1997) ("We do not read *Gilmer* as mandating enforcement of *all* mandatory agreements to arbitrate statutory claims; rather we read *Gilmer* as requiring the enforcement of arbitration agreements that do not undermine the relevant statutory scheme.").

Equally unavailing is any reliance on Coneff v. AT&T, Corp. 673 F.3d 1155, 2012 WL 887598 (9th Cir. 2012). *Coneff* -- like *Concepcion* -- examines when the FAA preempts state contract law. Unlike *Amex III*, the *Coneff* court was not focused on individual plaintiffs lacking an effective means of enforcing their rights. Rather, the question addressed in *Coneff* was, given the small damages awards in any individual arbitration, whether the plaintiffs would have an adequate *incentive* to vindicate their rights. The Ninth Circuit expressly recognized the difference between incentive and ability. Coneff, 673 F.3d 1155, 2012 WL 887598, at *3 n. 3 (distinguishing Amex III, 667 F.3d 204, 218 (2d Cir. 2012) on the ground that in *Amex III* "the *only economically feasible means* for plaintiffs enforcing their statutory rights is via a class action.")(emphasis **[**7]** in original).

Further, in both *Coneff* and *Concepcion* the individual damages awards available to any single plaintiff were small, but fee-shifting provisions ensured that a damaged plaintiff could be made whole. The reason that a plaintiff may not bring suit was not because he would not be likely to recoup his costs, but rather because the small amount of damages was not worth his trouble. In *Amex III*, however, plaintiffs were faced with substantial upfront expenditures to prosecute their antitrust rights -- costs that were only economically feasible if the plaintiffs prosecuted their claims as a class. *Amex I* explained why the Clayton Act's treble-damages and fee-shifting provisions would not make an individual plaintiff whole:

> [Not only is] the trebling of a small individual damages award [] not going to pay for the expert fees Dr. French has estimated will be necessary to make an individual plaintiff's case here, there is an even more important legal consideration that the district court did not consider. In *Crawford Fitting Co. v. J.T. Gibbons, Inc*., the Supreme Court addressed fee-shifting for expert witnesses under Rule 54(d) of the Federal Rules of Civil Procedure in an antitrust **[**8]** case, holding that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of [28 U.S.C.] § 1821(b). . . ." 482 U.S. 437, 439, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987). We note that figure is now set at a $40 per diem. Further, as the plaintiffs assert, there are no provisions "in the rules of any of the arbitral bodies designated [in the Card Acceptance Agreement] that would allow such costs to be awarded where they are not authorized by the applicable fee shifting statute." Even with respect to reasonable attorney's fees, which are shifted under Section 4 of the Clayton Act, the plaintiffs must **[*142]** include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs.

554 F.3d 300, 317-18 (2d Cir. 2009) (footnotes omitted); *see also* 15 U.S.C. § 15.

We need not tarry long in addressing a final concern: that *Amex III* permits plaintiffs to evade enforcement of class action arbitration waivers simply by manufacturing an affidavit or choosing pricey attorneys. The business plaintiffs here are prosecuting antitrust claims that will likely require complex discovery and expert testimony. Other statutory claims may **[**9]** not require such extensive proof. The courts are perfectly capable of doing the analysis necessary to determine if the plaintiffs have made the necessary showing. *See, e.g.,* Adkins v. Labor Ready, Inc., 303 F.3d 496, 502 (4th Cir. 2002) (refusing to strike class arbitration waiver where plaintiff failed to make required showing that he would incur prohibitively high expenses in prosecuting claim individually); Ornelas v. Sonic-Denver T, Inc., 2007 U.S. Dist. LEXIS 6214, 2007 WL 274738, at *6 (D. Colo. Jan. 29, 2007) (refusing to strike class arbitration waiver because the evidence did not demonstrate the costs of pursuing arbitration would effectively "preclude the plaintiff from pursuing his claims"); *see also* Bonanno v. Quizno's Franchise Co., LLC, 2009 U.S. Dist. LEXIS 37702, 2009 WL 1068744, at *16 (D. Colo. April 20, 2009) (enforcing contract clause barring class actions where plaintiffs failed to demonstrate they would incur excessively high costs in proceeding individually). *Amex III* specifically admonishes that each case will need to stand on its own merits.

Amex III gives full effect to a long line of Supreme Court precedent preserving plaintiffs' ability to vindicate federal statutory rights, rather than eviscerating more than 120 **[**10]** years of ***antitrust law*** by closing the courthouse door to all but the most well-funded plaintiffs. For these reasons, I concur in the denial of rehearing en banc.

Dissent by: DENNIS JACOBS, REENA RAGGI

Dissent

DENNIS JACOBS, Chief Judge, with whom Judge CABRANES and Judge LIVINGSTON join, dissenting from the denial of rehearing in banc:

I respectfully dissent from the denial of rehearing in banc.

In 1968, it became law in this Court that, for public policy reasons, federal antitrust claims could not be arbitrated. See *Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827-28 (2d Cir. 1968)*. The Supreme Court rejected that public policy approach in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)*. And in 1991, it reiterated that federal statutory claims can be subject to valid arbitration agreements. See *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)*.

Now the panel opinion in this case uses public policy to hold that arbitration agreements containing class-action waivers are unenforceable when applied to federal statutory claims *if* (as is always so easy to assert) a claim would not be "economically rational" to pursue individually. *In re Am. Express Merchs.' Litig., 667 F.3d 204, 214 (2d Cir. 2012)* **[**11]** (Amex III). The panel opinion thus impairs the Federal Arbitration Act's strong federal policy favoring the enforcement of arbitration agreements, and frustrates the goals of arbitration by multiplying claims, lawsuits, and attorneys' fees. "[T]he longstanding judicial hostility to arbitration agreements," *Gilmer, 500 U.S. at 24*, is undiminished.

* * *

At issue is a provision, of a kind commonly used in arbitration agreements, that bars class actions. The underlying arbitration involves an antitrust claim. In *In **[*143]** re American Express Merchants' Litigation, 554 F.3d 300 (2d Cir. 2009)* (Amex I), the panel held that such a bar ran afoul of the federal substantive law of arbitration because the litigation expense of the antitrust suit--expert testimony, in particular--would render separate arbitrations too expensive. So the panel ruled that a class action may proceed in court notwithstanding the agreement to arbitrate. *Id. at 320*. The Supreme Court granted certiorari and vacated Amex I in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010)*. Am. Express Co. v. Italian Colors Rest*., 130 S. Ct. 2401, 176 L. Ed. 2d 920 (2010)*.

Stolt-Nielsen holds that a party to an arbitration agreement **[**12]** cannot be compelled to submit to class arbitration absent a "contractual basis for concluding that the party *agreed* to do so . . . because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *130 S. Ct. at 1775*. On remand the (by then) two-judge panel reached the same conclusion as in Amex I. See *In re Am. Express Merchs.' Litig., 634 F.3d 187, 199 (2d Cir. 2011)* (Amex II).

Shortly after Amex II was published but before the mandate issued, the Supreme Court decided *AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)*, which holds that state law may not be used to invalidate a class-action waiver in an arbitration agreement on the ground that the only economical way to litigate the claim is through a class action. *Id. at 1748*. After soliciting briefing on the impact of Concepcion, the panel issued its third opinion. In Amex III, the panel yet again concludes that the class-action waiver is unenforceable on the ground that the only effective way to litigate the antitrust claims was by a class action in court. *Amex III, 667 F.3d at 218-19*.

As I **[**13]** undertake to show, the public policy rationale which Amex III relies upon is wrong because: [1] it runs counter to the public policy that the Supreme Court has made paramount in the context of the Federal Arbitration Act ("FAA"); [2] it employs a dubious ground of distinction to overcome Concepcion, which teaches that the FAA does not allow courts to invalidate class-action waivers even if "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," *Concepcion, 131 S. Ct. at 1753*; and [3] the dicta on which the panel precariously relies--that large "arbitration costs" cannot be allowed to prevent a plaintiff from "effectively vindicating" a statutory right--is pulled out of context and distorted.

I

Amex III cannot be squared with the FAA, as it has been applied and explained by the Supreme Court. In banc review is needed because [A] the panel opinion is unbounded and can be employed to defeat class-action waivers altogether; [B] it makes the district court the initial theater of arbitral conflict on the merits (how else does a district court estimate the cost of a litigation?); and [C] it is already working mischief in the district **[**14]** courts.

A

Amex III is a broad ruling that, in the hands of class action lawyers, can be used to challenge virtually every consumer arbitration agreement that contains a class-action waiver--and other arbitration agreements with such a clause. While it purports to require a case-by-case approach, its wording is categorical: "Supreme Court precedent recognizes that the **[*144]** class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action." *Amex III, 667 F.3d at 214*. Thus every class counsel and every class representative who suffers small damages can avoid arbitration by hiring a consultant (of which there is no shortage) to opine that expert costs would outweigh a plaintiff's individual loss.

The breadth of the holding is illustrated in the opinion. Amex III uncritically adopts the affidavit of a paid consultant to find that expert costs would be so high relative to potential damages, that "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action [in court]." **[**15]** *667 F.3d at 218*.

However, *Section 4* of the Clayton Act provides for the recovery of costs, including expert costs, and attorneys' fees. See *15 U.S.C. § 15(a)* ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."). The Amex panel is evidently of the view that the incentivizing fees and cost afforded by the statute would not fully compensate plaintiffs for the costs of pursuing their claims. See *Amex III, 667 F.3d at 218*. But Congress deems these incentives sufficient to encourage private suits. The judgment of Congress in such a matter is entitled to deference, not the panel opinion's dismissive treatment.

Amex III does not vouchsafe what is meant for a suit to be "economically feasible," or when a hypothetical "economically rational" plaintiff might be willing to pursue a claim. *Id. at 218*. It cannot mean that a potential plaintiff must have the opportunity to be made whole and happy by recovery of damages, costs, attorneys' fees, expert charges, etc., because such a result is rarely achieved by even **[**16]** the most successful litigants. Moreover, Amex III demands more than such complete victory; it demands a "risk-of-losing" premium. *Id. at 218* ("Even with respect to reasonable attorney's fees[,] . . . the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs."). This formulation betrays a dominant consideration--that, without the class-action vehicle, no lawyer will be incentivized to pursue these claims. That may be; but Concepcion rejected this very policy rationale. See *Concepcion, 131 S. Ct. at 1753* (rejecting argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," because rules inconsistent with the FAA cannot be imposed "even if desirable for unrelated reasons"); see also *Coneff v. AT&T Corp., 673 F.3d 1155, 1159 (9th Cir. 2012)* (rejecting argument that plaintiffs had insufficient incentive to pursue individual claims as "primarily a policy rationale" that "cannot undermine the FAA").

B

Under the panel opinion, arbitration must now begin in federal court--and be litigated there on the merits in many critical respects. The courtroom **[**17]** inquiry that the panel requires to be undertaken before any class arbitration can in fact take place is searching. Whether a dispute may require expert testimony is a question inseparable from the merits (and raises Daubert and other vexed questions). Without a close inquiry into the merits, no court can decide what expert testimony would be required, or how much discovery is needed. And it cannot be decided whether any **[*145]** discovery or testimony is needed at all without deciding if the claim is dismissible--or such prior questions as the statute of limitations and laches, controlling law, res judicata, etc., etc., not to mention little things like whether the putative class is duly constituted and properly represented, without which there is no class claim.

Under the FAA, however, all those questions are for the arbitrator to decide. See, e.g., *Prima Paint Corp v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)*. By requiring the district court to consider this at the threshold, Amex III effectively displaces arbitration with a trial court proceeding whenever lawyers assert a class claim. (And they will, often.) Even if arbitration is given a green light at the end of the judicial **[**18]** proceeding, the party seeking to arbitrate may have already spent many times the cost of an arbitral proceeding just enforcing the arbitration clause. And the partial list of issues above will create fertile ground for appeal, adding yet more delay, expense, and uncertainty. The predictable upshot is that Amex III will render arbitration too expensive and too slow to serve any of its purposes.

Amex III is incompatible with the FAA. The FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 & n.32 (1983)*. The federal substantive law of arbitration "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Id. at 24*. This is particularly true in light of Concepcion's reaffirmance of the "overarching purpose" of the FAA:

> The overarching purpose of the FAA, evident in the text of *§§ 2*, *3*, and *4*, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental **[**19]** attributes of arbitration and thus creates a scheme inconsistent with the FAA.

Concepcion, 131 S. Ct. 1740, 179 L. Ed. 2d 742.

In the six years Amex has been pending in this Court, its several iterations have been relied upon no fewer than three times in the Southern District of New York alone. See *Raniere v. Citigroup, Inc., No. 11 Civ. 2248, 827 F. Supp. 2d 294, 2011 U.S. Dist. LEXIS 135393, 2011 WL 5881926, at *13 (S.D.N.Y. Nov. 22, 2011)*; *Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950, 2011 U.S. Dist. LEXIS 73200, 2011 WL 2671813, at *2-5 (S.D.N.Y. July 7, 2011)*; *Sutherland v. Ernst & Young, LLP, 768 F. Supp. 2d 547, 550-54 (S.D.N.Y. 2011)*.[1] Given the recurrent influence of Amex, this Court should subject it to in banc review.

That responsibility is even more compelling because the panel opinion now splits with a recent holding of the Ninth Circuit Court of Appeals. See *Coneff v. AT&T Corp., 673 F.3d 1155, 1158 n.2, 1159 n.3 (9th Cir. 2012)*. In Coneff, a putative class of AT&T wireless **[**20]** customers sued AT&T on a variety of claims, including a violation of the Federal Communications Act. *Id. at 1157*. The Ninth Circuit held that *Green Tree Financial Corp. v. Randolph, 531*

[1] These three cases also happen to be the only citations in Amex III that support its "vindication of rights" analysis. See *Amex III, 667 F.3d at 219*. This is of course self-referential: the citation of Second Circuit opinions by the district courts of this Circuit is not a form of endorsement.

U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000), was no obstacle to the enforcement of the arbitration agreement containing a **[*146]** class-action waiver because under the FAA it is irrelevant whether customers "have insufficient incentive" "to vindicate their rights." *Id. at 1159*. (citing *Concepcion, 131 S. Ct. at 1753*).

II

Amex III is thus incompatible with the longstanding principle of federal law, embodied in the FAA and numerous Supreme Court precedents, favoring the validity and enforceability of arbitration agreements. It should come as no surprise, then, that the panel opinion finds no support in the Supreme Court's case law. Instead, Amex III proceeds by selective quotation from Supreme Court dicta, and by aggressive measures to distinguish away the Supreme Court's recent holding in Concepcion.

A

Concepcion, decided after the second iteration of Amex, vindicated the FAA against an unconscionability challenge that was materially indistinguishable from the challenge upheld in Amex. In Concepcion, the Supreme Court rejected a common-law **[**21]** rule, developed by the California Supreme Court, that was applied to void class-action waivers in contracts of all types. This is what the discredited California opinion had said:

> [B]ecause . . . damages in consumer cases are often small and because a company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit, the class action is often the only effective way to halt and redress such exploitation. . . . Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable.

Discover Bank v. Superior Court, 36 Cal. 4th 148, 161, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005) (internal quotation marks, citations, and alterations omitted).

The Supreme Court ruled that this attempt by California to police arbitration agreements was inconsistent with the FAA. *Concepcion, 131 S. Ct. at 1748*. Refuting the dissent's argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," the majority affirmed that rules inconsistent with the FAA cannot be imposed "even if desirable for **[**22]** unrelated reasons." *Id. at 1753*.

After the Amex panel solicited briefing from the parties on the effect of Concepcion, the panel reissued Amex (in the form of Amex III), evading the broad language and clear import of Concepcion. Again in Amex III, the panel found that a class-waiver provision in an arbitration agreement is unenforceable if "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action." *Amex III, 667 F.3d at 218*.

Amex III tries to narrow Concepcion to (in the words of Amex III) a "path for analyzing whether a state contract law is preempted by the FAA." *Amex III, 667 F.3d at 213*. In so doing, Amex III conceives the following distinction: Concepcion decided only whether California's doctrine of unconscionability was preserved by the FAA's savings clause for "grounds as exist at law or in equity for the revocation of any contract," *9 U.S.C. § 2*, whereas Amex III invalidates the arbitration agreement (for the same reason of unconscionability) on the ground that the underlying antitrust claim was federal, a circumstance that the panel dresses up rhetorically as a "federal substantive law of arbitrability," *Amex III, 667 F.3d at 213* **[**23]** (quotation marks omitted). This labored analysis does not rise to a distinction, **[*147]** and treats the reasoning of Concepcion as an obstacle to be surmounted or evaded. Since, as the Supreme Court has held, the FAA preempts even state law that permits evasion of a class action waiver clause, it is hard for me to see any justification for a rule permitting *precisely* the same sort of evasion as part of the "federal substantive law of arbitrability."

B

The panel opinion leans on the distortion of dicta from Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000). In Green Tree, a lender sought to compel a borrower to arbitrate claims she had raised under certain federal statutes. Id. at 83. The question was "whether [her] agreement to arbitrate is unenforceable because it says nothing about the costs of arbitration, and thus fails to provide her protection from potentially substantial costs of pursuing her federal statutory claims in the arbitral forum." Id. at 89. The Court reconfirmed "that federal statutory claims can be appropriately resolved through arbitration," id. at 89, and "rejected generalized attacks on arbitration that rest on a 'suspicion of arbitration as a method of weakening **[**24]** the protections afforded in the substantive law to would be complainants,'" id. at 89-90 (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)). And the challenge failed for want of evidence of the "cost" of the arbitration. Id. at 90.

A passage in dicta (relied upon in Amex III) added that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights." Id. at 90. However, "large arbitration costs" is not a reference to expense generally. Green Tree uses the phrase to reference the cost of *access* to an arbitral forum and is about the price of admission: "payment of filing fees, arbitrators' costs, and other arbitration expenses." Green Tree, 531 U.S. at 84. Only Amex III has suggested that a claim that may be expensive to litigate--whether in court *or* in arbitration--can for that reason be deemed to entail preclusive "arbitration costs." In any event, even if the Green Tree dicta were to have the meaning the panel ascribes to it, it is nonetheless still dicta. And it loses any persuasive power it might once have had in light of the Supreme Court's holding in Concepcion, which is **[**25]** more clear and more recent--and authoritative.

Similarly misleading is the panel's quotation of Mitsubishi, for the proposition that "should clauses in a contract operate 'as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.'" Amex III, 667 F.3d at 214 (quoting Mitsubishi, 473 U.S. at 637 n.19). The Court was there concerned with a hypothetical arbitral panel that might, relying on provisions concerning choice of forum or choice of law, refuse to apply American law to a federal statutory claim. Mitsubishi, 473 U.S. at 637 n.19.

Other circuit cases have excised provisions from arbitration agreements for the precise reasons anticipated by Green Tree and Mitsubishi. See Kristian v. Comcast Corp., 446 F.3d 25, 47-48 (1st Cir. 2006) (severing waiver of treble damages); Hadnot v. Bay, Ltd., 344 F.3d 474, 478 n.14 (5th Cir. 2003) (noting that waiver of exemplary and punitive damages is unenforcable); Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1060 (11th Cir. 1998) **[*148]** (holding that arbitration agreement cannot force a party to arbitrate a statutory right **[**26]** and at the same time bar it from being awarded damages in the arbitral forum). All of these three cases involved an arbitration agreement that entirely foreclosed a *remedy* to which one of the parties was otherwise entitled to seek at law. None of them invalidated an arbitration agreement on the ground that the claims were costly to litigate individually.[2]

In Amex, there is zero evidence that any "arbitration costs"--within the meaning of Green Tree--would hamper the plaintiffs' ability to vindicate their statutory rights. None of the three panel opinions references the size of the filing fees, or any arbitrators' fees that would befall the plaintiffs. In finding that claim-by-claim litigation would not be

[2] Amex III asserts that "[o]ther Circuits permit plaintiffs to challenge class-action waivers on the grounds that prosecuting such claims on an individual basis would be a cost prohibitive method of enforcing a statutory right," Amex III, 667 F.3d at 216-17 (citing In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 285 (4th Cir. 2007); Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 555, 557 (7th Cir. 2003); Adkins v. Labor Ready, Inc., 303 F.3d 496, 502-03 (4th Cir. 2002). Each of those opinions quotes the "prohibitive costs" passage of Green Tree, but none uses the phrase as Amex III uses it--and all find in favor of the party seeking to enforce the arbitration clause. For one thing, the plaintiffs in each case failed to provide non-conclusory cost evidence. Notably, in Livingston and Adkins (upon which Cotton Yarn relies) the plaintiffs **[**27]** had raised the specter of prohibitive arbitration fees--not expenses incident to litigation. See Livingston, 339 F.3d at 557 ("Tellingly, [plaintiffs'] only 'evidence' of prohibitive arbitration costs is an unsubstantiated and vague assertion that discovery in an unrelated arbitration matter disclosed fees of nearly $2,000 per day."); Adkins, 303 F.3d at 503 ("[Plaintiff] does not even provide any evidence about the most basic element of this challenge: the size of the allegedly 'prohibitive' arbitration fee itself."). These cases were thus concerned about the price of admission.

"economically feasible," *Amex III, 667 F.3d at 204*, the panel relies solely on the affidavit of a paid consultant, Gary French, who opined that preparing an antitrust study would cost "at least several hundred thousand dollars, while a larger study can easily **[**28]** exceed $1 million." *Id. at 212*.[3] His preliminary review of the particular claim yielded a guess of nearly one million dollars. Id. However, that is beside the point: The ability to spread costs among a class is only a procedural right, the absence of which cannot render arbitration costs prohibitive. *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)*, is instructive: an employee sought to avoid arbitrating his ADEA claims on the ground that "arbitration is inconsistent with the ADEA." *Id. at 30*. The Supreme Court characterized that argument as "rest[ing] on suspicion of arbitration as a method of weakening the protections afforded in substantive law to would-be complainants, and as such, . . . far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." Id. (internal quotation marks omitted).

Gilmer's argument about the unavailability of class actions was expressly rejected:

> It **[**29]** is also argued that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions. . . . But even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility **[*149]** of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.

Id. at 32 (internal quotation marks omitted). As the passage from Gilmer reflects, the ADEA expressly provides for a collective action; a fortiori, the same result obtains under the antitrust laws, which do not. The only right to an antitrust class action is "merely a procedural one, arising under *Fed. R. Civ. P. 23*, that may be waived by agreeing to an arbitration clause." *Johnson v. W. Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000)* (enforcing, due to absence of congressional intent to the contrary, a bilateral arbitration clause "even though [such clauses] may render class actions to pursue statutory claims . . . unavailable").

JOSÉ A. CABRANES, *Circuit Judge*, dissenting from the denial of rehearing *in banc*:

I concur fully in **[**30]** the thorough opinion of Chief Judge Jacobs dissenting from the denial of *in banc* review. I write separately simply to underscore that the issue at hand is indisputably important, creates a circuit split, and surely deserves further appellate review. This is one of those unusual cases where one can infer that the denial of *in banc* review can only be explained as a signal that the matter can and should be resolved by the Supreme Court.

REENA RAGGI, Circuit Judge, with whom Judge WESLEY joins, dissenting from the denial of rehearing en banc:

I respectfully dissent from the denial of en banc review in this case. The panel decision to hold a class action waiver unenforceable is at odds with *Coneff v. AT&T Corp., 673 F.3d 1155 (9th Cir. 2012)*. This circuit split appears unwarranted in light of controlling Supreme Court precedent for the reasons forcefully advanced by Chief Judge Jacobs in his opinion dissenting from the denial of rehearing en banc. While I identify much merit in the Chief Judge's analysis, I do not join in his opinion because I think it would be useful to have the issues explored further by the full court in the adversarial context of an en banc argument. To the extent a majority **[**31]** of the court maintains this circuit split without further consideration, I must dissent.

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[3] It evidently did not occur to French or the panel that the rules of evidence do not govern arbitration, and that an arbitrator can consult treatises and articles for relevant antitrust and economic principles, and should do so in some cases.

Cathode Ray Tube (CRT) Antitrust Litig. Crago, Inc. v. Chunghwa Picture Tubes, Ltd.

United States District Court for the Northern District of California

May 31, 2012, Decided; May 31, 2012, Filed

No. 07-5944 SC; MDL No. 1917; JAMS Reference No. 1100054618

Reporter
2012 U.S. Dist. LEXIS 189446 *; 2012 WL 9391679

IN RE: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION CRAGO, INC., et al., Plaintiffs, vs. CHUNGHWA PICTURE TUBES, LTD., et al., Defendants. This Document Relates to the DIRECT PURCHASER CLASS ACTION CASES

Subsequent History: Accepted by, in part, Rejected by, in part, Summary judgment granted, in part, summary judgment denied, in part by *In re Cathode Ray Tube (CRT) Antitrust Litig., 911 F. Supp. 2d 857, 2012 U.S. Dist. LEXIS 171180 (N.D. Cal., Nov. 29, 2012)*

Prior History: *Crago, Inc. v. Chunghwa Picture Tubes, Ltd. (In re Cathode Ray Tube (CRT) Antitrust Litig.), 536 F. Supp. 2d 1364, 2008 U.S. Dist. LEXIS 12204 (J.P.M.L., Feb. 15, 2008)*

Core Terms

purchaser, price-fixed, manufacturer, anti trust law, Recommended, decisions, antitrust, products, adhered, cases, suits, indirect, finished product, standing to sue, Clayton Act, Plaintiffs', defendants', conspiracy, overcharge, summary judgment motion, issue of fact, price fixing, pages

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

HN1[] **Clayton Act, Claims**

Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, defines who has standing to sue for a violation of the antitrust laws. It permits suits only by a person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. Suits by persons who did not directly purchase a price-fixed product are barred.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

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

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

HN2[] **Clayton Act, Claims**

The Clayton Act § 4, *15 U.S.C.S. § 15*, is the section of the antitrust laws that authorizes suits in federal court for antitrust violations. The basic standing to sue is defined as any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. A person must be "injured" in order to sue. And he must be injured by something forbidden in the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

HN3[] **Purchasers, Direct Purchasers**

The clear rule of Illinois Brick v. State of Illinois is that only the overcharged direct purchaser and not others in the chain of manufacture or distribution is the party who has standing to sue under antitrust laws. That rule is established in part to avoid the litigation complexities that will otherwise be necessary in making an economic analysis at each level of the manufacture and distribution of a product. The longstanding policy of encouraging vigorous private enforcement of the antitrust laws supports adherence to the rule in Hanover Shoe Inc. v. United Shoe Machinery Corp., under which direct purchasers are not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge. This rule will have the effect of eliminating any recovery by persons further down the chain of distribution who might in fact have been injured.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

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

HN4[] **Clayton Act, Claims**

In the context of antitrust standing under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, the rationales underlying Hanover Shoe Inc. v. United Shoe Machinery Corp. and Illinois Brick v. State of Illinois will not apply with equal force in all cases. Ample justification exists for not to carve out exceptions to the direct purchaser rule for particular types of markets. Even assuming that any economic assumptions underlying the Illinois Brick rule might be disproved in a particular case, it is an unwarranted and counterproductive exercise to litigate a series of exceptions.

Counsel: **[*1]** For Honorable Charles A. Legge, Special Master:Charles A. Legge, LEAD ATTORNEY, JAMS, San Francisco, CA.

For Crago, Inc., on behalf of itself and others similarly situated dba Dash Computers, Inc. a Kansas City corporation, Plaintiff: Bruce Lee Simon, LEAD ATTORNEY, Pearson Simon & Warshaw, LLP, San Francisco, CA; Guido Saveri, LEAD ATTORNEY, Saveri & Saveri, Inc., San Francisco, CA; Ashlei Melissa Vargas, Pearson, Simon & Warshaw LLP, San Francisco, CA; Christopher Wilson, Polsinelli Shughart PC, Kansas City, MO; Clifford H. Pearson, Pearson, Simon & Warshaw LLP, Sherman Oaks, CA; Daniel D. Owen, Shughart Thomson & Kilroy, P.C., Kansas City, MO; Daniel L. Warshaw, Pearson, Simon & Warshaw, LLP, Sherman Oaks, CA; David L. Yohai, Weil, Gotshal, & Manges, LLP, New York, NY; Esther L Klisura, Sher Leff LLP, San Francisco, CA; Jonathan Mark Watkins, Pearson Simon Warshaw & Penny LLP, San Francisco, CA; Patrick John Brady, Polsinelli Shughart, P.C., Kansas City, MO; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Aaron M. Sheanin, Pearson, Simon & Warshaw, LLP, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, **[*2]** P.L.L.P., James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Hawel A. Hawel d/b/a City Electronics, a California business, Plaintiff: Betty Lisa Julian, Modesto, CA; Cadio R. Zirpoli, Saveri & Saveri, Inc., San Francisco, CA; Clinton Paul Walker, Damrell, Nelson, Schrimp, Pallios, Pache & Silva, Modesto, CA; David L. Yohai, Weil, Gotshal, & Manges, LLP, New York, NY; Fred A. Silva, Damrell Nelson Schrimp Pallios, Pacher & Silva, Modesto, CA; Geoffrey Conrad Rushing, Saveri & Saveri Inc., San Francisco, CA; Gianna Christa Gruenwald, Saveri & Saveri, San Francisco, CA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Kathy Lee Monday, Damrell, Nelson, Schrimp, Pallios, Pacher & Silva Modesto, CA; Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Roger Martin Schrimp, Damrell Nelson Schrimp Pallios Pacher & Silva, Modesto, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P., **[*3]** Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Orion Home Systems, LLC, Plaintiff: Cadio R. Zirpoli, Saveri & Saveri, Inc., San Francisco, CA; David L. Yohai, Weil, Gotshal, & Manges, LLP, New York, NY; Geoffrey Conrad Rushing, Saveri & Saveri Inc., San Francisco, CA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Joseph W. Cotchett, Cotchett Pitre & McCarthy LLP, Burlingame, CA; Niki B. Okcu, AT&T Services, Inc. Legal Dept., San Francisco, CA; Randall R. Renick, Hadsell Stormer Richardson & Renick LLP, Pasadena, CA; Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Terry Gross, Gross Belsky Alonso LLP, San Francisco, CA; Adam C. Belsky, Gross Belsky Alonso LLP; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P., James P. McCarthy, Lindquist & Vennum, Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Monique Alonso, Gross & Belsky LLP; Sarah Crowley, Gross Belsky Alonso LLP; Steven Noel Williams, Cotchett **[*4]** Pitre & McCarthy LLP, Burlingame, CA.

For Jeffrey Figone, a California resident, on behalf of himself and all others similarly situated, Plaintiff: Brian Joseph Barry, Law Offices of Brian Barry, Los Angeles, CA; David L. Yohai, Weil, Gotshal, & Manges, LLP, New York, NY; Joseph Mario Patane, Law Office of Joseph M. Patane, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Mario N. Alioto, Trump Alioto Trump & Prescott, LLP, San Francisco, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Veronica Besmer, Besmer Law Firm, Los Angeles, CA.

For Chad Klebs, a Minnesota resident, on behalf of themselves and all others similarly situated, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Christopher Thomas

Micheletti, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; David L. Yohai, Weil, Gotshal, & Manges, LLP, New York, NY; Francis Onofrei Scarpulla, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Jennie Lee Anderson, Andrus Anderson LLP, San Francisco, CA; Judith A. Zahid, Zelle Hofmann Voelbel **[*5]** & Mason, LLP, San Francisco, CA; Lori Erin Andrus, Andrus Anderson LLP, San Francisco, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Patrick Bradford Clayton, Zelle Hofmann Voelbel Mason LLP, San Francisco, CA; Qianwei Fu, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Richard M. Hagstrom, Zelle Hofmann Voelbel Mason & Gette LLP, Minneapolis, MN; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P., James P. McCarthy, Lindquist & Vennum, Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Princeton Display Technologies, Inc., on behalf of itself and all others similarly situated, a New Jersey corporation, Plaintiff: Bryan L. Clobes, LEAD ATTORNEY, Cafferty Clobes Meriwether & Sprengel LLP, Philadelphia, PA; Lee Albert, LEAD ATTORNEY, Glancy Binkow & Goldberg LLP, New York, NY; David L. Yohai, Weil, Gotshal, & Manges, LLP, New York, NY; James E. Cecchi, Carella Byrne Bain Gilfillan Cecchi Stewart & Olstein **[*6]** PC, Roseland, NJ; Lindsey H. Taylor, Carella Byrne Bain Gilfillan Cecchi Stewart & Olstein PC, Roseland, NJ; Marisa C. Livesay, San Diego, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Betsy Carol Manifold, Wolf Haldenstein Adler Freeman & Herz; Francis M. Gregorek, Wolf Haldenstein Adler Freeman & Herz LLP; James M. Lockhart, Lindquist & Vennum, P.L.L.P., James P. McCarthy, Lindquist & Vennum, Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Rachele R. Rickert, Wolf Haldenstein Adler Freeman & Herz LLP.

For Carmen Gonzalez, a California resident, on behalf of herself and others similarly situated, Plaintiff: James McManis, McManis Faulkner, San Jose, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Marwa Elzankaly, McManis, Faulkner, San Jose, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P., James P. McCarthy, Lindquist & Vennum, Jennifer Milici, Boies Schiller and Flexner LLP, Washington, **[*7]** DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Samuel J. Nasto, a Nevada resident, Craig Stephenson, a New Mexico resident, David G. Norby, a Minnesota resident, John Larch, a West Virginia resident, Gary Hanson, a North Dakota resident, on behalf of themselves and all others similarly situated, Plaintiffs: Joel Flom, Jeffries Olson & Flom PA, Fargo, ND; Joseph Mario Patane, Law Office of Joseph M. Patane, San Francisco, CA; Kenneth Leo Valinoti, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio & Simon, Weirton, WV Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J. Mansfield, Mansfield & Tanick, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, **[*8]** Lindquist & Vennum, P.L.L.P.; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Craig Stephenson, a New Mexico resident, David G. Norby, a Minnesota resident, John Larch, a West Virginia resident, Gary Hanson, a North Dakota resident, on behalf of themselves and all others similarly situated, Plaintiffs: Joel Flom, Jeffries Olson & Flom PA, Fargo, ND; Joseph Mario Patane, Law Office of Joseph M. Patane , San Francisco, CA; Kenneth Leo Valinoti, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J. Mansfield, Mansfield & Tanick, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, **[*9]** Lafayette, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; James

P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Margaret Slagle, a Vermont resident, on behalf of herself and all others similarly situated, Plaintiff: Daniel R. Karon, LEAD ATTORNEY, Goldman Scarlato and Karon, PC, Cleveland, OH; Joseph M. Alioto, Sr., LEAD ATTORNEY, Joseph Michelangelo Alioto, Jr, Theresa Driscoll Moore, Alioto Law Firm, San Francisco, CA; Angelina Alioto-Grace, Alioto Law Firm, San Francisco, Ca; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Mary Gilmore Kirkpatrick, Kirkpatrick & Goldborough PLLC, South Burlington, VT; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For **[*10]** Barry Kushner, on behalf of themselves and all others similarly situated, Plaintiff: Joseph M. Alioto, Sr., LEAD ATTORNEY, Joseph Michelangelo Alioto, Jr, Theresa Driscoll Moore, Alioto Law Firm, San Francisco, CA; Angelina Alioto-Grace, Alioto Law Firm, San Francisco, Ca; Daniel R. Karon, Goldman Scarlato and Karon, PC, Cleveland, OH; Daniel Joseph Mulligan, St. James Recovery Services, P.C., San Francisco, CA; Derek G. Howard, Minami Tamaki LLP, San Francisco, CA; Jeffrey D. Bores, Chestnut & Cambronne, Mpls, MN; Karl L. Cambronne, Chestnut & Cambronne, Minneapolis, MN.

For Brian A. Luscher, a Arizona resident, on behalf of himself and all others similarly situated, Plaintiff: Angelina Alioto-Grace, Alioto Law Firm, San Francisco, Ca; Joseph Michelangelo Alioto, Jr, Theresa Driscoll Moore, Alioto Law Firm, San Francisco, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert James Pohlman, Ryley Carlock & Applewhite PC, Phoenix, AZ; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica **[*11]** Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Steven Ganz, a California resident, Plaintiff: John Dmitry Bogdanov, Josef Deen Cooper, Cooper & Kirkham, P.C., San Francisco, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Tracy R. Kirkman, Cooper & Kirkham PC.

For Dana Ross, a California resident, Plaintiff: Kathleen Styles Rogers, LEAD ATTORNEY, San Mateo, CA; Susan Gilah Kupfer, LEAD ATTORNEY, Glancy Binkow & Goldberg LLP, San Francisco, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, **[*12]** MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Brigid Terry, a Wisconsin resident, on behalf of herself and all others similarly situated, Plaintiff: Jean B. Roth, Mansfield Tanick & Cohen, Minneapolis, MN; Joseph Mario Patane, LEAD ATTORNEY, Law Office of Joseph M. Patane, San Francisco, CA; Kenneth Leo Valinoti, LEAD ATTORNEY, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, LEAD ATTORNEY, Law Offices of Lawrence G. Papale, St. Helena, CA; Lawrence P. Schaefer, LEAD ATTORNEY, Mansfield Tanick & Cohen, Minneapolis, MN; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert J. Bonsignore, LEAD ATTORNEY, Bonsignore & Brewer, Belmont, NH; Seymour J. Mansfield, LEAD ATTORNEY, Mansfield & Tanick, Minneapolis, MN; Sherman Kassof, LEAD ATTORNEY, Law Offices of Sherman Kassof, Lafayette, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist **[*13]** & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Southern Office Supply, Inc, on behalf of itself and all others similarly situated, Plaintiff: Gilmur Roderick Murray, LEAD ATTORNEY, Murray & Howard, LLP, San Francisco, CA; Daniel R. Karon, Goldman Scarlato &

Karon, Cleveland, OH; Donna F Solen, Whitfield Bryson & Mason LLP, Washington, DC; Donna F. Solen, Mason Law Firm-Washington, Washington, DC; Drew A. Carson, Miller Goler Faeges, Cleveland, OH; Issac L. Diel, Sharp McQueen, Overland Park, KS; Krishna B. Narine, Schiffrin & Barroway, LLP, Bala Cynwyd, PA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Steven J. Miller, Miller Goler Faeges, Cleveland, OH; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Meijer, Inc., On behalf of themselves and all others similarly situated, Plaintiff: Gregory Keith Arenson, LEAD ATTORNEY, Kaplan Fox & Kilsheimer **[*14]** LLP, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan Kilsheimer & Fox LLP, New York, NY; David Paul Germaine, PRO HAC VICE, Chicago, IL; Gary Laurence Specks, Kaplan Fox & Kilsheimer LLP, Highland Park, IL; Joseph Michael Vanek, PRO HAC VICE, Vanek Vickers & Masini PC, Chicago, IL; Linda P. Nussbaum, PRO HAC VICE, Nussbaum LLP, Scarsdale, NY; Linda Phyllis Nussbaum, Grant & Eisenhofer P.A., New York, NY; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Meijer Distribution, Inc., on behalf of themselves and all others similarly situated, Plaintiff: Gregory Keith Arenson, Robert N. Kaplan, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, New York, NY; David Paul Germaine, PRO HAC VICE, Chicago, IL; Gary Laurence Specks, Kaplan Fox & Kilsheimer LLP, Highland Park, IL; Joseph Michael Vanek, PRO HAC VICE, Vanek Vickers & Masini PC, Chicago, IL; Linda P. Nussbaum, PRO HAC VICE, Nussbaum LLP, Scarsdale, NY; Linda **[*15]** Phyllis Nussbaum, Grant & Eisenhofer P.A., New York, NY; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Arch Electronics, Inc, Plaintiff: Anthony J. Bolognese, LEAD ATTORNEY, Bolognese & Associates LLC, Philadelphia, PA; Gregory Keith Arenson, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, New York, NY; Linda P. Nussbaum, Robert N. Kaplan, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP, New York, NY; Gary Laurence Specks, Kaplan Fox & Kilsheimer LLP, Highland Park, IL; Joshua H. Grabar, Bolognese & Associates, LLC, Philadelphia, PA; Kevin Bruce Love, PRO HAC VICE, Hanzman Criden & Love, P.A., South Miami, FL; Linda Phyllis Nussbaum, Grant & Eisenhofer P.A., New York, NY; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & **[*16]** Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Studio Spectrum, Inc., is a California business, Plaintiff: Steven F. Benz, LEAD ATTORNEY, Kellogg, Huber, Hansen, Todd, Washington, DC; Guido Saveri, LEAD ATTORNEY, David Nathan-Allen Sims, Saveri & Saveri, Inc., San Francisco, CA; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Kory Pentland, a Michigan resident, Plaintiff: Elizabeth Anne McKenna, LEAD ATTORNEY, Milberg LLP, NY, NY; Westerman Law Corp, LEAD ATTORNEY, Executive Committee Member, Los Angeles, CA; Paul F Novak, LEAD ATTORNEY, PRO HAC VICE, Milberg LLP, Detroit, MI; Andrew J. Morganti, Milberg LLP, New York, NY; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Peter G.A. Safirstein, Morgan & Morgan, New York, NY; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, **[*17]** Lindquist & Vennum, Minneapolis, MN.

For Radio & TV Equipment, Inc, is a business headquartered in Fargo, North Dakota, Plaintiff: Lisa J. Rodriguez, LEAD ATTORNEY, Trujillo Rodriguez & Richards LLP, Haddonfield, NJ; Jason Kilene, Gustafson Gluek PLLC, Minneapolis, MN; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Brady Lane Cotton, a Florida resident, Charles Jenkins, a Mississippi resident, Plaintiffs: Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Christina Diane Crow, Jinks, Crow & Dickson P.C., Union Springs, AL; J. Matthew Stephens, Robert G. Methvin, McCallum Methvin & Terrell PC, Birmingham, AL; James Michael Terrell, Robert Gordon Methvin, Jr, McCallum, Methvin & Terrell, P.C., Birmingham, AL; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, **[*18]** P.L.L.P; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lynn W. Jinks, Nathan A. Dickson, Jinks Crow & Dickson PC.

For Colleen Sobotka, a Florida resident, Daniel Riebow, a Hawaii resident, Alan Rotman, a Minnesota resident, Daniel R. Hergert, a Nebraska resident, Adrienne Belai, a New York resident, Rosemary Ciccone, a Rhode Island resident, Frank Warner, a Tennessee resident, Indirect Purchaser Plaintiffs, Plaintiffs: Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Christopher William Cantrell, Birmingham, AL; J. Matthew Stephens, McCallum, Robert G. Methvin, McCallum Methvin & Terrell PC, Birmingham, AL; James Michael Terrell, Robert Gordon Methvin, McCallum, Methvin & Terrell, P.C., Birmingham, AL; Keith Thomson Belt, Jr., Robert Page Bruner, Belt Law Firm, P.C., Birmingham, AL; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P; James P. McCarthy, Lindquist **[*19]** & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lynn W. Jinks, Nathan A. Dickson, Jinks Crow & Dickson PC.

For Travis Burau, a Iowa resident, James Brown, a Michigan resident, Ryan Rizzo, a Minnesota resident, Joshua Maida, a North Carolina resident, Plaintiffs: Elizabeth Anne McKenna, LEAD ATTORNEY, Milberg LLP, NY, NY; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Paul F Novak, LEAD ATTORNEY, PRO HAC VICE, Milberg LLP, Detroit, MI; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Andrew Kindt, a Michigan resident, Plaintiff: James M. Lockhart, Lindquist & Vennum, P.L.L.P; James P. McCarthy, Lindquist & Vennum; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; **[*20]** Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC.

For Albert Sidney Crigler, a Tennessee resident, Plaintiff: Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert Brent Irby, LEAD ATTORNEY, Eric D. Hoaglund, McCallum Hoaglund Cook & Irby LLP, Vestavia Hills, AL; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Richard Freeman Horsley, King, Horsley & Lyons, Birmingham, AL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexne LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Direct Purchaser Plaintiffs, Plaintiff: Aaron M. Sheanin, Pearson, Simon & Warshaw, LLP, San Francisco, CA; Allan Steyer, Donald Scott Macrae, Jayne Ann **[*21]** Peeters, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Christopher L. Lebsock, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jill Michelle Manning, Steyer Lowenthal, San Francisco, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; P. John Brady, Shughart Thomson & Kilroy PC.

For Indirect Purchaser Plaintiffs, Plaintiff: Lingel Hart Winters, LEAD ATTORNEY, Law Offices of Lingel H. Winters, San Francisco, CA; Craig C. Corbitt, LEAD ATTORNEY, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; John Dmitry Bogdanov, Cooper & Kirkham, P.C., San Francisco, CA; Joseph Mario Patane, Law Office of Joseph M. Patane, San Francisco, CA; Judith A. Zahid, Zelle Hofmann Voelbel Mason & Gette, LLP, San Francisco, CA; Lauren Clare Capurro, Mario Nunzio Alioto, Trump Alioto Trump & **[*22]** Prescott LLP, San Francisco, CA; Sylvie K. Kern, KAG Law Group, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For State of Washington, Plaintiff: David Michael Kerwin, LEAD ATTORNEY, Washington State Attorney General's Office, Seattle, WA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Electrograph Systems, Inc, Electrograph Technologies Corp., Plaintiffs: Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J. Iovieno, PRO HAC VICE, Benjamin Daniel Battles, Philip J Iovieno, William A. Isaacson, Boies Schiller & Flexner, Washington, DC; James M. Lockhart, Lindquist & Vennum, P.L.L.P; James P. McCarthy, **[*23]** Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Interbond Corporation of America, Office Depot, Inc., Plaintiffs: Stuart Harold Singer, LEAD ATTORNEY, William A. Isaacson, Anne M. Nardacci, Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Compucom Systems Inc, Plaintiff: Mike McKool, Jr., PRO HAC VICE, Lewis Titus LeClair, LEAD ATTORNEY, Scott R. Jacobs, McKool Smith, Dallas, TX; William A. Isaacson, Anne M. Nardacci, Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Costco Wholesale Corporation, **[*24]** Plaintiff: Cori Gordon Moore, David Burman, Eric J. Weiss, Steven Douglas Merriman, Perkins Coie LLP, Seattle, WA; Euphemia Nikki Thomopulos, Perkins Coie, San Francisco, CA; Joren Surya Bass, Perkins Coie LLP, San Francisco, CA; Philip J Iovieno, William A. Isaacson, Boies Schiller & Flexner, Washington, DC; James M. Lockhart, Lindquist & Vennum, P.L.L.P; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Alfred H. Siegel, Alfred H. Siegel, as Trustee of the Circuit City Stores, Inc. Liquidating Trust, Plaintiff: David M. Peterson, John Pierre Lahad, Johnny William Carter, Susman Godfrey LLP, Houston, TX; Jonathan Jeffrey Ross, N/A, Susman Godfrey L.L.P., Houston, TX; Philip J Iovieno, Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; H. Lee Godfrey, Kenneth S. Marks, Susman Godfrey LLP; James M. Lockhart, Lindquist & Vennum, P.L.L.P; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica **[*25]** Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Department of Legal Affairs, Office of the Attorney General, Plaintiffs: Patricia A. Conners, LEAD ATTORNEY, Attorney General's Office, Department of Legal Affairs, Tallahassee, FL; R. Scott Palmer, LEAD ATTORNEY, Office of the Attorney General, State of Florida, Tallahassee, FL; Liz Ann Brady, Office of the Attorney General, Antitrust Division, Tallahassee, FL; Nicholas J. Weilhammer, Office of the Attorney General, State of Florida, Tallahassee, FL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P; James P. McCarthy, Lindquist & Vennum; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN.

For Best Buy Co., Inc., Best Buy Purchasing LLC, Best Buy Stores, L.P., Best Buy.com LLC, Best Buy Enterprise Services, Inc., Plaintiffs: David Martinez, LEAD ATTORNEY, Robins Kaplan Miller & Ciresi L.L.P., Los Angeles, CA; Laura Elizabeth Nelson, LEAD ATTORNEY, Robins Kaplan Miller and Ciresi, Minneapolis, MN; **[*26]** Jill Sharon Casselman, Robins, Kaplan, Miller and Ciresi L.L.P., Los Angeles, CA; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; K. Craig Wildfang, Attorney at Law; Roman M. Silberfeld, Robins Kaplan Miller & Ciresi L.L.P., Los Angeles, CA.

For Magnolia Hi-Fi, Inc., Plaintiff: David Martinez, LEAD ATTORNEY, Robins Kaplan Miller & Ciresi L.L.P., Los Angeles, CA; Laura Elizabeth Nelson, LEAD ATTORNEY, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jill Sharon Casselman, Robins, Kaplan, Miller and Ciresi L.L.P., Los Angeles, CA; K. Craig Wildfang, Attorney at Law; Roman M. Silberfeld, Robins Kaplan Miller & Ciresi L.L.P., Los Angeles, CA.

For **[*27]** Good Guys, Inc., Old Comp Inc., Radioshack Corp., Plaintiffs: Jason C. Murray, LEAD ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For KMart Corporation, Plaintiff: Jason C. Murray, LEAD ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; William J. Blechman, LEAD ATTORNEY, Kenny Nachwalter PA, Miami, FL; Gavin David Whitis, Pond North LLP, Los Angeles, CA; Jalaine Garcia, Miami, FL; James T Almon, Kenny Nachwalter, PA, Miami, FL; Kevin J. Murray, Kenny Nachwalter PA, Miami, FL; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Richard A. Arnold, Kenny Nachwalter, Miami, FL; Ryan C Zagare, Kenny Nachwalter, PA, Miami, Fl; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Sears, Roebuck and Co., Plaintiff: Jason C. Murray, LEAD ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; William J. Blechman, LEAD ATTORNEY, Kenny Nachwalter PA, Miami, FL; Gavin David Whitis, Pond North LLP, Los Angeles, CA; Jalaine Garcia, Miami, FL; James T Almon, Kenny Nachwalter, PA, Miami, FL; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Richard **[*28]** A. Arnold, Kenny Nachwalter, Miami, FL; Ryan C Zagare, Kenny Nachwalter, PA, Miami, Fl; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Kevin J. Murray, Kenny Nachwalter PA, Miami, FL.

For Target Corp., Plaintiff: Jason C. Murray, LEAD ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; Astor Henry Lloyd Heaven, III, Crowell and Moring LLP, Washington, DC; Jerome A. Murphy, Crowell & Moring LLP, Washington, DC; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Giovanni Constabile, On behalf of themselves and all others similarly situated, Gio's Inc, a California corporation, Plaintiffs: Lingel Hart Winters, LEAD ATTORNEY, Law Offices of Lingel H. Winters, San Francisco, CA.

For Schultze Agency Services, LLC, on behalf of Tweeter Opco, LLC, Plaintiff: William A. Isaacson, LEAD ATTORNEY, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Christopher V. Fenlon, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Philip J. Iovieno, PRO HAC VICE, Boies, Schiller & Flexner LLP, Albany, NY.

For Tweeter **[*29]** Newco, LLC, Plaintiff: Anne M. Nardacci, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J. Iovieno, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, LEAD ATTORNEY, Boies Schiller & Flexner, Washington, DC; Christopher V. Fenlon, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY.

For ABC Appliance, Inc., Plaintiff: Christopher V. Fenlon, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP, Albany, NY; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC.

For Marta Cooperative of America, Inc., P.C. Richard & Son Long Island Corporation, Plaintiffs: Christopher V. Fenlon, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP, Albany, NY; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Kerry Lee Hall, Plaintiff: Robert J. Gralewski, LEAD ATTORNEY, Kirby McInerney LLP, **[*30]** New York, NY; Daniel Hume, Kirby McInerney LLP, New York, NY.

For Tech Data Corporation, Plaintiff: Melissa Willett, LEAD ATTORNEY, Boies, Schiller & Flexner, Washington, DC; Mitchell E. Widom, LEAD ATTORNEY, Bilzin Sumberg Baena Price & Axelrod, LLP, Miami, FL; Robert Turken, LEAD ATTORNEY, Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL; Scott N. Wagner, LEAD ATTORNEY, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL; Stuart Harold Singer, LEAD ATTORNEY, Boies Schiller & Flexner, Fort Lauderdale, FL; William A. Isaacson, LEAD ATTORNEY, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Philip J. Iovieno, PRO HAC VICE, Boies, Schiller & Flexner LLP, Albany, NY.

For Tech Data Product Management, Inc., Plaintiff: Robert Turken, LEAD ATTORNEY, Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Scott N. Wagner, Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Jennifer Milici **[*31]** , Boies Schiller and Flexner LLP, Washington, DC.

For Sharp Electronics Corporation, Sharp Electronics Manufacturing Company of America, Inc., Plaintiffs: Craig A Benson, Paul Weiss LLP, Washington, DC; Jonathan Alan Patchen, Taylor & Company Law Offices, LLP, San Francisco, CA; Joseph J Simons, Paul Weiss LLP, Washington, DC; Kenneth A. Gallo, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Stephen E. Taylor, Taylor & Company Law Offices, LLP.

For Dell Inc., Dell Products L.P., Plaintiffs: Debra Dawn Bernstein, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; Elizabeth Helmer Jordan, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; Jon G. Shepherd, LEAD ATTORNEY, Gibson Dunn & Crutcher, Dallas, TX; Matthew D. Kent, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; Melissa Mahurin Whitehead, LEAD ATTORNEY, Alston and Bird, Atlanta, GA; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; Rodney J Ganske, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA.

For Sharp Corporation, Petitioner: Colin C. West, Bingham McCutchen LLP, San Francisco, CA; Jonathan Alan Patchen, Taylor & Company Law Offices, LLP, San Francisco, CA.

For Chunghwa Picture Tubes, LTD., ("Chunghwa **[*32]** PT") is a Taiwanese company, Defendant: Joel Steven Sanders, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Rachel S. Brass, Gibson Dunn & Crutcher LLP.

For Hitachi, Ltd., is a Japanese company, Defendant: Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; James Maxwell Cooper, Kirkland and Ellis LLP, San Francisco, CA; James Mutchnik, PRO HAC VICE, Chicago, IL; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Katherine Hamilton Wheaton, PRO HAC VICE, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Thomas R. Green, Morgan Lewis & Bockius LLP, San Francisco, CA; Diane Leslie Webb, Morgan, Lewis & Bockius LLP; John Clayton Everett, Jr., PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC; Michelle Park Chiu, Morgan **[*33]** Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC.

For Hitachi America, Ltd., ("Hitachi America") is a New York company, Defendant: Kent Michael Roger, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, San Francisco, CA; Christine S. Safreno, Morgan Lewis & Bockius, LLP, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; James Maxwell Cooper, Kirkland and Ellis LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jonathan DeGooyer, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Thomas R. Green, Morgan Lewis & Bockius LLP, San Francisco, CA; Diane Leslie Webb, Morgan, Lewis & Bockius LLP; John Clayton Everett, Jr., PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC.

For Hitachi Asia, Ltd., ("Hitachi Asia") is a Singaporean company, Defendant: Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; Christopher M. Curran, **[*34]** White & Case, Washington, DC; Douglas L Wald, LEAD ATTORNEY, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Maxwell Cooper, Kirkland and Ellis LLP, San Francisco, CA; James Mutchnik, Chicago, IL; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Katherine Hamilton Wheaton, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Thomas R. Green, Morgan Lewis & Bockius LLP, San Francisco, CA; Diane Leslie Webb, Morgan, Lewis & Bockius LLP; John Clayton Everett, Jr., PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC.

For Irico Group Corp., ("IGC") is a Chinese entity, Irico Display Devices Co., Ltd., ("IDDC") **[*35]** is a Chinese entity, Defendants: Joseph R. Tiffany, II, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, Palo Alto, CA.

For LG Electronics, Inc., ("LGEI") is a South Korean entity, Defendant: Douglas L Wald, LEAD ATTORNEY, Washington, DC; Christopher M. Curran, White & Case, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Hojoon Hwang, Munger Tolles & Olson LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jerome Cary Roth, Munger Tolles & Olson LLP, San Francisco, CA; John Clayton Everett, Jr., PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, **[*36]** NY; Bethany W. Kristovich, Munger Tolles & Olson LLP; Jonathan Ellis Altman, Munger Tolles and Olson; Kim YoungSang, ARNOLD & PORTER LLP; Laura K Sullivan, Munger, Tolles and Olson LLP; William David Temko, Munger, Tolles & Olson LLP, Los Angeles, CA; YongSang Kim.

For Panasonic Corporation of North America, ("PCNA") is a Delaware corporation, Defendant: David L. Yohai, LEAD ATTORNEY, Weil, Gotshal, & Manges, LLP, New York, NY; Eva W. Cole, LEAD ATTORNEY, PRO HAC VICE, Winston & Strawn LLP, New York, NY; Lucia Freda, LEAD ATTORNEY, Weil. Gotshal & Manges LLP; A. Paul Victor, Winston & Strawn LLP, New York, NY; Aldo A. Badini, Winston & Strawn LLP, New York, NY; Andrew R. Tillman, Paine Tarwater Bickers & Tillman, Knoxville, TN; Christopher M. Curran, White & Case, Washington, DC; David E. Yolkut, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Diana Arlen Aguilar, PRO HAC VICE, Weil, Gotshal and Manges, New York, NY; Douglas L Wald, LEAD ATTORNEY, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Gregory Hull, Weil, Gotshal & Manges LLP, Redwood Shores, CA; James F. Lerner, Winston & Strawn LLP, New York, NY; Jeffrey L. Kessler, Winston **[*37]** & Strawn LLP, New York, NY; John Clayton Everett, Jr., PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Joseph Richard Wetzel, King & Spalding, San Francisco, CA; Kajetan Rozga, PRO HAC VICE, New York, NY; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Kevin B. Goldstein, Weil, Gotshal and Manges LLP, New York, NY; Lara Elvidge Veblen, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Margaret Anne Keane, DLA Piper LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Molly Donovan, Winston & Strawn LLP, New York, NY; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven A. Reiss, Weil Gotshal & Manges LLP, New York, NY; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Molly M Donovan, Dewey & LeBoeuf LLP.

For Samsung SDI Co., Ltd., formerly know as Samsung Display Device Co., Defendant: Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald **[*38]** , LEAD ATTORNEY, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Samsung SDI America, Inc., ("Samsung America") is a California corporation, LG Eletronics U.S.A., Inc., ("LGEUSA") is a Delaware corporation, Philips Electronics North America Corporation, ("PENAC") is a Delaware corporation, Samsung SDI Co. Ltd, fka Samsung Display Device Company ("Samsung **[*39]** SDI") is a South Korean company formerly known as Samsung Display Device Co., Samsung SDI Co., Ltd., Toshiba America Consumer Products, LLC, ("TACP") is a limited liability company, is headquartered in Wayne, New Jersey, Samsung SDI (Malaysia) Sdn Bhd., ("Samsung Malaysia") is a Malaysian corporation, Samsung SDI Mexico S.A. de C.V., ("Samsung SDI Mexico") is a Mexican company, Defendants: Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Gary L. Halling, James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Scott A. Stempel, PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Michael W. Scarborough, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tyler Mark Cunningham, Sheppard Mullin Richter & **[*40]** Hampton.

For Samtel Color, Ltd., ("Samtel") is a Indian company, Defendant: William Diaz, McDermott Will & Emery LLP, Irvine, CA.

For Toshiba Corporation, ("TC") is a Japanese company, Toshiba America, Inc, ("Toshiba America") is a Delaware corporation, Defendants: Christopher M. Curran, White & Case, Washington, DC; Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Bijal Vijay Vakil, Jeremy Kent Ostrander, White & Case LLP, Palo Alto, CA; Douglas L Wald, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; George L. Paul, Lucius Bernard Lau, White & Case LLP, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Scott A. Stempel, PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Michael W. Scarborough, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & **[*41]** Mangesl LLP, New York, NY; Charise Naifeh, Matthew Frutig, White & Case LLP.

For Beijing-Matsushita Color CRT Company, Ltd., ("BMCC") is a Chinese company, Defendant: Terry Calvani, LEAD ATTORNEY, Bruce C. McCulloch, Christine A. Laciak, Craig D. Minerva, Richard Sutton Snyder, Freshfields Bruckhaus Deringer US LLP, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Michael W. Scarborough, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Samsung Electronics Co Ltd, ("SEC") is a South Korean company, Defendant: Ian T Simmons, LEAD ATTORNEY, David Kendall Roberts, Kevin Douglas Feder, Haidee L. Schwartz, O'Melveny & Myers LLP, Washington, DC; Michael Frederick Tubach, LEAD ATTORNEY, O'Melveny & Myers LLP, San Francisco, CA; Courtney C Byrd, PRO HAC VICE, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Kent Michael Roger, Michael W. Scarborough, Morgan Lewis & Bockius LLP, San Francisco, CA; Anton Metlitsky; David Roberts, O'Melveny & Myers LLP.

For Samsung Electronics America, Inc., ("SEAI") is **[*42]** a New York corporation, Defendant: Ian T Simmons, LEAD ATTORNEY, Kevin Douglas Feder, Haidee L. Schwartz, Benjamin Gardner Bradshaw, O'Melveny & Myers LLP, Washington, DC; Michael Frederick Tubach, LEAD ATTORNEY, O'Melveny & Myers LLP, San Francisco, CA; Courtney C Byrd, PRO HAC VICE, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Kent Michael Roger, Michael W. Scarborough, Morgan Lewis & Bockius LLP, San Francisco, CA; Anton Metlitsky; David Roberts, O'Melveny & Myers LLP; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP.

For Toshiba America Electronics Components, Inc, ("TAEP") is headquartered in Irvine, California, Toshiba America Information Systems, Inc., ("TAIP") is headquartered in Irvine, California, Defendants: Bernadette Shawan Gillians, LEAD ATTORNEY, Buist Moore Smythe and McGee, Charleston, SC; Christopher M. Curran, White & Case, Washington, DC; Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Bijal Vijay Vakil, Jeremy Kent Ostrander, White & Case LLP, Palo Alto, CA; Douglas L Wald, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton **[*43]** LLP, San Francisco, CA; George L. Paul, Lucius Bernard Lau, White & Case LLP, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Scott A. Stempel, PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Michael W. Scarborough, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Charise Naifeh, Matthew Frutig, White & Case LLP.

For MT Picture Display Co., LTD, fka Matsushita Toshiba Picture Display Co., Ltd. ("MTPD") is a Japanese entity, Defendant: A. Paul Victor, Aldo A. Badini, Eva W. Cole, Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; David E. Yolkut, Lara Elvidge Veblen, Weil, Gotshal and Manges LLP, New York, NY; Diana Arlen Aguilar, PRO HAC VICE, Weil, Gotshal and Manges, New York, NY; Douglas L Wald, Washington, **[*44]** DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Gregory D. Hull, Weil, Gotshal & Manges LLP, Redwood Shores, CA; John Clayton Everett, Jr., Scott A. Stempel, PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kajetan Rozga, New York, NY; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Margaret Anne Keane, DLA Piper LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Molly Donovan, Winston & Strawn LLP, New York, NY; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven A. Reiss, Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; David L. Yohai, Weil, Gotshal, & Manges, LLP, New York, NY; Molly M Donovan, Dewey & LeBoeuf LLP.

For Hitachi Displays, Ltd., ("Hitachi Displays") is a Japanese company also known as Japan Display Inc, Hitachi Electronic Devices (USA), ("HEDUS") is a Delaware corporation, Defendants: Eliot A. Adelson, Kirkland **[*45]** & Ellis LLP, San Francisco, CA; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Gary L. Halling, James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Scott A. Stempel, PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Michael W. Scarborough, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA;

Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For LG Electronics Taiwan Taipei Co., Ltd., ("LGETT") is a Taiwanese entity, Defendant: Hojoon Hwang, Munger Tolles & Olson LLP, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Michael W. Scarborough, Morgan Lewis & Bockius LLP, San Francisco, CA; Sharon D. **[*46]** Mayo, Arnold & Porter LLP, San Francisco, CA; Bethany W. Kristovich, Laura K Sullivan, Munger Tolles & Olson LLP; Jonathan Ellis Altman, Munger Tolles and Olson.

For Philips da Amazonia Industria Electronica Ltda., ("Philips Brazil") is a Brazilian company, Defendant: David Michael Lisi, Reed Smith LLP, Palo Alto, CA; Ethan E. Litwin, Hughes Hubbard & Reed LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA.

For Samsung SDI Brasil Ltda., ("Samsung SDI Brazil") is a Brazilian company, Shenzhen Samsung SDI Co. Ltd, ("Samsung SDI Shenzhen") is a Chinese company, Defendants: Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Michael W. Scarborough, Mona Solouki, James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; **[*47]** Kent Michael Roger, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Tianjin Samsung SDI Co., Ltd., ("Samsung SDI Tianjin") is a Chinese company, Defendant: Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Gary L. Halling, Michael W. Scarborough, Mona Solouki, James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tyler Mark Cunningham, Sheppard Mullin **[*48]** Richter & Hampton.

For Beijing Matsushita Color Crt Company, LTD., Defendant: Richard Sutton Snyder, Freshfields Bruckhaus Deringer US LLP, Washington, DC.

For Hitachi America, Ltd, Defendant: Eliot A. Adelson, James Maxwell Cooper, Kirkland & Ellis LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Katherine Hamilton Wheaton, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Hitachi Asia, Ltd., Defendant: Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Maxwell Cooper, Kirkland & Ellis LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Hitachi Displays, **[*49]** Ltd., also known as Japan Display Inc, Defendant: Eliot A. Adelson, James Maxwell Cooper, Kirkland & Ellis LLP, San Francisco, CA; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Mutchnik, Chicago, IL; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Katherine Hamilton Wheaton, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC

VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Hitachi Electronic Devices (USA), Defendant: Eliot A. Adelson, James Maxwell Cooper, Kirkland & Ellis LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Mutchnik, Chicago, IL; Kent Michael Roger, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; **[*50]** Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Hitachi Ltd., Defendant: Eliot A. Adelson, James Maxwell Cooper, Kirkland & Ellis LLP, San Francisco, CA; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Maxwell Cooper, Kirkland & Ellis LLP, San Francisco, CA; James Mutchnik, PRO HAC VICE, Chicago, IL; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Katherine Hamilton Wheaton, PRO HAC VICE, Chicago, IL; ent Michael Roger, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Koninklijke Philips N.V., "KPNV", Defendant: Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Jeffrey L. Kessler, Winston **[*51]** & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tiffany B. Gelott, PRO HAC VICE, Baker Botts LLP, Washington, DC; Charles M Malaise, Washington, DC; David T. Emanuelson, Erik T. Koons, Baker Botts L.L.P.

For LG Electronics Taiwan Taipei Co., Ltd., Defendant: Douglas L Wald, LEAD ATTORNEY, Washington, DC; Sharon D. Mayo, LEAD ATTORNEY, Arnold & Porter LLP, San Francisco, CA; Hojoon Hwang, Jerome Cary Roth, Munger Tolles & Olson LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Kim YoungSang, ARNOLD & PORTER LLP; Ryan M. Sandrock, Sidley Austin, LLP, San Francisco, CA; William David Temko, Munger, Tolles & Olson LLP, Los Angeles, CA.

For LG Electronics **[*52]** USA, Inc., Defendant: Douglas L Wald, LEAD ATTORNEY, Washington, DC; Hojoon Hwang, Jerome Cary Roth, Munger Tolles & Olson LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Bethany W. Kristovich, Munger Tolles & Olson LLP; Jonathan Ellis Altman, Laura K Sullivan, Munger Tolles and Olson; Kim YoungSang, ARNOLD & PORTER LLP; Sharon D. Mayo, LEAD ATTORNEY, Arnold & Porter LLP, San Francisco, CA; YongSang Kim.

For MT Picture Display Co., LTD, Defendant: Adam C. Hemlock, LEAD ATTORNEY, Weil Gotshal and Manges LLP, New York, NY; David L. Yohai, LEAD ATTORNEY, Weil, Gotshal, & Manges, LLP, New York, NY; Aldo A. Badini, Winston & Strawn LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Diana Arlen Aguilar, PRO HAC VICE, Weil, Gotshal and Manges, New York, NY; Douglas L Wald, Washington, DC; Eva W. Cole, Winston & Strawn LLP, New York, NY; James F. Lerner, Winston & Strawn LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, **[*53]** Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Kevin B. Goldstein, Weil, Gotshal and Manges LLP, New York, NY; Lara Elvidge Veblen Weil, Gotshal and Manges LLP, New York, NY; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Molly Donovan, Winston & Strawn LLP, New York, NY; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Panasonic Corporation, Defendant: Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Eva W. Cole, Winston & Strawn LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, **[*54]** Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Panasonic Corporation of North America, Defendant: David L. Yohai, LEAD ATTORNEY, Weil, Gotshal, & Manges, LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Diana Arlen Aguilar, PRO HAC VICE, Weil, Gotshal and Manges, New York, NY; Douglas L Wald, Washington, DC; Douglas L Wald, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Lara Elvidge Veblen Weil, PRO HAC VICE, Gotshal and Manges LLP, New York, NY; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Philips Electronics Industries (Taiwan), Ltd., Philips da Amazonia Industria, Electronica Ltda., Defendants: Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA.

For Samsung Electronics **[*55]** America, Inc., Defendant: David Kendall Roberts, O'Melveny and Myers LLP, Washington, DC; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Samsung Electronics Co., Ltd, Defendant: Ian T Simmons, LEAD ATTORNEY, O'Melveny & Myers LLP, Washington, DC; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Samsung SDI (Malaysia) SDN BHD, Defendant: Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, **[*56]** San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Samsung SDI America, Inc., Samsung SDI Co., Ltd., Samsung SDI Mexico S.A. de C.V., Tianjin Samsung SDI Co., Ltd., Defendants: Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Landon McGinnis, Mona Solouki, Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Samsung SDI Brasil LTDA, Samsung SDI **[*57]** Co., Ltd., Samsung SDI Co., Ltd., Shenzhen Samsung SDI Co. LTD., Defendants: Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Landon McGinnis, Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A.

Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Samtel Color, Ltd., Defendant: William Diaz, McDermott Will & Emery LLP, Irvine, CA.

For Toshiba America Consumer Products, Inc., Defendant: Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC.

For Toshiba **[*58]** America Electronics Components, Inc, Defendant: Aya Kobori, White and Case LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Lucius Bernard Lau, White & Case LLP, Washington, DC; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Charise Naifeh, Matthew Frutig, White & Case LLP.

For Toshiba America Information Systems, Inc., Defendant: Aya Kobori, White and Case LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Ian T Simmons, **[*59]** O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Lucius Bernard Lau, White & Case LLP, Washington, DC; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Charise Naifeh, Matthew Frutig, Matthew Frutig, White & Case LLP.

For Toshiba America, Inc, Defendant: Aya Kobori, White and Case LLP, New York, NY; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Lucius Bernard Lau, White & Case LLP, Washington, DC; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Charise Naifeh, Matthew Frutig, Matthew Frutig, White & Case LLP.

For Toshiba Corporation, Defendant: Aya Kobori, White and Case LLP, New York, NY; Douglas L Wald, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson **[*60]** , Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Lucius Bernard Lau, White & Case LLP, Washington, DC; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Charise Naifeh, Matthew Frutig, White & Case LLP.

For Technologies Displays Americas LLC, Defendant: Mark C. Dosker, Nathan Lane, III, Squire Sanders (US) LLP, San Francisco, CA.

For Technicolor S.A, Technicolor USA, Inc., Defendants: Calvin L. Litsey, LEAD ATTORNEY, Faegre Baker Daniels LLP, East Palo Alto, CA.

For Mitsubishi Digital Electronics Americas, Inc., Mitsubishi Electric & Electronics USA, Inc., Interested Parties: Brent Caslin, LEAD ATTORNEY, Jenner & Block LLP, Los Angeles, CA; Michael T. Brody, PRO HAC VICE, Terrence Joseph Truax, Jenner & Block LLP, Chicago, IL.

For Mitsubishi Electric Corporation, Interested Party: Brent Caslin, LEAD ATTORNEY, Jenner & Block LLP, Los Angeles, CA; Terrence Joseph Truax, **[*61]** Jenner & Block LLP, Chicago, IL.

For Thomson Consumer Electronics, Inc., Thomson S.A., Interested Parties: Calvin L. Litsey, LEAD ATTORNEY, Faegre Baker Daniels LLP, East Palo Alto, CA; Calvin Lee Litsey, Faegre Baker Daniels LLP, East Palo Alto, CA;

Jeffrey S. Roberts, PRO HAC VICE, Faegre Baker Daniels LLP, Denver, CO; Kathy L. Osborn, Ryan M. Hurley, PRO HAC VICE, Faegre Baker Daniels LLP, Indianapolis, IN.

For Douglas A. Kelley, as Chapter 11 Trustee for Petters Company, Inc. and related entities, and as Receiver for Petters Company, LLC and related entities, John R. Stoebner, as Chatper 7 Trustee for PBE Consumer Electronics, LLC and related entities, Miscellaneous: James M. Lockhart, LEAD ATTORNEY, Lindquist & Vennum, P.L.L.P., Minneapolis, MN; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For State of Illinois, Intervenor: Blake Lee Harrop, LEAD ATTORNEY, Office of the Attorney General, Chicago, IL; Chadwick Oliver Brooker, Office of the Illinois Attorney General, Chicago, IL; Blake L. Harrop, Office of the Illinois Attorney General.

For **[*62]** State of Oregon, Intervenor: Tim David Nord, Oregon Department of Justice, Salem, OR.

Judges: Hon. Charles A. Legge (Ret.), Special Master.

Opinion by: Charles A. Legge

Opinion

REPORT AND RECOMMENDATION REGARDING DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

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Summary, Conclusions, and Possible Results

Defendants have made a joint motion for summary judgment against nine of the direct class plaintiffs. The motion is made on the ground that those plaintiffs did not purchase an alleged price-fixed product; *i.e*. a cathode ray tube ("CRT"). Instead, they purchased a finished product ("FP"), *i.e*., a television set or a computer monitor into which the manufacturer had installed and integrated **[*63]** a CRT. Hence, defendants assert that those plaintiffs do not have standing to sue these defendants under the antitrust laws. The motion is straightforward and compelling, and the Special Master recommends granting the motion, based on the following:

1. A stipulation has eliminated FPs as accused products in the conspiracy alleged in this case. The only accused products are the CRTs.

2. The fact record demonstrates, with no issue of fact, that these plaintiffs did not purchase CRTs, but only FPs.

3. ***HN1***[] Section 4 of the Clayton Act (*15 U.S.C. § 15*) defines who has standing to sue for a violation of the antitrust laws. It permits suits only by a person "who shall be injured in his business or property by reason of anything forbidden in the antitrust laws..."

4. In interpreting that section, the United States Supreme Court in *Illinois Brick Company v. State of Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, barred suits by persons who did not directly purchase a price-fixed product.

5. Subsequent decisions of the United States Supreme Court and the Ninth Circuit have adhered to that rule and have barred suits by persons who did not directly purchase a price-fixed product.

Those points will be discussed further **[*64]** below. And the Special Master believes that those joints, even as simply stated above, compel the granting of defendants' motion.

However, the Special Master notes some possible results of that recommended decision:

1. Although this motion is only against nine of the named plaintiffs, the decision will possibly be a basis for broader application in this direct class action case, perhaps by more encompassing motions for summary judgment, or by objections to the certification of a class.

2. The decision may also be the basis for motions for summary judgment in the direct action cases.

3. The decision may conflict with opinions of District Judge Susan Illston in the LCD cases, discussed below on page 10.

In spite of those possible results, the Special Master believes that the granting of defendants' motion is compelled by (1) the absence of any issue of fact that plaintiffs did not purchase a price-fixed product, (2) Clayton Act § 4, (3) decisions of the U.S. Supreme Court, and (4) decisions of and within the Ninth Circuit.

Procedure

Defendants filed their joint motion on January 19, 2012. It was accompanied by a factual record, primarily the responses of the nine plaintiffs to discovery, and **[*65]** the declaration of Molly M. Donovan for defendants. The direct purchaser plaintiffs filed a brief in opposition to the motion on February 24, 2012, and attached the declaration of Mr. R. Alexander Saveri and numerous exhibits. An opposition was also filed by the direct action plaintiffs, although no motion has been filed against them. Defendants filed a closing brief in support of their motion on March 9, 2012. The motion and oppositions were argued on March 20. The reporter's transcript was completed on April 9, 2012. The motion has been submitted for decision.

The Key Points of the Motion

1. The accused products are the CRTs, and not the television sets or computer monitors into which they were integrated.

The complaint in this action originally alleged a conspiracy to fix the prices of both CRTs and FPs. However, all allegations regarding the price fixing of FPs were eliminated by a stipulation and an order signed by your Honor on

August 26, 2011; document No. 996. More specifically, paragraph 3 of that stipulation and order stated that the direct purchaser plaintiffs:

> "hereby withdraw their CRT Finished Products Conspiracy Claims stated in the Direct CAC and the allegations of the **[*66]** Direct CAC purporting to allege a conspiracy encompassing Finished Products are stricken from the Direct CAC..."

The direct purchaser plaintiffs also withdrew "any and all requests for discovery regarding or relating to information in support of the CRT Finished Product Conspiracy Claims..." (paragraph 4). As a result of that stipulation and order, the only products alleged to be price-fixed in this case are the CRTs themselves.

2. The plaintiffs against whom this motion is directed did not purchase CRTs, but only FPs.

This motion is brought against nine of the alleged direct plaintiffs. They are listed in defendants' joint motion on pages 3-4, and their names are stated below in the recommendation of a form of order. Each of those nine is named as a plaintiff in the direct purchaser consolidated amended complaint, pages 3 and 4. Some of the plaintiffs listed in the complaint are not objects of this motion, but may be addressed in some future procedures by defendants. The fact record establishes, without a genuine issue, that each of the nine did <u>not</u> purchase a CRT. The supporting records are contained in the declaration of Ms. Donovan, and more precise citations to that record are contained **[*67]** in defendants' motion on pages 3 and 4. The Special Master does not believe that the supporting record needs to be cited or discussed further in this report, because plaintiffs do <u>not</u> contest that record, and do <u>not</u> argue that there is any issue of fact regarding that record, in their opposition to this motion. Indeed, at the oral argument of the motion, plaintiffs admitted the absence of any issue of fact. The following quotation is from p. 41 of the hearing transcript, (ll. 15-21):

> "**Special Master**: Alright. Now, to start out do you contest that these eight or nine plaintiffs did not purchase a CRT?
>
> **Mr. Lehmann [plaintiffs' counsel]**: Your Honor, I am unaware of any facts that would indicate that they purchased CRTs.
>
> **Special Master**: Okay.
>
> **Mr. Lehmann**: As opposed to finished products."

So there is no issue of fact that the plaintiffs against whom this motion is directed did <u>not</u> purchase a CRT, but only purchased a FP. This is the <u>only fact</u> upon which this motion is based, and it is without opposition.

3. Clayton Act Section 4 permits suits only by plaintiffs who have been injured by reason of a violation of the antitrust laws.

HN2[] Clayton Act § 4, *15 U.S.C. § 15*, is the section of the antitrust **[*68]** laws that authorizes suits in federal court for antitrust violations. The basic standing to sue is defined as "any person who shall be <u>injured</u> in his business or property <u>by reason of anything forbidden in the antitrust laws</u>..." (emphasis added). A person must be "injured" in order to sue. And he must be injured by something "forbidden in the antitrust laws." Does a person who never purchased a price-fixed product, but only purchased something which contained a price-fixed product, have standing to sue? That question was answered in the negative by the United States Supreme Court, primarily in *Illinois* Brick.

4. *Illinois Brick* bars suits by plaintiffs who did not directly purchase a price-fixed product.

The United States Supreme Court in *Illinois Brick Company v. State of Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, discussed its earlier decision in *Hanover Shoe Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*, and reaffirmed and expanded on its holding. The Court in *Illinois Brick* stated its conclusions on pp. 728 and 729 of its opinion:

> "[W]e decline to abandon the construction given § 4 in *Hanover Shoe* that the overcharged direct purchaser, and not others in the chain of manufacture or distribution, **[*69]** is the party 'injured in his business or property' within the meaning of the section..."

HN3[] The clear rule of *Illinois Brick* is that only "the overcharged direct purchaser" and "not others in the chain of manufacture or distribution" is the party who has standing to sue. That rule was established in part to avoid the litigation complexities that would otherwise be necessary in making an economic analysis at each level of the manufacture and distribution of a product. See pages 731-2.

The Court said at pp. 745-6:

> "We think the longstanding policy of encouraging vigorous private enforcement of the antitrust laws [citation omitted] supports our adherence to the *Hanover Shoe* rule, under which direct purchasers are not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge."

The Court recognized that its rule would have the effect of eliminating any recovery by persons further down the chain of distribution who might in fact have been injured (p. 746).

The Court intended its decision to be a bright light rule: "We reject these attempts to carve out exceptions to the *Hanover Shoe* rule for particular types of markets;" p. **[*70]** 744.

5. Subsequent Supreme Court and Ninth Circuit decisions adhere to the *Illinois Brick* rule.

The Supreme Court has subsequently reaffirmed *Illinois Brick*'s limitation of the right to sue to persons who directly purchased a price-fixed product. And it has expressly opposed the creation of exceptions. In *Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*, the Court held (p. 204):

> "We must decide who may sue under § 4 when, in violation of the antitrust laws, suppliers overcharge a public utility for natural gas and the utility passes on the overcharge to its customers. Consistent with [*Hanover Shoe* and *Illinois Brick*], we hold that only the utility has the cause of action because it alone has suffered injury within the meaning of § 4."

The Court went on to discuss whether there might be variations from the *Illinois Brick* rule because of different economic factors or different factual settings. The Court said "no" and explained the reasons (pp. 216-7):

> ***HN4***[] "The rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases. We nonetheless believe that ample justification exists for our stated decision not to 'carve out exceptions to the [direct purchaser] **[*71]** rule for particular types of markets.' The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule. As we have stated:
>
> '[T]he process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would impact the same 'massive evidence and complicated theories' into treble-damages proceedings, albeit at a somewhat higher level of generality. [Citation omitted.]
>
> In sum, even assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a particular case, we think it is an unwarranted and counterproductive exercise to litigate a series of

> exceptions. Having stated the rule in *Hanover Shoe* and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4."

One must conclude that *Illinois Brick* is still the law and the policy of the United States Supreme Court, and that it is a bright light rule. It applies even if otherwise meritorious claims are barred **[*72]** by the "direct purchasers only" rule.

The Ninth Circuit Court of Appeals also adheres to *Illinois Brick*.

In *Delaware Valley Surgical Supply, Inc. v. Johnson & Johnson, 523 F.3d 1116 (2008)*, the District Court had ruled that a plaintiff had no standing to assert a claim under the antitrust laws. The Ninth Circuit affirmed, because the party lacked "standing to pursue an antitrust claim under a direct purchaser theory;" p. 1118. The Court added (p. 1123):

> "Quite simply, we are bound by the sensible and straightforward rule set forth by *Illinois Brick*. Appellants argue this situation is distinguishable because [the parties had an independent contractual relationship]. However, the Supreme Court jurisprudence has been neither vague nor ambiguous in establishing the direct purchaser rule. The Supreme Court intended to make a bright light rule for identifying the proper plaintiff when an antitrust violation occurs in a multi-tiered distribution system. The Court has explicitly rejected attempts to create exceptions to that rule, even when the considerations in a particular market may undermine some of the reasoning used by the *Illinois Brick* Court."

In *Kendall v. Visa, 518 F.3d. 1042 (9th Cir. 2008)*, **[*73]** the appellate court affirmed the dismissal of an antitrust complaint because of, among other things, "the indirect purchaser rule in *Illinois Brick*;" p. 1051.

In *Coordinated Pretrial Proceedings in Petroleum Antitrust Litigation, 691 F.2d 1335 (9th Cir. 1982)*, the defendant oil companies allegedly conspired to fix the prices of refined petroleum products. Plaintiffs sued to recover for the resulting inflated retail gasoline prices paid by consumers. The Court of Appeals immediately stated that, "The principal difficulty plaintiffs have faced is the Supreme Court's intervening announcement in *Illinois Brick* that indirect purchasers of price-fixed goods may not maintain an antitrust damage action for overcharges passed on to them by direct purchasers from the defendant," (p. 1338). The Ninth Circuit affirmed the District Court's dismissal of plaintiffs' claims and denial of plaintiffs' motion to certify classes of retail consumers; (p. 1338).

District Court decisions within the Ninth Circuit have also adhered to *Illinois Brick*.

In *In re: ATM Fee Antitrust Litigation, 2010 U.S. Dist. LEXIS 97009, 2010 WL 3701912 (N.D. Cal. 2010)* plaintiffs were ATM cardholders who sought damages for alleged unlawful interchange fees **[*74]** that their respective banks had passed on to them. Plaintiffs acknowledged that they were the indirect payers of those fees, and that the banks were the direct payers. The District Court said, "In light of this concession, Defendants have moved for summary judgment, arguing that the *Illinois Brick* rule barring indirect purchasers from recovering monetary damages in an antitrust suit applies here and precludes Plaintiffs from seeking such damages. As explained below, the Court agrees." (Page 4).

In *Stanislaus Food Products Company v. USS-POSCO Industries, 2010 U.S. Dist. LEXIS 92236, 2010 WL 3521979 (E.D. Cal.) 2010*, plaintiff purchased tin cans from a manufacturer who had purchased the tin plate used to make the cans. Plaintiff sued a defendant who had allegedly fixed the price of the tin plate. The Court concluded that plaintiff was not a direct purchaser of the tin plate (p. 6), and dismissed the complaint (p. 30).

In *Sun Microsystems, Inc. v. Hynix, 608 F. Supp. 2d. 1166 (2009 N.D. Cal.)*, a computer manufacturer brought an antitrust action against manufacturers of dynamic random access memory. The Court held that the plaintiff computer manufacturer was not a direct purchaser of DRAM first purchased by an external **[*75]** manufacturer. The Court granted defendant's motion for summary judgment based on *Illinois Brick*, (p. 17).

The Special Master concludes that the above authorities of the Supreme Court, and of the appellate and district courts in this circuit, demonstrated faithful adherence to *Illinois Brick*, and resistance to, or outright rejection of, any new exception to that decision.

Plaintiffs' Arguments and Citations

Plaintiffs first argue that Your Honor has already rejected this motion in a prior order in his case, *Cathode Ray Tube Antitrust Litigation, 738 F.Supp.2d. 1011 (2010)*. The language of the order that is the basis for that contention is on page 1023:

> "Furthermore, courts have found antitrust standing where plaintiffs purchased downstream goods from manufacturers who made, and allegedly fixed the price of, a component of those goods."

The cited support for that statement was the *Linerboard* decision of the Third Circuit, which will be discussed below. However, the distinguishing points here are that the motion was for dismissal based upon the face of the complaint, and not for summary judgment based on a fact record. And at the time of that order, the allegations of the complaint included **[*76]** both CRTs and FPs; see p. 1023.

Plaintiffs rely heavily upon Judge Illston's decisions in the LCD cases. They are reported at *586 F.Supp.2d. 1109 (2008)*; *2009 U.S. Dist. LEXIS 132973, 2009 WL 533130 (2009)*; *2010 U.S. Dist. LEXIS 38111, 2010 WL 1264230 (2010)*; *267 FRD 291 (2010)*; and *2011 U.S. Dist. LEXIS 133852, 2011 WL 5357906 (2011)*. Indeed, Judge Illston's opinions contain statements which appear contrary to the Special Master's recommendation here. However, the Special Master nevertheless respectfully suggests that those statements are an incorrect interpretation of prior authority as applied to this present case, for several reasons. First, Judge Illston did not have occasion to discuss the factual setting which is controlling in this motion; that is, that the plaintiffs here admittedly did not purchase any price-fixed product from anyone. Second, LCD relied heavily on the *Sugar* and *Linerboard* cases in the Third Circuit, which the Special Master does not believe are good law in the Ninth Circuit, as discussed below.

Plaintiffs contend that the Ninth Circuit has already recognized their claimed exception to *Illinois Brick*. They cite *Royal Printing v. Kimberly Clark Corp., 621 F.2d. 323 (9th Cir. 1980)*, and *Freeman v. San Diego Association of Realtors, 322 F.3rd 1133 (9th Cir. 2003)*, **[*77]** for that proposition. *Royal Printing* is not applicable here because it dealt with the issue of from whom plaintiffs had to make a purchase in order to establish the necessary "directness." But that analysis does not answer the issue we have in this case, which is that the plaintiffs here never purchased the price-fixed product from anybody. In *Royal Printing*, the plaintiffs did in fact make some purchases of the price-fixed products; see p. 324. *Freeman* is not applicable to this motion for the same reason; that is, plaintiffs did pay the price-fixed services of the Multiple Listing Service; see p. 1147.

As noted above, plaintiffs and Judge Illston rely on two decisions from the Third Circuit arguably holding that the purchasers of a final product have standing to sue the makers of a component of that product who fixed prices of the component. *In re: Sugar Industry Antitrust Litigation, 579 F.2d. 13 (3rd Cir. 1978)*, and *In re: Linerboard Antitrust Litigation, 305 F.3d. 145 (3rd Cir. 2002)*. However, the Special Master is of the opinion that those cases are not the law of the Ninth Circuit. Their conclusions have not been adopted by the Ninth Circuit Court of Appeals or by any other circuit. **[*78]** And indeed, they are contrary to the above-cited Ninth Circuit decisions in *Delaware, Kendall*, and *Petroleum*, which decisions have applied the *Illinois Brick* bright-light rule. And they are contrary to the opinion in *Delaware Valley*, in which the Ninth Circuit stated its opposition to creating any new exceptions to *Illinois Brick* (p. 1122).

Plaintiffs have argued extensively, citing primarily *Royal Printing* and *Freeman*, about from whom plaintiffs purchased their products, and the relationships of the various defendant companies. But such an argument and such authorities do not answer the central fact in this motion: that is, plaintiffs did not purchase a price-fixed product from anyone.

Plaintiffs also contend, quite correctly, for the principle of ***antitrust law*** which encourages private actions. However, plaintiffs attempt to elevate that underlying principle into a separate exception to the *Illinois Brick* rule. But that does not satisfy the requirements of § 4 of the Clayton Act. Plaintiffs raise the specter that no one would be a direct purchaser who could bring an action. However, the Special Master does not believe that such an extensive conspiracy as the me alleged in this case, **[*79]** with its potential financial consequences, would escape prosecution by companies or persons who were indeed direct purchasers of the price-fixed CRTs. This motion is only against nine of the alleged members of the class, and not against the entire class. It is not even against all of the named class representatives. And it seems evident, without the necessity for factual development, that if there is a manufacturer of television sets or computer monitors who purchased allegedly price-fixed CRTs from one of the defendants or its affiliates, that the manufacturer would have the incentive to bring a direct suit against the CRT manufacturers. Further, the purchasers of FPs are probably indirect purchasers who can maintain causes of action, although under state law and not federal, for any economic harm to them. Indeed, many are already doing so in the related indirect class action that is presently pending. Finally, it is a matter of record that the Antitrust Division of the Department of Justice has been pursuing criminal actions against some of these defendants.

Plaintiffs finally contend that this motion is premature, because no depositions have been taken and the paper discovery is **[*80]** not quite complete. But the evidence which plaintiffs seek to develop by more discovery cannot be a defense to this motion. That is, the sole fact question in this motion is whether any of the named plaintiffs purchased a price-fixed product, a CRT, from one of the defendants or their affiliates. And in the record cited above, the evidence is already undisputed that none of these named plaintiffs purchased a price-fixed product.

In the present setting, where plaintiffs never purchased a price-fixed product from anybody, the Special Master continues to recommend that the above analysis on pages 4-9 counsels the granting of this motion.

Recommended Order

Finding who is and who is not a "direct" purchaser has resulted in numerous decisions in the application of the *Illinois Brick* rule. However, in this case, that search begins and ends with a simple fact: The plaintiffs against whom this motion is directed did not purchase any price-fixed product, *i.e*. a CRT, from anyone. They purchased, at best, a manufactured product which contained a CRT. Therefore, even the cases which have found some exception to *Illinois Brick* cannot apply in this case, because plaintiffs did not purchase a price-fixed **[*81]** product. Plaintiffs are at best indirect purchasers of a price-fixed product. Section 4 of the Clayton Act, as interpreted by the U.S. Supreme Court and the Ninth Circuit, bars a direct action suit here.

That result does not, as plaintiffs contend, create a major hole in the antitrust laws. It is consistent with the United States Supreme Court and Ninth Circuit decisions. Indeed, it is Plaintiffs' argument for another exception to *Illinois Brick* that would upset established Ninth Circuit law on antitrust standing.

The Special Master therefore recommends that defendants' motion for summary judgment be granted, and that judgment be entered against plaintiffs Arch Electronics, Inc.; Crago d/b/a Dash Computers Inc.; Electronic Design Company; Meijer, Inc. and Meijer Distribution, Inc.; Nathan Muchnick, Inc.; Orion Home Systems, LLC; Radio and TV Equipment, Inc.; Royal Data Services, Inc.; and Studio Spectrum, Inc.

Respectfully Recommended,

Date: May 31, 2012

/s/ Charles A. Legge

Hon. Charles A. Legge (Ret.), Special Master.

The Report and Recommendations are: Accepted and Ordered / Denied / Modified.

Date:

Hon. Samuel Conti, United States District Judge

End of Document

Krause Marine Towing Corp. v. Ass'n of Md. Pilots

Court of Special Appeals of Maryland

May 31, 2012, Filed

No. 561, September Term, 2010

Reporter

205 Md. App. 194 *; 44 A.3d 1043 **; 2012 Md. App. LEXIS 56 ***; 2012 AMC 2323; 2012 WL 1959303

KRAUSE MARINE TOWING CORP., ET AL. v. ASSOCIATION OF MARYLAND PILOTS, ET AL.

Prior History: Appeal from the Circuit Court for Baltimore City. Kaye A. Allison, *Judge*.

Disposition: **[***1]** THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED IN PART AND VACATED IN PART AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLANTS TO PAY COSTS.

Core Terms

pilots, docking, tug, vessel, masters, trial court, pilotage, ship, Port, rotation, work rule, Antitrust, regulated, licensed, rule of reason, declaratory judgment, steamship, antitrust claim, safely, guideline, rights, towing, moor, member of the association, motion for judgment, membership, assigned, maritime, asserts, argues

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

HN1[] **Judgment as Matter of Law, Directed Verdicts**

See *Md. R. 2-519(b)*.

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

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

An appellate court reviews a trial court's legal conclusions de novo.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN3[] **Standards of Review, Clearly Erroneous Review**

An appellate court sets aside a trial court's factual determinations only when they are clearly erroneous and, in making that evaluation, the appellate court must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Md. R. 8-131(c)*.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Appeals > Standards of Review > General Overview

HN4[] **Judgment as Matter of Law, Directed Verdicts**

If a trial court grants a motion for judgment without clearly articulating its reason for doing so, an appellate court will affirm the trial court's decision to grant the motion for judgment if the record indicates that at least one of the grounds asserted by the moving party supported the court's decision.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] **Antitrust & Trade Law, Sherman Act**

Maryland's Antitrust Act, Md. Code Ann., *Com. Law § 11-201 et seq.* (2005), was enacted to complement the body of federal law governing restraints of trade, unfair competition and related matters in order to protect the public and foster fair and honest intrastate competition. Md. Code Ann., *Com. Law § 11-202(a)(1)* (2005). This statute is essentially the same as *§ 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*. In construing the Maryland Antitrust Act, courts are to be guided by the interpretation given by federal courts to the various federal statutes dealing with the same or similar matters. Md. Code Ann., *Com. Law § 11-202(a)(2)* (2005).

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6[] **Sherman Act, Scope**

An undue restraint is one that tends to impair competition significantly without adequate justification. There are three modes of analysis that courts utilize in determining whether a restraint violates antitrust laws: (1) a per se analysis; (2) a "quick-look" analysis; and (3) a "rule of reason" analysis.

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN7[] **Sherman Act, Scope**

Under a full "rule of reason" analysis, a court must decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition. Under the classic formulation of the "rule of reason," the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. The Court of Appeals has adopted the rule of reason analysis for claims arising under Maryland's Antitrust Act, Md. Code Ann., *Com. Law § 11-201 et seq.* (2005).

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

Evidence > Burdens of Proof > Burden Shifting

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8[] **Sherman Act, Scope**

Under the rule of reason, the plaintiffs bear an initial burden to demonstrate the defendants' challenged behavior had an actual adverse effect on competition as a whole in the relevant market. Because the antitrust laws protect competition as a whole, evidence that plaintiffs have been harmed as individual competitors will not suffice. If the plaintiffs satisfy their initial burden, the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement. Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means. Ultimately, the factfinder must engage in a careful weighing of the competitive effects of the agreement—both pro and con—to determine if the effects of the challenged restraint tend to promote or destroy competition.

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Licensing & Registration

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN9[] **Water Transportation, Licensing & Registration**

Under Md. Code Ann., *Bus. Occ. & Prof. § 11-501(a)*, each American vessel engaged in foreign trade and each foreign vessel shall employ a licensed pilot to pilot the vessel when it is underway on the navigable waters of the State, including when the vessel is towing or being towed by another vessel. Pilotage and docking master fees are established by the Public Service Commission. Md. Code Ann., *Bus. Occ. & Prof. § 11-502*. These fees are paid by the owners of the vessels. Md. Code Ann., *Bus. Occ. & Prof. § 11-501(a)*.

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Licensing & Registration

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN10[] **Water Transportation, Licensing & Registration**

Under the Maryland Pilots Act, Md. Code Ann., *Bus. Occ. & Prof. § 11-101 et seq.* (2010), all Maryland bay pilots and docking masters who service foreign ships are licensed by the Maryland Board of Pilots. Additionally, these pilots are members of the Association of Maryland Pilots. Pilots are regulated both by the Act, which the Board has been given authority to enforce, and by work rules passed by the Association.

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Licensing & Registration

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN11[] Water Transportation, Licensing & Registration

It is the express power of the Maryland Board of Pilots to adopt regulations and pass orders to govern and regulate licensed pilots. Md. Code Ann., *Bus. Occ. & Prof. § 11-205(a)*. *Section 11-205(b)(2)* states that the Board shall be responsible for safety in providing pilotage. To help ensure the pilots are properly trained, Md. Code Ann., *Bus. Occ. & Prof. § 11-305* authorizes the Board to determine which potential pilots are sufficiently qualified for the positions and allows the Board to determine how many pilots are necessary to protect the commercial interests of the State. *Section 11-305(b)*.

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN12[] Water Transportation, State & Local Regulation

The Association of Maryland Pilots plays two important roles in the State's regulatory scheme. First, it is the collection agent for the receipt and disbursement of all pilotage fees. Md. Code Ann., *Bus. Occ. & Prof. §§ 11-503* and *11-602(c)(1)*. The Maryland Board of Pilots has the authority to require the Association of Maryland Pilots to make retirement and disability payments to certain inactive pilots, Md. Code Ann., *Bus. Occ. & Prof. §§ 11-504* and *11-505*, and to reserve a portion of its income in a capital replacement fund, disbursements from which can be made only with the Maryland Board of Pilots' approval. Md. Code Ann., *Bus. Occ. & Prof. 11-506(a)-(c)*. Second, the Association maintains work rules for its members. Rules that pertain to pilot list administration, appointments and assignment intervals must be approved by the Board, as well as rules that affect safe operations of vessels by Maryland pilots. *Md. Code Regs. 09.26.04.01*.

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN13[] Water Transportation, State & Local Regulation

Under Md. Code Ann., *Bus. Occ. & Prof. § 11-603*, a licensed pilot may not allow personal financial interests to conflict with professional responsibilities, *§ 11-603(b)(3)*, and can be paid for his or her services only through the Association. Section *§ 11-603(c)(1)*.

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN14[] Water Transportation, State & Local Regulation

See Md. Code Ann., *Bus. Occ. & Prof. § 11-603*.

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN15[] **Constitutional Law, Substantive Due Process**

See *Md. Const. Decl. Rights art. 24*.

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

HN16[] **Reviewability of Lower Court Decisions, Preservation for Review**

The scope of appellate review is determined by what plainly appears by the record to have been raised in or decided by a trial court. *Md. R. 8-131(a)*. This rule is a matter of basic fairness to the trial court and to opposing counsel, as well as being fundamental to the proper administration of justice. Specifically, on matters of such import and significance as constitutional questions, the appellate court cannot overstress the necessity of fully preserving the issue below. The trial court should be given not only the opportunity to rule, but also the assistance of counsels' arguments and memoranda in reaching its result.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > General Overview

HN17[] **Declaratory Judgments, State Declaratory Judgments**

A person whose rights are affected by a statute may obtain a declaration of his rights and status.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > General Overview

HN18[] **Declaratory Judgments, State Declaratory Judgments**

See Md. Code Ann., *Cts. & Jud. Proc. § 3-406* (2006).

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN19[] **State Declaratory Judgments, Scope of Declaratory Judgments**

See Md. Code Ann., *Cts. & Jud. Proc. § 3-409*.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN20[] **State Declaratory Judgments, Scope of Declaratory Judgments**

When a declaratory judgment action is brought and the controversy is appropriate for resolution by declaratory judgment, the court must enter a declaratory judgment, defining the rights and obligations of the parties or the status of the thing in controversy, and that judgment must be in writing and in a separate document. That requirement is applicable even if the action is not decided in favor of the party seeking the declaratory judgment. The crucial question is whether the action is appropriate for declaratory judgment, that is, whether the declaratory judgment would terminate the controversy and whether there are actual, concrete, and adverse claims or interests, as provided by Md. Code Ann., *Cts. & Jud. Proc. § 3-409*.

Headnotes/Summary

Headnotes

Maryland Antitrust Act — Under the Maryland Antitrust Act, "[a] person may not . . . [b]y contract, combination, or conspiracy with one or more other persons, unreasonably restrain trade or commerce." *Md. Code Ann. Com. Law ("CL") § 11-204(a)(1)* (1975, 2005 Repl. Vol.). Maryland's Antitrust Act was enacted "to complement the body of federal law governing restraints of trade, unfair competition [and related matters] . . . in order to protect the public and foster fair and honest intrastate competition." *CL § 11-202(a)(1)*. This statute "is essentially the same as *§ 1* of the Sherman Antitrust Act, . . . *15 U.S.C. § 1*." *Natural Design, Inc. v. Rouse Co., 302 Md. 47, 53, 485 A.2d 663 (1984)*.

Maryland Antitrust Act — Rule of Reason — There are three modes of analysis that courts utilize in determining whether a restraint violates antitrust laws: (1) a *per se* analysis; (2) a "quick-look" analysis; and (3) a "rule of reason" analysis. Under a "rule of reason" analysis, a court must "decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." *Ariz. v. Maricopa County Medical Soc., 457 U.S. 332, 343, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. The classic formulation of the "rule of reason" was articulated by Justice Brandeis in *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*. Under this scheme, a court must balance various factors—e.g., the facts peculiar to the business, the evil believed to exist and the reason for adopting the particular remedy—to determine "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Id*.

Maryland Antitrust Act — Pilots Association Work Rules — The work rules of the Association of Maryland Pilots, which establish a job assignment rotation system among docking masters, are not unreasonable and do not violate Maryland's Antitrust Act. The rules permit docking masters to perform their duties free from any consideration other than the safe and efficient mooring of a vessel. There is an incidental anti-competitive effect that stems from the rotation system but limitations on competition among pilots have long been an aspect of Maryland's pilotage law and are a typical feature of pilotage laws in the United States.

Preservation for Appellate Review — *Rule 8-131(a)* — The scope of our appellate review is determined by what "plainly appears by the record to have been raised in or decided by the trial court . . . ." *Rule 8-131(a)*.

Before the trial court, appellants argued that the Pilots Act, *BOP §§ 11-101 et seq., as a whole* was facially invalid and unconstitutional. On appeal, appellants no longer challenge the Pilots Act *as a whole*, but instead claim that the appeal is only a challenge "to the required Association membership." This much narrower question was not before the trial court. Moreover, appellants have failed to identify the portion of the Act (if not the Act as a whole) that they want invalidated. This argument has not been preserved.

Declaratory Judgment — "It has long been held that a person whose rights are affected by a statute may obtain a declaration of his rights and status." *Dewolfe v. Richmond, __ Md. __, 2012 Md. LEXIS 1, at *46 (No. 34, Sept. Term, 2011, filed January 4, 2012)* (citations and quotation marks omitted). Appellants asked for declaratory relief in their complaint. "[W]hen a declaratory judgment action is brought and the controversy is appropriate for resolution by declaratory judgment, the court must enter a declaratory judgment, defining the rights and obligations of the parties or the status of the thing in controversy, and that judgment must be in writing and in a separate document." *Id. at *47*. The trial court disposed of this case by granting appellees' motions for judgment at the close of appellants' case in chief. The court did not execute a separate judgment defining the rights and obligations of the parties and we remand this case for the court to do so.

Counsel: *Argued by*: Elan P. Hillman of Hamden, CT & Donna M. B. King of Towson, MD (Kern & Hillman, LLC on the brief) *for Appellant*.

Argued by Jonathan R. Krasnoff of Baltimore, MD & James W. Barlett, III of Baltimore, MD (Douglas F. Gansler Attorney General, Richard A. Tabuteau, Semmes, Bowen & Semmes on the briefs) *for Appellee*.

Judges: *Panel*: Krauser, C.J., Kehoe, Hotten, JJ. Opinion by Kehoe, J.

Opinion by: Kehoe

Opinion

[*198] **[**1046]** Opinion by Kehoe, J.

At the heart of this appeal is an antitrust challenge to the work assignment rules of the Association of Maryland Pilots (the "Association") as they affect pilotage and tug services rendered to cargo ships in the Port of Baltimore.

Appellants, Krause Marine Towing Corporation ("KMTC"), a company that provides tug services, and Joseph L. Krause, Jr. ("Krause"), a docking master licensed by the Maryland Board of Pilots (the "Board"), filed a multi-count complaint in the Circuit Court for Baltimore City against the State, the Board, the Association, and several individual members of the Association.[1] At trial, the court granted appellees' motion for judgment at the conclusion of appellants' case in chief. Before this Court, only two of appellants' claims remain in dispute: (1) KMTC's assertion that the Association inhibited its ability to compete for tug business in violation of Maryland's Antitrust Act, *see* **[***2]** *Md. Code Ann., Com. Law ("CL") §§ 11-201 et seq*. (1975, 2005 Repl. Vol.), specifically, *CL § 11-204(a)* (stating that "[a] person may not . . . unreasonably restrain trade or commerce."); and (2) Krause's claim that the Maryland Pilots Act (the "Act"), *see* *Md. Code Ann., Bus. Occ. & Prof. ("BOP") §§ 11-101 et seq*. (1989, 2010 Repl. Vol.), infringes upon his right to contract freely.

Appellants present four issues to us. First, KMTC asserts that the trial court erred in granting the Association's motion for judgment on KMTC's antitrust claim. We hold that the trial court did not err because KMTC did not prove that the Association's work rules unreasonably restrained competition.

Second, KMTC argues that the trial court erred in permitting the Association to assert a statute of limitations defense at trial, **[***3]** thus limiting its claim for damages. We need not **[*199]** address this contention because we have decided against KMTC on its antitrust claim. As KMTC concedes, the statute of limitations issue would only be relevant if we decided in favor of KMTC on the merits of this appeal.

Third, Krause contends that the trial court erred in granting the State's motion for judgment on his claim that Maryland docking masters should not be required to be members of the Association. Krause argues that this requirement is an unconstitutional exercise of the State's police power. This contention, as presented to this Court, has not been preserved for appellate review.

[1] The claims against some of the individual defendants were dismissed prior to trial. The remaining individual defendants are Eric A. Nielsen, John Traut and Alan Watts. On appeal, the assertions against them are not distinct from the claims against the Association itself. When we refer to the Association as a party in this opinion, we are referring to the entity and the three members collectively.

[1047]** Finally, both appellants argue that the trial court erred by failing to issue a declaratory judgment as to their antitrust and constitutional claims. We agree. In disposing of appellants' claims, the trial court failed to enter a declaratory judgment, and we will remand the case to the circuit court for entry of a judgment declaring the rights of the parties in accordance with this opinion.

BACKGROUND

Overview: Pilotage and Tug Services in the Port of Baltimore

The majority of the relevant facts that fuel this dispute arise from tug boat activities **[***4]** in the Port of Baltimore. The Port is one of the busiest in the United States.[2] The container, **[*200]** vehicle transport, and bulk carrier ships that use the Port are enormous: they can be more than three football fields long, up to 138 feet wide and can draw nearly 48 feet. These vessels are too large to berth and unberth by themselves; they require the assistance of tug boats to safely accomplish this task.

There are two types of pilots that help guide these maritime behemoths into and out of port. The first are bay pilots (also referred to as harbor pilots), who direct vessels from the open sea through the Chesapeake Bay to the ship's port of destination (and vice versa). S.B. 237 (2000), Fiscal Note at 2.[3] The **[*201]** second are docking **[**1048]**

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[2] "The Port of Baltimore plays a vital role in Maryland's economy, generating $3.2 billion in annual revenue and local purchases, as well as supporting 50,700 jobs." *Maryland At A Glance: Port of Baltimore*, Maryland State Archives (Mar. 27, 2012), *http://www.msa.md.gov/msa/mdmanual/01glance/html/port.html*. "It serves over 50 ocean carriers making nearly 1,800 annual visits." *Id*. "Total cargo moving through the Port in 2010 amounted to 33 million tons, up from 22.3 millions tons in 2009." *Id*. "Moreover, the value of cargo traveling through the Port in 2010 increased to $41.5 billion, up from $30.2 billion in 2009." *Id*. The Port handles more automobile, farm and construction machinery imports than any other port in the nation. *Id*. Baltimore is one of only two ports on the East coast where **[***5]** the main shipping channel is 50 feet deep. *Id*. There are two routes by which vessels can reach the Port via the Chesapeake Bay: one from the South that originates at Cape Henry and one from the North that originates at the Chesapeake and Delaware Canal.

[3] Some background information in this opinion derives from the fiscal notes of Senate Bill 237 (2000) and House Bill 884 (2004). As we will discuss more fully *infra*, Senate Bill 237 established a State Board of Docking Masters; House Bill 884 abolished the State Board of Docking Masters and transferred **[***6]** the regulatory authority of such masters to the State Board of Pilots. We will use these fiscal notes to aid our discussion of pilotage in Maryland. *See* *Robey v. State, 397 Md. 449, 457, 918 A.2d 499 (2007)* (relying on a fiscal note as evidence to support a particular statutory interpretation); *Moore v. State, 388 Md. 623, 636 n.4, 882 A.2d 256 (2005)* (explaining that a fiscal note is a part of the General Assembly bill file that may be considered in determining legislative intent).

The fiscal note to SB 237 (2000) is available at: *http://mlis.state.md.us/PDF-Documents/2000rs/fnotes/bil_0007/sb0237.pdf*.

The fiscal note to House Bill 884 (2004) is available at: *http://mlis.state.md.us/pdf-documents/2004rs/fnotes/bil_0004/hb0884.pdf*.

Other background information in this opinion is borrowed from various "sunset review" publications. Under the Maryland Program Evaluation Act, *see* *Md. Code Ann. State Gov't ("SG") §§ 8-401 et seq*. (1984, 2009 Repl. Vol.), the Department of Legislative Services conducts periodic legislative reviews of the activities of Maryland's executive branch. This review process is known as a "sunset review" because the agencies subject to review usually have termination dates in their authorizing **[***7]** statutes. *See Sunset Review*, Department of Legislative Services (Ma rch 27, 2012), *http://dls.state.md.us/Content.aspx?page=105*. The purpose of the review process is to "determine whether a governmental activity is necessary for the public interest" and to "make units that are responsible for necessary governmental activity accountable and responsive to the public interest . . . ." *SG § 8-402(b)(1)*.

masters (also called docking pilots), whose primary responsibility is to coordinate and direct the services of tugs to maneuver a ship as it moors and unmoors. H.B. 884 (2004), Fiscal Note at 5. Krause is a docking master; the regulation of docking masters (as opposed to bay pilots) is at the heart of this appeal.

Moving these ships through the Chesapeake Bay to their destination requires tightly planned coordination. Each steamship line that does business in the Port of Baltimore maintains a "ship's agent." Prior to the arrival of a vessel in the Chesapeake Bay, the ship's agent notifies the Association that a bay pilot is needed to guide the ship to Baltimore. Sunset Review (2001) at 27. As the ship nears its destination, the ship's agent makes arrangements for the mooring of the vessel **[***8]** by notifying the Association that a docking master is required and by contacting a tug company. The Association assigns jobs according to established work rules that provide for rotation among pilots and docking masters. (We will discuss these work rules more fully later).

Three ship-docking tug companies serve the Baltimore harbor: KMTC,[4] McAllister Towing of Baltimore, Inc., and Moran Towing Corporation. Each company owns a number of tugs that vary in utility for a given job because of size, design and engine power. Either directly or through affiliates, McAllister and Moran provide tug services to numerous commercial ports in the United States. KMTC focuses primarily on the Port of Baltimore. The three marine tug companies compete for business. In contrast, as we will explain, docking masters have a legally-established monopoly for their services and their fees are regulated by the Public Service Commission.

[*202] *The Disputes*

There are two separate claims that we must address in this case. One **[***9]** involves an antitrust claim brought by KMTC against the Association. The other involves a constitutional challenge to the Act brought by Krause against the State. Both claims involve the Association's work rules for docking masters.

The Association's work rules, dated February 2009, were entered into evidence before the trial court. These rules establish a rotation schedule so that each docking master is subject to approximately the same workload. Sunset Review (2009) at 4. Under these rules, docking masters work two weeks on duty and two weeks off duty, and when they are on duty they complete a three-assignment turn. When the three assignments are completed, the docking master returns to the back end of the rotation schedule. Critical to the underlying dispute in this case, when a ship's agent contacts the Association's dispatch unit to obtain a docking master for a ship, the docking master at the front end of the rotation schedule is automatically assigned to that vessel. As a result, steamship lines cannot contract directly with a particular docking master, nor can a docking master control which steamship line he or she serves on a regular basis.

[1049]** While the three tug companies actively **[***10]** compete for customers and commonly make arrangements with individual steamship lines to provide tug services to that line's vessels, the custom of the industry gives the assigned docking master final say in determining which and how many tugs are adequate for the job. *See* *Cooper/T. Smith, Inc. v. NLRB, 177 F.3d 1259, 1264-65 (11th Cir. 1999)* ("Once a docking pilot receives the schedule of ships docking and undocking in the port on a given day, he decides the number of tugs that will be needed based upon factors such as the dimensions and power of the ship and tidal conditions."); *Guy v. Donald, 203 U.S. 399, 404, 27 S. Ct. 63, 51 L. Ed. 245 (1906)* (describing the pilot, who was a member of the Virginia Pilots Association, as the "sole master of his course" with a free ability "to do what he thought best" **[*203]** and "no duty

Throughout this opinion, we will cite to the sunset review publications of November 2000 (not available online), October 2001 (available at, *http://dlslibrary.state.md.us/publications/OPA/S/F/Pilots_2001.pdf*) and December 2009 (available at, *http://dls.state.md.us/data/polanasubare/polanasubare_sunrev/Pilots.pdf*).

[4] At the time of trial, KMTC was owned by Krause's wife, Joann Krause, and his son, David Krause. From 1989 to 2000, Krause was a part owner of KMTC. In 2000, Krause relinquished his stake in KMTC.

to obey" advice from fellow pilots).[5] If the assigned pilot decides that the tugs provided by a tug company are not adequate for a job, either the shipping line or the tug company must hire additional tugs.

KMTC argues that this setup interferes with its contracts with steamship lines because the system prevents both steamship lines and KMTC from selecting the docking master of their choice. Because neither a steamship line nor a tug company can select its own docking masters, KMTC cannot ensure that the assigned docking master—given the pilot's discretion as to the type and number of tugs necessary for a particular job—will decide that KMTC's tugs are adequate, even though KMTC has a contract with the steamship line.

KMTC asserts that "[t]he prime example" of its problem with the rotation system is seen at the New Ore Pier located at Sparrows Point. It claims that, in 2004, the Association passed a special guideline that caused it to lose work. The guideline stated that vessels with a draft of 44 feet attempting to moor or unmoor at that facility must use at least three tugs, each with at least 3000 horsepower and the ability **[***12]** to maintain a 90 degree angle to the vessel. KMTC asserts that the guideline was adopted because of a dredging project in the area but that the guideline remained in place even after the dredging was completed. KMTC asserts that it does not own three tugs that comply with the guideline and that the requirements listed in the guideline are no longer necessary to safely moor vessels at Sparrows Point. As a result of the guideline, some docking masters have refused to use KMTC tugs at Sparrows Point. As explained by KMTC, if it had the power to bypass the rotation system and select its own pilot, then, in the event the initially scheduled pilot decided that **[*204]** KMTC's tugs did not meet the Sparrows Point guidelines, KMTC could select a different pilot willing to do the job.

KMTC also points to three instances when individual docking masters decided that, under the weather and environmental conditions at the time, KMTC's tugs were inadequate to safely moor a ship. As an example, Joann Krause testified on behalf of KMTC that a docking master, Captain Jankowiak, refused to dock a ship, the M/V MAKIKI, in winds blowing at 25 knots with single screw tugboats owned by KMTC. KMTC alleges that this **[***13]** is just one example of a docking master obstructing **[**1050]** the work of KMTC "under the guise of safety, to prevent [KMTC] from executing its contracts with the shipping companies."

Krause's grievance against the State is much narrower. He asserts that docking masters should not be forced to be members of the Association; instead, he argues that masters should be able to work independently of the Association's work rules. Krause challenges this required membership as an infringement on his freedom of contract rights.

The Trial Court Proceedings

KMTC and Krause filed suit in the Circuit Court for Baltimore City on July 18, 2008 and thereafter filed an eleven count amended complaint asking for compensatory and punitive damages and declarative and injunctive relief. The amended complaint listed the following defendants: the State, the Board, the Association, and various members of the Association.

In November 2009, the trial court issued several orders granting summary judgment in favor of appellees as to several counts. In December 2009, at the time of trial, only six counts remained: namely, Count V (antitrust claim by KMTC against the Pilot Defendants and the Association); Count VI (antitrust **[***14]** claim by KMTC against the State of Maryland for enacting *BOP § 11-603*); Count VII (freedom of contract claim by KMTC against the State); Count IX (antitrust claim by KMTC against the State for granting authority to the Board **[*205]** of Pilots); Count X (antitrust claim by Krause against the State); and Count XI (freedom of contract claim by Krause against the State). The court conducted a five day bench trial on these counts.

[5] This principle was confirmed by the testimony of Captain Michael Duarte, a docking master in Boston's harbors and KMTC's expert witness on tugboat capabilities, who agreed that a docking master **[***11]** must exercise discretion in "choosing how to accomplish a particular job" and stated further that this "would have a lot to do with the docking pilot, his experience, knowing his boats and the people running the boats . . . and knowing the waters and the berths."

Appellants filed a motion for declaratory judgment but, on the first day of trial, requested the court to defer a ruling on its motion until after trial, which the trial court agreed to do. Upon the conclusion of appellants' evidence, appellees moved for judgment. The court received extensive argument on the motion on January 22, 2010.

On April 22, 2010, the trial court issued an order, granting appellees' motions for judgment. The order stated:

> Having considered the plaintiff's evidence at trial on December 8, 9, 10, 11 and 14, 2009; having considered the oral and written motions of the defendants for judgment; having considered the plaintiffs' arguments in opposition; and having considered the defendants' replies thereto, it is this 22nd day of April, 2010, hereby,
>
> ORDERED **[***15]** that the "Motion for Judgment" filed by the Association of Maryland Pilots, Eric A. Nielsen, John Traut, and Alan Watts and the "Motion for Judgment" filed by the State of Maryland, the Maryland State Board of Pilots and Eric Nielsen in his capacity as a member of the Maryland State Board of Pilots are GRANTED *for the reason that the plaintiffs failed to present any credible evidence sufficient to establish any of their claims against any of the defendants*. (Emphasis added).

Appellants filed a Notice of Appeal and, after the parties obtained a clarifying order from the circuit court entering judgment in favor of appellees on Counts V, VI, VII, IX, X and XI, appellants filed a Supplemental Notice of Appeal. This Court consolidated the appeals. The appeal only concerns Counts V and XI.

ANALYSIS

Maryland Rule 2-519(b) provides that ***HN1***[] "[w]hen a defendant moves for judgment at the close of the evidence offered by the **[*206]** plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to **[**1051]** determine the facts and to render judgment against the plaintiff . . . . " ***HN2***[] We review the court's legal conclusions *de novo. Cattail Assocs. v. Sass, 170 Md. App. 474, 486, 907 A.2d 828 (2006)*. In contrast, **[***16]** ***HN3***[] we set aside a trial court's factual determinations only when they are clearly erroneous and, in making that evaluation, we must "give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Maryland Rule 8-131(c)*.

The trial court found "that the plaintiffs failed to present any credible evidence sufficient to establish any of their claims." It did so without stating what specific evidence it found to be unworthy of belief. This presents a significant challenge for the appellants because it is "almost impossible for a judge to be clearly erroneous when he is simply not persuaded of something." *Bricker v. Warch, 152 Md. App. 119, 136, 831 A.2d 453 (2003)* (emphasis removed); *see also Starke v. Starke, 134 Md. App. 663, 680-81, 761 A.2d 355 (2000)* ("Mere non-persuasion, on the other hand, requires nothing but a state of honest doubt. It is virtually, albeit perhaps not totally, impossible to find reversible error in that regard."). Appellants have tailored their appellate contentions accordingly, limiting themselves to those based upon facts that were not challenged at trial.

I. The Association's Rotation System and the Maryland Antitrust Act

KMTC contends that the "Association **[***17]** has a state-granted monopoly over docking in the Port [of Baltimore]" and that the "anti-competitive effect [of the monopoly] outweighs the pro-competitive effect, if any." KMTC further argues that the Association's work rules, which allow docking masters to bypass KMTC's tugboat services, significantly harm its opportunity to compete with the two larger, higher priced towing companies. This, according to KMTC, not only negatively affects its own business, but it also raises prices in the towing market and hurts the bottom line of the steamship companies serving Maryland's ports. In short, KMTC contends that the **[*207]** Association's work rules impose an unreasonable restraint on competition and violate state antitrust laws.

The factual scenario that gives rise to this claim against the Association, and the basis of KMTC's antitrust argument, is summarized in the testimony of Joann Krause, a part owner of KMTC. She explains:

> [T]here is a serious problem with the [Association's] rotation system . . . The pilot calls [] in certain instances and says that he is not going to do the job with my tugs for whatever reason, whether it's windy, there's not enough water under the draft, it's not enough **[***18]** bollard pull,[6] it's not enough horsepower, whatever it is. [And] I don't have the luxury of going down the list [to select another pilot], even though there are pilots qualified to do the work, I'm at a standstill. I lose the work. . . . and this is my problem. And that's really why I'm here.

Thus, in a situation where a docking master decides that he or she cannot safely perform a particular job using KMTC services, KMTC believes it should have the option to designate another docking master to perform the job in the place of the docking master assigned by operation of the Association's rotation system. It is only this situation, *viz*., "where [KMTC is] not allowed to seek and secure a docking pilot who would trade with the assigned pilot and do [KMTC's] work," that KMTC **[**1052]** objects to on appeal and complains is an unreasonable restraint on trade.[7]

Before we begin our analysis of KMTC's antitrust claim, we note that, ***HN4***[] if a trial court grants a motion for judgment without clearly articulating its reason for doing so, **[*208]** we will affirm the trial court's decision to grant the motion for judgment if the record indicates that at least one of the grounds asserted by the moving party supported the court's decision. *See* *Smigelski v. Potomac Insurance Co., 403 Md. 55, 61, 939 A.2d 189 (2007)*; *Phillips v. Allstate Indem. Co., 156 Md. App. 729, 740, 848 A.2d 681 (2004)*; *Ross v. Am. Iron Works, 153 Md. App. 1, 10, 834 A.2d 962, (2003)* (stating the proposition that in a summary judgment context an appellate court will affirm a trial court's decision if the record indicates that at least one of the grounds asserted in favor of the motion for summary judgment supported the trial court's decision).

The Association based its motion for judgment on the following grounds:

(1) The Association could not constitute a "combination or conspiracy" for purposes of an antitrust violation;

(2) The Association's rules are **[***20]** not governed by the Sherman Act because they are the product of a clear policy of the State and are actively supervised by the State;
(3) Any alleged restraint of trade is not unreasonable;
(4) KMTC failed to prove the monetary damages it claimed; and
(5) Most of the monetary damages KMTC claims are time-barred.

We will focus on the Association's third issue—whether the alleged restraint of trade by the Pilots Association was reasonable—in analyzing this case.[8]

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[6] "Bollard pull" is a term for the towing capacity of a tug.

[7] In its brief, KMTC asserts that it "does not challenge the rotation system itself" but rather challenges "the aspect of the Association's work rule rotation system . . . that restrains and excludes [KMTC] from competing to serve some of its own customers." To the extent we can distinguish **[***19]** these two positions, we interpret this to mean that KMTC only criticizes the rotation system as it affects its preexisting contracts with shipping lines, not as it operates generally.

[8] We have selected the third issue partly as a result of a process of elimination. With regard to the first issue, we cannot determine whether the concerted action by the Pilot Defendants could constitute a conspiracy to violate *§ 1* of the Sherman Act because the record contains very little relevant information. *See* *American Needle, Inc. v. NFL, __ U.S. __, 130 S. Ct. 2201, 2209, 176 L. Ed. 2d 947 (2010)* (Whether parties are engaged in a conspiracy to violate *§ 1* of the Sherman Act is not based upon legal formalities but rather on "a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.").

As for issue two, the Association claims that it is immune from liability under the state action doctrine. **[***21]** The state action doctrine is an affirmative defense to an antitrust claim that requires a defendant to show "first, [that] the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, [that] the State provides active supervision of [the alleged] anticompetitive conduct undertaken by private actors." *FTC v. Ticor Title Ins. Co., 504 U.S. 621, 631, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)* (citation omitted). Because the trial court resolved this case on a motion for judgment, the Association

[*209] ***HN5***[] **[**1053]** Maryland's Antitrust Act was enacted "to complement the body of federal law governing restraints of trade, unfair competition [and related matters] . . . in order to protect the public and foster fair and honest intrastate competition." *CL § 11-202(a)(1)*. This statute "is essentially the same as *§ 1* of the Sherman Antitrust Act, . . . *15 U.S.C. § 1*." *Natural Design, Inc. v. Rouse Co., 302 Md. 47, 53, 485 A.2d 663 (1984)*. The General Assembly made explicit its intent "that, in construing [the Antitrust Act], courts are to be guided by the interpretation given by federal courts to the various federal statutes dealing with the same or similar matters. . . . " *CL § 11-202(a)(2)*. Decisions of federal courts interpreting the Sherman Antitrust Act guide our analysis in this case. *Id.; accord State v. Jonathan Logan, Inc., 301 Md. 63, 66-68, 482 A.2d 1 (1984)*; *Greenbelt Homes, Inc. v. Nyman Realty, Inc., 48 Md. App. 42, 426 A.2d 394 (1981)*.

"The purpose of Sherman Act *§ 1* is to prevent agreements that unduly restrain trade." 7 Phillip E. Areeda & Herbert Hovenkamp, ***ANTITRUST LAW*** **[***23]** AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 1511c at 465 (3rd ed. 2010). ***HN6***[] "An undue restraint is one that tends to impair competition significantly **[*210]** without adequate justification." *Id*. There are three modes of analysis that courts utilize in determining whether a restraint violates antitrust laws: (1) a *per se* analysis; (2) a "quick-look" analysis; and (3) a "rule of reason" analysis.

Restraints are *per se* unlawful when "their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*; *accord State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. "*Per se* treatment is appropriate once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *State Oil, 522 U.S. at 10* (citation and quotations marks omitted).

Under the "quick-look" scheme, there is usually some pro-competitive justification for the restraint (thus, the unreasonableness of the restraint is not clear enough **[***24]** to warrant a *per se* analysis); but nonetheless, an elaborate analysis is not needed because "the great likelihood of anticompetitive effects can easily be ascertained." *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*. Courts apply a "quick-look" analysis only "to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability." *Texaco Inc. v. Dagher, 547 U.S. 1, 7 n.3, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. If an arrangement "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," more than a "quick-look" is required, and a court must conduct "a more thorough enquiry into the consequences of those restraints . . . ." *Cal. Dental, 526 U.S. at 759, 771*.

HN7[] Under a full "rule of reason" analysis, a court must "decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." **[*211]** *Arizona v. Maricopa* ***[**1054]*** *County Medical Soc., 457 U.S. 332, 343, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. Under the classic formulation of the "rule of reason," articulated by Justice Brandeis in *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*:

> The true test of legality **[***25]** is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine

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was never required to present evidence on its state action defense. Thus, the record is scant as to the degree to which the Board actually supervised the Association's work rules.

With regard to issue four, the trial court's order granting judgment gives us no indication as to whether the court concluded KMTC's evidence as to damages was credible.

Finally, we will not focus on the argument that most, but not all, of KMTC's claimed damages were time-barred because resolving this issue would not fully address the disputes between the parties.

In contrast, the record is sufficient for us to determine whether the anti-competitive effects of the Association's work rules are reasonable. Moreover, **[***22]** in light of the importance of docking masters to the efficient operation of the Port of Baltimore, resolution of this question is in the public interest.

> that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

The Court of Appeals has adopted the rule of reason analysis for claims arising under Maryland's Antitrust Act. *Natural Design, 302 Md. at 54-55*.

We will analyze the alleged restraint in this case using the "rule of reason." On appeal, KMTC does not assert, and the Association does not contest, that either a *per se* analysis or a "quick-look" analysis is appropriate; both parties posit that the rule of reason **[***26]** applies to these facts. Our analysis proceeds from this standpoint.[9]

[*212] *The Rule of Reason applied to KMTC's Antitrust Claim*

Our first task in conducting a "rule of reason" analysis is to identify specifically the alleged practice or restraint that KMTC complains has an anti-competitive effect. Lawrence A. Sullivan, ANTITRUST, § 68 at 187 (1977) ("To apply the rule [of reason], one must first identify specifically the practice involved."). Here, the relevant restraint that KMTC challenges is the Association's rotation system; more specifically, as stated in KMTC's brief, KMTC challenges "the aspect of the Association's work rule rotation system" that "denies marine towing companies (and vessel owners) the right to seek to use an 'independent contractor' docking pilot of their choice to perform docking services for their customers." With this alleged restraint in mind, we will consider the "rule of reason" factors that are relevant **[**1055]** to the facts of this case. Because of the nature of this dispute, much of our "rule of reason" analysis will **[***28]** focus on background information and "the facts peculiar to maritime pilotage." Specifically, in this first portion of the analysis, we will address (1) the historical evolution of the Act and Maryland's pilotage regulations; (2) the authority that the Act gives to the Board; (3) the duties of the Association in administering pilotage work rules; (4) the development of the law regulating docking masters; (5) the addition of the conflict of interest provision, *BOP § 11-603*, to the Act; and (6) the effect of these developments on tug companies in the Port of Baltimore. After providing this background information and discussing "the facts peculiar to maritime pilotage," we will then proceed to address the history of the restraint, the evil sought to be addressed by the **[*213]** restraint, and the reasons for the particular remedy adopted by the Association.

We begin with the facts peculiar to maritime pilotage, "a unique institution [which] must be judged as such." *Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 558, 67 S. Ct. 910, 91 L. Ed. 1093 (1947)*. Pilots must possess substantial technical skill and knowledge to guide vessels amidst the "infinite variety of navigation hazards, currents, tides, sand bars, submerged **[***29]** objects, weather conditions and the like that mark the harbors . . .

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[9] A "rule of reason" analysis is conducted in various stages, where each party must satisfy an initial burden before a court conducts a complete review of the relevant facts. As stated in *Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 317 (2d Cir. 2008)*:

> ***HN8***[] Under the rule of reason, the plaintiffs bear an initial burden to demonstrate the defendants' challenged behavior had an actual adverse effect on competition as a whole in the relevant market. Because the antitrust laws protect competition as a whole, evidence that plaintiffs have been harmed as individual competitors will not suffice. If the plaintiffs satisfy their initial burden, the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement. Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means. Ultimately, the factfinder must engage in a careful weighing of the competitive effects of the agreement—both pro and con—to determine if the effects of **[***27]** the challenged restraint tend to promote or destroy competition.

(Citation omitted). For purposes of this discussion, we will assume that each party has met its initial burden and perform a full "rule of reason" analysis.

open to commercial vessels." *Jackson v. Marine Exploration Co., 583 F. 2d 1336, 1338 (5th Cir. 1978)*. These considerations apply as fully to docking masters as to other pilots. Nicholas J. Healy & Joseph C. Sweeney, THE LAW OF MARINE COLLISION 260 (1st ed. 1998) ("The tug master must know water levels, depth of water and state of the tides, currents, ordinary obstructions, width and length of channels, and clearance of bridges."). As Justice Black explained:

> Pilots are . . . indispensable cogs in the transportation system of every maritime economy. Their work prevents traffic congestion and accidents which would impair navigation in and to the ports. It affects the safety of lives and cargo, the cost and time expended in port calls, and, in some measure, the competitive attractiveness of particular ports.

Kotch, 330 U.S. at 558.

Every maritime state has both a mandatory pilotage requirement and pilot licensing regulations. Paul G. Kirchner & Clayton L. Diamond, *Unique Institutions, Indispensable Cogs, and Hoary Figures: Understanding Pilotage Regulations in the United States*, 23 U.S.F. Mar. L.J. 168, 187-89 (2011). Maryland **[***30]** is no exception. We will now address the specific aspects of Maryland's scheme at issue in this case.

(1) The History of the Act

The General Assembly first passed a law regulating pilots of vessels in 1787. 1787 Md. Laws (November Session) at 277-80.[10] **[*214]** The statute required ships above a certain size to use State-licensed pilots while in that portion of the Chesapeake Bay within the boundaries of the State, set out qualifications for licensure, and established a licensing and regulatory board.[11] *Id*. Growing from these core requirements, **[**1056]** Maryland's pilotage law has been supplemented and amended many times throughout the years and is now codified as the Act.

Among other things, the current Act establishes the manner in which pilots are employed and compensated. ***HN9***[] Under *BOP § 11-501(a)*, "[e]ach American vessel engaged in foreign trade and each foreign vessel shall employ a licensed pilot to pilot the vessel when it is underway on the navigable waters of the State, including when the vessel is towing or being towed by another vessel." Pilotage and docking master fees are established by the Public Service Commission. *BOP § 11-502*; *see also* *Md. Code Ann., Pub. Util. Cos. ("PUC") §§ 4-303(a)* and *4-303.1* (1998, 2010 Repl. Vol.) (The Public Service Commission establishes "fees and charges" for both pilotage services and docking services "at a just and reasonable rate."). These fees are paid by the owners of the vessels. *BOP § 11-501(a)*.

HN10[] Under the Act, all Maryland bay pilots and docking masters who service foreign ships are licensed by the Board. Additionally, these pilots are members of the Association. Sunset Review (2009) at 2. Pilots are regulated both by the Act, which the Board has been given authority **[***32]** to enforce, and by work rules passed by the Association. Thus, the Board and the Association play pivotal roles in the administration of pilotage **[*215]** services in Maryland. A discussion of both entities is warranted.

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[10] The text of the law is accessible at the Maryland State Archives website (vol. 204 in the online version) available at: *http://www.msa.md.gov/megafile/msa/speccol/sc2900/sc2908/000001/000204/html/am20* 4--277.html.

[11] As stated in the Preamble to Maryland's Pilotage Act of 1787:

> WHEREAS it is necessary for the safety and preservation of vessels bound from this state to sea, or coming into Chesapeake bay . . . that able and experienced pilots should be established to conduct and pilot such vessels, for reasonable fees, to their several **[***31]** moorings, and that ignorant and unskillful persons should be prevented from undertaking such pilotage. . . .

1787 Md. Laws (November Session) at 277.

(2) The Board

The Board "has been in existence for over 200 years, and its priorities and legislative mandate remain largely the same today as when the Board was first established: to provide safety in navigation of Maryland's commercial waterways in the interests of the ships, the citizens of the State, and the environment." Sunset Review (2009) at 3. ***HN11***[] It is the express power of the Board to "adopt regulations and pass orders to govern and regulate licensed pilots." *BOP § 11-205(a)*. *BOP § 11-205(b)(2)* states that "the Board shall . . . be responsible for safety in providing pilotage." To help ensure the pilots are properly trained, *BOP § 11-305* authorizes the Board to determine which potential pilots are sufficiently qualified for the positions and allows the Board to determine how many pilots are "necessary to protect the commercial interests of the State." *BOP § 11-305(b)*.

(3) The Association

"All pilots licensed by the State Board of Pilots are also members of the Association **[***33]** of Maryland Pilots, founded in 1852." Sunset Review (2009) at 4. ***HN12***[] The Association plays two important roles in the State's regulatory scheme. First, it is the collection agent for the receipt and disbursement of all pilotage fees. *BOP § 11-503*; *§ 11-602(c)(1)*.[12] The Board **[*216]** has the authority **[**1057]** to require the Association to make retirement and disability payments to certain inactive pilots, *see BOP § 11-504* and *§ 11-505*, and to reserve a portion of its income in a capital replacement fund, disbursements from which can be made only with the Board's approval. *BOP 11-506(a)-(c)*.

Second, the Association maintains work rules for its members. Rules that pertain to "pilot list administration, appointments [and] assignment intervals" must be approved by the Board, as well as rules that "affect safe operations of vessels by Maryland pilots." *COMAR 09.26.04.01*.

(4) The Regulation of Docking Masters

Today, both the Board and the Association have the authority to regulate bay pilots and docking masters, but this was not always the case. Before 2000, docking masters were specifically exempt from the regulation and licensure requirements of the Act. Instead, docking masters held Coast Guard licenses entitling them to operate a tug and were usually employees of tug companies. Parks & Cattell, *supra*, at 999. The Coast Guard grew concerned about the accountability of docking masters because the Coast Guard licensing procedure did not involve **[***35]** an evaluation of the licensee's experience or skills in any docking master function. *Id*. at 1002. Following a series of administrative law proceedings involving negligence or misconduct by docking masters in other ports in the 1980's and 1990's, the Coast Guard "contacted the state authorities in those states in which the use of docking masters was common . . . to express concern that there were persons over whom no one was asserting jurisdictional control, who were docking and undocking vessels." *Id*. at 1002; *see also* Sunset Review (2009) at 6 ("Prior to 2000, . . . accountability in the event of a docking incident was not clearly defined.").

Maryland's Docking Master Law, enacted in 2000, addressed this regulatory gap by establishing a State Board of **[*217]** Docking Masters to license and regulate docking masters. *See* S.B. 237 (2000), Fiscal Note at 2 (explaining

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[12] The concept of a centralized entity for collecting pilotage fees developed incrementally. By Chapter 214 of the acts of 1853, the "board of pilots" was charged with collecting license fees from vessels exempted from the mandatory pilotage requirement and distributing those revenues to licensed pilots. 1853 Md. Laws 278. The 1853 statute was codified as Article 74 § 19 of the Code of 1860. Shortly thereafter, the "board of pilots" was charged with collecting all pilotage fees. *See* Chapter 25, Acts of 1866, 1866 Md. Laws 35. This arrangement remained in effect for nearly a century. *See* MD. ANN. CODE (1904) Art. 74, § 19 **[***34]** and MD. ANN. CODE (1924) Art. 74, § 19. By Chapter 523 of the Acts of 1947, the Association was designated as the collection agent. 1947 Md. Laws 1282. Substantially the same statutory provision appeared in the 1951 and 1957 Codes, *see* MD. ANN. CODE (1951) Art. 74, § 12; MD. ANN. CODE (1957) Art. 74, § 1019, as well as in the current Act.

that the bill addresses the U.S. Coast Guard's concern "about which legal authority (the State or federal officials) has jurisdiction should there be an accident in the port itself.").

In 2004, however, with the passage of House Bill 884 (2004), the Docking Master Act was repealed, the Board of Docking Masters was abolished and the **[***36]** docking masters passed under the regulatory aegis of the State Board of Pilots. *See* BOP § 11-101(i) (defining "pilotage" to include "maneuvering a vessel during berthing and unberthing operations" and "shifting a vessel within a port with tug assistance."). Thus, beginning in 2004, both bay pilots and docking masters received their licenses from the Board and were both generally regulated by the Act.[13]

(5) BOP § 11-603—The Conflict of Interest Provision in the Act

Of particular import to this appeal, the 2004 legislation added a conflict of interest **[***37]** **[**1058]** provision to the Act. *See* BOP § 11-603.[14] ***HN13***[] Under BOP § 11-603, a licensed pilot may not **[*218]** allow "personal financial interests to conflict with professional responsibilities," § 11-603(b)(3), and can be paid for his or her services only through the Association. BOP § 11-603(c)(1).

The General Assembly's decision to prohibit financial relationships between docking masters, tug companies and steamship lines is consistent with the independence of judgment traditionally afforded pilots:

> Under law and custom [pilots] have an independence wholly incompatible with the general obligations of obedience normally owed by an employee to his employer. [] Their fees are fixed by law and their charges must not be discriminatory. As a rule no employer, no person, **[***39]** can tell them how to perform their

[13] Not all bay pilots in Maryland waters hold a license issued by the Board. The United States Coast Guard licenses pilots for vessels that travel from one domestic port to another, *see* 46 U.S.C. § 8502 (2006), while Maryland licenses pilots for ships bound to or coming from foreign ports. ***BOP § 11-501***; *see also* Alex A. Parks & Edward V. Cattell, Jr., THE LAW OF TUG, TOW, AND PILOTAGE 991 (3rd ed. 1994) ("In the United States, vessels engaged in the coastwise trade [i.e., from one domestic port to another] must be piloted by holders of Coast Guard-issued licenses, while vessels involved in foreign trade . . . must employ state-licensed pilots.").

[14] § 11-603. **Licensed pilot — Conflicts of interest**.

> ***HN14***[] (a) *Prohibited*. — A licensed pilot may not engage in conduct that constitutes a conflict of interest.
>
> (b) *Circumstances*. — A conflict of interest exists in situations in which:
>
> (1) except as provided in subsection (c) of this section, a licensed pilot solicits or accepts financial or other consideration of value from a tugboat, towing, vessel-assist, vessel-owning, or vessel-chartering company, or an agent or officer of that company, or from any other entity providing services in the port community;
>
> (2) a licensed pilot takes any action with the intent to benefit or harm the economic interests of a tugboat, towing, vessel-assist, vessel-owning, or vessel-chartering company, or any other entity providing services in the port community;
>
> (3) a licensed pilot allows personal financial interests to conflict with professional responsibilities;
>
> (4) a licensed pilot solicits **[***38]** business for a tugboat, towing, vessel-assist, vessel-owning, or vessel-chartering company, or any other entity providing services in the port community; or
>
> (5) a licensed pilot discourages a person from engaging the services of a tugboat, towing, vessel-assist, vessel-owning, or vessel-chartering company, or any other entity providing services in the port community.
>
> (c) *Circumstances — Conflict does not exist*. — A conflict of interest does not exist in situations in which:
>
> (1) remuneration is paid to the pilot through the Association in return for the provision of pilotage services; or
>
> (2) there is an exchange of nominal social pleasantries between the licensed pilot and any entity providing services to the port community.

> pilotage duties. When the law does not prescribe their duties, pilots are usually free to act on their own best judgment while engaged in piloting a vessel.

Bisso v. Inland Waterways Corp., 349 U.S. 85, 93-94, 75 S. Ct. 629, 99 L. Ed. 911 (1955) (plurality opinion) (citing, among other authorities, *The China, 74 U.S. 53, 7 Wall. 53, 67, 19 L. Ed. 67 (1869)*; and *Smith v. Pierce, 1 La. 349, 357-58 (1830)*. As two commentators explained:

> **[*219]** A key aspect of the state pilotage system is that in virtually every circumstance the state pilot is independent of the vessel and the vessel operator. . . . The primary responsibility of every state pilot is to protect the public interest by facilitating the safe and efficient movement of vessels in state waters. *In that respect, the principal customer of the pilot's services is not the vessel's operator but rather the state and its public interests*. []

Kirchner & Diamond, *supra*, at 188 (emphasis added; footnote omitted).

(6) The Effect of the Current Regulations on Tug Services in the Port of Baltimore

The Association's rotation system and the Act's conflict of interest provision, *BOP § 11-603*, both protect the independence **[**1059]** of judgment traditionally afforded to pilots in a direct **[***40]** and concrete fashion. The evidence presented by KMTC demonstrates the difficulties faced by docking masters as they guide very large, unwieldy vessels to moorings in the face of narrow channels, high winds, and adverse tide conditions. Maryland's pilotage scheme allows pilots to perform their duties in an independent fashion, separate from the pressures that may stem from the vessel's operator. This serves to ease the tension between the interests of a shipping line—to have its vessels moored and unmoored as quickly and inexpensively as possible—and a docking master's duty to the public to perform those duties safely. The facts peculiar to pilotage support the notion that Maryland's fixed rotation system, which has the effect of immunizing docking masters from pressure from the master of a vessel, is a reasonable approach to a complex problem.

Next, we will discuss, concurrently, the history of the restraint, the evil sought to be addressed, and the reasons for the particular remedy adopted by the Association. This requires us to return to the history of the *Pilots Act*.

The Association designed the rotation system to ensure that pilots have approximately the same workload and to protect **[***41] [*220]** against sending out fatigued pilots. *See* Sunset Review (2000) at 4 (explaining that "maintaining the work rotation schedules . . . ensure[s] pilots are subject to approximately the same workload and they have had enough rest prior to boarding and piloting the next ship."). While application of the Association's rotation rules to docking masters may be of relatively recent origin, Maryland's policy of diminishing competition among pilots is not. *See, e.g.*, 1787 Md. Laws 278, Vol. 204, §§ 10 and 11 (requiring licensed pilots to offer their services "first to the vessel nearest the land or in most distress" and the masters of such ships to accept the pilot). In this regard, Maryland is no different from other maritime states. *See* *Kotch, 330 U.S. at 561* (explaining that pilot associations arose to prevent competition among pilots and that "'[o]ne of the unfortunate results of intense competition was the fact that frequently pilots could not be had when wanted, [as] they might be far out to sea in quest of business.'" (quoting PILOTAGE IN THE UNITED STATES 28 (Department of Commerce 1917))).

We perceive significant benefits to the public in a work rule that allows a docking master to exercise **[***42]** discretion in calling for equipment that he or she thinks most suitable for a particular task. The rule allows the docking master to make this decision without fearing that the owner of the vessel will replace him or her with another docking master willing to attempt to perform the job with different tugs. In this regard, the work rule furthers the purpose and effect of *BOP § 11-603(b)(2)*, which prohibits pilots from taking any action with the intent to benefit, or to harm, the economic interests of a tug company.

Moreover, the corresponding harm to KMTC is limited. Not only is the type of harm suffered by KMTC discrete in nature (the fact that KMTC cannot choose its own pilots), but the frequency of harm is small as well. At oral argument, all parties agreed that there are approximately 5,000 calls for tug services per year in and around the

Port of Baltimore. Even so, at trial, KMTC presented evidence on just three instances that it believed restrained its ability to fairly and freely **[*221]** conduct business. On these three occasions, KMTC lost business because the docking master in each instance independently determined that the available KMTC tugboats were inadequate to safely moor the **[***43]** vessel in question because of weather conditions. **[**1060]** This was the extent of KMTC's harm on this issue. There was no evidence of any anti-competitive intent on behalf of the docking masters involved.[15]

Our review of the record establishes that Maryland's regulated pilotage system provides highly specialized services vital to the State's economic health as well as to the environment of the Chesapeake Bay. The Association's work rules and *BOP § 11-603* have the effect of permitting docking masters to perform their duties free from any consideration other than the safe and efficient mooring of a vessel. The work rule also allocates the burden of providing docking master services among the handful of licensees. There is an incidental anti-competitive effect but, as we have explained, limitations on competition among pilots have long been an aspect of Maryland's pilotage law and are typical features of pilotage **[***44]** laws in the United States. *See* *Kotch, 330 U.S. at 561*; *Olsen v. Smith, 195 U.S. 332, 344-45, 25 S. Ct. 52, 49 L. Ed. 224 (1904)*.

Indeed, the rotation schedule that KMTC criticizes is a common aspect of pilots associations. Parks & Cattell, *supra*, at 1049 ("The general form of a pilot association is that of a loose partnership, in which the various members maintain a central accounting and dispatch office and operate out of a pool; that is, the individual pilot members take turns piloting vessels on a rotation basis."); Thomas J. Schoenbaum, 2 ADMIRALTY AND MARITIME LAW 96 (5th ed. 2011) ("[Pilots] associations maintain a roster of pilots and a central office that receives requests for pilotage. [Pilots Associations] may dispatch pilots for duty on a rotating basis."); *accord* *Guy, 203 **[*222]** U.S. at 404* (describing the Virginia Pilot Association as an "unincorporated association" made up of pilots whom "[b]y their agreement . . . take turns in boarding vessels required by law to take a pilot"). That, on rare occasions, individual docking masters concluded that KMTC's tugs were inadequate does not weigh heavily in our analysis of the utility and reasonableness of the system.

In light of all of these considerations, we hold **[***45]** that KMTC failed to demonstrate that the Association's work rules implementing the rotation system are unreasonable or violate Maryland's Antitrust Act. The trial court did not err in granting the motion for judgment of the Association.

II. Mandatory Membership in the Association

To this Court, Krause argues, under two distinct theories, that it is an unconstitutional use of a State's police power to require a pilot to be a member of the Association. Under one theory, he contends that the Act infringes upon his freedom of contract rights in violation of the *due process clause of Article 24 of the Maryland Declaration of Rights.*[16] The other argument asserted by Krause is that, under the equal protection portion of *Article 24*,[17] the Act unfairly distinguishes **[**1061]** between pilots and "any other state professionals, licensed or otherwise" by requiring docking masters and pilots to be members of the Association. Krause asserts that, under either theory,

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[15] Nor was there any evidence produced, assuming the job could be performed by another tug company, as to why KMTC could not purchase more modern equipment, with increased horsepower and maneuverability, to compete more effectively with the other tug companies and avoid this problem altogether.

[16] *Article 24* provides:

> ***HN15***[] That no man ought to be taken or imprisoned **[***46]** or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

[17] The protections afforded by *Article 24* extend to equal protection of the laws. *See, e.g.,* *State Admin. Bd. of Election Laws v. Board of Supvrs., 342 Md. 586, 595 n.6, 679 A.2d 96 (1996)*.

"the required Association membership provision . . . cannot surmount the hurdles that [the law] *not* be 'unreasonable' or 'arbitrary' or 'discriminating.'" (Emphasis in original).

The State argues that Krause did not raise a due process or equal protection argument based on *Article 24* before the trial **[*223]** court and that accordingly these contentions have not been preserved for appellate review. We agree with the State but only in part.

A review of the record establishes that Krause did not raise an equal protection argument before the trial court. We will not consider this contention for the first time on appeal. With regard to Krause's due process claim, it is true that Krause presented *a* due process argument to the trial court; however, as we will discuss, the due process argument that he presents to us on appeal is radically different from and inconsistent with the argument that he offered to the trial court. Accordingly, Krause's due process argument is not preserved.

HN16[] The scope **[***47]** of our appellate review is determined by what "plainly appears by the record to have been raised in or decided by the trial court . . . ." *Rule 8-131(a)*. This rule "'is a matter of basic fairness to the trial court and to opposing counsel, as well as being fundamental to the proper administration of justice.'" *In re Kaleb K., 390 Md. 502, 513, 889 A.2d 1019 (2006)* (quoting *Medley v. State, 52 Md. App. 225, 231, 448 A.2d 363 (1982))*. Specifically, "[o]n matters of such import and significance as constitutional questions, we cannot overstress the necessity of fully preserving the issue below. The trial court should be given not only the opportunity to rule, but also the assistance of counsels' arguments and memoranda in reaching its result." *Hall v. State, 22 Md. App. 240, 245, 323 A.2d 435 (1974)*.

Throughout the proceedings before the trial court, Krause argued that the Pilots Act *as a whole*, and specifically *BOP § 11-603*, were facially invalid and unconstitutional.[18] On **[*224]** appeal, Krause's position is diametrically opposed to the position that he set forth before the trial court. He no longer challenges the Pilots Act *as a whole*, but instead claims that the appeal is only a challenge "to the required Association membership." As **[***48]** stated in his brief:

> To reiterate, this is not a challenge to the constitutionality of the Pilots Act as a whole, nor to the "conflict of interest" provision, *§ 11-603*. It is a challenge only to the required Association membership, as violative of the Declaration of Rights, MD Code, Constitution, *Art. 24*, by depriving Captain Krause of his 'liberty or property,' i.e., his freedom to work as an independent contractor docking pilot."[19]

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[18] As stated in appellants' amended complaint, Krause requested that the trial court declare *BOP § 11-603*, "and any other piloting law requiring Joseph Krause to practice his profession only through membership in the Association, to be an unlawful restraint of the right of freedom of contract . . . ." In opening statements on the State's motion for summary judgment, counsel for Krause emphasized that "Captain Krause is challenging the validity of the statute as a whole" and that "[t]he State will argue this is not a facial attack, but it is." Again, in their opposition to the State's motion for judgment, appellants urged that "[b]oth **[***49]** Krause Marine and Captain Krause assert that the Pilots Act is an unlawful restraint on their respective freedoms of contract."

[19] To understand Krause's *volte face*, we must return briefly to the proceedings before the trial court and consider an affirmative defense raised by the State.

Prior to filing the current action, Krause was the subject of an administrative disciplinary proceeding brought by the Board against him for an alleged violation of *§ 11-603*. The Board prevailed before the administrative law judge. Krause sought judicial review and, eventually, the administrative decision was affirmed in part and reversed in part by a panel of this Court in *State Board of Pilots v. Krause*, No. 2979, September Term, 2007, (filed July 24, 2009), *cert. denied*, ***411 Md. 357, 983 A.2d 432 (2009)***. Krause did not challenge the constitutionality of *§ 11-603* in that proceeding.

Before the trial court in the instant case, the State asserted that Krause waived the right to challenge *§ 11-603* by failing to rase it in the administrative proceeding. In response, Krause argued that the requirement of exhaustion of administrative remedies was inapplicable because he was challenging the Pilots Act as a whole, citing *Ins. Comm'r v. Equitable Life Assurance Soc'y of the United States, 339 Md. 596, 619, 664 A.2d 862 (1995)*. **[***50]** Krause was adamant about characterizing his claim as a

There are problems with Krause's new position. First, this much narrower question—which **[**1062]** involves "a challenge only to the required Association membership" and not a facial challenge to the Pilots Act—was not before the trial court. Second, Krause has failed to identify the portion of the Act (if not **[*225]** the Act as a whole or *BOP § 11-603*) that he wants invalidated. Krause insists that this is a challenge "to the required Association membership," but we cannot address this assertion if Krause does not direct us to the offending provision of the Act. *See* *Maryland Rule 8-504(a)(5)*; *Citizens v. Board of Elections, 201 Md. App. 605, 622 n.18, 30 A.3d 245 (2011)* (this Court will not consider arguments that are not presented with particularity). For these reasons, Krause's due process argument has not been preserved. *Rule 8-131(a)*.[20]

III. The Declaratory Judgment

"It has long been held that ***HN17***[] a person whose rights are affected by a statute may obtain a declaration of his rights and status." *Dewolfe v. Richmond, ___ Md. ___, 2012 Md. LEXIS 1, at *46* (No. 34, Sept. Term, 2011, filed January 4, 2012) (citations and quotation marks omitted). *Section 3-406 of the Courts and Judicial Proceedings Article* states:***HN18***[] "Any person . . . whose rights, status, or other legal relations are affected **[***52]** by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations under it." *Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 3-406* (1973, 2006 Repl. Vol.). Likewise, *CJP § 3-409* explains that ***HN19***[] "a court may grant a declaratory judgment or decree in a civil case, if it will serve to terminate the uncertainty or controversy giving rise to the proceeding . . . ."

As the Court of Appeals explained in *Dewolfe*:

> **[*226]** ***HN20***[] **[**1063]** when a declaratory judgment action is brought and the controversy is appropriate for resolution by declaratory judgment, the court must enter a declaratory judgment, defining the rights and obligations of the parties or the status of the thing in controversy, and that judgment must be in writing and in a separate document. That requirement is applicable even if the action is not decided in favor of the party seeking the declaratory judgment.

Id. at *47 (citations and quotation marks omitted). "The crucial question is whether the action is appropriate for declaratory judgment, that is, whether the declaratory judgment would terminate the controversy and whether there are actual, **[***53]** concrete, and adverse claims or interests, as provided by *C.J.P. § 3-409*." *Id*.

Here, appellants requested declaratory relief and the pertinent allegations in appellants' amended complaint—i.e., that the work rules of the Association violated the State's Antitrust Act and that the Act unconstitutionally limited Krause's right to freedom of contract—presented "actual, concrete, and adverse claims." In disposing of them, the trial court simply stated "that the plaintiffs failed to present any credible evidence sufficient to establish any of their claims against any of the defendants." The trial court should have executed a separate judgment defining the rights and obligations of the parties. Had the court done so, it would have entered a judgment addressing the requests for declaratory relief as presented to it, not the requests as framed before us. Our instructions on remand will be limited to the issues raised before the trial court.

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facial attack on the constitutionality of the Act (as opposed to a challenge to a discrete, fact-specific situation) to rebut the "exhaustion of administrative remedies" defense proffered by the State.

[20] Our own review of the Act leads us to conclude that no single provision of the Act requires pilots to be members of the Association. **[***51]** *BOP § 11-603(c)(1)* prohibits pilots from receiving remuneration for their services other than through the Association and *BOP § 11-505(a)(2)(iii)* requires the Association to distribute net fees to "regularly working licensed pilots who are members in good standing of the Association." The two statutes operate together to impose an effective requirement of Association membership, at least for those pilots who wish to earn a living through their services. Krause cannot simultaneously assert that "this is not a challenge to . . . the 'conflict of interest' provision, *§ 11-603*" while also contending that this "is a challenge only to the required Association membership" when *§ 11-603* is an integral part of the statutory scheme requiring membership.

We remand this case to the trial court with instructions to enter a written judgment declaring that: (i) the February 2009 rules of the Association of Maryland Pilots implementing the rotation system did not violate *CL § 11-204(a)(1)*; and (ii) the *Pilots Act* **[***54]** does not unlawfully restrain Krause's right of freedom of contract. *See* *Donnelly Adv. Corp. v. City of Baltimore, 279 Md. 660, 672, 370 A.2d 1127 (1977)* (When the trial court dismissed plaintiff's request for a declaratory judgment **[*227]** action without a declaration of the parties' rights, remand for entry of declaratory judgment was appropriate.).

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED IN PART AND VACATED IN PART AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

APPELLANTS TO PAY COSTS.

End of Document

[Daniel v. Wells Fargo Bank, N.A.](#)

United States District Court for the Eastern District of California

June 4, 2012, Decided; June 4, 2012, Filed

No. 2:11-cv-02652-MCE-EFB

Reporter
2012 U.S. Dist. LEXIS 77200 *; 2012 WL 2118539

PAUL DANIEL, MARGIE DANIEL, PlaintiffS, v. WELLS FARGO BANK, N.A., et al., Defendants.

Core Terms

savings, notice, motion to dismiss, disclosure, fraudulent, judicial estoppel, good faith, origination, bankruptcy proceedings, cause of action, fair dealing, conclusory, covenant, merits, unfair, fails, state law claim, leave to amend, injunction, rescission, preempted, quotation, Mortgage, omission, statute of limitations, allegations, estopped, MOOT, factual allegations, breach of contract

LexisNexis® Headnotes

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

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

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

On a motion to dismiss for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*, all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. *Fed. R. Civ. P. 8(a)(2)* requires only a short and plain statement of the claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. Though a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. A plaintiff's factual allegations must be enough to raise a right to relief above the speculative level.

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

HN2[] **Complaints, Requirements for Complaint**

Fed. R. Civ. P. 8(a)(2) requires a showing, rather than a blanket assertion of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirements of providing not only fair notice of the nature of the claim, but also grounds on which the claim rests. A pleading must contain only enough facts to state a claim to relief that is plausible on its face. If the plaintiffs have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.

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

HN3[] **Amendment of Pleadings, Leave of Court**

A court granting a motion to dismiss a complaint must then decide whether to grant leave to amend. *Fed. R. Civ. P. 15(a)* empowers the court to freely grant leave to amend when there is no undue delay, bad faith, dilatory motive on the part of the movant, undue prejudice to the opposing party by virtue of the amendment, or futility of the amendment. Leave to amend is generally denied when it is clear the deficiencies of the complaint cannot be cured by amendment. While leave to amend must be freely given, the court is not required to allow futile amendments.

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

HN4[] **Estoppel, Judicial Estoppel**

In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements. Further, judicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset.

Banking Law > ... > Banking & Finance > Federal Acts > Home Owners' Loan Act

Banking Law > ... > Banking & Finance > Regulators > US Office of Thrift Supervision

HN5[] **Federal Acts, Home Owners' Loan Act**

Federal savings associations, including federal savings banks, are subject to the Home Owner's Loan Act (HOLA), *12 U.S.C.S. §§ 1461 et seq.*, and are regulated by the Office of Thrift Supervision (OTS). *12 U.S.C.S. § 1464*.

Banking Law > ... > Banking & Finance > Federal Acts > Home Owners' Loan Act

Banking Law > ... > Banking & Finance > Regulators > US Office of Thrift Supervision

HN6[] **Federal Acts, Home Owners' Loan Act**

Under the Home Owner's Loan Act (HOLA), *12 U.S.C.S. §§ 1461 et seq.*, the Office of Thrift Supervision (OTS), *12 U.S.C.S. § 1464*, enjoys plenary and exclusive authority to regulate all aspects of the operations of Federal savings associations and its authority occupies the entire field of lending regulation for federal savings associations. The Ninth Circuit has stated that the enabling statute and subsequent agency regulations are so pervasive as to leave no room for state regulatory control. Under the regulations promulgated by the OTS, HOLA preempts any state law claim having to do with disclosures and advertising; processing, origination, servicing, sale, or purchase of, or investment or participation in, mortgages; terms of credit; and loan-related fees, *12 C.F.R. § 560.2(b)(4)*, *(5)*, *(9)*, *(10)*.

Banking Law > Consumer Protection > Truth in Lending > Disclosure

Banking Law > Consumer Protection > Truth in Lending > Liability for Violations

HN7[] Truth in Lending, Disclosure

The Truth in Lending Act (TILA), *15 U.S.C.S. §§ 1601 et seq.*, requires that lenders make certain disclosures to borrowers, which will give rise to a cause of action if the lender violates its disclosure requirements. Further, TILA mandates that borrowers be given three business days to rescind, without penalty, a consumer loan that uses their principle dwelling as security, *15 U.S.C.S. § 1635(a)*. A TILA claim seeking damages is subject to a one-year statute of limitations, *15 U.S.C.S. § 1640(e)*, That limitations period begins to run on the date of consummation of the transaction. If the lender has not complied with TILA's disclosure requirements, the rescission period is extended to three years, *§ 1635(f)*.

Governments > Legislation > Statute of Limitations > Tolling

HN8[] Statute of Limitations, Tolling

The Court will apply equitable tolling in situations where, despite all due diligence, the party invoking equitable tolling is unable to obtain vital information bearing on the existence of the claim.

Real Property Law > Financing > Foreclosures > General Overview

HN9[] Financing, Foreclosures

Under California law, a plaintiff challenging a foreclosure sale or any cause of action "implicitly integrated" with the sale is required to make a valid and viable tender of payment of the debt. An offer to tender is an offer to pay the full amount of the debt for which the property was security.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN10[] Heightened Pleading Requirements, Fraud Claims

The elements for a fraud claim are (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or scienter); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. *Fed. R. Civ. P. 9(b)* requires a plaintiff to state with particularity the circumstances constituting fraud. This includes an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.

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

HN11[] Deceptive & Unfair Trade Practices, State Regulation

California's Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code §§ 17200 et seq.*, defines unfair competition as any unlawful, unfair or fraudulent business act or practice. "Unlawful" practices are practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulation, or court-made. To state a cause of action based on an "unlawful" business act or practice under the UCL, a plaintiff must allege facts sufficient to show a violation of some underlying law.

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

HN12[] Deceptive & Unfair Trade Practices, State Regulation

A business act or practice is "unfair" when the conduct threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to a violation of the law, or that otherwise significantly threatens or harms competition. To sufficiently plead an action based on an "unfair" business act or practice, a plaintiff must allege facts showing the "unfair" nature of the conduct and that the harm caused by the conduct outweighs any benefits that the conduct may have.

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

HN13[] Deceptive & Unfair Trade Practices, State Regulation

A "fraudulent" business act or practice is one in which members of the public are likely to be deceived. Thus, in order to state a cause of action based on a "fraudulent" business act or practice, the plaintiff must allege that consumers are likely to be deceived by the defendant's conduct. Furthermore, a plaintiff alleging unfair business practices under *Cal. Bus. & Prof. Code § 17200* must state with reasonable particularity the facts supporting the statutory elements of the violation.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN14[] Breach of Contract Actions, Elements of Contract Claims

Under California law, a claim for breach of contract requires that a plaintiff demonstrate: (1) the existence of the contract; (2) plaintiff's performance or excuse for nonperformance of the contract; (3) defendant's breach of the contract; and (4) resulting damages.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN15[] Contract Interpretation, Good Faith & Fair Dealing

Under California law, every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. The covenant of good faith and fair dealing requires that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. The covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN16[] Contract Interpretation, Good Faith & Fair Dealing

The implied covenant does not require parties to negotiate in good faith prior to any agreement.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN17[] **Injunctions, Preliminary & Temporary Injunctions**

The party requesting preliminary injunctive relief must show that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Counsel: **[*1]** For Paul Daniel, Margie Daniel, Plaintiffs: Herman A. D. Franck, V, LEAD ATTORNEY, Law Offices of Herman Franck, Sacramento, CA.

For Wells Fargo Bank, N.A., Successor by Merger to Wells Fargo Bank Southwest, N.A., formerly known as Wachovia Mortgage FSB, formerly known as World Savings Bank FSB, Defendant: Tim G. Ceperley, LEAD ATTORNEY, Anglin, Flewelling, Rasmussen, Campbell & Trytten LLP, Pasadena, CA.

Judges: MORRISON C. ENGLAND, JR., UNITED STATES DISTRICT JUDGE.

Opinion by: MORRISON C. ENGLAND, JR.

Opinion

MEMORANDUM AND ORDER

Before the Court are Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint ("FAC") (ECF No. 5), Defendants' Motion to Strike Portions of Plaintiffs' FAC (ECF No. 6) and Request for Judicial Notice ("RJN") (ECF No. 7). Also before the Court are Plaintiffs' Motions for: (1) Remand (ECF No. 9); (2) Untimely Filing of Opposition to Motion to Dismiss (ECF No. 13); (3) Issuance of Temporary Restraining Order ("TRO") and Preliminary Injunction ("PI") (ECF No. 20); and (4) Setting of Expedited Hearing on the Motion for TRO/PI (ECF No. 25). [1] For the reasons that follow, Defendants' Motion to Dismiss (ECF No. 5) and Request for Judicial Notice (ECF No. 7) are GRANTED and Defendants' **[*2]** Motion to Strike (ECF No. 6) is DENIED as MOOT. Plaintiffs' Motion for Remand (ECF No. 9) is DENIED, Plaintiffs' Motion for Untimely Filing of Opposition to Motion to Dismiss (ECF No. 13) is GRANTED, and Plaintiffs' Motions for TRO/PI and an expedited hearing on same (ECF Nos. 20 and 25) are DENIED as MOOT.

BACKGROUND[2]

In the spring of 2007, Plaintiffs Paul Daniel and Margie Daniel refinanced their home located at 7821 Killdeer Way, Elk Grove, California, and entered into an Option Adjustable Rate Mortgage ("ARM") with World Savings Bank, which later became Wells Fargo Bank, N.A. ("Wells Fargo"). [3] (FAC, ECF No. 1, at 7, Ex. A.)

Plaintiffs' FAC does not indicate what exactly happened following the refinancing, but **[*3]** Defendants state that Plaintiffs' original complaint was filed in state court in April of 2010 (although Defendants state they were not served with the FAC until September of 2011). (MTD, ECF No. 5 at 10; Notice of Removal and FAC, ECF No. 1.) In

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[1] Because oral argument would not be of material assistance, the Court orders these matters submitted on the briefs. E.D. Cal. Local Rule 78-230(h).

[2] To the extent possible, the following facts are taken from Plaintiffs' FAC (ECF No. 1.) For the purposes of this Motion, the Court accepts Plaintiffs' facts as true and makes all inferences in the light most favorable to Plaintiffs.

[3] In 2008, Plaintiffs again refinanced the property into an ARM with Wells Fargo. (ECF No. 7, Ex. C.)

addition, Defendants state that Plaintiffs filed a petition for Chapter 7 bankruptcy in December 2010, and that this petition was discharged on May 17, 2011. (ECF No. 5 at 9, ECF No. 7, Exs. I and J (Voluntary Petition and Discharge of Debtor).) Defendants removed to this Court on October 7, 2011, on the basis of federal question jurisdiction.

Plaintiffs generally allege that the Option ARM is a deceptively devised financial product, which had higher interest rates than promised, and which was designed to, and did in fact, cause negative amortization of their loan to occur. [4] (FAC at 8-9.) Plaintiffs raise five claims for relief: (1) violations of the Truth in Lending Act, *15 U.S.C., §§ 1601, et seq.* ("TILA"); (2) fraudulent omissions; (3) violation of California's Unfair Competition Law, *Business and Profession Code §§ 17200, et seq.* ("UCL"); (4) breach of contract; and (5) breach of the implied covenant of good faith and fair dealing.

On October 14, 2011, Defendants filed their MTD. (ECF No. 5.) Defendants' move to dismiss, under *Fed. R. Civ. P. 12(b)(6)*, [5] on the basis that Plaintiffs': (1) claims are barred by judicial estoppel; (2) state law claims against Wachovia are barred by the Home Owner's Loan Act, *12 U.S.C. §§ 1461, et seq.* ("HOLA"); (3) TILA claims are time-barred and Plaintiffs never tendered their indebtedness; (4) fraudulent omission claim fails to satisfy the elements for such a claim; (5) have failed to state a claim for unfair business practices under the UCL; (6) failed to allege a breach of the note or deed of trust; and (7) failed to state a claim for breach of the implied covenant of good faith and fair dealing. In addition, Plaintiffs filed a Motion to Strike portions of Plaintiffs' FAC. (ECF No. 6.)

On December 10 and 16, 2011, Plaintiff Paul Daniel filed a request, which the Court interprets as a **[*5]** Motion to Remand (see ECF Nos. 9 and 10), generally asking the Court to send the case back to state court due to Mr. Daniel's deteriorating health. While the Court is sympathetic to Mr. Daniel's health issues, they are not a basis for remand, and Defendants properly removed this case on the basis of federal question jurisdiction. Therefore, the motion is denied.

On March 28, 2012, Plaintiffs filed their Motion seeking leave to untimely file their Opposition, which attached their proposed Opposition. (ECF No. 13.) The motion to permit untimely filing of the Opposition is unopposed and will be granted due to the fact that Plaintiffs' prior attorney has been indicted and Plaintiffs have only recently obtained new counsel. (See ECF No. 13, Exs. A-D.)

Thereafter, Plaintiffs filed their Motion for TRO/PI and Motion for Expedited Hearing. (ECF Nos. 20-25.) Plaintiffs contend that a TRO/PI is necessary to prevent Defendants from evicting them and because there is an unlawful detainer action proceeding in Sacramento Superior Court.

ANALYSIS

Because the Court's denial of Plaintiffs' Motion for a TRO/PI relates to the merits of their claims, the Court will first address Defendants' MTD. (ECF Nos. **[*6]** 5.) Because the Court concludes that the MTD should be granted, the MTS, (ECF No. 6), is denied as moot.

I. MOTION TO DISMISS

A. Standard

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[4] Negative **[*4]** amortization refers to the situation where a loan payment for a particular period is less than the interest charged for that period, so the balance owed on the loan increases over time.

[5] All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

HN1[] On a motion to dismiss for failure to state a claim under *Rule 12(b)(6)*, all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. *Rule 8(a)(2)* requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the. . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554-55, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal citations and quotations omitted). Though "a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id. at 555* (internal citations and quotations omitted). A plaintiff's factual allegations must be enough to raise a right to relief above the speculative level. **[*7]** Id. (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004) ("The pleading must contain something more. . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

Moreover,*HN2*[] "*Rule 8(a)(2)* . . . requires a 'showing,' rather than a blanket assertion of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirements of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Twombly, 550 U.S. at 555, n.3* (internal citations omitted). A pleading must contain "only enough facts to state a claim to relief that is plausible on its face." *Id. at 570*; see also *Ashcroft v. Iqbal, 556 U.S. 662, 677-679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. If the "plaintiffs . . . have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly, 550 U.S. at 570*; *Iqbal, 556 U.S. at 680*.

HN3[] A court granting a motion to dismiss a complaint must then decide whether to grant leave to amend. *Rule 15(a)* empowers the court to freely grant leave to amend when there is no "undue delay, **[*8]** bad faith[,] dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of . . . the amendment, [or] futility of the amendment. . . ." *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*. Leave to amend is generally denied when it is clear the deficiencies of the complaint cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992)*; *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)* ("A complaint should not be dismissed under *Rule 12(b)(6)* unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.")(internal citations omitted). While leave to amend must be freely given, the court is not required to allow futile amendments. *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983)*.

B. Analysis

Defendants generally argue this action may be dismissed on the basis of: (1) judicial estoppel; (2) HOLA; and (3) failure to state a claim on each of Plaintiffs' causes of action. Each will be addressed before the Court discusses Plaintiffs' Motion for TRO/PI.

1. Judicial Estoppel

(a) Parties' Contentions

Defendants **[*9]** first contend that Plaintiffs' claims are barred under the doctrine of judicial estoppel because Plaintiffs failed to raise any of these claims in their bankruptcy proceeding and they should be estopped from raising them after the discharge of their bankruptcy. (MTD, ECF No. 5 at 2-4.) Specifically, Defendants argue that Plaintiffs' claims all arise from either the origination of their loan, or from its subsequent refinancing, all of which occurred before Plaintiffs filed for bankruptcy. (Id. at 2-3.) Because Plaintiffs failed to assert their claims in the bankruptcy proceeding, Defendants contend they should be estopped from pursuing their claim in this proceeding. (Id. at 3.)

In their Opposition, Plaintiffs do not contest that the claims should have been first filed in the bankruptcy proceeding. (ECF No. 19 at 2-3.) Rather, Plaintiffs argue that this action should be held in abeyance while they seek to reopen the bankruptcy action to raise their claims. Id.

(b) Analysis

HN4[] "In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements." *Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 783 (9th Cir. 2001)* **[*10]** (holding that plaintiff was estopped from suing an insurer subsequent to the discharge of his bankruptcy where he had notice of his claims against the insurer during the pendency of the bankruptcy action). Further, "[j]udicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset." *Id. at 784*.

Here, Plaintiffs' claims arise from the loan origination and refinancing, which occurred in 2007-2008, so prior to their bankruptcy action, which was initiated in December of 2010 and discharged in 2011. In addition, Plaintiffs filed their lawsuit in state court during the pendency of the bankruptcy action. Plaintiffs were therefore on notice of their claims but failed to raise them in the bankruptcy proceedings. They are therefore estopped from proceeding with this lawsuit on the basis of claims that they failed to raise in their bankruptcy proceeding. See *id. at 783-84*.

Furthermore, Plaintiffs have not demonstrated good cause for this Court to hold this matter in abeyance while they **[*11]** attempt to reopen the bankruptcy proceedings and raise these claims. Plaintiffs have not presented any reason why their claims could not have been brought in the Bankruptcy Court in the first instance, and their failure to do so is not a basis for this Court to further delay this action while they seek to reopen the bankruptcy proceeding.

Therefore, Plaintiffs' MTD is granted without leave to amend on the basis that Plaintiffs are judicially estopped from bringing the present action due to their failure to raise their claims in the prior bankruptcy proceeding and any amendment to their FAC would be futile. However, even if the Court were to consider the substance of Plaintiffs' claims, the Court would still grant the motion to dismiss.

2. State Law Claims Barred by HOLA

(a) Parties' Contentions

Defendants contend that Plaintiffs' state law claims are preempted by HOLA. (ECF No. 5 at 4-8.) They state that World Savings was a federal savings bank organized and operating under HOLA, and that the alleged misconduct here falls within HOLA, even though World Savings was subsequently acquired by Wachovia Mortgage and Wachovia Mortgage later merged with Wells Fargo. Id. at 4.

Plaintiffs argue that **[*12]** HOLA was not intended to preempt common law fraud claims or otherwise supplant state law and it does not preempt their claims. (ECF No. 19 at 7-10).

(b) Analysis

HN5[] Federal savings associations, including federal savings banks, are subject to HOLA and are regulated by the Office of Thrift Supervision ("OTS"). *12 U.S.C. § 1464*; *Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1005 (9th Cir. 2008)*. Here, because Plaintiffs' loan originated with World Savings, which was a federal savings bank, their claims are subject to HOLA. Further, the Court finds that HOLA continues to apply after Wachovia Mortgage acquired World Savings and later merged with Wells Fargo. See, e.g., *DeLeon v. Wells Fargo Bank, N.A., 729 F.*

Supp.2d 1119, 1126, (N.D. Cal. 2010) ("Wells Fargo notes that at the time the loan was made to the DeLeons [plaintiffs], World Savings Bank, FSB was a federally chartered savings bank organized and operating under HOLA and observes correctly that the same preemption analysis would apply to any alleged misconduct after November 1, 2009, when the lender merged into a national savings banking association.) (internal quotation mark omitted); Guerrero v. Wells Fargo Bank, N.A., 2010 U.S. Dist. LEXIS 96261 (C.D. Cal. Sept. 14, 2010) **[*13]** ("Where a national association, such as [Wells Fargo], acquires the loan of a federal savings bank, it is proper to apply preemption under HOLA.").

HN6[] Under HOLA, the OTS enjoys "plenary and exclusive authority ... to regulate all aspects of the operations of Federal savings associations" and its authority "occupies the entire field of lending regulation for federal savings associations." 12 C.F.R. §§ 545.2, 560.2(a). The Ninth Circuit has stated that the enabling statute and subsequent agency regulations are "so pervasive as to leave no room for state regulatory control." Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1260 (9th Cir. 1979). Under the regulations promulgated by the OTS, HOLA preempts any state law claim having to do with disclosures and advertising; processing, origination, servicing, sale, or purchase of, or investment or participation in, mortgages; terms of credit; and loan-related fees. See 12 C.F.R. § 560.2(b)(4), (5), (9), (10).

Here, Plaintiffs' state law (1) fraudulent omissions, (2) UCL, (3) breach of contract and (4) good faith and fair dealing claims are all barred by HOLA. Each of Plaintiffs' claims arise out of the origination of the loan and, **[*14]** to a lesser extent, its subsequent servicing. In essence, the Plaintiffs' FAC alleges that Defendants' Option ARM is a deceptively devised financial product, which had higher interest rates than promised, and which was designed to, and did in fact, cause negative amortization of their loan to occur. (FAC at 8-9.) Because the origination and servicing of the loan is subject to HOLA, and because each of Plaintiffs' claims is predicated on the origination and servicing of the loan, each of Plaintiffs' state law claims are preempted.

Therefore, even if the Court had not already concluded that this action is barred by judicial estoppel, it would still conclude that Defendants' state law claims are preempted by HOLA and dismiss those claims on that basis. However, even if the Court were to reach the merits of each of Plaintiffs' claims, it would grant Defendants' MTD.

3. Failure to State Substantive Claims

Because the Court has determined that Plaintiffs' state law claims are barred on the basis of judicial estoppel and judicial estoppel and HOLA, and because the Court finds that each of Plaintiffs' substantive claims fails to satisfy the pleading requirements of Rule 8(a), as interpreted by **[*15]** Iqbal and Twombly, its treatment of these claims will be limited.

(a) Violations of TILA

(i) Parties' Contentions

Defendants' argue that Plaintiffs' (1) damages claim is time-barred, and (2) their rescission claim fails because they have failed to tender their indebtedness. (ECF No. 16-17.) Specifically, Defendants contend that the statute of limitations for a TILA damages claim is within one year from the consumation of the loan, and that Plaintiffs failed to bring this action within one year following the loan origination in 2007. (Id. (citing 15 U.S.C. §§ 1635(f), 1640(e)). Further, Defendants contend that a plaintiff seeking rescission under TILA must plead and prove an ability to tender the loan, and that Plaintiffs have not done so here. Id. at 16.

Plaintiffs contend that equitable tolling saves their damages claim. They allege that they did not have a reasonable opportunity to discover the fraud/nondisclosure during the one-year statute of limitations period. (ECF No. 19 at 10-13.) In the alternative, Plaintiffs assert that their claims also fall within the three-year statute of limitations set forth in

15 U.S.C. § 1635(f) because they were not given proper notice of their right **[*16]** to rescind their loan agreement. (Id. at 12, citing FAC, ECF No. 1 at ¶¶ 40-44, 68-73.) Regarding the rescission claim, Plaintiffs argue that they do not have to tender payment now, but can do so after they prevail on their rescission claim. (Id. at 13-15 (citing Palmer v. Wilson, 502 F.2d 860, 861 (9th Cir. 1974)).)

(ii) Analysis

HN7[] TILA requires that lenders make certain disclosures to borrowers, which will give rise to a cause of action if the lender violates its disclosure requirements. See, e.g., 15 U.S.C. §§ 1601-1667f. Further, TILA mandates that borrowers be given three business days to rescind, without penalty, a consumer loan that uses their principle dwelling as security. § 1635(a). A TILA claim seeking damages is subject to a one-year statute of limitations. See 15 U.S.C. § 1640(e) ("Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation...."). That limitations period begins to run "on the date of consummation of the transaction." King v. State of Cal., 784 F.2d 910, 915 (9th Cir. 1986) If the lender has not complied with TILA's disclosure **[*17]** requirements, the rescission period is extended to three years. § 1635(f); see also Miguel v. Country Funding Corp., 309 F.3d 1161, 1164-65 (9th Cir. 2002) (upholding dismissal of a rescission claim under TILA where the three-year statute of limitations had expired).

First, Plaintiffs' TILA claims are insufficient to satisfy the pleading requirements of Rule 8(a). Plaintiffs do not allege any facts that support their contention that the Defendants failed to satisfy their disclosure requirements. Rather, Plaintiffs' FAC contains generic conclusory accusations that Defendants failed to comply with their disclosure requirements without providing any facts that would support such a conclusion. (See ECF No. 1, at ¶¶ 9-38, 40-44, 68-73.) A court is not required to accept as true a "legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 555). "Factual allegations must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555.

Second, Plaintiffs' damages claim is barred by the one-year statute of limitations, 15 U.S.C. § 1640(e), and equitable tolling does not apply. **HN8**[] The Court "will apply equitable tolling in **[*18]** situations where, despite all due diligence, the party invoking equitable tolling is unable to obtain vital information bearing on the existence of the claim." Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1045 (9th Cir. 2011) (internal quotation marks and alterations omitted). Plaintiffs' conclusory allegations in that they didn't have the opportunity to learn of the disclosure violations during the statutory period is conclusory. Further, they provide no facts that support the conclusion that any "disclosure" by Defendants was either not made or was faulty. Plaintiffs are therefore not entitled to equitable tolling of the TILA claim. [6]

In addition, Plaintiffs' claim for rescission under TILA fails because they have failed to allege either that they have the ability to tender or offer evidence that they have tendered payment to Defendants. **HN9**[] Under California law, a plaintiff **[*19]** challenging a foreclosure sale or any cause of action "implicitly integrated" with the sale is required to make a valid and viable tender of payment of the debt. Arnolds Mgmt. Corp. v. Eischen, 158 Cal. App. 3d 575, 578-79, 205 Cal. Rptr. 15 (1984); Karlsen v. Am. Sav. & Loan Assn., 15 Cal. App. 3d 112, 121, 92 Cal. Rptr. 851 (1971). An offer to tender is "an offer to pay the full amount of the debt for which the property was security." Arnolds Mgmt. Corp., 158 Cal. App. 3d at 578.

In conclusion, Plaintiffs' TILA claim fails because: (1) they failed to sufficiently plead their claim in accordance with Rule 8(a) as interpreted by the United States Supreme Court in Iqbal and Twombly; (2) their claim is time-barred;

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[6] Further, Plaintiffs' contention that the three-year statute of limitations may apply to their damages claim misconstrues the statute: the one-year limitations period applies to damages claims, the three-year period applies to rescission claims. Cf. 15 U.S.C. §§ 1640, 1640(e) and 15 U.S.C. §§ 1635, 1635(f).

and (3) it fails because of lack of tender. Therefore, even if the Court were to reach the merits of Plaintiffs' TILA claim, it would be dismissed.

(b) Fraudulent Omissions

(i) Parties' Contentions

Defendants argue that Plaintiffs have failed to sufficiently plead fraud with particularity. (ECF No. 5 at 17-19.) Specifically, Defendants contend that Plaintiffs' claims that Defendants concealed the actual interest rates and the resulting negative amortization does not specify what Defendants caused what harm, nor does **[*20]** the FAC detail what facts were concealed, when they were concealed, what representations were made, or what duties were owed by the particular parties that either omitted or concealed any facts. (Id.)

Plaintiffs contend that they sufficiently pleaded fraud with particularity in their FAC, the misrepresentations are written into the loan agreement, and, in any event, they cannot recall exactly who, if anyone, made any misrepresentations.

(ii) Analysis

HN10[] The elements for a fraud claim are "(a) a misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or scienter); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *In re Estate of Young, 160 Cal. App. 4th 62, 72, 72 Cal. Rptr. 3d 520 (2008)*. *Rule 9(b)* requires a plaintiff to "state with particularity the circumstances constituting fraud." This includes "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)* (citation and quotations omitted).

Here, even if Plaintiffs' claims were not barred by judicial estoppel and preempted **[*21]** by HOLA, the Court would still conclude that Plaintiffs have failed to sufficiently plead their fraudulent omission claim under either *Rule 8(a)* or the higher standard set forth in *Rule 9(b)*. Plaintiffs' claims are essentially legal conclusions couched as facts. They lack sufficient detail to provide notice as to what the omissions are and who was responsible for them.

(c) Unfair Competition Law

(i) Parties' Contentions

Defendants assert that Plaintiffs have failed to allege sufficient facts to support a UCL claim. (ECF No. 5 at 19-20.). Plaintiffs contend that the same set of facts that form the basis for their fraudulent omission claims form the basis for their UCL claim. (ECF No. 19 at 17-18.)

(ii) Analysis

HN11[] California's UCL, *Business and Professions Code §§ 17200 et seq.*, defines unfair competition as "any unlawful, unfair or fraudulent business act or practice." "Unlawful" practices are practices "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulation, or court-made." *Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-39, 33 Cal. Rptr. 2d 438 (1994)* (citing *People v. McKale, 25 Cal. 3d 626, 632, 159 Cal. Rptr. 811, 602 P.2d 731 (1979))*. To state a cause of action based on an "unlawful" business **[*22]** act or practice under the UCL, a plaintiff must allege facts sufficient to show a violation of some underlying law. *McKale, 25 Cal.3d at 635*.

HN12[] A business act or practice is "unfair" when the conduct "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to a violation of the law, or that otherwise significantly threatens or harms competition." *Cel-Tech Communications, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. To sufficiently plead an action based on an "unfair" business act or practice, a plaintiff must allege facts showing the "unfair" nature of the conduct and that the harm caused by the conduct outweighs any benefits that the conduct may have. *Motors, Inc. v. Times Mirror Co., 102 Cal. App. 3d 735, 740, 162 Cal. Rptr. 543 (1980)*.

HN13[] A "fraudulent" business act or practice is one in which members of the public are likely to be deceived. *Hall v. Time, Inc., 158 Cal. App. 4th 847, 849, 70 Cal. Rptr. 3d 466 (2008)*; *Olsen v. Breeze, Inc., 48 Cal. App. 4th 608, 618, 55 Cal. Rptr. 2d 818 (1996)*("does not refer to the common law tort of fraud but only requires a showing members of the public 'are likely to be deceived'"). Thus, in order to state a cause **[*23]** of action based on a "fraudulent" business act or practice, the plaintiff must allege that consumers are likely to be deceived by the defendant's conduct. *Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal. 3d 197, 212, 197 Cal. Rptr. 783, 673 P.2d 660 (1983)*. Furthermore, a plaintiff alleging unfair business practices under *§ 17200* "must state with reasonable particularity the facts supporting the statutory elements of the violation. *Khoury v. Maly's of California, Inc., 14 Cal. App. 4th 612, 619, 17 Cal. Rptr. 2d 708 (1993)*.

In this case, Plaintiffs fail to plead a UCL claim under any available theory. First, the 'unlawful" prong of the UCL requires an underlying violation of a state or federal statute or common law. As noted above, the Court is granting Defendants' MTD as to all of Plaintiffs' state and federal claims. As a result, none of these claims cannot form the basis of Plaintiffs' UCL claim. In addition, conclusory allegations that Defendants knowingly promised consumers low payments that were insufficient to pay off their loan amounts, as Plaintiffs do here, without more, is not sufficient to maintain a plausible claim, particularly not where the loan documents themselves explicitly warn that the mortgage **[*24]** payments may not be sufficient to pay down the balance. Such conclusory allegations are insufficient to satisfy *Rule 8(a)*'s pleading standard. See *Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868*; *Twombly, 550 U.S. at 555*.

Next, Plaintiffs do not adequately plead an independent UCL claim for unfair or fraudulent business practices because Plaintiffs fail to allege facts to support any identifiable wrongdoing by any specific Defendants. Likewise, Plaintiffs' mere conclusory recitation of the elements of these claims do not give proper notice to the respective Defendants as to the alleged misconduct.

Accordingly, even if the Court were to reach Plaintiffs' UCL claim, it could not survive Defendants' MTD.

(d) Breach of Contract

(i) Parties' Contentions

Defendants contend that Plaintiffs' argument that monthly payments were not applied to the principal loan balance fails to describe a breach of contract where the contract document explicitly states that the payments may not be sufficient to pay the entire amount of monthly accrued interest. (ECF No. 5 at 20-22.) Plaintiffs respond that they sufficiently alleged breach by arguing that Defendants failed to apply the interest rate listed in the note. (ECF No. 19 at 19-21, **[*25]** citing FAC, ECF No. 1 at ¶¶ 120-125.)

(ii) Analysis

HN14[] Under California law, a claim for breach of contract requires that a plaintiff demonstrate: (1) the existence of the contract; (2) plaintiff's performance or excuse for nonperformance of the contract; (3) defendant's breach of the contract; and (4) resulting damages. *Armstrong Petrol. Corp. v. Tri Valley Oil & Gas Co., 116 Cal. App. 4th 1375, 1391 n.6, 11 Cal. Rptr. 3d 412 (2004)*.

Here again, the FAC fails to adhere to the pleading standard set forth in Rule 8(a) as interpreted by Iqbal and Twombly. Plaintiffs' claims lack specificity as to how Defendants breached the note beyond the conclusory statements that: (1) Defendants provided Plaintiffs with a payment schedule that was inconsistent with the contract; (2) applied a different interest rate than the one set forth in the note; and (3) failed to apply any of Plaintiffs' monthly payments toward the balance of the loan. In addition to being conclusory, Plaintiffs have failed to establish how these allegations are inconsistent with the terms of the note, which expressly states that Plaintiffs chose the amount of their monthly payment and that the amount of that payment might not be sufficient to cover accrued **[*26]** interest. (See, e.g., ECF No. 5 at 12-14.) In sum, even if the Court were to reach Plaintiffs' breach of contract claim, it would be dismissed.

(e) Implied Covenant of Good Faith and Fair Dealing

(i) Parties' Contentions

Defendants assert that Plaintiffs are attempting to use California's implied covenant of good faith and fair dealing as a means to overturn the express terms of the contract. (ECF No. 5 at 22). Plaintiffs contend that by breaching the terms of the note, Defendants violated the covenant of good faith and fair dealing.

(ii) Analysis

HN15[] Under California law, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Marsu, B.V. v. Walt Disney Co., 185 F.3d 932, 937 (9th Cir. 1999)*(internal quotation marks omitted). The covenant of good faith and fair dealing requires "that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *Andrews v. Mobile Aire Estates, 125 Cal. App. 4th 578, 589, 22 Cal. Rptr. 3d 832 (2005)* (internal quotation marks omitted). The covenant "is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations **[*27]** not contemplated in the contract." *Racine & Laramie, Ltd. v. Dep't of Parks & Recreation, 11 Cal. App. 4th 1026, 1032, 14 Cal. Rptr. 2d 335 (1992)*.

To the extent that Plaintiffs allege bad faith in the origination of the loan on Defendants' part, Plaintiffs' claim fails because ***HN16***[] "the implied covenant . . . does not require parties to negotiate in good faith prior to any agreement." *McClain v. Octagon Plaza, LLC, 159 Cal. App. 4th 784, 799, 71 Cal. Rptr. 3d 885 (2008)*. With respect to Defendants' alleged breach of the note's terms and failure to modify the note, Plaintiffs' claims fail for lack of sufficient factual support. See *Twombly, 550 U.S. at 555-56*. Again, were the Court to reach this issue, it would dismiss this claim.

II. MOTION FOR TEMPORARY RESTRAINING ORDER/PRELIMINARY INJUNCTION[7]

Because the Court has dismissed Plaintiffs' FAC without leave to amend, Plaintiffs' motions for a Temporary Restraining Order ("TRO/PI") and an expedited hearing on same (ECF Nos. 20 and 25) are denied as moot. However, even if the Court were to reach the merits of Plaintiffs' Motion for a TRO/PI, it would still deny the motion.

A. Standard

HN17[] The party **[*28]** requesting preliminary injunctive relief must show that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips

[7] Defendants have not yet filed an Opposition to the Motions for TRO/PI and an expedited hearing.

in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*; *Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009)* (quoting same).

Alternatively, under the so-called sliding scale approach, as long as the Plaintiffs demonstrate the requisite likelihood of irreparable harm and show that an injunction is in the public interest, a preliminary injunction can still issue so long as serious questions going to the merits are raised and the balance of hardships tips sharply in Plaintiffs' favor. *Alliance for Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-36 (9th Cir. 2011)* (concluding that the "serious questions" version of the sliding scale test for preliminary injunctions remains viable after Winter).

B. Plaintiffs' Contentions

Plaintiffs generally contend that they have a likelihood of success on the merits, that the unlawful detainer action/eviction proceeding will cause them irreparable harm, and that **[*29]** the balance of equities tip in their favor because the Defendants will not suffer any serious hardship if the unlawful detainer action/eviction is enjoined. (See ECF Nos. 21-24.)

C. Analysis

Because the Court dismisses Plaintiffs' Complaint without leave to amend on the basis that their claims are barred by (1) judicial estoppel; (2) HOLA; and (3) they generally fail to satisfy the pleading requirements under *Rules 8(a)* and *9(b)* and the cases interpreting those rules, the Court concludes that Plaintiffs have little likelihood of success on the merits. Although Plaintiffs raise various claims against Defendants, it does not appear that any of these claims are meritorious. Rather, it appears that Plaintiffs defaulted on their mortgage and are now attempting to use the legal system in an effort to delay or block the unlawful detainer/eviction action. Because such action appears to be within the legal rights of the Defendants, the balance of hardships and equities tips sharply in Defendants' favor. Therefore, the Court concludes that under either the Natural Resources Defense Council or Cottrell standards for granting a TRO or PI, Plaintiffs' motion fails.

CONCLUSION

As a matter of law, and **[*30]** for the reasons set forth above, Defendants' Motion to Dismiss (ECF No. 5) and Request for Judicial Notice (ECF No. 7) are GRANTED. Defendants' Motion to Strike (ECF No. 6) is DENIED as MOOT. Plaintiffs' Motion for Remand (ECF No. 9) is DENIED, Plaintiffs' Motion for Untimely Filing of Opposition to Motion to Dismiss (ECF No. 13) is GRANTED, and Plaintiffs' Motions for TRO/PI and a For an Expedited Hearing on same (ECF Nos. 20 and 25) are DENIED as MOOT. The Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

Dated: June 4, 2012

/s/ Morrison C. England, Jr.

MORRISON C. ENGLAND, JR.

UNITED STATES DISTRICT JUDGE

Card Tech Int'l, LLLP v. Provenzano

United States District Court for the Central District of California

June 7, 2012, Decided; June 7, 2012, Filed

Case No. CV 11-2434 DSF (PLAx)

Reporter
2012 U.S. Dist. LEXIS 81481 *; 2012 WL 2135357

CARD TECH INTERNATIONAL, LLLP, a Maine Limited Liability Limited Partnership, Plaintiff, v. SHARYN PROVENZANO a.k.a. SHARYN PROVENZANO, an individual, and PRODEEN, INC., Defendants.

Prior History: *Card Tech Int'l, LLLP v. Provenzano, 2011 U.S. Dist. LEXIS 164910 (C.D. Cal., Apr. 6, 2011)*

Core Terms

Card, website, trade dress, presat, products, sales, infringement, packaging, trademarks, customers, invoice, marks, terminated, domain name, Counter-claim, profits, DIAMOND, shipping, cleaning, orders, Disko, deliberately, appearance, conveyed, Proven, deposits, Prodeen, inventory, transferred, TECHNOLOGY

Counsel: **[*1]** For Card Tech International LLLP, a Maine Limited Liability Limited Partnership, Plaintiff, Counter Defendant: Arnold E Sklar, Ernest E Price, Ropers Majeski Kohn and Bentley, Los Angeles, CA.

For Sharyn Provenzano, also known as Sharyn Nappi, an individual, Defendant: Bayleigh Jordan Pettigrew, Brandon Charles Murphy, James G Morris, Morris and Associates, Burbank, CA.

For Prodeen Inc, Defendant: James G Morris, LEAD ATTORNEY, Bayleigh Jordan Pettigrew, Brandon Charles Murphy, Morris and Associates, Burbank, CA.

For Prodeen Inc, Sharyn Provenzano, Counter Claimants: James G Morris, LEAD ATTORNEY, Bayleigh Jordan Pettigrew, Brandon Charles Murphy, Morris and Associates, Burbank, CA.

For Norman Farrar, an individual, Counter Defendant: Ernest E Price, Ropers Majeski Kohn and Bentley, Los Angeles, CA.

For Card Tech International LLLP, a Maine Limited Liability Limited Partnership, Counter Defendant: Arnold E Sklar, Ernest E Price, Ropers Majeski Kohn and Bentley, Los Angeles, CA.

Judges: Dale S. Fischer, United States District Judge.

Opinion by: Dale S. Fischer

Opinion

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A trial by the Court was held January 10-13, 2012.

The Court ordered that counsel for Card Tech International LLLP **[*2]** (Card Tech) submit Card Tech's proposed Findings of Fact and Conclusions of Law to counsel for Defendants Sharyn Nappi a.k.a. Sharyn Provenzano and

Prodeen, Inc. (referred to jointly and severally as Provenzano except as otherwise indicated). Apparently because of defense counsel's trial schedule, he was unable to provide timely comments. Card Tech lodged its [Proposed] Findings of Fact and Conclusions of Law on February 23, 2012. On February 27, 2012, Provenzano lodged Defendants and Counterclaimants' [Proposed] Findings of Fact and Conclusions of Law On March 12, 2012, Provenzano lodged her Opposition to Card Tech's Proposed Findings of Fact and Conclusions of Law, and Card Tech lodged its Objections to Defendants' [Proposed] Findings of Fact and Conclusions of Law. Although the Court has reviewed and considered all of these documents, and has made some additions, deletions, and changes based on its detailed review of the transcript and the documentary evidence and its own recollection of the trial and assessment of the credibility of the witnesses, where Provenzano has not objected to paragraphs of Card Tech's [Proposed] Findings of Fact and Conclusions of Law, the Court generally **[*3]** accepts those findings as accurate, and has not sought or cited to further support in the record. The Court has included proposed Findings of Fact and Conclusions of Law proposed by Provenzano, to the extent relevant and not contradicted by the evidence. The deletion of a proposed finding or conclusion does not necessarily mean that the Court disagrees with the proposed finding or conclusion. The Court may simply have determined that the finding was not necessary to its determination.

FINDINGS OF FACT

1. This Court has subject matter jurisdiction pursuant to the Trademark Act of 1946, as amended (the Lanham Act), *15 U.S.C. § 1125(a)* and *§ 1125(d)*. Also, the Court has diversity jurisdiction pursuant to *28 U.S.C. § 1332*: the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs and there is complete diversity of citizenship between the parties. The Court has supplemental jurisdiction over the state-law claims. *28 U.S.C. § 1367*.

2. Venue is proper in this district as the defendants reside here.

3. Card Tech is a Maine limited liability limited partnership, with its principal place of business in Maine.

4. At the time of trial, the employees of Card Tech **[*4]** were Norman Farrar, his son Stephen Farrar, and one other person. Norman Farrar is a principal of Card Tech.

5. Provenzano is an individual residing in Acton, California.

6. Prodeen, Inc. is a California corporation with its principal place of business in California. Provenzano directs the conduct of Prodeen. From 2003 through 2010 there were no other employees of Prodeen. Tr. 1/12/12 at p. 162:11-18. There is no evidence of any other employees of Prodeen since 2010.

7. Card Tech is, and since March 2010 has been, in the business of selling technical cleaning products. Technical cleaning products are used to clean the slots of credit card machines, bill readers, slot machines, key cards, and similar magnetic card readers. It is a niche business. Individual technical cleaning products are very inexpensive. Tr. 1/12/12 at p. 161:8-9.

8. In the late 1990s Norman Farrar was a principal of a company named Enefco, which decided to go into the card cleaning products business. Farrar met Provenzano at a trade show and eventually hired her as Enefco's first sales manager for the card cleaning business. Provenzano worked from her home in Acton, California, and was in charge of sales and market development. **[*5]** Farrar worked well with Provenzano and thought she was talented.

9. In or around 2003, Farrar sold his company. The new owners "released" Provenzano — she was terminated. Tr. 1/10/12 at p. 42:24-25, Tr. 1/11/12 at pp. 179:22-180:1.

10. In 2003 Provenzano began marketing and selling technical cleaning products. In or around March 2006, Provenzano established Prodeen, Inc. dba Proven Products, which sold cleaning cards. Tr. 1/11/12 at pp. 180:14-181:6. Provenzano owns all of the stock of Prodeen, Exhibit 75, and directs the conduct of Prodeen.

11. As of the beginning of 2010, Provenzano marketed and sold technical cleaning products under the trademarks and trade dress PROVEN PRODUCTS, a stylized V symbol, PRESAT with a water droplet symbol, PRESAT with a rippled water image, DIAMOND TECHNOLOGY, a "magnifying glass and dollar bill" image, an orange area on the left side and images of certain machines in certain layouts, CLEAN SWAB, EASY WIPES, EASY CLEAN CARD, and EASY SWAB, and the slogan "The Results Are Obvious"; and utilized a website. Tr. 1/10/12 at pp. 64:15-70:10; Tr. 1/11/12 at pp. 181:12-22, 183:1-185:6, Exhibit 26. On June 10, 2008, trademark registration number 3443482 was issued **[*6]** to Provenzano for the mark PRESAT. See Exhibit 93-2.

12. There is nothing about the layout or overall appearance of the trade dress, both packaging and website, that enables the package or website, respectively, to function. The "V"-shaped Proven Products logo, and the Diamond Technology logo with its three overlapping diamonds, are wholly nonfunctional; the water drop design and the rippled water designs, the magnifying glass and dollar bill images, and the slogan, are wholly non-functional for cleaning cards. The content of the website can be arranged differently; the package can have a different appearance. Neither the appearance of the packaging nor the website provides a benefit apart from identifying the source of the product. Neither the layout of the website nor the layout or color of the packaging describes the products. The particular arrangement of the depictions and instructions, and the overall visual impression created by Card Tech's website and packaging, is not essential to use of the products Card Tech sells. Moreover, there are numerous ways to design a website or product packaging for cleaning card products. See Exhibit 26. Therefore, protecting Card Tech's trade **[*7]** dress will not impair competition in the industry.

The Asset Purchase Agreement

13. In 2006 Farrar reconnected with and provided some assistance to Provenzano. He was impressed with the package design she used. At about the time that Farrar's "non-compete" agreement with Enefco was about to end, Farrar and Provenzano began negotiating for Card Tech's purchase of Provenzano's business. Card Tech was established to purchase the assets of Proven Products from Prodeen. TR. 1/10/12 at p. 46:5-19. Prior to entering into the Asset Purchase Agreement, Farrar wanted Provenzano to be sure she would be happy in her new role. Tr. 1/10/12 at pp. 44:8 -56:15; see Exhibit 21.

14. On March 8, 2010, Provenzano and Card Tech entered into an Asset Purchase Agreement. Exhibit 75. The signatories for the seller are Prodeen, Inc. and Provenzano. Pursuant to that Agreement, Provenzano sold to Card Tech and Card Tech bought from Provenzano the business assets including, among other things:

• All inventory;

• All right, title and interest in and to all of the trademarks, trade names, dbas and assumed names used to any extent in the operation of the business or otherwise related thereto;

• All business records, including **[*8]** but not limited to all customer and supplier lists;

• The internet websites: *www.4cleaningcard.com* and *www.presat.com*, including the content and all rights necessary to access, operate and use those websites, and the domain names related to the business;

• All goodwill of the business.

Exhibit 75 at 1.1. Card Tech understood it was purchasing all trademarks, trade names, business records, customers, promotional material, and goodwill. Tr. 1/10/12 at pp. 62:23-70:21. Provenzano understood she was selling to Card Tech all of the trademarks, trade names, and dbas, assumed names, the art work for the packaging and all business records. Tr. 1/12/12 at pp. 3:24-4:4, 5:13-17, 6:22-24. Provenzano executed a separate written assignment of the PRESAT trademark. Exhibit 93.

15. In the Agreement, Provenzano represented that there were no undisclosed liabilities, and that she had disclosed to Card Tech all material facts. Exhibit 75 at 8.11, 8.17.

16. Acquiring all of Provenzano's intellectual property was important to Card Tech. Card Tech considered the name, the packaging and the website important to have. Tr. 1/10/12 at pp. 51:7-21, 57:20-58:14.

17. Provenzano's packaging was attractive and desirable **[*9]** to Card Tech. No other competitors were using a design similar to the Provenzano packaging that Card Tech purchased. Tr. 1/10/12 at p. 68:23-25. It was important to Card Tech to go into the market with a known product and trade name. Tr. 1/10/12 at pp. 51:15-18, 58:1-4.

18. The purchase price to be paid by Card Tech to Provenzano is $253,315.36, payable $205,795.36 at closing and $47,520.00 paid over two years. Card Tech paid $205,795.36 at closing and executed a promissory note for $47,520.00. It appears that the $205,795.36 was for the inventory, and the $47,520.00 was for the goodwill and all of the other assets. Tr. 1/10/12 at p. 73:21-23; 1/12/12 at p. 14:14-23. The Agreement itself states that there was an allocation of the purchase price set forth in Schedule 7, Exhibit 75 at **7**, but no schedules were provided to the Court. Card Tech has paid $23,760.00 on the promissory note. The last payment Card Tech made on the promissory note was the February 2011 payment. Tr. 1/11/12 at p. 107:15-17. The amount unpaid on the note is $23,760.00.

19. Card Tech contends that Provenzano did not disclose a liability that she was obligated to disclose by the terms of the Asset Purchase Agreement, **[*10]** in the amount of about $6,000. Card Tech contends it paid that liability at Provenzano's request and was not able to offset this liability completely. Tr. 1/11/12 at p. 135:3-25. Provenzano's objection that she was not required to disclose the liability because Card Tech was not assuming liabilities is legally incorrect. The Asset Purchase Agreement contained a specific warranty that all liabilities had been disclosed. Provenzano breached this warranty by her failure to disclose. Moreover, that Card Tech paid the amount is undisputed. Nevertheless, this breach does not appear to have been material to Card Tech.

20. The Asset Purchase Agreement, Employment Agreement, and promissory note were executed in connection with one another. See Exhibits 75, 76, and 77.

The Employment Agreement

21. Both Card Tech and Provenzano wanted Provenzano to have a five year employment contract. Tr. 1/11/12 at p. 15:22-23. Provenzano, at the age of 62, wanted job security through an agreement that could be terminated only for just cause. Tr. 1/12/12 at p.168:4-11. Card Tech felt Provenzano would be a very important part of the company and wanted her services. Tr. 1/10/12 at pp. 52:11-14, 125:15-17. During **[*11]** the negotiations, Provenzano's attorney was asking for a salaried position. Tr. 1/10/12 at p. 53:1-4.

22. Concurrently with the sale of the business, Card Tech and Provenzano entered into an Employment Agreement. Exhibit 77.

23. By the Employment Agreement, Provenzano was employed by Card Tech for five years as Vice President of Sales. Exhibit 77 at 2a. Provenzano was to devote her full time and exclusive attention to perform duties for Card Tech. Tr. 1/12/12 at p. 70:10-13; Exhibit 77 at 3. The Agreement provides for termination for just cause. Just cause is defined as, *inter alia*, dishonesty, disobedience of reasonable directives, breach of Card Tech policies and procedures not cured within seven days after written notice, misappropriation of assets, material inaccuracy in any report, any breach under the Asset Purchase Agreement. Exhibit 77 at 6c.

24. Provenzano was Vice President of Sales and reported directly to the President of Card Tech. See Exhibit 77 at 3. Provenzano's role was to develop and implement a sales program to increase the business of Proven Products. She was the entire sales and marketing staff of Card Tech. Tr. 1/10/12 at p. 53:8-11; Tr. 1/11/12 at p. 31:24-25.

25. **[*12]** Card Tech did not supervise or micro-manage Provenzano's work. Instead, she operated autonomously, submitting reports on her activities from time to time. Tr. 1/10/12 at p. 85:4-12. She did many things on her own initiative, including: ordering inventory to have on hand, Tr. 1/12/12 at p. 18:19-24; giving discounts to customers, Tr. 1/13/12 at p. 18:8-22; and seeking to register domain names, Tr. 1/12/12 at p. 75:19-24. As Vice President of Sales, she thus had duties and responsibilities that involved the performance of the office or non-manual work

directly related to Card Tech's management policies and general business operations; she customarily and regularly exercised discretion and independent judgment; she executed special assignments and tasks without any supervision or, at most, under only general supervision; and she spent most of her Card Tech work time engaged in such duties. Though Provenzano objects to what she refers to as Card Tech's attempts to qualify her employment as exempt from overtime, her own description of her employment relationship in her proposed findings is somewhat more favorable to Card Tech's position than is Card Tech's own description. The Court concludes **[*13]** this inconsistency results from her recognition that the only possible - though ultimately unsuccessful - response that she has to the evidence of her wrongful conduct is her complete autonomy in her employment.

26. The Employment Agreement provides for an annual base salary of $55,000 per year, plus sales commissions under certain circumstances. Exhibit 77 at 4a. There was never any consideration of overtime. Both parties agree Provenzano had complete autonomy to keep her own hours and flexibility to take whatever time off she wished for any reason. Tr. 1/11/12 at p. 112:10-14; 1/13/12 at p. 76:22-77:11. The Agreement also provided that Provenzano would be entitled to medical benefits, two weeks paid vacation, and reimbursement for all authorized business expenses. Exhibit 77.

27. Prior to April 13, 2011, Provenzano did not indicate that she was working overtime or expected to be compensated for overtime. Tr. 1/10/12 at pp. 100:24-101:6, 230:11-15; Tr. 1/11/12 at p. 112:8-11; Tr. 1/13/12 at p. 76:11-21. Card Tech told her she did not have to work weekends. Tr. 1/11/12 at p. 112:19-23. When Card Tech learned she was working overtime, Card Tech instructed her not to do so. Exhibit 147-1.

28. **[*14]** Provenzano did not produce any documentary evidence of working more than 40 hours per week for the benefit of Card Tech, or any requests for overtime during the course of her employment.

29. Provenzano admits she understood that she had an obligation to keep Card Tech informed of her business activities. Tr. 1/12/12 at p. 9:14-17. As set forth throughout these findings, the evidence establishes that — at least since December 2010 — she failed to do so in material respects.

Provenzano's conduct with regard to the presat.com website and domain name

30. Provenzano makes much of the distinction between the presat.com website, which she apparently owned, and the presat.com domain name, which she has at all relevant times known she did not own. Tr. 1/11/12 at p. 68:7-16; p. 185:7-11; Tr. 1/12/12 at p. 170:8-10. The Court is not entirely certain that either the Court or the parties or their counsel fully grasp the distinction between the two concepts. But Provenzano's efforts to defend her wrongful conduct based on this technicality fail. By at least September 25, 2009, before the execution of the Asset Purchase Agreement, Card Tech made clear that it required that "presat.com" - both the website **[*15]** and the domain name - be provided as part of the sale. Tr. 1/10/12 at p. 57:20-24; Exhibit 21. Farrar's email of that date specifically stresses the importance to Card Tech of ownership of the domain name. Exhibit 21 ("We never spoke specifically regarding domain names. I am surprised that you would not include those used on your letterhead. I really don't care about the others but it is necessary that both 4cleaningcards.com and presat.com be included in the sale."). And the Asset Purchase Agreement specifically provides that among the "assets of the Sellers" being sold are "the following internet web sites (including without limitation the content located thereon and all rights necessary to access, operate and use such web sites) and domain names related to the Business: *www.4cleaningcards.com* and *www.presat.com*." Exhibit 75 at 1.1(g).

31. Because it was important to Card Tech to enter the market with a known website and a way for customers to contact Card Tech, and a way to refer people to the website for information, the presat.com website was a material part of the assets Card Tech was buying. Tr. 1/10/12 at pp. 57:22-59:5. But for at least several years before the 2010 sale, Provenzano **[*16]** knew that Richard Rzasa owned the domain name. Tr. 1/11/12 at pp. 68:9-69:2; Exhibit 81, p. 34. Provenzano also knew that without ownership of the domain name, one could not be assured of access to the website through use of "presat.com." See Tr. 1/11/12 at p. 68:9-16.

32. Although the presat.com website could be accessed through 4cleaningcards.com, Provenzano clearly knew that this was not what Card Tech had bargained for. Indeed, she made efforts to keep from Card Tech the fact that she did not own the presat.com domain name. For example, on December 29, 2010, she affirmatively deceived Card Tech by stating to Card Tech that the website's server had possibly been hacked and that Card Tech should not use presat.com. Tr. 1/10/12 at pp. 118:17-119:3; Exhibit 37-1. There is no evidence that Provenzano informed Card Tech that the website was accessible through the domain name 4cleaningcards.com. Provenzano never explained the ownership of presat.com. Tr. 1/10/12 at p.120:1-3.

33. On January 20, 2011, Card Tech stated that it was "very concerned that sales and shipments have dropped off so drastically since the start of December." Exhibit 37-2. Card Tech had seen a drop off of about $5,000 **[*17]** to $6,000 sales per month after early December 2010, with little or no orders through the websites. Card Tech asked the status of the problem with the presat.com website; Provenzano did not respond. Tr. 1/10/12 at pp. 120:4-121:13, 122:12-25.

34. On February 2, 2011, Card Tech again asked Provenzano about the presat.com website, and when it could "start using this site." She delayed revealing her previous misrepresentations by stating: "It is something we need to discuss." Tr. 1/10/12 at pp.123:22-124:15; 1/11/12 at p. 196:5-18; Exhibit 37-3. There is no evidence that such a discussion ever took place and Provenzano does not appear to contend that it did.

35. Card Tech did not know that Provenzano did not own the right to access the presat.com website because she did not own the domain name until it was discovered on or about February 10, 2011. Tr. 1/11/12 at pp. 133:19-134:12; see Exhibit 59; see Tr. 1/11/12 at p. 92:2-15. That the website was not "down" at all, that it was "down" only for a few days, that Card Tech eventually decided to abandon it, etc., even if true, is irrelevant.

36. There is no evidence that Provenzano ever transferred to Card Tech the presat.com website or the **[*18]** content, rights necessary to access, operate and use the website, or the domain names. In fact, the evidence shows that Provenzano did not own the rights necessary to provide access to the website at any relevant time. See Tr. 1/11/12 at pp. 86: 2-87:12. Provenzano materially breached the Asset Purchase Agreement by failing to provide all necessary rights to presat.com or reveal the truth of the status of presat.com.

37. In response to Card Tech's request for the password to the presat.com website, on or about April 20, 2011, Provenzano provided the password for 4cleaningcards.com. There is no evidence that she provided Card Tech the password for 4cleaningcards.com before April 2011. She did not provide the password for presat.com. Tr. 1/13/12 at p. 73:24-25; see Exhibit 307.

38. Provenzano owned the 4cleaningcards.com domain name. That domain name linked to presat.com. Tr. 1/10/12 at pp. 50:18-51:1. There is no evidence that Provenzano transferred to Card Tech the content, rights necessary to access, operate and use any website, or the domain name. Nor would it have served any purpose because it linked to a site that relied on a domain name that Card Tech did not own. See Tr. 1/11/12 **[*19]** at pp. 86: 21 - 87:12.

39. Sales through the presat.com website were about $2,968 in 2008 and increased steadily through the first three months of 2011: $3,042 in 2009; $9,304 in 2010; and $3,781 in the first three months of 2011. Tr. 1/11/12 at pp. 85:20-86:5.

40. Because Provenzano did not own the domain name and did not transfer the website to Card Tech, since late April 2011 Card Tech has not had a website. Card Tech eventually decided that it would develop its own website rather than dealing with the issues created by Provenzano's conduct concerning the presat.com website. Tr. 1/11/12 at p. 48:2-11. At the time of trial, Card Tech was in the process of developing a website, but it would not be completed for several more months. Card Tech had to that point spent about $4-5,000 and expects to spend an additional $2-3,000 for a new website. Management of Card Tech has contributed "untold" hours to the process.

Normal Procedures at Card Tech

41. The parties dispute whether there were any "normal procedures" at Card Tech. Provenzano at times claims there were none, and at times explains such procedures in significant detail (including in her post-trial submissions). To the extent that **[*20]** the nature of such procedures is relevant (which is minimal), the Court generally accepts the testimony of Farrar and rejects the testimony of Provenzano, as the Court finds Provenzano was not credible.

42. Card Tech believed UPS account # X8535 was a "Proven Products" account utilized for shipping goods from Acton, California to fill orders. Tr. 1/11/12 at pp. 25:22-26:11. Provenzano was to send end-of-day reports, provided by UPS, daily. Until November 2010, she did so. Tr. 1/11/12 at p. 138:4-9, Exhibit 94-12. Exhibits 53-1 and 150. Some orders were invoiced and shipped by Provenzano from her location in California. For those orders Provenzano testified that she prepared the invoice and sent a copy of the invoice and "UPS daily reports" weekly (or sometimes less frequently) to Card Tech in Maine via fax. Tr. 1/11/12 at pp. 185:1-186:1.

43. Other orders were shipped from Maine. UPS account # A3766 was used to ship these orders. For any order placed through Provenzano to be shipped from Maine, Provenzano testified that she prepared and faxed to Maine a packing slip. After it was shipped, Card Tech would inform Provenzano and she would prepare and send out an invoice and send a copy **[*21]** of the invoice to Maine. Provenzano was to make deposit slips each day for payments received and fax them to Card Tech in Maine. Tr. 1/11/12 at pp. 22:23-23:3; Tr. 1/12/12 at p. 186:8-14.

44. Sales proceeds received by Provenzano were to be deposited into a bank account in California authorized by Card Tech (set up by Provenzano) and then paid over to Card Tech in Maine. Tr. 1/11/12 at p. 16:17-18.

45. From March through November 2010, sales averaged $32,000 to $35,000 per month. Tr. 1/10/12 at p. 99:18-24.

<u>Provenzano's control of bank accounts</u>

46. At Provenzano's request and with the approval of Card Tech, Provenzano opened a bank account in California in the name of Prodeen, Inc. (account number XXXXXX2277—the '277 account). This account was for the purpose of Provenzano depositing any sales proceeds Provenzano received. Tr. 1/12/12 at p. 105:6-11. Provenzano would issue a check from this account to Card Tech as money was received. Tr. 1/11/12 at p. 28:14-19. Provenzano received the statements for this account and provided the statements to Card Tech. Tr. 1/10/12 at pp. 95:18-96:10. Provenzano was responsible for this bank account; she maintained it in the name of her corporation for **[*22]** the benefit of Card Tech. Tr. 1/11/12 at p.17:15-20.

47. Card Tech trusted Provenzano with the bank account. Tr. 1/11/12 at p. 17:11-14. Provenzano provided reports to Maine; Card Tech relied on her for accurate information. Tr. 1/10/12 at p. 82:8-10.

48. Provenzano had, and continued to maintain, a pre-existing bank account in the name of Prodeen, Inc. (account number XXXXXX4207—the '207 account). Tr. 1/12/12 at p. 105:19-22. Card Tech did not have access to this account and Provenzano never provided a statement for this account to Card Tech. Tr. 1/12/12 at p. 110:17-21.

49. In December 2010, and January and February 2011, there was a trend of decreasing deposits into the '277 account and a trend of increasing deposits to the '207 account. Tr. 1/11/12 at p. 163:9-24; Exhibit 87. One reason for that uptrend is that Provenzano was depositing Card Tech funds into the '207 account. Tr. 1/12/12 at p. 108:12-20. A customer named Castle Six made a $14,766.55 payment by check. It was deposited to the '207 account, though it should have been deposited into the '277 account. Tr. 1/12/12 at pp. 109:11- 110:2.

50. In March and April 2011, there was a substantial increase in electronic bank transfers **[*23]** from the '207 account to the '277 account. $46,000 was transferred in March and April 2011; for the entire year or year plus period $95,000 was transferred. Tr. 1/11/12 at p. 166:13-20. This occurred after Card Tech began asking Provenzano questions and requesting information about the UPS '046 account. Before March 2011, there had been some months when there were no transfers between the accounts, and in other months the transfers were much smaller than the amounts transferred in March and April 2011. Tr. 1/11/12 at p. 171:1-10.

51. Card Tech established that Provenzano has not transferred approximately $21,000 of proceeds from sales received into Provenzano's two Prodeen accounts. Tr. 1/11/12 at pp. 159:1 - 160:16. Nappi admits that she still holds at least $20,000 of Card Tech's money that should have been transferred to Card Tech. Tr. 1/12/12 at pp. 98:24-99:14.

Provenzano resists notice of the transfer of her business to Card Tech

52. Card Tech had originally planned to send a notice to the trade that it had acquired Proven Products. After discussions with Provenzano, Card Tech felt it was best not to notify the customers until the inventory was relocated in Maine -which took place **[*24]** over the summer months - and until the business had settled into the new shipping routine. At Provenzano's request Card Tech agreed to delay an announcement. Tr. 1/10/12 at p. 101:21-25, Tr. 1/11/12 at p. 27:1-15.

53. From Card Tech's perspective, the main reason that the bank account was set up in California was that Provenzano was afraid that if customers sent funds to a bank account in Maine, it might cause the customers to question what was going on. Tr. 1/10/12 at p. 102:9-12.

54. Provenzano kept secret from vendors that Card Tech had acquired her business. Michael Caulley of Plastic Printing Professionals (P3), a supplier, had been dealing with Provenzano for some time. On March 18, 2010, Provenzano instructed P3 to change the billing address to Card Tech. Caulley asked who Card Tech was. She responded: "We have set up an accounting, marketing communications and east coast shipping office. . . . " Tr. 1/10/12 at pp. 148:19-152:17, Exhibit 79-312 and 313. Before April 2011 Provenzano deliberately referred to Card Tech as an "investor," though it was not. In early April 2011, Provenzano told George Mouchet, her website designer, for the first time that she had sold her company to **[*25]** Card Tech and she was hired to do its sales. Tr. 1/11/12 at pp. 77:18-78:4, Tr. 1/10/12 at p. 168:1-3, Exhibits 79-128, 81-42.

55. In December 2010, Card Tech decided that enough time had passed for an announcement that it had acquired Proven Products. On December 7, 2010, Card Tech told Provenzano that a notice must go out by mid-December, and asked her to draft a letter. Tr. 1/10/12 at pp. 101:21-102:2, 104:8-21; Tr. 1/11/12 at pp. 27:16-20, 28:20-23, 198:12-20; Exhibit 94-8. Card Tech determined this announcement was important for customers to know who Card Tech was, to have administrative control in Maine, and most importantly to get bank accounts directed to Maine. Tr. 1/10/12 at pp. 102:4-8, 104:19-106:7.

56. On January 18, 2011, Card Tech again asked Provenzano for an announcement letter, and directed that certain points be included. Tr. 1/10/12 at pp. 106:14-110:15; Exhibit 94-4, 5. Provenzano responded the next day that she would put something together. Tr. 1/10/12 at pp. 111:23-112:12; Exhibit 94-3.

57. On February 1, 2011, Card Tech received from Provenzano, by fax, a draft outline as a proposed notice to the trade. Tr. 1/10/12 at pp. 112:16-113:4; Exhibit 94-10. It did not **[*26]** include any of the points requested. It did not satisfy Card Tech's request that the marketplace be informed of Card Tech ownership and that accounting would be in Maine; and it contained false statements - for example, that Card Tech was an investment company and that the transaction occurred January 31, 2011. Tr. 1/10/12 at pp. 112:16-7, 114:5-115:22, Tr. 1/11/12 at p. 203:5-12; Exhibit 94-10. It seemed to Card Tech that Provenzano was resisting notice of the actual circumstances. Tr. 1/10/12 at p. 116:8-13. Provenzano testified that she thought that since it was now almost a year since the purchase "it would be more of a problem to say 'Hey, guess what, I sold the company a year ago but you're only finding out about it now.'" Tr. 1/11/12 at p. 203:12-15. The Court agrees with Card Tech.

Purchases of inventory from P3

58. On or about November 30, 2010, Provenzano issued a purchase order to P3 for 15 cases (500 per case) of item #207, with the following instructions: "ALSO VERY, VERY IMPORTANT: INVOICE TO ME IN ACTON, CA!

PLEASE CHANGE THE BILLING ADDRESS BACK TO ACTON, CA." Card Tech was not aware of this order. Tr. 1/10/12 at pp. 157:16-158:11; Exhibit 79-310, 311.

59. On or about **[*27]** December 9, 2010, Provenzano ordered 18,200 pieces of item # 200 and made note to bill to Proven Products in California; and she directed the use of UPS X8535 account. Tr. 1/10/12 at pp. 160:14-161:18; Exhibit 79-239.

60. On or about December 27, 2010, Provenzano ordered from P3 100,000 units of item # 207. It was billed to her in Acton, California. Exhibit 50-1. This was for a product sold to a customer in Europe; Card Tech had previously informed Provenzano that it had 300,000 of this item in production. Tr. 1/10/12 at pp. 130:17-131:11. On the same date Provenzano also ordered from P3 40,000 units of item # 200, which is the most popular card Card Tech sold. At the time, Card Tech had inventory which Provenzano knew was being packaged at that time in California. Tr. 1/10/12 at p. 135:4-14, Exhibit 50-2.

61. On or about January 4, 2011, Card Tech received two invoices from P3 for these orders, though Card Tech had no knowledge of these transactions. One invoice was addressed to Provenzano, individually, in Acton, California. Card Tech was shocked when it received the invoices for these large orders. Normal procedure would be for Provenzano to coordinate with Card Tech in Maine any **[*28]** purchases of inventory Provenzano wished to make, but Provenzano did not coordinate this purchase with Maine. These invoices caused Card Tech concern. Tr. 1/10/12 at pp.129:9-135:17. Provenzano contends that she had ordered goods in the past and been commended for her actions and reimbursed for the purchases. As with her other wrongful conduct, Provenzano had a purported explanation. She contended that she was concerned that products Card Tech had ordered for manufacture in China would not be ready in time to deliver to the customer, and that Card Tech's inventory levels were low. 1/13/12 at pp. 12-13. The Court concludes that this purchase was significantly different — especially in light of the fact that Provenzano went to great lengths to be sure Card Tech was unaware of the purchase. The Court does not find Provenzano's testimony credible. Even if Provenzano were truthful in this case, her after-the-fact explanation does not justify concealing her conduct from Card Tech, both before and after she ordered the goods.

62. Card Tech did not contact Provenzano for an explanation because it hoped this was an oversight. Card Tech decided to wait until the end of the month to see if Provenzano **[*29]** would provide an explanation. No explanation was ever provided. Tr. 1/10/12 at 135:19-22.

63. On January 5, 2011, P3 confirmed to Provenzano that as of December 31, 2010, she had not paid invoice number 8703. Provenzano responded that she had no record of it and hoped it was not sent to another office. Tr. 1/10/12 at p. 163:11-24; 1/12/12 at p. 27:7-13; Exhibit 79-295. On or about January 31, 2011, P3 followed up to ask Card Tech about payment of outstanding invoices. Tr. 1/10/12 at pp. 177:20-179:1; Exhibit 79-257.

64. Provenzano tried to conceal from Card Tech that she had purchased inventory for her own account. Provenzano spoke to a P3 representative on the phone and told P3 that the email was sent to Card Tech in error and that P3 should send her the invoices. Tr. 1/10/12 at p. 181:7-11. P3 told Provenzano "if it's OK with you," P3 would tell Card Tech her request for payment was sent to the wrong account. Provenzano responded: "Thanks, that should be fine." Tr. 1/12/12 at pp. 28:12-29:8.

65. On January 31, 2011, Card Tech responded to P3 that it had no record of outstanding invoices. P3 replied that the email requesting payment was sent to Card Tech in error; it should have gone **[*30]** to a different company. Tr. 1/10/12 at pp. 178:9-16, 183:9-21; Exhibit 64. P3 justifiably interpreted Provenzano's "Thanks, that should be fine" response as condoning this misleading strategy. Tr. 1/10/12 at pp. 182:6-183:4.

66. On about January 31, 2011, Card Tech asked Provenzano if she was holding any P3 invoices. Provenzano clearly knew what Card Tech was referring to, and she admits that she deliberately misled her employer by denying that she had the invoices. See Tr. 1/12/12 at pp. 32:2-33:15. The Court finds Provenzano's explanation of why this answer was acceptable to be simply another step in her efforts to conceal her wrongdoing.

67. Provenzano did not inform Card Tech that she had purchased inventory from P3, and Card Tech would have known that only if it needed the inventory. Tr. 1/13/12 at p. 53:17-24. Provenzano admitted - and the Court finds -

that she breached her obligation to be truthful to her employer by encouraging a vendor to withhold material information from Card Tech. See Tr. 1/12/12 at p. 30:20-24.

Card Tech's investigation reveals Provenzano is shipping with an unknown UPS account, not reporting sales, and not depositing sales proceeds into the approved '277 **[*31]** account.

68. Card Tech received UPS daily reports from Provenzano through November 2010; she stopped sending them in December 2010. Tr. 1/10/12 at p. 197:2-6. On or about January 7, 2011, Card Tech noted to Provenzano that it had not received UPS end-of-day reports since November 2010. Provenzano responded that she faxed them in December. Card Tech did not receive any UPS dailies from Provenzano in December, but did receive other faxes from Provenzano in December. Tr. 1/10/12 at pp. 202:23-204:9; Exhibit 94-12.

69. Also on or about January 7, 2011, Provenzano sent a handwritten list confirming shipments, and days with no shipments, in December 2010. Tr. 1/10/12 at pp. 205:15-207:13; Exhibit 74. Sending such a handwritten list was unusual. Tr. 1/10/12 at p. 208:2-5. There was only one discrepancy with the information Card Tech had. Tr. 1/10/12 at pp. 206:15-18, 208:13-17.

70. Having received the P3 invoices and not having received UPS end-of-day reports, Card Tech investigated Provenzano's conduct. It decided to test the website by arranging for several orders to be placed to see if the billing would be done in the normal manner. Tr.1/10/12 at pp. 188:22-189:3.

71. Card Tech asked three **[*32]** individuals to place such orders: Hibscher, Robert, and Lakhani. Hibscher placed an order, and a few weeks later Card Tech received a package from Hibscher that contained a sealed carton with Card Tech products, in Card Tech trade dress, with a Card Tech packing slip indicating that the order was placed by Hibscher on January 11, 2011. Card Tech expected that it would have received an invoice that same day and the payment would have been deposited into the '277 account the same day. But Card Tech did not receive invoicing for that shipment at that time, and the money was not then deposited into the '277 account. Tr. 1/10/12 at pp. 188:22-193:7. Instead, Card Tech received a batch of invoices at the end of February that accounted for some sales in January and February. There was a new numbering system used on those invoices. Hibscher's invoice was among these. Tr. 1/11/12 at p. 56:9:17.

72. Card Tech then decided to conduct another test purchase. Card Tech wanted to give Provenzano the benefit of the doubt by placing another order to see if the results would be the same. It did not contact Provenzano directly to ask for an explanation. Tr. 1/11/12 at p. 50:12-19. It requested Robert **[*33]** to place an order from presat.com or 4cleaningcards.com. Shortly thereafter a package was received from Robert in the same fashion as the Hibscher package, with a Card Tech packing slip indicating "sold to Stacy Robert" and that the order was placed on February 2, 2011. Tr. 1/10/12 at pp. 193:16-195:18; Exhibit 1. Card Tech received the invoice "quite a long time after" the order was placed. Tr. 1/11/12 at p. 56:19-24.

73. The shipping label on the Robert package indicated that it was shipped using a UPS account in the name "Proven Products" - the UPS '046 account. Tr. 1/10/12 at pp. 195:21-196:24; Exhibit 1. Although Provenzano had earlier expressed concern about keeping her personal shipping separate from Card Tech's shipping, this was the first indication Card Tech had of this UPS '046 account. Tr. 1/10/12 at p. 197:2-11; Tr. 1/11/12 at p. 61:3-20. Card Tech also made a test purchase through Lakhani. Card Tech did receive payment for that purchase. Tr. 1/11/12 at p. 130:5-16. Contrary to Provenzano's implication, this establishes only that on one of the three test orders, Provenzano promptly and properly accounted for the sale.

74. Card Tech decided to wait to see if Provenzano would **[*34]** come forward with an explanation for this situation, but she did not offer any explanation. Tr. 1/10/12 at p. 125:12-20.

75. On or about April 4, 2011, Card Tech requested a UPS end-of-day report from Provenzano. Later that day, instead of sending the UPS daily report, Provenzano sent a copy of a shipping label to a customer, UTI. Card Tech saw that the shipment to UTI was shipped via Provenzano's UPS '046 account. Tr. 1/10/12 at pp. 222:1-224:5.

76. The next day, April 5, Card Tech asked Provenzano about that UPS '046 account. In response, after consulting with her counsel, she stated that it was for personal shipping. Tr. 1/12/12 at pp. 56:3-57:12. Provenzano never provided a UPS daily report for the UPS '046 account. Tr. 1/10/12 at p. 197:9-11, 15-17. Evidence at trial established that at least 65-70 shipments Provenzano sent via her UPS '046 account were business-related, not personal. Tr. 1/10/12 at pp. 232:15-242:25, Exhibit 151. The test purchase by Robert and a further test purchase by Hibscher were shipped via Provenzano's UPS '046 account. Tr. 1/10/12 at pp. 197:21-198:5; Tr. 1/10/12 at p. 195:21-23, Exhibit 89, Bates numbers 269, 272, 273. Once again, Provenzano provided an **[*35]** explanation for her apparent deception: When using the UPS website, the default for shipping is the account that was last used. While that is true, the Court finds Provenzano's implied claim that she simply forgot to reset the account number after making a person purchase on 65 to 70 shipments during this period is not credible. Even if that were true, Provenzano's response that the account was for personal shipping was misleading under these circumstances.

77. Card Tech directed Provenzano to provide accurate sales and collections information for October 2010 through March 2011. On or about April 4, 2011, Card Tech received from Provenzano a summary report of sales. Card Tech had no record of any of the sales on that report, and had never received copies of invoices for those sales. The invoice numbering had changed. Tr. 1/10/12 at pp. 214:18-215:20, 216:19-219:3, 220:10-221:4, Exhibits 5-1, 5-2, 27 and 74-1.

78. Provenzano had started a new invoicing system in 2011, but did not inform Card Tech. The new sequence applied to website orders, and all orders with this new invoicing system were shipped on the UPS '046 account. Test purchases by Hibscher and Robert were invoiced on Provenzano's **[*36]** new invoice numbering system. Tr. 1/12/12 at pp. 46:10-25, 47:10-20, 48:3-51:11; Exhibit 89. Provenzano attempts to deflect Card Tech's criticism and concern by stating that she had total autonomy, and therefore could unilaterally institute a new numbering system. Even assuming she had the authority to do so, her implementation of this measure without notice of or explanation to Card Tech was justifiable cause for concern.

79. Card Tech compared Provenzano's April sales report to the handwritten report of December 2010 sales and found that the dates of activity did not match. For example, the handwritten report stated no shipments on December 1, 2, and 3 through 10, whereas the typed report received in April showed shipments on the 1st, 8th, and 10th. Tr. 1/10/12 at pp. 220:16-221:4.

80. From these documents Card Tech concluded that Provenzano kept two sets of documents for December, that the information in the handwritten note was incorrect, and that Provenzano was not being honest with Card Tech. Tr. 1/10/12 at pp. 218:16-19, 221:8-17.

81. Card Tech compared the invoice numbers provided by Provenzano for website sales from November 2010 through early April 2011. Card Tech found numerous **[*37]** gaps in the invoice numbering. The website prepares invoice numbers automatically. The gaps indicated to Card Tech that there were orders Provenzano did not report to Card Tech. Tr. 1/11/12 at pp. 52:23-53:22, 54:5-9, 141:14-22.

Provenzano's new website

82. Card Tech approved a trip to Europe to take place in February 2011, to visit a customer and to visit Disko, a supplier, ostensibly for training. Tr. 86:10-19, Tr. 1/12/12 at p. 69:15-20. On about February 21, 2011, days after returning from this trip, Provenzano told Mouchet that she wanted a website separate from Proven Products, devoted entirely to Disko, with the same structure as Proven Products. Tr. 1/11/12 at pp. 72:13-73:2, Tr. 1/12/12 at p.69:6-25; Exhibit 81. Provenzano did not inform Card Tech that she was seeking to establish a Disko website. Tr. 1/12/12 at p. 71:4. She told Mouchet that she had made an arrangement with the Disko company to be their exclusive distributor in the Americas. Tr. 1/11/12 at p. 77:1-5.

83. On about March 19, 2011, Provenzano told Mouchet: "I would like to get this website up and running ASAP, including a shopping cart. It's going to have to be a Disko domain in the U.S." Tr. 1/11/12 at p. 73:18-22: **[*38]** Exhibit 81-50. Provenzano did not inform Card Tech. Tr. 1/12/12 at p. 71:4. Provenzano contends that she

had total autonomy, and that there is no evidence that she was required to inform Card Tech of the domain name or website. While this is factually accurate, the Court finds that the only reason Provenzano would not immediately tout such a substantial coup to Card Tech is that she was in the process of considering leaving Card Tech - or had already decided to do so - and that she planned to appropriate this opportunity for herself in breach of her duty to and agreement with Card Tech. She did not instruct Mouchet to register the website in Card Tech's or Proven Products' name.

84. On April 2, 2011, Provenzano asked Mouchet to begin work on the Disko website, stating: "I will need to get this up and going ASAP so I can continue making [a] living." She also asked Mouchet to register the domain name disko-us.com, and to email her only at an aol.com email address: snapprotek7@aolcom. She further asked that he not use any of the 4cleaningcards or presat email addresses. Tr. 1/11/12 at p. 76:1-25; Exhibit 81-44, 45, 48. By this date, if not sooner, Provenzano had clearly decided to end **[*39]** her employment with Card Tech (or that Card Tech would be terminating her), and that she would hide her misappropriation of the Disko business from Card Tech. Provenzano admits that as of this date she believed Card Tech would terminate her, and contends that on April 5 Card Tech did decide to terminate her. This, of course, does not justify hiding her April 2 activities with regard to Disko.

85. On April 7, 2011, Provenzano asked Mouchet if he had the template for presat.com and 4cleaningcards.com so she could use it later. She wanted to be sure he had all the files associated with the website. Tr. 1/11/12 at pp. 78:17-79:10; Exhibit 81-42.

86. Again on April 23, 2011, Provenzano told Mouchet she wanted to be sure he had all orders, customers, purchases, and other records from the presat.com website. Tr. 1/11/12 at p. 82:8-21, Exhibit 81-30.

87. At Provenzano's request all of the records from the presat.com website were put onto a new website for Provenzano, prodeeninc.com (sometimes referred to as the "disko website"). Mouchet cloned the presat.com website to make Provenzano's new website, so that all the information from the presat.com website was on the disko.com website. Tr. 1/11/12 **[*40]** at p. 83:3-15.

<u>Provenzano's claimed expenses</u>

88. Provenzano was instructed that expenses for the European trip should be reasonable. Card Tech requested a trip report but Provenzano never provided one. Tr. 1/10/12 at p. 87:4-16; Tr. 1/13/12 at p. 63:23-25.

89. Provenzano submitted a request for expenses. Card Tech believed certain expenses were extraordinarily high: a chauffeured car for about $398, a meal with clients for about $500 (for four people), telephone expenses of about $500. The hotel bill for London for four nights was $2,686. Provenzano stated that the rate was $395 per night, but that other things such as taxes were included on the bill. Tr. 1/13/12 at pp. 64:16-24-65:19.

90. In or about early March 2011, Card Tech and Provenzano each received a cease and desist letter from the owner of a patent. Card Tech decided to stop selling the product and informed the patentee. Tr. 1/11/12 at p. 30:4-22. On March 5, 2011, Card Tech also informed Provenzano. Tr. 1/13/12 at pp. 72:24-73:4; Exhibit 116. Provenzano nevertheless hired a lawyer to represent her in the matter after March 5, 2011.

<u>Termination of Provenzano's employment</u>

91. Card Tech had grounds to terminate Provenzano by at **[*41]** least April 5, 2011. On April 13, 2011, Card Tech requested specific information from Provenzano. When Card Tech sent its letter, it had not yet decided to terminate her. Tr. 1/11/12 at pp. 113:13-17; 118:13-17. Provenzano was seen as an important part of the Card Tech operation and Card Tech wanted to work with her. Tr. 1/10/12 at p. 125:14-17, Tr. 1/11/12 at p. 31:21-22. Provenzano was given a short time to respond to the letter because Card Tech knew that some damage had been done, but it did

not know what else had occurred, and it did not want to delay and risk more damage. Tr. 1/11/12 at pp. 113:25-114:5.

92. Provenzano responded that she could not get the information within 48 hours. Tr. 1/11/12 at p. 115:2-4. Card Tech decided not to give Provenzano more time. Tr. 1/11/12 at p. 114:2-5.

93. Provenzano was officially terminated by an email sent April 18, 2011. Termination was effective April 25, 2011. Exhibit 78. The email stated: "Your employment is being terminated for just cause within the meaning of your employment agreement with the company. The grounds for termination include, but are not necessarily limited to, the following." Id. The email then lists a number of non-exclusive **[*42]** grounds for the termination. Id. In addition, the email referred to the instant litigation and stated: "The facts stated in our complaint and in [Farrar's] declaration establish numerous other grounds for terminating your employment." Id. Farrar testified that one of the "prime" reasons for terminating Provenzano was that she was not being truthful and honest with Card Tech. Tr. 1/10/12 at pp. 229:24-230:11. The Court agrees with this analysis. As described in these Findings, there were numerous occasions on which Provenzano had not been truthful or honest with Card Tech. In addition, the Court finds credible Farrar's testimony that Card Tech did not terminate Provenzano to avoid paying her under the Employment Agreement, paying her for overtime, or paying her travel expenses. Tr. 1/10/12 at p. 230:3. Provenzano's last payment for her employment was probably April 15, 2012. Tr. 1/11/12 at p. 107:18-20.

94. For all of the reasons described previously, Card Tech had just cause to terminate the Employment Agreement with Provenzano.

Provenzano's unauthorized use of Card Tech trademarks and trade dress

95. After her employment with Card Tech was terminated, Provenzano continued to engage in **[*43]** the business of selling technical cleaning cards; she uses the '207 account for that business. Tr. 1/12/12 at p. 121:7-18.

96. Since May or June 2011 Provenzano has been selling the same technical cleaning products in packaging very similar to Card Tech packaging. Tr. 1/13/12 at p. 83:5-16. The products Provenzano has been selling are similar to the products sold by Card Tech and directly competitive. Exhibits 26 and 46. Provenzano does not contend that Card Tech approved, authorized, or in any way consented to Provenzano's use of Card Tech's trademarks or trade dress competing with Card Tech.

97. Provenzano mimicked Card Tech packaging because all the templates were there, the artwork plates were already there, the cost to change was significantly less than going into an entirely new design; she saved herself a considerable amount of money. Tr. 1/13/12 at p. 90:15-20.

98. In about June 2011, Card Tech discovered a prodeen.com website. It had the same overall appearance and impression as the presat.com website, offered directly competing products, and displayed the same packaging as Card Tech packaging. Tr. 1/10/12 at pp. 247:13-248:7, 248:24-251:3, 89:15-91:3; Exhibit 46.

99. On May 12, **[*44]** 2011, nearly three weeks after Provenzano was terminated by Card Tech, Provenzano issued her P.O. # 0716-621 to Diamond Wipes for a package design that is similar to the package design conveyed by Provenzano to Card Tech. Tr. 1/12/12 pp. 128:10-133:17. Provenzano used that design after April 2011. Tr. 1/12/12 at p. 134:2-3.

100. At the time of trial, Provenzano was still offering and selling products in packaging that looks like the Card Tech design. Tr. 1/10/12 at pp. 251:10-252:9; Tr. 1/12/12 at pp. 127:23-25, 129:14-149:3; Exhibit 35; Exhibit 128-4. Provenzano's website shows that she has been offering and selling technical cleaning products for sale using Card Tech's trademarks, or confusingly similar marks, including *at least* the marks PRESAT, DIAMOND TECHNOLOGY, the Three Drop symbol, EASY CLEAN CARD, and EASY SWAB. Exhibit 46.

101. The overall appearance of Card Tech's packaging, taken as a whole, is not functional — packaging can have many different appearances and there are other equally efficient ways to arrange images in connection with

instructions (and indeed other images). Many of the aspects of the packaging copied by Provenzano are not related to instructions at all; **[*45]** while some images may be suggestive, other suggestive images could be used. The overall appearance of Card Tech's packaging, taken as a whole, is not functional.

102. Card Tech acquired from Provenzano and uses the mark DIAMOND TECHNOLOGY and a "magnifying glass and dollar bill" symbol. Tr. 1/10/12 at pp. 64:6-8, 67:21-68:1, Tr. 1/11/12 at pp. 184:13-185:5; Exhibit 26-31. Some time prior to August 25, 2011, Provenzano changed the use of DIAMOND TECHNOLOGIES on her website to DIAMOND ICE TECH. Exhibit 46-15. Those marks are likely to be confused, though no evidence of actual confusion was presented.

103. As of the time of trial, Provenzano was still offering and selling products in packaging similar to Card Tech packaging with an image of a diamond and in other respects the same as the Card Tech package that uses the trademark DIAMOND TECHNOLOGIES. Provenzano admits the diamond image could be confused with the DIAMOND mark. Tr. 1/12/12 at pp. 143:7-144:24.

104. As of the time of trial, Provenzano was still offering and selling packaging that is very similar to the Card Tech package bearing the mark PRESAT. Tr. 1/12/12 at pp. 145:22-148:8; Exhibit 119. Provenzano admitted her packaging **[*46]** duplicates the entire format of the Card Tech package except that "saturated" is substituted for SAT. Tr. 1/12/12 at pp. 147:25-148:2. A person seeing PRESAT and presaturated would think there is some commonality between the two. Tr. 1/11/12 at p. 81:8-15. PRESAT and PREsaturated are likely to be confused.

105. Before she was terminated from Card Tech, Provenzano asked Mouchet about names similar to the names she had conveyed to Card Tech. Tr. 1/11/12 at p. 80:12-81:7. Also, Mouchet had asked her about registering disko.us to prevent confusion with disko-us.com, to which Provenzano replied, "yes." Exhibit 81-44, 45.

106. As of the time of trial, Provenzano was offering technical cleaning products for sale through a website, prodeeninc.com, that was substantially similar in overall impression to the presat.com website used for Card Tech's business in 2010, which was an asset Provenzano had agreed to convey to Card Tech. Tr. 1/10/12 at p. 89:3-25; Exhibit 75. Mouchet cloned the presat.com website to make Provenzano's new website. Tr. 1/11/12 at p. 83:7-9. The only difference is that some images are not displayed on the website currently. Tr. 1/12/12 at pp. 131:11-14, 135:15-18.

107. The **[*47]** overall appearance of Card Tech's website is not functional - there are many different "looks" for websites and there are other equally efficient ways to arrange a website. The overall appearance of Card Tech's website, taken as a whole, is not functional.

108. Money deposited to Provenzano's '207 account in May, June, and July 2011, totaled $107,022, all of which appeared to be business deposits. Tr. 1/11/12 at p. 168:18-25, p. 169:19-23. There was a clear upward trend of deposits into this account. Tr. 1/11/12 at p. 169:16-18. In August through December 2011, monthly sales have been $15-20,000 per month. Tr. 1/12/12 at p. 122:13-25. Provenzano's total sales from May until the preliminary injunction are, therefore, $167,022.

109. Provenzano used trademarks and trade dress that are very similar to the Card Tech marks. She knew they were similar, having transferred the trademarks and trade dress to Card Tech. She intended to use the similar marks, and did so because it was less expensive for her. She knew and understood that marks that are similar, even if not identical, would infringe. To the extent she contends otherwise, the Court finds her testimony incredible or irrelevant. The goods **[*48]** in connection with which the marks are used are identical and directly competitive with Card Tech goods; and the goods are inexpensive. Provenzano and Card Tech use similar marketing channels, and Provenzano used a website (a marketing channel) that is identical in overall look and feel. There is a likelihood of confusion between Provenzano marks, including her website, and Card Tech marks. No evidence of actual confusion was submitted.

<u>Provenzano used Card Tech customer information</u>

110. Provenzano sold and conveyed all of her business records and customer list information (among other things) to Card Tech. Exhibit 75. Thereafter, Provenzano was Vice President of Sales and reported directly to the President of Card Tech. See Exhibit 77 at 3. Provenzano was the entire sales and marketing staff of Card Tech. Tr. 1/10/12 at p. 53:8-11; Tr. 1/11/12 at p. 31:24-25.

111. While Provenzano was still an officer of and employed by Card Tech, she instructed Mouchet to be sure he had in his files "all the information from the Presat website such as all orders, customers, best products purchased, etc., and whatever other records [Provenzano] gathered during the years of this website up and running." **[*49]** Tr. 1/12/12 at p. 87:9-20. Thus by having Mouchet clone the information into her new website, Provenzano took for her own use information she had sold to Card Tech, and breached the Asset Purchase Agreement. She used the information in her own website, used marks on her website that are similar or identical to Card Tech trademarks, and solicited sales of goods that used without permission Card Tech trademarks and trade dress.

112. Provenzano was aware of an economic relationship between Card Tech and its customers that probably would have resulted in a continuing relationship with those customers and economic benefit to Card Tech. Indeed, that was the purpose of conveying the customer list and information to Card Tech. While it appears likely that Provenzano solicited Card Tech's customers, Card Tech provided no evidence of any actual solicitations. Card Tech has provided no facts that would justify an award of damages. Card Tech's First Amended Complaint seeks actual damages according to proof at trial, but Card Tech has not proven - or even requested - a specific sum.

Defamatory statements

113. Provenzano sent emails to third parties stating that Card Tech swindled her out of her business, **[*50]** Card Tech had no clue how to run a business, Card Tech stole her company, and Card Tech was trying to turn vendors and suppliers against her so they would not want to do business with her. Tr. 1/12/12 at pp. 89:16-91:10, 94:15-25, 95:10-96:8; Exhibit 83-93; 79-56.

114. There is no evidence that Card Tech swindled her out of her business or was trying to turn vendors against her. In fact, this Court has determined that no such conduct occurred. Failing to pay on a note when there is a dispute whether payment continues to be due is not "swindling."

115. However, Card Tech has not established that any recipient of the emails knew Provenzano was referring to Card Tech or Farrar.

116. Such statements conveyed a negative impression, were mean-spirited, and painted Card Tech in a negative light. Tr. 1/12/12 at pp. 91:24-25, 93:6-8, 94:15-25. However, there is no evidence that any of the recipients of the emails thereafter declined to do business with Card Tech, or that Card Tech even wished to do business with these particular entities. Card Tech's First Amended Complaint seeks general damages for this wrongful conduct, but Card Tech has not requested a specific sum and there is no evidence **[*51]** of actual damage.

Provenzano was not truthful with or concerning Card Tech

117. Provenzano failed to disclose and then avoided disclosing the status of the presat.com domain name and website. She failed to disclose a liability in breach of the Asset Purchase Agreement.

118. Provenzano had little or no documentary evidence for her explanations. Her response to written requests was often 'we need to talk about it,' and often no response at all.

119. The Court does not believe - and Card Tech was justified in not believing - that Provenzano ordered and paid for more than ten thousand dollars of inventory without telling Card Tech, planning to request reimbursement only if it was needed at an unknown time in the future. That Provenzano had "total autonomy" is irrelevant as she took affirmative steps to hide this transaction from Card Tech.

120. Provenzano misrepresented that Card Tech was an investor. She misrepresented her activities to Card Tech. Provenzano shipped product using her UPS '046 account and deposited the proceeds into her '207 account, without reporting the activity to Card Tech. Card Tech would not have known about the transactions, Tr. 1/12/12 at pp. 112:6-111:2, but for its **[*52]** investigation. Provenzano misappropriated customer information that she had sold to Card Tech. Provenzano's contention that in order for a misrepresentation to have occurred, it must be "material" is simply incorrect. Provenzano's repeated misrepresentations are relevant to the Court's analysis of the evidence in this case. In any event, many of Provenzano's misrepresentations were material.

Provenzano's testimony was evasive, contradictory, disingenuous, and generally lacking in credibility

121. Provenzano contended she was a good and loyal employee, but her own testimony established that she was not. She testified that her purchases of inventory without Card Tech's approval - or even its knowledge - were for the good of Card Tech in case it needed the inventory, Tr. 1/12/12 at p. 19:18-20:1. She then testified that the payment for a purchase by Castle Six properly went into her separate '207 bank account because it was a purchase of something not in Card Tech/Proven Products inventory, Tr. 1/12/12 at pp. 109:18-110:2. She stated that she didn't have the responsibility for paying the bills (except in the vendors' minds), Tr. 1/12/12 at p. 184:13-18, but she deliberately ordered inventory **[*53]** and directed that it be billed to her personally, Tr. 1/12/12 at p. 21:4-6; she directed a vendor (P3) to change billing to Card Tech International but described Card Tech as her east coast office, Exhibit 79-312-313. Thus, if Provenzano was viewed as financially responsible it was because of her own misrepresentations. The Court does not find credible Provenzano's allegation that it was Farrar who wanted the Card Tech purchase to remain a secret due to his alleged concerns about a "non-compete." Provenzano also testified: "We" were the exclusive distributor for Disko. Tr. 1/12/12 at p. 72:22-23; Proven Products (which Card Tech had purchased) was a distributor for Disko, Tr. 1/12/12 at p. 78:17-20; Card Tech did not assume her rights as exclusive distributor for Disko because Card Tech was the distributor based only on her personal relationship with Disko, Tr. 1/13/12 at pp. 78:3-81:16. She also testified both that she presumed Card Tech had an interest in Disko, Tr. 1/12/12 at pp. 78:21-79:1, and that Card Tech had no interest in Disko, Tr. 1/12/12 at pp. 79:2- 80:13. She testified she started a new invoicing system that deliberately was not numbered sequentially, Tr. 1/13/12 at **[*54]** p. 56:8-11; but then stated that the non-sequencing was from a typographical error multiple times, Tr. 1/13/12 at pp. 56:12-58:6. She testified that she asked Mouchet to get a new, separate Disko website up and running ASAP on March 19, 2011, Tr. 1/12/12 at p. 73:8-25, Exhibit 81; but also stated she did not "initiate" a Disko website before April 5, 2011, Tr. 1/12/12 at p. 70:18-25.

122. Provenzano admitted several times she was not being honest with Card Tech. On other occasions her responses were technically true but misleading. For example, it is technically true that the "purpose" of the UPS '046 account was for personal items, but in fact she used it over and over to ship business items. Tr. 1/12/12 at p. 56:3-25. It is technically true that Provenzano was not "holding" any P3 invoices, because she did not have the physical invoices, Tr. 1/12/12 at p. 32:2-21, but it is misleading.

123. Provenzano's responses to questions at trial were frequently evasive, seeking to be technically true but not answering the entire question; and sometimes not responsive at all. For example, "Q: Were you trying to associate that product with the earlier Diamond Technologies by using the diamond? **[*55]** A: The product itself is distinctive," Tr. 1/12/12 at p. 144:8-10; "Q: [C]onceivably a customer could receive, if they got a head cleaning card, this type of design; correct? A. That design is not on the website any longer." Tr. 1/12/12 at p. 135:15-18.

124. Provenzano had a prepared excuse for much of her wrongful conduct. Some of the excuses were incredible on their face. Others the Court found not to be credible based on her demeanor and manner while testifying, as well as contradictory documentary evidence, and the testimony of Norman Farrar, whom the Court found to be credible. Provenzano also often tried to excuse her wrongful conduct by claiming she was not a lawyer or didn't know that what she was doing was wrong. Nevertheless, Provenzano continued to engage in her infringing conduct even after this Court issued a preliminary injunction. Docket No. 105.

125. It appears to the Court that, while Provenzano may have entered into the Asset Purchase Agreement and Employment Agreements intending to perform -albeit reluctantly - she soon after developed "seller's remorse" and

began efforts to develop her own business once again. In addition, she concluded that Farrar and Card Tech had **[*56]** stolen her business from her. Based on her actions, she appears to believe that this justifies whatever conduct she chooses to engage in.

CONCLUSIONS OF LAW

A. Plaintiff's claims

Claim 1: Breach of Contract

1. Card Tech and Provenzano entered into several related contracts. The Asset Purchase Agreement provides that Maine law will govern. Exhibit 75 at 15.10. The Employment Agreement does not contain a choice of law provision.

2. Under both Maine and California law, when several documents are executed together for one transaction, the documents are construed together as one instrument. *Handy Boat Serv., Inc. v. Prof'l Servs., Inc., 1998 ME 134, 711 A.2d 1306, 1308 (Me. 1998)*; *Margolis v. Margolis, 115 Cal. App. 2d 131, 136, 251 P.2d 396 (1952)*. Under both Maine and California law, to prevail on a breach of contract claim, the plaintiff must show (1) a valid contract existed, (2) performance, or excuse of performance, by the plaintiff, (3) a breach of obligation by the defendant, and (4) damages. *Jenkins, Inc. v. Walsh Bros., 2001 ME 98, 776 A.2d 1229, 1234-35 (Me. 2001)*; *Wall Street Network, Ltd. v. N.Y. Times Co., 164 Cal. App. 4th 1171, 1178, 80 Cal. Rptr. 3d 6 (2008)*. To excuse performance by one party to a contract, the breach by the other **[*57]** party must be material. *Jenkins, 776 A.2d at 1234*; *Brown v. Grimes, 192 Cal. App. 4th 265, 277, 120 Cal. Rptr. 3d 893 (2011)*.

3. Provenzano's failure to deliver what she promised to deliver pursuant to the Asset Purchase Agreement is a breach. *C.N. Brown Co. v. Gillen, 569 A.2d 1206, 1214 (Me. 1990)*; *Woodard v. Glenwood Lumber Co., 171 Cal. 513, 522-23, 153 P. 951 (1915)*; 1 Witkin Summary of California Law: Contracts § 849 (10th ed. 2005). It also constitutes a failure of consideration. *Augusta Bank v. Hamblet, 35 Me. 491, 495-96 (1853)*; *Madera Canal & Irrigation Co. v. K. Arakelian, Inc., 103 Cal. App. 592, 597, 284 P. 971 (1930)*; 1 Witkin Summary § 813.

4. Provenzano failed to perform material obligations — for example, she failed to deliver all rights and domain names to presat.com, used for her own purposes trademarks and business information that she had conveyed to Card Tech for its exclusive use, failed to report sales, provided inaccurate information of sales and shipments, and did not devote her exclusive attention to Card Tech's business. Provenzano was not excused from performance of her contractual obligations.

5. Conveying the trademarks, trade names, trade dress, and goodwill of a business and then using them again in **[*58]** derogation of the assets conveyed constitutes a material breach of contract, as well as trademark infringement. 3 McCarthy on Trademarks and Unfair Competition § 18:15 (4th ed. 1994).

6. Provenzano's material breaches excused further performance of the Asset Purchase Agreement by Card Tech. *Augusta Bank, 35 Me. at 495-96*; *Brown, 192 Cal. App. 4th at 277* (citing 1 Witkin Summary §§ 813, 814). No further sums are due from Card Tech to Provenzano.

7. As a result of Provenzano's failure to convey all rights and domain names to presat.com, Card Tech has had to develop its own website. Card Tech has suffered damages in the amount of $4000 spent to create the website, and will likely incur $2000 in additional damages. Defendants are liable to Card Tech in the amount of $6000.

Claim 2: Fraudulent Inducement

8. The elements of fraud, which give rise to the tort action for deceit, are (1) a misrepresentation, (2) scienter, (3) intent to induce reliance, (4) justifiable reliance, and (5) damages. *Lazar v. Superior Court, 12 Cal. 4th 631, 638, 49 Cal. Rptr. 2d 377, 909 P.2d 981 (1996)*. A promise made with no intent to perform constitutes a misrepresentation that will give rise to a fraud claim. *Cal. Civ. Code § 1710(4)*; *Lazar, 12 Cal. 4th at 638*.

9. **[*59]** While there is evidence that Provenzano never intended to convey exclusive ownership of at least the presat.com domain name and website, the Court finds that Card Tech has not shown fraudulent inducement of the Asset Purchase Agreement by a preponderance of the evidence. Provenzano knew that she did not have the rights she claimed to have, but she apparently believed Card Tech would have exclusive access to the website nevertheless.

10. There is little or no evidence that — at the time she entered into the Employment Agreement — Provenzano did not intend to be an employee and work exclusively for Card Tech for five years.

11. The Court finds in favor of Provenzano as to the fraudulent inducement claim.

Claim 4: Unfair Competition — trade dress

12. Trade dress is the total image of a product and may include features such as size, shape, color or color combinations, texture, or graphics. *Two Pesos v. Taco Cabana, 505 U.S. 763, 765 n.1, 112 S. Ct. 2753, 120 L. Ed. 2d 615 (1992)*; *Clicks Billiards, Inc. v. Sixshooters, Inc., 251 F.3d 1252, 1257 (9th Cir. 2001)*. To prevail on a trade dress infringement claim, the plaintiff must establish (1) that its trade dress is nonfunctional, (2) that it is inherently distinctive or has acquired **[*60]** a secondary meaning, and (3) that the defendant's conduct creates a likelihood of confusion. *Clicks Billiards, 251 F.3d at 1258*.

13. Trade dress is considered as a whole. Elements that are separately unprotectable may be protected together as part of a trade dress. See *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 973 F.2d 1033, 1042 (2d Cir. 1992)* ("In examining trade dress the focus is on the entire look of the product or packaging. Individual aspects of a trade dress may be eligible for trademark protection in their own right, but in an action for trade dress infringement each aspect should be viewed in relation to the entire trade dress.").

14. For example, "[a] restaurateur cannot prevent others from using any particular color or feature, but can protect a combination of visual elements 'that, taken together, . . . may create a distinctive visual impression.'" *Fuddruckers, Inc. v. Doc's B.R. Others, Inc., 826 F.2d 837, 842 (9th Cir. 1987)* (quoting *Falcon Rice Mill, Inc. v. Cmty. Rice Mill, Inc., 725 F.2d 336, 346 (5th Cir. 1984))*.

The overall appearance of the Card Tech trade dress is not functional

15. To be protectable, trade dress must be nonfunctional. *Clicks Billiards, 251 F.3d at 1258*. **[*61]** Here, the trade dress is the packaging, not the product itself. To the extent product trade dress is treated differently from packaging trade dress, authorities dealing with product trade dress may not be applicable.

16. "A product feature is functional and cannot serve as a trademark if the product feature is essential to the use or purpose of the article or if it affects the cost or quality of the article, that is, if the exclusive use of the feature would put competitors at a significant, non-reputation-related disadvantage." *Clicks Billiards, 251 F.3d at 1258*.

17. Trade dress is examined as a whole to determine its functionality; functional elements that are not protectable separately can be protected together as part of a trade dress. *Clicks Billiards, 251 F.3d at 1259*; *Kendall-Jackson Winery Ltd. v. E. & J. Gallo Winery, 150 F.3d 1042, 1050 (9th Cir. 1998)*; *Fuddruckers, 826 F.2d at 842-43*.

18. Courts consider several factors in determining the functionality of trade dress: "(1) whether the design yields a utilitarian advantage, (2) whether alternative designs are available, (3) whether advertising touts the utilitarian

advantages of the design, and (4) whether the particular design **[*62]** results from a comparatively simple or inexpensive method of manufacture." *Clicks Billiards, 251 F.3d at 1260*. The functionality requirement is designed "to protect advances in functional design from being monopolized." *Le Sportsac, Inc. v. K Mart Corp., 754 F.2d 71, 76 (2d Cir. 1985)* (citation omitted). Trade dress likely is not functional where protection would leave many alternatives to competitors that would not prove confusingly similar to the protected trade dress. *Clicks Billiards, 251 F.3d at 1261*.

19. The overall appearance created by a combination of colors and design features is not functional. See, e.g., *Fuddruckers, 826 F.2d at 842* (stating that a "combinational of visual elements" in the design of a restaurant that, "taken together may create a distinctive visual impression" was not functional (alteration, citation, and internal quotation marks omitted)); *Lisa Frank, Inc. v. Impact Int'l, Inc., 799 F. Supp. 980, 986-87 (D. Ariz. 1992)* (concluding that the "overall visual appearance" of novelty stationery resulting from a combination of colors, graphics, and aesthetic features was not functional). One court has specifically reached this conclusion in the context of Internet **[*63]** websites. See *Conf. Archives, Inc. v. Sound Images, Inc., 2010 U.S. Dist. LEXIS 46955, 2010 WL 1626072, at *17 (W.D. Pa. Mar. 31, 2010)* ("Concerns about . . . monopolization are minimized in the context of web sites," because there are "so many other equally efficient ways to arrange a site. . . . As long as there are alternate ways to design a web site, beyond the arrangement protected by the trade dress, the site's interface should not be considered functional." (citation and internal quotation marks omitted)).

20. The overall appearance of Card Tech's website and packaging are not functional. Providing a product name, instructions for use, depictions of the product, and how-to illustrations are arguably functional features because they yield a utilitarian advantage, and because preventing a competitor from using these features would hamper competition and put competitors at a non-reputation-related disadvantage. *Clicks Billiards, 251 F.3d at 1258-60*. However, trade dress is to be viewed as a whole. The particular arrangement of these features, along with the colors and shapes on Card Tech's packaging, is not functional. Card Tech submitted examples of its trade dress. That was sufficient evidence for the Court **[*64]** to perform the functionality analysis.

Card Tech's trade dress is inherently distinctive

21. To qualify for protection, trade dress must either be inherently distinctive or have acquired secondary meaning. *Two Pesos, 505 U.S. at 769*. If trade dress is inherently distinctive, the plaintiff need not show secondary meaning. *Id. at 771-73*. Card Tech's trade dress is inherently distinctive.

22. In considering whether a mark is inherently distinctive, courts consider "whether it is a 'common' basic shape or design, whether it is unique or unusual in a particular field, and whether it is a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods . . . ." *Brooks Shoe Mfg. Co., Inc. v. Suave Shoe Corp., 716 F.2d 854, 858 (11th Cir. 1983)* (alterations omitted) (quoting *Seabrook Foods, Inc. v. Bar-Well Foods Ltd., 568 F.2d 1342, 1344 (C.C.P.A. 1977))*.

23. Card Tech's trade dress is unique (aside from Provenzano's copying). A unique combination of common aesthetic features can be distinctive. For example, "[t]he combination of particular hues of [two] colors, arranged in certain geometric **[*65]** designs, presented in conjunction with a particular style of printing" on a chemical label that creates "a distinctive visual impression" is inherently distinctive. *Chevron Chem. Co. v. Voluntary Purchasing Grps., Inc., 659 F.2d 695, 703 (5th Cir. 1981)*; see also *AmBrit, Inc. v. Kraft, Inc., 812 F.2d 1531, 1536 (11th Cir. 1986)* (concluding that the Klondike bar trade dress "with its square size, bright coloring, pebbled texture, polar bear and sunburst images, and distinctive style of printing" was inherently distinctive); *Lisa Frank, 799 F. Supp. at 989* (concluding that the "use of bold colors and a graduated color-fade with knock-out graphics and other artwork" created a "distinctive visual impression" in novelty stationery and was inherently distinctive). Although certain elements of Card Tech's trade dress may be commonly available, its particular combination of elements is not a mere refinement of well-known forms of ornamentation commonly used by others in the relevant industry.

There is a likelihood of confusion

24. Likelihood of confusion is the touchstone for trade dress infringement. "Likelihood of confusion exists when customers viewing the mark would probably assume that **[*66]** the product or service it represents is associated with the source of a different product or service identified by a similar mark." *Clicks Billiards, 251 F.3d at 1265*. The factual elements to be considered for likelihood of confusion include the strength of the mark, proximity of goods, similarity of the marks, evidence of actual confusion, marketing channels used, degree of care exercised by purchasers, defendant's intent in adopting the mark, and likelihood of expansion of product lines. *AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979)*, abrogated on other grounds by *Mattel Inc. v. Walking Mt. Prods., 353 F.3d 792, 810 n.19 (9th Cir. 2003)*. These factors are not a "rote checklist." *Network Automation, Inc. v. Advanced Sys. Concepts, Inc., 638 F.3d 1137, 1145 (9th Cir. 2011)*.

25. In this case, Defendants' trade dress is virtually identical to Card Tech's, the goods are the same, and the marketing channel (i.e., the Internet) is the same. The use of an identical advertisement of a nearly identical product with a nearly identical name is likely to cause consumer confusion. Docket No. 82, Order Granting Application for Preliminary Injunction at 11.

26. Although evidence **[*67]** of actual confusion is a factor in determining likelihood of confusion, absence of such evidence is not dispositive. See, e.g., *Eclipse Assocs., Ltd. v. Data Gen. Corp., 894 F.2d 1114, 1118 (9th Cir. 1990)* (citing *Sleekcraft, 599 F.2d at 353*). A plaintiff need not prove actual confusion to prevail on a trade dress infringement claim. See *15 U.S.C. § 1125(a)(1)(A)*; *Clicks Billiards, 251 F.3d at 1258*.

27. Deliberate copying of a similar mark creates a presumption of intent to deceive. *Interstellar Starship Servs., Ltd. v. Epix, Inc., 184 F.3d 1107, 1111 (9th Cir. 1999)*; *Official Airline Guides v. Goss, 6 F.3d 1385, 1394 (9th Cir. 1993)*. Intent to deceive is strong evidence of likely confusion. *Interstellar Starship Servs., 184 F.3d at 1111*.

28. Bad faith is not required for deliberate copying to be strong evidence of likely confusion. See *Sleekcraft, 599 F. 2d at 354* ("When the alleged infringer knowingly adopts a mark similar to another's, reviewing courts presume that the defendant can accomplish his purpose: that is, that the public will be deceived. Good faith is less probative of the likelihood of confusion, yet may be given considerable weight in fashioning a remedy." (citations **[*68]** omitted)).

29. Provenzano's use of Card Tech's trade dress was deliberate. The obvious similarity of the trade dress, Provenzano's knowledge of the trade dress and that it belonged to Card Tech, and Provenzano's deliberate and unmitigated copying of the presat.com website establishes deliberate copying. Provenzano deliberately sought and received a substantially identical website and packaging that is identical in overall appearance and impression. Provenzano chose to use Card Tech's trade dress because it was less expensive for her. To the extent that Provenzano claimed that she was unaware that her conduct was wrongful, the Court finds her testimony is not credible. Provenzano's conduct is strong evidence of likely confusion.

30. "When the goods produced by the infringer compete for sales with those of the trademark owner, infringement usually will be found if the marks are sufficiently similar that confusion can be expected." *Sleekcraft, 599 F.2d at 348*; see also *Fin. Express LLC v. Nowcom Corp., 564 F. Supp. 2d 1160, 1175 (C.D. Cal. 2008)*. Consumer confusion is likely here because the similar trade dress is used by Provenzano to sell products that are virtually identical to Card **[*69]** Tech products. Cf. *Faegre & Benson, LLP v. Purdy, 367 F. Supp. 2d 1238, 1244-45 (D. Minn. 2005)* (finding a low likelihood of confusion where similar websites were used for completely distinct purposes, and one of the websites included a disclaimer on each page stating that it was a parody of the other site). Where the marks are the same and the products are the same, the strength of the mark is of diminished importance. *Brookfield Commc'ns, Inc. v. W. Coast Entm't, 174 F.3d 1036, 1058-59 (9th Cir. 1999)*.

31. Where products are relatively inexpensive, there is a higher likelihood that consumers will be confused because they are likely to use less care while shopping. *Classic Foods Int'l Corp. v. Kettle Foods, Inc., 2006 U.S. Dist. LEXIS 97200, 2006 WL 5187497, at *14 (C.D. Cal. Mar. 2, 2006)*. Because the relevant products here are inexpensive,

customers are more likely to be confused by Defendants' nearly identical trade dress. Moreover, Provenzano took affirmative steps to conceal from customers that she had sold her business to Card Tech. Thus, any investigation by the customer would be unlikely to eliminate confusion. Injunctive relief is warranted

32. Injunctive relief is appropriate where there is no adequate **[*70]** remedy at law. *Richfield Oil Corp. v. United States, 207 F.2d 864, 870 (9th Cir. 1953)*.

33. Legal remedies are generally inadequate in the context of trademark infringement. See, e.g., *Century 21 Real Estate Corp. v. Sandlin, 846 F.2d 1175, 1180 (9th Cir. 1988)* ("Injunctive relief is the remedy of choice for trademark and unfair competition cases since there is no adequate remedy at law for the injury caused by a defendant's continuing infringement."); 5 McCarthy § 30:2 ("It is difficult to imagine an unfair competition case where damages are adequate to remedy the problem of defendant's continued acts."). This is because the likelihood of confusion generated by an infringing mark generally threatens the plaintiff's goodwill and reputation. *Paulsson Geophysical Servs. v. Sigmar, 529 F.3d 303, 313 (5th Cir. 2008)* (noting that the defendant's infringement causes the plaintiff to "los[e] control of the quality of the technology that was being associated with its mark"). Loss of goodwill and damage to reputation is "not readily measurable," and loss of sales is "notoriously difficult to calculate," making money damages an inadequate remedy. *Omega Importing Corp. v. Petri-Kine Camera Co., 451 F.2d 1190, 1195 (2d Cir. 1971)*.

34. **[*71]** Causation is not an element of a trade dress infringement claim; Card Tech need not prove that *any* sales in fact resulted from actual confusion. See *15 U.S.C. § 1125(a)(1)(A)*; *Sleekcraft, 599 F.2d at 352-53* (a plaintiff need only prove that confusion is *likely*). Where a plaintiff seeks injunctive relief, as opposed to actual damages, actual loss need not be proven. See *15 U.S.C. § 1125(a)(1)(A)*; *Safeway Stores, Inc. v. Rudner, 246 F.2d 826, 829 (9th Cir. 1957)*.

Claim 5: Unfair Competition - trademark

35. Trademark rights arise from use. *CreAgri, Inc. v. USANA Health Sciences, Inc., 474 F.3d 626, 630 (9th Cir. 2007)*. Each and all of the marks at issue were in use by Provenzano prior to March 2010. These marks were assets conveyed to Card Tech by the Asset Purchase Agreement. Ms. Provenzano individually was a signatory to that conveyance.

36. The trademark PRESAT is registered with the U.S. Patent and Trademark Office (Registration Number 3443482). That registration includes a Three Drop symbol used with the word PRESAT.

37. The PRESAT mark is presumptively valid and protectable. *15 U.S.C. § 1057(b)*; *Quiksilver, Inc. v. Kymsta Corp., 466 F.3d 749, 755 (9th Cir. 2006)*. Provenzano has not **[*72]** claimed that the PRESAT mark is not protectable.

38. DIAMOND TECHNOLOGY, CLEAN SWAB, EASY WIPES, EASY CLEAN CARD, EASY SWAB, and the slogan "Results Are Obvious" are unregistered trademarks used by Card Tech. Unregistered marks are subject to the same standard as registered marks. *Brookfield Commn'cs, 174 F.3d at 1046*.

There is a likelihood of confusion

39. Likelihood of confusion is the touchstone for trade dress infringement. "Likelihood of confusion exists when customers viewing the mark would probably assume that the product or service it represents is associated with the source of a different product or service identified by a similar mark." *Clicks Billiards, 251 F.3d at 1265*. The factual elements to be considered for likelihood of confusion include the strength of the mark, proximity of goods, similarity of the marks, evidence of actual confusion, marketing channels used, degree of care exercised by purchasers, defendant's intent in adopting the mark, and likelihood of expansion of product lines. *Sleekcraft, 599 F.2d at 348-49*. These factors are not a "rote checklist." *Network Automation, 638 F.3d at 1145*.

40. Although evidence of actual confusion is a factor in determining likelihood **[*73]** of confusion, absence of such evidence is not dispositive. See, e.g., *Eclipse Assocs., 894 F.2d at 1118* (citing *Sleekcraft, 599 F.2d at 353*). A plaintiff need not prove actual confusion to prevail on a trade dress infringement claim. See *15 U.S.C. § 1125(a)(1)(A)*; *Clicks Billiards, 251 F.3d at 1258*.

41. Trademarks need not be identical in order to infringe; it is enough if they are confusingly similar. See, e.g., *Saxlehner v. Eisner & Mendelson Co., 179 U.S. 19, 21 S. Ct. 7, 45 L. Ed. 60, 1900 Dec. Comm'r Pat. 362 (1900)*; *Wash. Speakers Bureau Inc. v. Leading Authorities Inc., 33 F. Supp. 2d 488 (E.D. VA. 1999)* (considering domain names), aff'd *217 F.3d 843 (4th Cir. 2000)*. Conflicting marks are to be compared with respect to sight, sound, and meaning. *Sleekcraft, 599 F.2d at 351*.

42. After this action was commenced, Provenzano changed her use of the DIAMOND TECHNOLOGY mark to use of DIAMOND ICE TECHNOLOGY. DIAMOND ICE TECHNOLOGY is confusingly similar to Card Tech's mark DIAMOND TECHNOLOGY. See, e.g., *Con Agra v. Hormel & Co., 990 F.2d 368 (8th Cir. 1998)* (concluding, in the context of the facts of the case, that "Healthy Choice" and "Health Selections" were confusingly similar marks); *Mobil Oil Corp. v. Teagarden, 190 U.S.P.Q. 560 (T.T.A.B. 1976)* **[*74]** (concluding, in the context of the facts of the case, that "Mobil Man" and "Mobil Muffler Man" were confusingly similar marks); see also 4 McCarthy § 23.29.

43. After being ordered to cease using any mark confusingly similar to DIAMOND TECHNOLOGY, Provenzano replaced the word DIAMOND with the image of a Diamond. A picture and a word may be confusingly similar. See, e.g., *Beer Nuts, Inc. v. King Nut Co., 477 F.2d 326 (6th Cir. 1973)* (concluding that use of the word NUTS as part of a mark with a picture of stein of beer infringed on the word mark BEER NUTS); *Arrow-Hart, Inc. v. Yazaki Corp., 169 U.S.P.Q. 249 (T.T.A.B. 1971)* (concluding that an ARROW and picture of an arrow were confusingly similar to the registered mark ARROW); *Jockey Int'l, Inc. v. Butler, 3 U.S.P.Q.2d 1607 (T.T.A.B. 1987)* (concluding that a picture of a jockey riding a horse was confusingly similar to the word mark JOCKEY). The mark using the picture of a diamond is confusingly similar to the DIAMOND TECHNOLOGY mark.

44. Provenzano changed her use of PRESAT to PREsaturated. Moreover, she continued to use the rippled water image from the Card Tech trade dress with the PREsaturated mark. This mark is confusingly similar **[*75]** to the PRESAT mark.

45. In this case, Defendants' marks are very similar to Card Tech's, the goods are the same, and the marketing channel (i.e., the Internet) is the same. The use of an identical advertisement of a nearly identical product with a nearly identical name is likely to cause consumer confusion. Docket No. 82, Order Granting Application for Preliminary Injunction at 11. "When the goods produced by the infringer compete for sales with those of the trademark owner, infringement usually will be found if the marks are sufficiently similar that confusion can be expected." *Sleekcraft, 599 F.2d at 348*; see also *Fin. Express LLC, 564 F. Supp. 2d at 1175*. Consumer confusion is likely here because the similar marks were used by Provenzano to sell products that are virtually identical to Card Tech products. Cf. *Faegre & Benson, LLP, 367 F. Supp. 2d at 1244-45*.

46. Where the marks are the same and the products are the same, the strength of the mark is of diminished importance. *Brookfield Commc'ns, 174 F.3d at 1058-59*.

47. Deliberate copying of a similar mark creates a presumption of intent to deceive, which is strong evidence of likely confusion. *Interstellar Starship Servs., 184 F.3d at 1111*; **[*76]** *Official Airline Guides, 6 F.3d at 1394*. Deliberate copying, even absent bad faith, is evidence of likely confusion. See *Sleekcraft, 599 F. 2d at 354*.

48. Provenzano's use of these marks was deliberate - she knew that she had conveyed the marks to Card Tech, and she used identical or nearly identical marks. She chose to use the marks because it was less expensive for her. In addition, Provenzano's series of minor, incremental changes to the similar marks evidence the intent to deceive, and the intent to continue to take advantage of Card Tech's goodwill. Provenzano's conduct is strong evidence of likely confusion.

49. Where products are relatively inexpensive, there is a higher likelihood that consumers will be confused because they are likely to use less care while shopping. *Classic Foods Int'l Corp., 2006 U.S. Dist. LEXIS 97200, 2006 WL 5187497, at *14*. Because the relevant products here are inexpensive, customers are more likely to be confused by Defendants' nearly identical trade dress. Moreover, Provenzano took affirmative efforts to conceal from customers that she had sold her business to Card Tech would make any investigation by a customer unlikely to eliminate confusion.

Injunctive relief is warranted

50. **[*77]** Injunctive relief is appropriate where there is no adequate remedy at law. *Richfield Oil Corp., 207 F.2d at 870*.

51. Legal remedies are generally inadequate in the context of trademark infringement. See, e.g., *Century 21, 846 F.2d at 1180*; 5 McCarthy § 30:2. This is because the likelihood of confusion generated by an infringing mark generally threatens the plaintiff's goodwill and reputation. *Paulsson Geophysical Servs., 529 F.3d at 313*. Loss of goodwill and damage to reputation is "not readily measurable," and loss of sales is "notoriously difficult to calculate," making money damages an inadequate remedy. *Omega Importing Corp., 451 F.2d at 1195*.

52. Causation is not an element of an action for trademark infringement; Card Tech need not prove that *any* sales in fact resulted from actual confusion. See *15 U.S.C. § 1125(a)(1)(A)*; *Sleekcraft, 599 F.2d at 352-53* (a plaintiff need only prove that confusion is *likely*). Where a plaintiff seeks injunctive relief, as opposed to actual damages, actual loss need not be proven. See *15 U.S.C. § 1125(a)(1)(A)*; *Safeway Stores, 246 F.2d at 829*.

Claim 6: Unfair Competition - state law

53. The basis for Card Tech's claim under California's unfair competition **[*78]** law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, is identical to its federal trademark and trade dress infringement claims. UCL claims are "substantially congruent" to trademark infringement claims under the Lanham Act. *Acad. of Motion Picture Arts & Scis. v. Creative House Promotions, Inc., 944 F.2d 1446, 1457 (9th Cir. 1991)* (citation omitted).

54. However, California's UCL is broader than the Lanham Act. The UCL "does not proscribe specific practices," but rather "defines 'unfair competition' to include 'any unlawful, unfair or fraudulent business act or practice.'" *Cel-Tech Commn'cs, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)* (quoting *Cal. Bus. & Prof. Code § 17200*). "[T]he Legislature . . . intended by [the UCL's] sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur." *Id. at 181* (alterations in original) (citation omitted); see also *Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1266-67, 10 Cal. Rptr. 2d 538, 833 P.2d 545 (1992)* ("In drafting the act, the Legislature deliberately traded the attributes of tort law for speed and administrative simplicity."). "In permitting the restraining of all 'unfair' **[*79]** business practices, [the UCL] undeniably establishes only a wide standard to guide courts of equity; . . . given the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard would not be adequate." *Cel-Tech, 20 Cal. 4th at 181* (citation omitted).

55. Courts have consistently interpreted the language of *§ 17200* broadly. See, e.g., *Prata v. Superior Court, 91 Cal. App. 4th 1128, 1137, 111 Cal. Rptr. 2d 296 (2001)*. The statute imposes strict liability - i.e., a defendant may be liable even if she did not intend to injure anyone. Id.

56. The UCL "governs 'anti-competitive business practices' as well as injuries to consumers, and has as a major purpose the preservation of fair business competition.'" *Cel-Tech, 20 Cal. 4th at 180*.

57. *Section 17200* defines unfair competition to include any "unfair" business practice. The California Supreme Court has specifically defined "unfair" in the context of competitor actions, in which the plaintiff claims that it "suffered injury from a direct competitor's 'unfair' act or practice." *Cel-Tech, 20 Cal. 4th at 187*. In the competitor

context, "unfair" refers to "conduct that threatens an incipient violation of an ***antitrust law***, or **[*80]** violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." Id. The policy should be "tethered to a constitutional or statutory provision or a regulation carrying out statutory policy." *Id. at 185* (citation omitted). In the context of consumer actions — or actions by competitors "alleging other kinds of violations of the [UCL]," *id. at 187 n.12* — a different standard applies. Many California courts apply the rule that a business practice is "unfair" if "(1) the consumer injury is substantial; (2) the injury is not outweighed by any countervailing benefits to consumers or competition; and (3) the injury could not reasonably have been avoided by consumers themselves." *Klein v. Chevron U.S.A., Inc., 202 Cal. App. 4th 1342, 1376, 137 Cal. Rptr. 3d 293 (2012)* (citing *Camacho v. Auto. Club of S. Cal., 142 Cal. App. 4th 1394, 1403, 48 Cal. Rptr. 3d 770 (2006)* (distinguishing Cel-Tech)). Card Tech may not sue under the UCL to vindicate the rights of consumers. See *Cal. Bus. & Prof. Code § 17204* (stating that a UCL claim may be brought "by a person who has suffered injury in fact and has lost money or property **[*81]** as a result of the unfair competition").

58. Provenzano's use of infringing trademarks and trade dress, as well as her efforts to conceal the fact that she had sold her business to Card Tech, clearly "violates the policy or spirit of [the anti-trust] laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech, 20 Cal. 4th at 187*. The purpose underlying California's Unfair Practices Act, *Cal. Bus. & Prof. Code § 17000 et seq.*, California's anti-trust law, is "to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented." *Cal. Bus. & Prof. Code § 17001*. Provenzano's conduct clearly destroyed or prevented fair and honest competition by misleading the public as to the true source of her products, and by appropriating sales of Card Tech's goods as her own, thus denying Card Tech the ability to compete in the market. This conduct qualifies as "unfair" under the UCL. See *Cel-Tech, 20 Cal. 4th at 189* (concluding that practices violating *§ 17001* qualify as "unfair" under **[*82]** the UCL). Card Tech was harmed by this conduct, as evidenced by the decline in its sales. See *Cal. Bus. & Prof. Code § 17204*.

59. A court may enjoin any practice that constitutes unfair competition under the UCL. *Cal. Bus. & Prof. Code § 17203*.

Claim 9: Fraudulent Concealment

60. The elements of a fraudulent concealment claim are: "(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." *Jones v. ConocoPhillips Co., 198 Cal. App. 4th 1187, 1198, 130 Cal. Rptr. 3d 571 (2011)* (citation omitted). The plaintiff bears the burden of proof by a preponderance of the evidence. *Liodas v. Sahadi, 19 Cal. 3d 278, 291, 137 Cal. Rptr. 635, 562 P.2d 316 (1977)*; *Sierra Nat'l Bank v. Brown, 18 Cal. App. 3d 98, 105, 95 Cal. Rptr. 742 (1971)*; see also *Cal. Evid. Code § 115*.

61. Provenzano was an officer and an employee of Card **[*83]** Tech. As either, she owed a fiduciary duty to Card Tech. *Diodes, Inc. v. Franzen, 260 Cal. App. 2d 244, 249, 67 Cal. Rptr. 19 (1968)*.

62. Provenzano concealed at least the following material facts from Card Tech: that she did not own the presat.com domain name, purchases of inventory used by Card Tech for her own account, orders from customers, shipments via her UPS '046 account not known to Card Tech and for which she did not provide reports, deposits of payments intended for Card Tech into her '207 bank account that were not authorized by Card Tech and for which she never provided any statements, the creation, and/or the preparation to create, new websites. She concealed all these things knowingly and intentionally. Provenzano understood that she had an obligation to keep Card Tech informed of her business activities.

63. Card Tech did not know of those activities and could not reasonably have discovered them without an investigation.

64. Card Tech has established by a preponderance of the evidence that Provenzano concealed the deposits made to the '207 account with the intent to defraud Card Tech. Provenzano transferred money from her '207 account into the Card Tech-authorized '277 account in March **[*84]** and April that far exceeded the amounts transferred in any prior months. The great increase in transfers combined with the questions that Card Tech was asking is evidence that Provenzano made the transfers only when she believed that Card Tech would find out about her diversion if the money was not transferred to the '277 account.

65. The $20,000 that Provenzano admits she failed to transfer to Card Tech's account constitutes damages.

Claim 11: Conversion

66. The "essential elements of a conversion action . . . are the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages." *Shopoff & Cavallo LLP v. Hyon, 167 Cal. App. 4th 1489, 1507, 85 Cal. Rptr. 3d 268 (2008)* (internal quotation marks and citation omitted). Any act of dominion wrongfully exerted over the personal property of another is conversion. *Plummer v. Day/Eisenberg, LLP, 184 Cal. App. 4th 38, 50, 108 Cal. Rptr. 3d 455 (2010)*. It is not necessary for conversion that there be a manual taking of the property; any assumption of control or ownership over the property, or application of the property to the alleged converter's own use, is conversion. **[*85]** Id.; *Shopoff & Cavallo, 167 Cal. App. 4th at 1507*. Money can be the subject of a cause of action for conversion if there is a "specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment." *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP, 150 Cal. App. 4th 384, 395, 58 Cal. Rptr. 3d 516 (2007)*.

67. Provenzano accepted a fixed sum of money — approximately $20,000 — for payment of Card Tech goods shipped to fill an order.

68. Provenzano does not dispute that she exercised and continues to exercise dominion over at least $20,000 of Card Tech's money.

69. Provenzano's exercise of dominion is wrongful. She is not entitled to retain the funds even if Card Tech owed her money under *California Labor Code §§ 203* and *2802*. Rights to penalties under *§ 203* do not vest until the employee brings an enforcement action. *Pineda v. Bank of Am., N.A., 50 Cal. 4th 1389, 1402, 117 Cal. Rptr. 3d 377, 241 P.3d 870 (2010)*; *Murphy v. Kenneth Cole Prods., Inc., 40 Cal. 4th 1094, 1108, 56 Cal. Rptr. 3d 880, 155 P.3d 284 (2007)*. And even if the funds owed under *§ 2802* constitute wages in which Provenzano has a vested interest, California law suggests that she must file either a judicial action or an administrative **[*86]** action to recover the funds. *Reynolds v. Bement, 36 Cal. 4th 1075, 1084, 32 Cal. Rptr. 3d 483, 116 P.3d 1162 (2005)*, abrogated on other grounds by *Martinez v. Combs, 49 Cal. 4th 35, 50 n.12, 109 Cal. Rptr. 3d 514, 231 P.3d 259 (2010)*. Defendants provide no support for the claim that Provenzano could rightfully retain the funds.

70. As an officer and an employee of Card Tech, Provenzano was an agent of Card Tech. An agent "is ordinarily liable for converting the funds of [her] principal when [she] refuses to account for them upon proper demand. While it is true that money cannot be the subject of an action for conversion unless a specific sum capable of identification is involved, it is not necessary that each coin or bill be earmarked. When an agent is required to turn over to [her] principal a definite sum received by [her] on [her] principal's account, the remedy of conversion is proper." *Fischer v. Machado, 50 Cal. App. 4th 1069, 1072, 58 Cal. Rptr. 2d 213 (1996)*.

71. Initially the sum over which Provenzano exercised dominion without authority (deposits to the '207 account not promptly transferred to the '277 account) was considerably in excess of $20,000. Eventually, after some months and after Card Tech began asking probing questions for information, Provenzano paid over all **[*87]** except at least $20,000. Provenzano is liable to Card Tech in that amount.

Claim 12: Intentional interference with prospective economic advantage

72. The elements of the tort of intentional interference with prospective economic advantage are: "(1) an economic relationship between the plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) an intentional act by the defendant, designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the defendant's wrongful act, including an intentional act by the defendant that is designed to disrupt the relationship between the plaintiff and a third party." *Edwards v. Arthur Andersen LLP, 44 Cal. 4th 937, 944, 81 Cal. Rptr. 3d 282, 189 P.3d 285 (2008)*. "The plaintiff must also prove that the interference was wrongful, independent of its interfering character." Id. (citing *Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376, 392-93, 45 Cal. Rptr. 2d 436, 902 P.2d 740 (1985))*.

73. Provenzano knew Card Tech's customers - she had conveyed her rights to the customer list and their sales records - and she was selling Card Tech products to **[*88]** those customers. She also knew there was a probability that the customers would continue dealing with Card Tech. Provenzano intended to disrupt Card Tech's business relationship and deal with the customers herself.

74. Soliciting business in competition is not wrongful unless by action that is wrongful in and of itself. *Reeves v. Hanlon, 33 Cal. 4th 1140, 1150, 17 Cal. Rptr. 3d 289, 95 P.3d 513 (2004)*; *Della Penna, 11 Cal. 4th at 392-93*. Using business information that had been conveyed to Card Tech is wrongful in and of itself. See, e.g., *Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg, 216 Cal. App. 3d 1139, 1154, 265 Cal. Rptr. 330 (1989)* (stating that use of confidential information, or breach of fiduciary duty, is wrongful in and of itself). Infringement of Card Tech's trade dress and trademarks is wrongful in and of itself.

75. However, Card Tech has provided no evidence that it lost a single sale or lost a single customer as a result of Provenzano's wrongful conduct. Nor does it provide evidence of any damage at all. Therefore, Card Tech cannot prevail on this claim. See, e.g., *Reeves, 33 Cal. 4th at 1146-48* (affirming a judgment for the plaintiffs where former employees of a firm persuaded nine employees to **[*89]** leave, causing the firm to spend more than $20,000 for employee recruitment to mitigate damages, and solicited the business of the firm's clients, causing 144 of them to fail to pay fees they owed the firm); *Little v. Amber Hotel Co., 202 Cal. App. 4th 280, 305, 136 Cal. Rptr. 3d 97 (2011)* (affirming the award of lost profits where the evidence showed that the defendant's misconduct ended the plaintiff's profitable relationship with identified individuals); *Guillory v. Godfrey, 134 Cal. App. 2d 628, 632, 286 P.2d 474 (1955)* (rejecting the claim that a damage award was not supported by evidence of lost profits because the plaintiff had provided evidence of medical expenses resulting from physical illness resulting from the defendants' conduct).

Claim 13: Defamation

76. Libel is a form of defamation. See *Cal. Civ. Code § 44(a)*. Libel is "a false and unprivileged publication . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Id. *§ 45*. "A corporation can be libeled by statements which injure its business reputation." *Barnes-Hind, Inc. v. Superior Court, 181 Cal. App. 3d 377, 381, 226 Cal. Rptr. 354 (1986)*.

77. Libel that **[*90]** is "defamatory of the plaintiff without the necessity of explanatory matter" is libel per se. *Barnes-Hind, 181 Cal. App. 3d at 382*. Where a statement is libel per se, damage to reputation is presumed, and the plaintiff need not show actual damage.

78. Provenzano's statement that Card Tech "swindled" her out of her business is libel per se. The statement is false. There is no evidence that Card Tech swindled her out of her business or was trying to turn vendors against

her. Not continuing to pay on a note when there is a dispute whether payment continues to be due is not "swindling."

79. A false accusation of "swindling" is an accusation of a crime or of fraud. *People v. Berry, 191 Cal. 109, 122, 215 P. 74 (1923)*; Black's Law Dictionary (9th ed. 2009). Such a statement could have a tendency to injure Card Tech in its occupation and to discourage others from associating or dealing with it.

80. However, Card Tech has not established that any recipient of the emails knew Provenzano was referring to Card Tech or Farrar. Therefore, Card Tech cannot prevail on this claim.

Card Tech is entitled to Provenzano's "infringer profits"

81. Card Tech is entitled to Provenzano's "infringer profits" on sales up to **[*91]** November 7, 2011, the date the preliminary injunction issued - profit from sales after November 7 are being awarded pursuant to the Contempt Order. In this case, that profit is Provenzano's gross receipts, because she did not produce any admissible evidence of deductible costs.

82. An award of infringer profits in a trademark case is a statutory remedy. "In addition to actual damages, *Section 1117(a)* expressly provides for an award of defendant's profits, subject to the principles of equity." *Hansen Beverage Co. v. Vital Pharm., Inc., 2010 U.S. Dist. LEXIS 79218, 2010 WL 3069690, at *8 (S.D. Cal. Aug. 3, 2010)*; see also *Lindy Pen Co. v. Bic Pen Corp., 982 F.2d 1400, 1405 (9th Cir. 1993)* ("The Supreme Court has indicated that an accounting of profits follows as a matter of course after infringement is found by a competitor. Nonetheless, an accounting of profits is not automatic and must be granted in light of equitable considerations." (citations omitted)), superseded on other grounds by *Pub. L. No. 106-43, § 3(b), 113 Stat. 219 (Aug. 5, 1999)*.

83. The Ninth Circuit has recognized three justifications for awarding an infringer's profits: (1) compensating the plaintiff for diverted sales; (2) preventing unjust enrichment; **[*92]** and (3) serving as a deterrent to infringers. *Maier Brewing Co. v. Fleischmann Distilling Corp., 390 F.2d 117, 123 (9th Cir.1968)*.

84. To support an award of profits, a plaintiff must prove that the defendant's infringement was willful. *Adray v. Adry-Mart, Inc., 76 F.3d 984, 988 (9th Cir. 1996)* (noting that a plaintiff need not prove willfulness when lost profits are merely used a proxy for estimating the plaintiff's actual damages); *Lindy Pen, 982 F.2d at 1405*; *Maier, 390 F.2d at 123*. The infringement must be "willfully calculated to exploit the advantage of an established mark." *Lindy Pen, 982 F.2d at 1405* (citation omitted).

85. The Ninth Circuit has suggested that where infringement is deliberate and willful, a remedy no greater than an injunction is insufficient. See *Playboy Enters., Inc. v. Baccarat Clothing Co., Inc., 692 F.2d 1272, 1274 (9th Cir. 1982)* ("[A]n award of little more than nominal damages would encourage a counterfeiter to merely switch from one infringing scheme to another as soon as the infringed owner became aware of the fabrication. Such a method of enforcement would fail to serve as a convincing deterrent to the profit maximizing entrepreneur who engages in trademark **[*93]** piracy."); see also *Lindy Pen, 982 F.2d at 1405*. The Ninth Circuit has also stated that making acts of deliberate trademark infringement unprofitable - through the award of profits - accomplishes the purposes of the Lanham Act. *Maier Brewing, 390 F.2d at 123*.

86. Proof of actual injury is not required to recover profits. *Gracie v. Gracie, 217 F.3d 1060, 1068 (9th Cir.2000)*. When awarding profits, the plaintiff "is not . . . entitled to a windfall." *Bandag, Inc. v. Al Bolser's Tire Stores, Inc., 750 F.2d 903, 918 (Fed. Cir. 1984)*.

87. The award of profits is justified in this case. Provenzano deliberately continued to operate the very business, using the very trademarks, trade dress, and goodwill that she conveyed to Card Tech. There can be no doubt here that Provenzano did not act in a good faith belief in her right to use the marks and trade dress. Although there is little evidence of fraudulent inducement, Provenzano clearly regretted her decision to sell her business and eventually decided Card Tech had "stolen" it from her. Provenzano intentionally sought to exploit the trademarks,

trade dress, and goodwill that she had conveyed to Card Tech, and her testimony that she did not know **[*94]** she was acting wrongfully is false. Further, Provenzano not only deliberately infringed on Card Tech's trademarks and trade dress, but she then violated the Court's preliminary injunction barring that conduct. Under the circumstances of this case, a judgment limited to an injunction is clearly inadequate.

88. In computing defendant's profits, the defendant has the burden of proof as to the allowance of any deductions or costs from its gross sales. *15 U.S.C. § 1117(a)*; *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 316 U.S. 203, 206-07, 62 S. Ct. 1022, 86 L. Ed. 1381, 1942 Dec. Comm'r Pat. 767 (1942)*. There is a presumption that an infringer's sale of infringing products resulted from the infringement and not from another cause. See *Mishawaka Rubber, 316 U.S. at 207* ("In the absence of his proving to the contrary, it promotes honesty and comports with experience to assume that the wrongdoer who makes profits from the sales of goods bearing a mark belonging to another was enabled to do so because he was drawing upon the good will generated by that mark."). Where the defendant fails to establish allowable deductions, courts will award gross sales. *Id. at 206-07*; *WMS Gaming Inc. v. WPC Prods. Ltd., 542 F.3d 601, 609 (7th Cir. 2008)*.

89. **[*95]** It is Defendants' burden to prove (1) which, if any, of their sales were not attributable to the wrongful act, and (2) deductible costs and expenses to arrive at net profits. *15 U.S.C. § 1117(a)*; *Mishawaka Rubber, 316 U.S. at 206-07*. In discovery, Provenzano claimed to have no records, and she did not produce any at trial. Any doubts about the actual amount of gross sales or profits are resolved against the infringing party. See *Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966, 972 (2d Cir. 1985)* (concluding that the district court did not clearly err in finding sufficient evidence of profits where the defendants stated in a videotaped interview that they earned $3.00 to $3.50 on every $18.00 counterfeit bag they sold, and that they purchased a certain amount of counterfeit bags every week for a period of months).

90. Provenzano did not present sufficient evidence that her nonwebsite sales were not attributable to Card Tech's goodwill in the industry. Where there is evidence that a percentage of the infringer's sales resulted from something other than infringement, apportionment of profits may be proper. See, e.g., *Holiday Inns, Inc. v. Airport Holiday Corp., 493 F. Supp. 1025, 1027-28 (N.D. Tex. 1980)* **[*96]** (awarding the plaintiff 30% of the profits made by a hotel that wrongfully used a sign bearing the plaintiff's mark where the defendant testified that 30% of the hotel's profits resulted from transient patrons reading the sign, and that 70% was "weekly trade" that resulted from the defendant's personal efforts to drum up business by knocking on doors in the community), aff'd *683 F.2d 931 (5th Cir. 1982)*; but see *Truck Equip. Serv. Co. v. Fruehauf Corp., 536 F.2d 1210, 1222 (8th Cir. 1976)* (concluding in a willful infringement case that equity required awarding all profits, regardless of a market report indicating that only 20% of the defendant's profits resulted from the appearance of the infringing product or customers' knowledge of the plaintiff's mark). Defendants presented evidence that only 10% of their sales resulted from website orders. However, this does not show by a preponderance of the evidence that telephone orders did not result from Card Tech's goodwill. That a customer placed an order by phone does not mean that the customer never viewed the website.

91. Provenzano did not present any evidence of deductible costs. Evidence of Card Tech's profit margin in 2010, or of Prodeen's **[*97]** profit margin in 2009 (before it was purchased by Card Tech), does not constitute evidence of Provenzano's profit margin after her employment with Card Tech terminated. An invoice from P3 was received into evidence. Exhibit 18. An invoice, that presumably must be paid before the goods are received, is sufficient proof of a single deductible cost. *Tamko Roofing Prods., Inc. v. Ideal Roofing Co., 282 F.3d 23, 39 (1st Cir. 2002)*; *Bambu Sales, Inc. v. Ozak Trading, 58 F.3d 849 (2d Cir. 1995)*. However, the invoice is from 2010, and therefore is not relevant to determining Provenzano's profits from May through November 2011.

This case is exceptional—Card Tech is entitled to attorney's fees attributable to the trademark and trade dress claims

92. The Lanham Act permits the award of attorney's fees in exceptional cases. *15 U.S.C. § 1117(a)*.

93. There is no statutory definition of an exceptional case. The Ninth Circuit defines a case as exceptional when the non-prevailing party's case is groundless, unreasonable, vexatious or pursued in bad faith. *Gracie, 217 F.3d. at 1071* (quoting *Interstellar Starship Servs., 184 F.3d at 1112*). The standard applies equally to prevailing defendants and prevailing **[*98]** plaintiffs. Id. Conclusory, unsupported statements that a party acted in bad faith are not sufficient to support the award of attorney's fees. Id. However, actual evidence of willful infringement has been held sufficient to support an award of attorney's fees. *Intel Corp. v. Terabyte Int'l, 6 F.3d 614, 622 (9th Cir. 1993)*. The district court, as a trier of fact, may find bad faith. Id.

94. As stated previously, Provenzano's conduct clearly constituted willful infringement. Provenzano intentionally used the trademarks and trade dress she had conveyed to Card Tech for her own benefit. The Court finds that her testimony that she did not know such use was wrongful is not credible. Therefore, her defense is groundless and unreasonable. Furthermore, Provenzano deliberately continued her infringing conduct in violation of the preliminary injunction. The Court finds that Provenzano acted in bad faith and with the intent to harm Card Tech. This is an exceptional case in which the award of attorney's fees is appropriate.

Sharyn Provenzano is personally liable

95. Provenzano committed the wrongful conduct individually. To the extent wrongful conduct was committed by Prodeen Inc., Provenzano knew **[*99]** of, authorized, directed, consented to, and actively participated in the wrongful conduct of Prodeen, Inc. Provenzano was and is the sole person through whom Prodeen, Inc. operated.

96. Directors or officers of a corporation incur personal liability for torts of the corporation if they participate in the wrong or authorize or direct that it be done. *U.S. Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 595, 83 Cal. Rptr. 418, 463 P.2d 770 (1970)*. In other words, "an officer or director will not be liable for torts in which he does not personally participate, of which he has no knowledge, or to which he has not consented. While the corporation itself may be liable for such acts, the individual officer or director will be immune unless he authorizes, directs, or in some meaningful sense actively participates in the wrongful conduct." *Seagate Tech. v. A. J. Kogyo Co., 219 Cal. App. 3d 696, 701, 268 Cal. Rptr. 586 (1990)* (alterations omitted).

97. Provenzano is personally liable for the acts of Prodeen, Inc.

B. Defendant's counter-claims

Counter-claim 1: Money due on promissory note

98. When several documents are executed together for one transaction, the documents are construed together as one instrument. *Handy Boat Serv., Inc. v. Prof'l Servs., Inc., 1998 ME 134, 711 A.2d 1306, 1308 (Me. 1998)*; **[*100]** *Margolis v. Margolis, 115 Cal. App. 2d 131, 136, 251 P.2d 396 (1952)*. Thus, the promissory note must be read together with the Asset Purchase Agreement.

99. Card Tech has not paid all of the money due on the promissory note.

100. To prevail on a breach of contract claim, the plaintiff must show (1) a valid contract existed, (2) performance, or excuse of performance, by the plaintiff, (3) a breach of obligations by the defendant, and (4) damages. *Jenkins, Inc. v. Walsh Bros., 2001 ME 98, 776 A.2d 1229, 1234-35 (Me. 2001)*; *Wall Street Network, Ltd. v. N.Y. Times Co., 164 Cal. App. 4th 1171, 1178, 80 Cal. Rptr. 3d 6 (2008)*. To excuse performance by one party to a contract, the breach by the other party must be material. *Jenkins, 776 A.2d at 1234*; *Brown v. Grimes, 192 Cal. App. 4th 265, 277, 120 Cal. Rptr. 3d 893 (2011)*. A "material" breach is the non-performance of a duty "that is so material and important as to justify the injured party in regarding the whole transaction as at an end." *Jenkins, 776 A.2d at 1234* (finding material breach of a construction contract where the contractor failed to maintain necessary working

conditions at the job site); Associated Builders, Inc. v. Coggins, 1999 ME 12, 722 A.2d 1278, 1280-81 (Me. 1999) (finding that a three-day delay in **[*101]** payment was not a material breach).

101. Provenzano failed to perform material obligations - for example, she failed to deliver all rights and domain names to presat.com, used for her own purposes trademarks and business information that she had conveyed to Card Tech for its exclusive use, failed to report sales, provided inaccurate information of sales and shipments, and did not devote her exclusive attention to Card Tech's business.

102. Card Tech is excused from further performance under the promissory note.

103. The Court finds for Card Tech on this claim.

Counter-claim 2: Breach of contract — termination without just cause

104. The Employment Agreement must be read together with the Asset Purchase Agreement. *Margolis, 115 Cal. App. 2d at 136*.

105. California law applies to this counter-claim. The Employment Agreement's choice-of-law agreement (providing that Maine law applies) is not applicable because the counter-claim is based on Provenzano's unwaivable rights under the California Labor Code. See *Perry v. AT&T Mobility LLC, 2011 U.S. Dist. LEXIS 102334, 2011 WL 4080625, at *5 (N.D. Cal. Sept. 12, 2011)* (citing *Gentry v. Superior Court, 42 Cal. 4th 443, 465, 64 Cal. Rptr. 3d 773, 165 P.3d 556 & n.8 (2007)* and *Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 98-99, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000)*, **[*102]** overruled on other grounds by *AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748-49, 179 L. Ed. 2d 742 (2011))*.

106. Provenzano's employment was for a specified term under the Employment Agreement. "An employment for a specified term may be terminated at any time by the employer in case of any willful breach of duty by the employee in the course of his employment . . . ." *Cal. Lab. Code §2924*. To establish that its termination of Provenzano was justified, Card Tech must prove that Provenzano willfully breached the Employment Agreement — it is not sufficient that Card Tech mistakenly believed that Provenzano breached the agreement. *Khajavi v. Feather River Anesthesia Med. Grp., 84 Cal. App. 4th 32, 57, 100 Cal. Rptr. 2d 627 (2000)* (considering an oral contract for a specified term); cf. *Cotran v. Rollins Hudig Hall Int'l, Inc., 17 Cal. 4th 93, 95, 69 Cal. Rptr. 2d 900, 948 P.2d 412 (1998)* (concluding that an employer's reasonable, though mistaken, belief, reached after an adequate investigation, was sufficient to justify discharge where there was an implied agreement, not for a specified term, that an employee not be dismissed except for good cause).

107. Provenzano could only be terminated for "Just Cause" pursuant to the Employment Agreement. The Court has **[*103]** previously found that Provenzano materially breached the Asset Purchase Agreement by failing to convey ownership of the preset.com domain name. A material breach of the Asset Purchase Agreement is specified as "Just Cause" for termination in the Employment Agreement, and the evidence establishes that this breach by Provenzano was willful. Card Tech need not prove any further grounds for termination. Card Tech further proved, however, that Provenzano was dishonest with Card Tech in that she, *inter alia*, affirmatively misrepresented to Card Tech that the presat.com website had been hacked, concealed the fact that she was ordering inventory for her own sales, and concealed her true nature of her interaction with Disko. Card Tech also established that Provenzano misappropriated company assets, and provided inaccurate reports. These breaches constitute just cause for termination, and Card Tech has established that these breaches were willful.

108. Termination of the Employment Agreement excused any further performance by Card Tech. *Brown, 192 Cal. App. 4th at 277*.

Counter-claim 3: Failure to pay overtime

109. Under California wage and hour law, an employer is not required to pay an employee **[*104]** overtime pay for overtime work on behalf of the employer if the employee spends more than half of his or her time doing work that comes within specified exemptions. The employer claiming the exemption bears the burden of proving that the employee is exempt. *Kettenring v. L.A. Unified Sch. Dist., 167 Cal. App. 4th 507, 513, 84 Cal. Rptr. 3d 196 (2008)*.

110. The applicable exemption is the Administrative Exemption: California Industrial Welfare Commission Order 4-2001 ("Wage Order 4") § 1(A)(2). Provenzano's work for Card Tech is subject to that exemption. Findings of Fact ¶ 24; Wage Order 4 § 1(A)(2)(a)(i), (A)(2)(b), (A)(2)(e), and (A)(2)(f). As a result, Card Tech was not required to pay Provenzano overtime.

111. Card Tech was not required to provide Provenzano with *any* pay, much less overtime pay, for time she spent doing her own business rather than Card Tech's. Wage Order 4, § 1.

112. The employee bears the burden of proving that she performed work for which she was not sufficiently compensated. *Eicher v. Advanced Bus. Integrators, Inc., 151 Cal. App. 4th 1363, 1377, 61 Cal. Rptr. 3d 114 (2007)*.

113. Ordinarily, the employer must keep track of the amount of time a non-exempt employee works. Here, there is no dispute that Provenzano **[*105]** worked autonomously. Indeed, this is her defense to many of Card Tech's claims. She also had autonomy to take time off as she wished. Moreover, it is apparent that Provenzano was working for herself at the same time she was working for Card Tech. Even if Card Tech had kept records, the information could only have been provided by Provenzano herself because Card Tech had no ability to keep track of the hours she worked.

114. Provenzano did not keep any record of time she spent working for Card Tech versus time she spent on her personal matters. Provenzano never asserted she was working overtime until Card Tech began raising issues about her conduct. Provenzano produced no documentary evidence that she spent more than 40 hours per week working for Card Tech. The Court finds Provenzano's testimony to that effect is not credible. The Court concludes that Provenzano was not working more than 40 hours per week for Card Tech. Findings of Fact ¶¶ 58-67.

115. Thus, even if Provenzano were eligible for overtime pay, Provenzano simply did not present credible evidence that she is entitled to any.

Counter-claim 4: Waiting time penalties

116. Under California wage and hour law, waiting time penalties **[*106]** are awardable only if the employer *willfully* fails to pay a departing employee all wages due at the time of termination. *Cal. Lab. Code § 203(a)*. No waiting time penalties are awardable if the employer believes in good faith that it has valid defenses to the departing employee's claims for additional pay. *Armenta v. Osmose, Inc., 135 Cal. App. 4th 314, 325, 37 Cal. Rptr. 3d 460 (2005)*.

117. Card Tech had a good faith basis to believe that no additional payments were due to Provenzano at the time she was terminated because Provenzano had deliberately withheld funds and therefore had dishonestly and willfully caused losses to Card Tech. See Wage Order 4 § 8 (providing that deductions from an employee's wages are permissible where a cash shortage, breakage, or loss was caused "by a dishonest or willful act, or by the gross negligence of the employee"). In fact, the Court finds that Provenzano did just that.

118. At trial Ms. Provenzano alluded to vacation pay. However, she acknowledged that she could take time off whenever and for whatever reason she wanted. Provenzano did not present any credible evidence that she was owed vacation pay. There is evidence that she took time off for personal matters. Indeed, **[*107]** the trip to Europe appears to have been, at least in part, for Provenzano's personal business in violation of her duties to Card Tech. At the very least, this would qualify as vacation.

119. In any event, because the Court finds no additional payments were due Provenzano at the time she was terminated, Provenzano cannot prevail on this claim.

Counter-claim 5: Expenditures

120. Provenzano's claim that she has incurred business expenses on behalf of Card Tech, but that the company has wrongfully refused to reimburse her for them, is governed by ordinary common law principles of contract law.

121. There was no reason for her to retain an attorney to represent her regarding a claim of patent infringement that Card Tech had already amicably resolved with the claimant.

122. Provenzano was told to keep expenses within reason on the trip to Europe. At least certain expenses (e.g., chauffeured limousine, hotel) were not reasonable on their face. Shortly after her return, Card Tech was suspicious of Provenzano's activities in general — and rightly so. Provenzano used the trip for her personal benefit — to make a deal with Disko to be its exclusive distributor in the United States.

123. A plaintiff **[*108]** claiming reimbursement for necessary expenditures bears the burden of proving recoverable expenses. *Cassady v. Morgan, Lewis & Bockius LLP, 145 Cal. App. 4th 220, 239, 51 Cal. Rptr. 3d 527 (2006)*. Provenzano has failed to carry this burden. Card Tech provided Provenzano ample opportunity to prove that the expense items she now claims were in fact incurred in the course and scope of her work for Card Tech and were reasonable in amount. While a portion of the trip expenses may be justified as both reasonable and for the benefit of Card Tech, Provenzano has not provided such proof. Accordingly, Card Tech has not violated any obligation to reimburse her for Card Tech business expenses, and Provenzano cannot prevail on this claim.

Counter-claim 6: Alter ego

124. Alter ego is not a separate claim for relief. *Leek v. Cooper, 194 Cal. App. 4th 399, 418, 125 Cal. Rptr. 3d 56 (2011)*. It is a basis for liability. Provenzano has not proven facts that establish that Card Tech was the alter ego of Norman Farrar. In any event, Provenzano has not established that she is entitled to any relief, so the claim is moot.

CONCLUSION

Card Tech's Claims

Claim 1: Breach of Contract

125. The Court finds for Card Tech on the breach of contract claim. Defendants **[*109]** are liable to Card Tech in the amount of $6,000.

Claim 2: Fraudulent Inducement

126. The Court finds for Defendants on the fraudulent inducement claim.

Claims 4 and 5: Unfair Competition — trademark and trade dress infringement

127. The Court finds for Card Tech on the trademark and trade dress infringement claims. Defendants are liable for profits in the amount of $167,022. Defendants are permanently enjoined from the conduct described in the separate judgment. Card Tech is entitled to attorney's fees in an amount to be determined.

Claim 6: Unfair Competition — state law

128. The Court finds for Card Tech on the state law unfair competition claim. Defendants are permanently enjoined from the conduct described in the separate judgment.

Claim 9: Fraudulent Concealment

129. The Court finds for Card Tech on the fraudulent concealment claim. Defendants are liable to Card Tech in the amount of $20,000.

Claim 11: Conversion

130. The Court finds for Card Tech on the conversion claim. The damages on this claim are the same as the damages on Card Tech's fraudulent concealment claim.

Claim 12: Intentional interference with prospective economic advantage

131. The Court finds for Defendants on the intentional **[*110]** interference with prospective economic advantage claim.

Claim 13: Defamation

132. The Court finds for Defendants on the defamation claim.

Defendants' Counter-claims

Counter-claim 1: Money due on promissory note

133. The Court finds for Card Tech on this counter-claim.

Counter-claim 2: Breach of contract

134. The Court finds for Card Tech on this counter-claim.

Counter-claim 3: Failure to pay overtime

135. The Court finds for Card Tech on this counter-claim.

Counter-claim 4: Waiting time penalties

136. The Court finds for Card Tech on this counter-claim.

Counter-claim 5: Expenditures

137. The Court finds for Card Tech on this counter-claim.

Counter-claim 6: Alter ego

138. The Court finds for Card Tech on this counter-claim.

Dated: 6/7/12

/s/ Dale S. Fischer

Dale S. Fischer

United States District Judge

JUDGMENT

The Court having conducted a trial of this case, and having reviewed the evidence submitted by the parties that it deemed relevant, and having issued its Findings of Fact and Conclusions of Law,

It is hereby ORDERED, ADJUDGED, AND DECREED that judgment be entered as follows:

- In favor of Card Tech on the First claim for breach of contract,
- In favor of Defendants on the Second claim for fraudulent **[*111]** inducement,
- In favor of Card Tech on the Fourth claim for trade dress infringement,
- In favor of Card Tech on the Fifth claim for trademark infringement,
- In favor of Card Tech on the Sixth claim for unfair competition under California law,
- In favor of Card Tech on the Ninth claim for fraudulent concealment,
- In favor of Card Tech on the Eleventh claim for conversion,
- In favor of Defendants on the Twelfth claim for intentional interference with prospective economic advantage,
- In favor of Defendants on the Thirteenth claim for defamation,
- In favor of Card Tech on Defendants' First Counter-claim for money due on a promissory note,
- In favor of Card Tech on Defendants' Second Counter-claim for breach of contract,
- In favor of Card Tech on Defendants' Third Counter-claim for failure to pay overtime compensation,
- In favor of Card Tech on Defendants' Fourth Counter-claim for waiting-time penalties,
- In favor of Card Tech on Defendants' Fifth Counter-claim for indemnification for expenditures, and
- In favor of Card Tech on Defendants' Sixth Counter-claim for alter ego.

Plaintiff's Third, Seventh, Eighth, and Tenth claims were resolved between the parties prior to trial, and these claims **[*112]** are therefore dismissed.

Plaintiff shall recover from Defendants $20,000 in deposits for Card Tech's sales, $6000 as damages that have been, and will be incurred, in creating a new website, and $167,022 in Defendants' profits. The total amount awarded to Plaintiff is $193,022.00. Post-judgment interest shall accrue and be calculated in accordance with *28 U.S.C. § 1961(a)* and shall be calculated from the date of entry of judgment. Plaintiff shall recover its reasonable attorney's fees in an amount to be determined.

The Court having found that Defendants committed trademark and trade dress infringement in violation of the Lanham Act, *15 U.S.C. § 1125(a)*, and California's Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, Defendants are ordered to discontinue use of the term "Diamond Technology" - and any terms confusingly similar thereto, including, but not limited to, "Diamond Ice Technology" - as well as use of all pictures and phrases that typically appear with that mark. Defendants are also ordered to discontinue use of the terms "Proven Products" and "PreSat," as well as any terms confusingly similar thereto. Defendants are further enjoined from using - in their packaging, their **[*113]** website, or in any other capacity - the subject trade dress, or any trade dress that emulates the overall impression of the subject trade dress, including through the particular arrangement of product name, instructions for use, and visual depictions, together with Plaintiff's use of colored shapes and borders.

Plaintiff is awarded costs of suit pursuant to a bill of costs filed in accordance with *28 U.S.C. § 1920*.

Dated: 6/7/12

/s/ Dale S. Fischer

Dale S. Fischer

United States District Judge

Hughes v. Abell

United States District Court for the District of Columbia

June 7, 2012, Decided

Civil Action No. 09-0220 (JDB)

Reporter
867 F. Supp. 2d 76 *; 2012 U.S. Dist. LEXIS 79287 **; 2012 WL 2054882

GEORGE R. HUGHES, Plaintiff, v. VINCENT ABELL, et al., Defendants.

Prior History: *Hughes v. Abell, 634 F. Supp. 2d 110, 2009 U.S. Dist. LEXIS 62495 (D.D.C., July 20, 2009)*

Core Terms

mortgage, counterclaims, equitable subrogation, quiet title, documents, alleges, unjust enrichment, material fact, misrepresentation, deed, summary judgment, argues, contends, lease, unconscionable, asserts, summary judgment motion, equitable lien, crossclaim, refinance, interest rate, own property, consumer, liens, no reasonable probability, equitable, damages, parties, mortgage deed, unclean hands

LexisNexis® Headnotes

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

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate when the pleadings and the evidence demonstrate that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)(2)*.

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

HN2[] **Burdens of Proof, Movant Persuasion & Proof**

A party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine dispute of material fact.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

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

HN3[] **Summary Judgment, Supporting Materials**

A moving party may successfully support its motion by identifying those portions of the pleadings, the discovery and disclosure materials on file, and any affidavits" which it believes demonstrate the absence of a genuine issue of material fact. *Fed. R. Civ. P. 56(c)(2)*.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN4[] **Summary Judgment, Evidentiary Considerations**

In determining whether there exists a genuine issue of material fact sufficient to preclude summary judgment, a court must regard the nonmovant's statements as true and accept all evidence and make all inferences in the nonmovant's favor.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

HN5[] **Burdens of Proof, Scintilla Rule**

On summary judgment, a non-moving party must establish more than the mere existence of a scintilla of evidence in support of its position.

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

HN6[] **Burdens of Proof, Movant Persuasion & Proof**

By pointing to the absence of evidence proffered by the nonmoving party, a moving party may succeed on summary judgment.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN7[] **Summary Judgment, Entitlement as Matter of Law**

If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

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

HN8[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate if the nonmovant fails to offer evidence on which the jury could reasonably find for the nonmovant.

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

Banking Law > Consumer Protection > State Law > General Overview

HN9[] **Deceptive & Unfair Trade Practices, State Regulation**

The D.C. Consumer Protection Procedures Act, *D.C. Code § 28-3904(r)*, applies to real estate finance transactions. Whether a practice is unconscionable under this provision is determined by weighing several factors, including knowledge by the person at the time credit sales are consummated that there was no reasonable probability of payment in full of the obligation by the consumer, knowledge by the person at the time of the sale or lease of the inability of the consumer to receive substantial benefits from the property or services sold or leased, and that the person has knowingly taken advantage of the inability of the consumer reasonably to protect his interests. *D.C. Code § 28-3904(r)(1)*, *(2)*, *(5)*.

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

Banking Law > Consumer Protection > State Law > General Overview

HN10[] **Deceptive & Unfair Trade Practices, State Regulation**

The D.C. Consumer Protection Procedures Act, prohibits misrepresentations as to a material fact which has a tendency to mislead. *D.C. Code § 28-3904(e)*.

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

Banking Law > Consumer Protection > State Law > General Overview

Civil Procedure > ... > Equity > Maxims > Clean Hands Principle

Governments > Legislation > Types of Statutes

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

HN11[] **Deceptive & Unfair Trade Practices, State Regulation**

The defense of unclean hands does not fit comfortably with alleged violations of the D.C. Consumer Protection Procedures Act (CPPA), *D.C. Code § 28-3904*, which is a broad remedial statute intended to assure that a just mechanism exists to remedy all improper trade practices. A claim under the CPPA cannot be barred by the plaintiff's own misconduct.

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

Banking Law > Consumer Protection > State Law > General Overview

HN12[] **Deceptive & Unfair Trade Practices, State Regulation**

The D.C. Consumer Protection Procedures Act (CPPA), *D.C. Code § 28-3901*, is intended to promote fair business practices in the community at large, not just to resolve individual disputes between consumers and businesses. Accordingly, the CPPA expressly indicates that conduct may constitute a violation whether or not any consumer is in fact misled, deceived or damaged thereby, *D.C. Code § 28-3904*, and provides for the recovery of treble damages, *D.C. Code § 28-3905(k)(1)(A)*. Hence, as with federal ***antitrust law***, the statute operates through private enforcement via suits by affected consumers, but the statute is concerned with the deterrence effect on the general business community as well as with making individual consumers whole. That is why the statute allows for plaintiffs to recover treble damages and defines violations to include instances in which a consumer is not in fact misled, deceived, or damaged. *D.C. Code § 28-3904*. Similarly, the fact that an individual plaintiff may have engaged in inequitable conduct is not particularly relevant to the desired outcome of deterring unlawful behavior in the business community.

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

Banking Law > Consumer Protection > State Law > General Overview

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

The D.C. Consumer Protection Procedures Act prohibits misrepresentations as to a material fact which has a tendency to mislead. *D.C. Code § 28-3904(e)*.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN14[] **Business Torts, Fraud & Misrepresentation**

Opinions or predictions of future events do not constitute representations of material fact upon which a plaintiff successfully may place dispositive reliance for misrepresentation.

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

Banking Law > Consumer Protection > State Law > Remedies

Contracts Law > Remedies > Rescission & Redhibition > General Overview

HN15[] **Deceptive & Unfair Trade Practices, State Regulation**

Civil remedies available under the D.C. Consumer Protection Procedures Act include any relief which the court deems proper, which may include rescission. *D.C. Code § 28-3905(k)(1)(F)*.

Real Property Law > Title Quality > Adverse Claim Actions > Quiet Title Actions

HN16[] **Adverse Claim Actions, Quiet Title Actions**

A court's equitable powers allow it to quiet title in favor of a borrower if the lender's actions warrant that remedy.

Civil Procedure > Pleading & Practice > General Overview

HN17[] **Civil Procedure, Pleading & Practice**

Fed. R. Civ. P. 7 states that only these pleadings are allowed and then sets forth a list of pleadings that does not include counterclaims.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

HN18[] **Pleadings, Counterclaims**

Fed. R. Civ. P. 13 requires that a counterclaim be set forth in a pleading.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN19[] **Pleadings, Amendment of Pleadings**

Once an amended pleading is interposed, the original pleading no longer performs any function in the case.

Civil Procedure > Pleading & Practice > Pleadings > Answers

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

HN20[] **Pleadings, Answers**

An answer and a counterclaim, even if contained in the same document, serve different functions; the counterclaim shares more with a complaint, setting out claims against the other party, than it does with the answer.

Evidence > Burdens of Proof > Clear & Convincing Proof

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN21[] **Burdens of Proof, Clear & Convincing Proof**

The essential elements of common law fraud are: (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) with intent to deceive, and (5) on which reliance is placed. Fraud must be established by clear and convincing evidence.

Real Property Law > ... > Liens > Nonmortgage Liens > General Overview

HN22[] **Liens, Nonmortgage Liens**

Liens, whether equitable or legal, are merely a means to the end of satisfying a claim for the recovery of money.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN23[] **Types of Contracts, Quasi Contracts**

There can be no claim for unjust enrichment when an express contract exists between parties.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

HN24[] **Judges, Discretionary Powers**

Although there is no Federal Rule of Civil Procedure that expressly addresses motions for reconsideration, where a court's opinion does not fully adjudicate all the claims in the case, a reconsideration motion is properly characterized as a motion pursuant to *Fed. R. Civ. P. 54(b)*. Under *Fed. R. Civ. P. 54(b)*, where a court resolves fewer than all the claims, it may revise its opinion at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities. A court has broad discretion to hear a motion for reconsideration brought under *Rule 54(b)*, and reconsideration is appropriate as justice requires. Considerations a court may take into account under the as justice requires standard include whether the court patently misunderstood the parties, made a decision beyond the adversarial issues presented, made an error in failing to consider controlling decisions or data, or whether a controlling or significant change in the law has occurred. Review under *Rule 54(b)* amounts to determining, within the court's discretion, whether reconsideration is necessary under the relevant circumstances.

Counsel: [1]** For GEORGE R. HUGHES, Plaintiff: Heather M. Latino, Jennifer Ngai Lavallee, LEAD ATTORNEYS, LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, Washington, DC.

VINCENT ABELL, Defendant, Pro se, Washington, DC.

For WELLS FARGO BANK, N.A., Defendant: Amy Sanborn Owen, LEAD ATTORNEY, Benje Allen Selan, COCHRAN & OWEN, LLC, Vienna, VA.

VINCENT ABELL, Counter Claimant, Pro se, Washington, DC.

VINCENT ABELL, Cross Claimant, Pro se, Washington, DC.

VINCENT ABELL, Cross Defendant, Pro se, Washington, DC.

For WELLS FARGO BANK, N.A., Cross Defendant, Cross Claimant, Counter Claimant: Amy Sanborn Owen, LEAD ATTORNEY, COCHRAN & OWEN, LLC, Vienna, VA.

Judges: JOHN D. BATES, United States District Judge.

Opinion by: JOHN D. BATES

Opinion

[*79] **MEMORANDUM OPINION**

Plaintiff George R. Hughes brings this action against Vincent Abell, Calvin Baltimore, Modern Management Company, and **[*80]** Wells Fargo Bank. His claims relate to two transactions involving Hughes' residence, a property in Washington, DC, which Hughes purchased in 1997. In 2004, Hughes transferred title to the property to Abell in a transaction also involving Baltimore and Modern Management. Then, in 2006, Hughes nonetheless entered into a mortgage transaction with Wells Fargo, not disclosing **[**2]** to Wells Fargo that he had previously transferred title to the property.

With respect to Abell, Baltimore, and Modern Management, Hughes brings claims for violations of the D.C. Consumer Protection Procedures Act ("CPPA"), the Truth in Lending Act ("TILA") and the Home Ownership and Equity Protection Act ("HOEPA"), a claim for common law fraud, and a claim for an equitable mortgage. With respect to Wells Fargo, Hughes alleges violations of the CPPA. Hughes maintains that he is the rightful owner of the residence and he seeks to quiet title with respect to both Abell and Wells Fargo. Wells Fargo asserts counterclaims against Hughes for equitable subrogation, equitable lien, unjust enrichment, fraud, and breach of contract, and against Abell for fraud, quiet title, equitable subrogation, and unjust enrichment. Abell asserts a crossclaim for quiet title against Wells Fargo.

Now before the Court are Wells Fargo's motion for summary judgment on its claims against the other parties and Abell's renewed motion for summary judgment on Hughes' claims against Abell and Modern Management. Although the numerous claims in this case belie easy description, Wells Fargo's primary contention is that the **[**3]** evidence in the record shows that Hughes was aware that Abell claimed ownership of the residence at the time that Hughes entered into the transaction with Wells Fargo. Wells Fargo argues that Hughes' knowledge should bar any recovery against Wells Fargo and also warrants judgment in Wells Fargo's favor on its claims. Abell, for his part, moves out of disagreement with this Court's prior decision rejecting his argument that Hughes' claims are barred by the statute of limitations.

For the reasons discussed below, the Court will grant Wells Fargo's motion in part and deny it in part. As described below, the Court has reached two primary conclusions at this stage of the proceedings. With respect to Wells Fargo's claims, the Court concludes that Hughes committed fraud against Wells Fargo. Nonetheless, the Court rejects Wells Fargo's assertion that Hughes' conduct bars his recovery under the CPPA. This claim will be permitted to proceed, but in more limited form than as alleged by Hughes' complaint.

There are many other issues in this case, some of which can also be resolved now based on the fraud determination. Others are also largely decided by the fraud decision, but technically cannot **[**4]** be resolved until the resolution of the CPPA claim or the resolution of the dispute between Hughes and Abell about the prior transaction. Many of these issues will nonetheless fall easily into place once the other claims in the case are resolved.

Accordingly, the Court will grant Wells Fargo's motion with respect to the fraud claim, as well as with respect to some, but not all, of Wells Fargo's other claims. For the reasons discussed below, the Court will also deny Abell's motion.

I. Background

a. Facts

Hughes purchased 5236 5th Street, NW, Washington, DC ("the Property") in November 1997. Am. Compl. [Docket Entry **[*81]** 53] ¶¶ 4, 9. He took out two mortgages against the Property in order to pay for it, the larger of the two from Chase Manhattan Bank. Id. ¶¶ 10, 12. After Hughes became delinquent on the larger loan in 2004, Chase Manhattan notified him that it would foreclose. Id. ¶¶ 13, 14. Hughes needed to pay arrears in the amount of $16,485.51, plus costs and fees, to prevent the auction of his home in September 2004. Id. ¶ 4. Prior to foreclosure, Calvin Baltimore, working with Abell and Modern Management, solicited Hughes's business and represented that he would help Hughes remain in his **[**5]** home. Id. ¶¶ 15-17, 24. Hughes signed a series of documents, the effect of which was to transfer title to the property to Abell, who then rented it back to Hughes. Id. ¶¶ 20, 25. Hughes alleges that he understood the transaction "as a way to retain ownership of his home." Id. ¶ 24.

The only papers Baltimore provided Hughes at the end of the transaction were a lease agreement and an option agreement. Id. ¶ 21. Baltimore told Hughes that he would provide him with copies of the other papers, but never did, despite Hughes's repeated attempts to contact Baltimore and obtain copies. Id. The lease agreement provided that Hughes would pay $1034.76 per month, which Hughes alleges that he believed would "cover his mortgage as well as the loan." Id. ¶ 20. Attached to the lease was an "Option Agreement" that provided that Hughes could purchase his home for $75,000.00 within the next year. Id. ¶ 22. Baltimore explained that Modern Management would help Hughes refinance the loan at the end of the year. Id. ¶ 20. Hughes also received $10,000.00 up front as part of this transaction. Id. Assuming Hughes borrowed $30,000 under this loan — the $10,000 payment and approximately $20,000 to cover arrears **[**6]** — the annual percentage rate would have been 122.57%, based on twelve monthly payments of $1034.76 and a final payment of $75,000. Id. ¶ 23. At the time of this transaction in September 2004, the property was worth $147,060, according to D.C. property tax assessment records. Id. ¶ 24.

Around August 2006, Hughes received notice from Chase Manhattan that it had changed his contact information to that of the offices of Modern Management. Id. ¶ 29. He also received notice from Modern Management that he was behind in his payments. Id. ¶ 30. Hughes approached defendant Wells Fargo to seek refinancing of his Chase Manhattan mortgage. Id. ¶¶ 31, 32. With respect to his transaction with Abell, Hughes told Wells Fargo, orally and in writing, "that he had previously borrowed money (from Calvin Baltimore) to stop a foreclosure against the Property." Id. ¶ 34. Wells Fargo tried unsuccessfully to reach Baltimore and did not find any recordation of Hughes' transaction with Abell upon inquiring at the Recorder of Deeds. Id. Wells Fargo suggested to Hughes that he discuss his transaction with Baltimore with a lawyer, and Hughes spoke with the law firm of Weinstock, Friedman, and Friedman, P.A. See Decl. **[**7]** of George Hughes [Docket Entry 115-2] ¶¶ 18, 21-22.

Wells Fargo offered to refinance Hughes' Chase Manhattan mortgage so long as Hughes consolidated his second mortgage and other nonmortgage debts, which together totaled $33,517.03, into his agreement with Wells Fargo. Id. ¶¶ 33, 36. Hughes would also receive $61,080.22 up front at closing. Id. ¶ 36. The statute of limitations had passed for some of these nonmortgage debts. Id. ¶ 35. Hughes's outstanding balance on his Chase Manhattan mortgage was $87,775.43, so that after consolidation Wells Fargo was proposing to make a loan with a 38% increase over the value of Hughes's prior mortgage debt. **[*82]** Id. ¶ 36. Hughes was to pay $1,604.18 per month for this loan; his previous monthly payment to Chase Manhattan was $815 per month. Id. ¶¶ 11, 42. This payment amounted to approximately 46% of Hughes's monthly income of $3,511.83. Id. ¶ 38. Hughes reported this income to Wells Fargo and made no representations about whether it would increase or decrease in the future. Id. The application that Wells Fargo prepared for his loan indicates that Hughes had monthly income of $3,783.33 per month. Id. ¶ 37.

Wells Fargo reserved the right to increase the **[**8]** loan's initial interest rate of 7.875% up to a limit of 13.875% after the first two years of the loan. Id. ¶ 41. Wells Fargo's representative told Hughes that "he did not need to worry about the loan being an adjustable-rate mortgage, because he should be able to refinance the loan before the rate changed," which Hughes has not been able to do. Id. ¶ 43-44. Hughes accepted these terms and closed the loan on September 22, 2006. Id. ¶ 40. Hughes paid $10,127.32 in closing costs. Id. ¶ 46. Prior to the commencement of the transaction between Hughes and Wells Fargo on September 22, and unbeknownst to either party, on September 15, 2006, Abell recorded a deed transferring title of the property from Hughes to Abell. Id. ¶ 47.

b. Present Suit

Hughes brought the present action on January 15, 2009 in the Superior Court of the District of Columbia. Wells Fargo removed the case to this Court on January 29, 2009. Hughes asserts the following claims against Abell, Baltimore, and Modern Management: violations of the CPPA (Count I), creation of an equitable mortgage (Count II), violations of TILA and HOEPA (Count III), common law fraud (Count IV), and usury (Count VIII). Am. Compl. ¶¶ 50-79, 95-98. **[**9]** Against Wells Fargo, Hughes asserts violations of the CPPA (Count V) and common law negligence (Count VII). Id. ¶¶ 80-84, 90-94. Count VI seeks to quiet title against both Wells Fargo and Abell. Id. ¶¶ 85-89. Abell filed counterclaims against Hughes for quiet title, rent or possession, unjust enrichment, and fraud. Countercl. [Docket Entry 70] ¶¶ 43-69. Abell also filed a crossclaim to quiet title against Wells Fargo. Cross-cl. [Docket Entry 70] ("Abell Cross-cl. Against Wells Fargo") ¶¶ 74-75. Wells Fargo filed crossclaims against Abell for fraud (Count I), quiet title (Count II), equitable subrogation (Count III), and unjust enrichment (Count IV). Cross-cl. [Docket Entry 12] ("Wells Fargo Cross-cls. Against Abell") ¶¶ 6-33. Wells Fargo also asserts the following counterclaims against Hughes: equitable subrogation (Count I), equitable lien (Count II), unjust enrichment (Count III), fraud (Count IV), and breach of contract (Count V). Wells Fargo Bank, N.A.'s Am. Answer and Countercls. to Pl. George R. Hughes' Compl. [Docket Entry 30] ("Wells Fargo Countercls. Against Hughes").

This Court previously ruled, in July 2009, on Wells Fargo's motion to dismiss Hughes's original complaint. *Hughes v. Abell, 634 F. Supp. 2d 110 (D.D.C. 2009)*. **[**10]** The Court ruled that Hughes had alleged facts sufficient to state an unconscionability claim under the CPPA, and that Hughes's quiet title count also survived. Wells Fargo's motion to dismiss was, however, granted in part, because Hughes failed adequately to allege misrepresentation under the CPPA. Wells Fargo then filed an answer to Hughes' complaint and then an amended answer, which contained Wells Fargo's counterclaims against Hughes. Hughes was granted leave to file an amended complaint with restated allegations of misrepresentations under the **[*83]** CPPA in May 2010. Wells Fargo filed a motion to dismiss this amended complaint and Abell filed a motion for summary judgment on some, but not all, of the claims against him. After the filing of these motions and during the course of ongoing discovery, the Court was informed of a privilege dispute arising from a subpoena directed to the Weinstock firm by Wells Fargo. After considering argument from the parties and reviewing relevant documents in camera, the Court ruled that the content of communications between Hughes and staff of the law firm was protected by the attorney-client privilege.

In November 2010, the Court ruled on Wells Fargo's **[**11]** motion to dismiss and Abell's motion for summary judgment. *Hughes v. Abell, 794 F. Supp. 2d 1 (D.D.C. 2010)*. The Court denied Wells Fargo's motion in its entirety, granted Abell's motion with respect to the usury claim, and denied Abell's motion with respect to the remaining claims. *Id. at 15*. Wells Fargo then filed an answer to the amended complaint.

Wells Fargo filed the present motion for summary judgment in April 2011. In January 2012, the Court ordered supplemental briefing on whether a declaration by Hughes that was attached to Hughes' opposition to Wells Fargo's motion waived the attorney-client privilege with respect to the content of his communications with the Weinstock firm. A hearing on the motion for summary judgment, as well as the privilege issue, was held on February 24, 2012. The Court then ruled that Hughes' declaration did waive the attorney-client privilege with respect to his communications with the firm in the time period surrounding his transaction with Wells Fargo. The Court subsequently released a partially redacted version of a document produced by the Weinstock firm that had previously been provided to the Court for in camera review. The document, entitled **[**12]** "Redacted Intake Notes Summary," described communications between Hughes and Weinstock firm staff. The Court ordered Wells Fargo to refile its motion for summary judgment with a supplemental memorandum addressing the significance, if any, of the released document. On March 23, 2012, Hughes stipulated to the dismissal of his negligence claim (Count VII) against Wells Fargo. Wells Fargo then refiled its motion for summary judgment with a supplemental memorandum addressing the significance of the released documents. On April 20, 2012, Abell filed a renewed motion for summary judgment on all the remaining counts that Hughes alleges against Abell and Modern Management. The motions are now ripe for decision by the Court.

II. Summary Judgment Standard

HN1[] Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)(2)*. ***HN2***[] The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine dispute of material fact. See *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. ***HN3***[] The moving party may successfully **[**13]** support its motion by identifying those portions of "the pleadings, the discovery and disclosure materials on file, and any affidavits" which it believes demonstrate the absence of a genuine issue of material fact. *Fed. R. Civ. P. 56(c)(2)*; see *Celotex, 477 U.S. at 323*.

HN4[] In determining whether there exists a genuine issue of material fact sufficient to preclude summary judgment, the court must regard the non-movant's statements as true and accept all evidence and make **[*84]** all inferences in the non-movant's favor. See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. ***HN5***[] A non-moving party, however, must establish more than the "mere existence of a scintilla of evidence" in support of its position. *Id. at 252*. ***HN6***[] By pointing to the absence of evidence proffered by the non-moving party, a moving party may succeed on summary judgment. *Celotex, 477 U.S. at 322*. ***HN7***[] "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson, 477 U.S. at 249-50* (citations omitted).***HN8***[] Summary judgment is appropriate if the non-movant fails to offer "evidence on which the jury could reasonably find for the [non-movant]." *Id. at 252*.

III. Discussion

a. Hughes' Claims **[**14]** Against Wells Fargo

Hughes has two remaining claims against Wells Fargo. First, he alleges that Wells Fargo violated the CPPA by providing him financing on unconscionable terms and misrepresenting material facts about the transaction. Second, Hughes seeks to quiet title on the Property on the ground that Wells Fargo obtained its security interest in the Property in violation of the CPPA.

i. Hughes' Claim Under the CPPA

Hughes asserts that Wells Fargo's financing practices are unconscionable within the meaning of *D.C. Code § 28-3904(r)*. Am. Compl. ¶¶ 80-83. ***HN9***[] The CPPA applies to real estate finance transactions like the one in this case. *DeBerry v. First Gov't Mortgage & Investors Corp., 743 A.2d 699, 703 (D.C. 1999)*. Whether a practice is unconscionable under this provision is determined by weighing several factors, including "knowledge by the person at the time credit sales are consummated that there was no reasonable probability of payment in full of the obligation by the consumer," "knowledge by the person at the time of the sale or lease of the inability of the consumer to receive substantial benefits from the property or services sold or leased," and "that the person has knowingly **[**15]** taken advantage of the inability of the consumer reasonably to protect his interests." *D.C. Code § 28-3904(r)(1)*, *(2)*, *(5)*.

Hughes supports his claim that Wells Fargo provided him financing on which "there was no reasonable probability of payment in full," id. *§ 28-3904(r)(1)*, with allegations that the financing requires payment of an excessive share of his income. Hughes alleges that his monthly payment to Wells Fargo amounts to approximately 46% of his monthly income. Am. Compl. ¶ 38. He further alleges that although the interest rate at the time was the minimum allowed by Wells Fargo's terms, that rate may increase in the future. Id. ¶ 42. Because Hughes made no representation about whether his present income would remain constant or increase, that —coupled with the adjustable rate — could result in future monthly payments of more than half of his income. Id. ¶ 37.

Hughes next alleges that Wells Fargo's terms are unconscionable under *D.C. Code § 28-3904(r)(2)* because Wells Fargo knew that he would be unable "to receive substantial benefits" from Wells Fargo's terms. Through the refinancing, Hughes received $61,080.22 upon closing and consolidated $33,517.03 in other debt. Am. Compl. **[**16]** ¶¶ 35, 36. Notwithstanding these apparent benefits, Hughes contends that the refinancing also doubled his monthly mortgage payment and paid off debt on which the statute of limitations had run. Id. ¶¶ 35, 42.

Finally, Hughes alleges that Wells Fargo has "knowingly taken advantage of the **[*85]** inability of the consumer reasonably to protect his interests." *D.C. Code § 28-3904(r)(5)*. He asserts that a representative from a settlement company retained by Wells Fargo had Hughes "sign a stack of papers" but only gave Hughes "unsigned copies" and that "no notary was present." Am. Compl. ¶ 40.

The Court has previously concluded that, in consideration of these three factors under *section 28-3904(r)*, Hughes stated a claim of unconscionability under the CPPA. *Hughes, 794 F. Supp. 2d at 9*. The Court determined that "[a]t minimum, Hughes sufficiently alleges that, under the first factor, 'there was no reasonable probability of payment in full.'" Id.

Hughes also alleges a second violation of the CPPA, claiming that Wells Fargo "misrepresent[ed] material facts when such failure tended to mislead." Am. Compl. ¶ 84. ***HN10***[] The CPPA prohibits "misrepresent[ations] as **[**17]** to a material fact which has a tendency to mislead." *D.C. Code § 28-3904(e)*. Hughes asserts that a Wells Fargo representative told him not to worry about the loan being an adjustable rate mortgage, because he should be able to refinance the loan before the rate changed in two years. Am. Compl. ¶ 43. Hughes alleges that he has not been able to refinance the Wells Fargo loan. Id. ¶ 44. The Court previously concluded that "Wells Fargo's alleged representation . . . may have misled Hughes regarding the potential costs and risks involved in his transaction with Wells Fargo." *Hughes, 794 F. Supp. 2d at 9*.

ii. Wells Fargo's Argument for Summary Judgment on CPPA Claim

Wells Fargo argues that, contrary to Hughes' allegations, the terms of the loan are not unconscionable. First, Wells Fargo indicates that Hughes' contention that the loan had "an interest rate that would range between 7.875% and 13.875%," Am. Compl. ¶ 42, is factually incorrect. Wells Fargo's Mem. in Supp. of its Mot. for Summ. J. [Docket Entry 132-1] ("Wells Fargo Mem.") at 11-12. Although the initial interest rate was 7.875% and the rate was adjustable, the rate could vary both downward and upward; indeed, in 2009-2010, the rate **[**18]** adjusted as low as 5.625%. Id. Wells Fargo seems to suggest that it could not have had "knowledge . . . that there was no reasonable probability of payment in full," *D.C. Code § 28-3904(r)(1)*, by Hughes because the required loan payments could have decreased. Furthermore, Wells Fargo contends that Hughes' allegation that he did not "receive substantial benefits," *D.C. Code § 28-3904(r)(2)*, from the loan is unsupportable from the record. Wells

Fargo notes that the loan was applied to satisfy two outstanding mortgages on the property as well as more than $15,000 in other outstanding debts and that Hughes received an immediate payout of more than $60,000. Wells Fargo Mem. at 12-13. Wells Fargo observes that Hughes stated at his deposition that he benefitted from the loan by receiving cash and having Wells Fargo become his mortgage holder. Id. at 13; see id. Ex. 12. Relatedly, Wells Fargo maintains that Hughes cannot establish that he suffered injury-in-fact from Wells Fargo's conduct because he benefitted from the loan, including by the loan's decreasing interest rate. Wells Fargo's Supplemental Mem. in Supp. of its Mot. for Summ. J. [Docket Entry 134] ("Wells Fargo Suppl. Mem.") at 6-8. **[**19]** Additionally, Wells Fargo argues that there is no evidence that Hughes had an "inability . . . reasonably to protect his interests by reasons of age, physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of the agreement, or similar factors." *D.C. Code § 28-3904(r)(5)*. Wells Fargo notes that **[*86]** Hughes is literate and educated and testified at his deposition that he understood the details of the loan. Wells Fargo Mem. at 15-17; see id. Ex. 12.

With respect to the allegation that Wells Fargo misrepresented material facts about the loan, Wells Fargo disputes that its agent made the relevant statement and argues that even if the statement was made, it was neither material nor a representation of fact. Wells Fargo contends that the alleged statement — that Hughes should have been able to refinance the loan within two years, before the interest rate adjusted — cannot be considered a representation of material fact because it was a prediction about a future event. Wells Fargo Mem. at 17-18. Wells Fargo argues further that the alleged statement was not material because the record indicates that Hughes has not attempted to refinance the loan. Id. at 18-19.

Finally, **[**20]** Wells Fargo contends that Hughes concealed material facts about the previous transaction on the Property (with Abell, Baltimore, and Modern Management) when entering into the transaction with Wells Fargo. Wells Fargo Suppl. Mem. at 7-8. Wells Fargo argues on the basis of this alleged concealment both that Hughes cannot show Wells Fargo caused any harm to him — because it would not have entered into the loan if it had known the true circumstances — and that Hughes should not be allowed to recover under the CPPA due to his unclean hands. Id.

iii. Analysis of CPPA Claim

As indicated at the motion to dismiss stage, see *Hughes, 794 F. Supp. 2d at 8*, Hughes' claim is analogous to other CPPA claims that have been sustained in this Circuit, most notably in *Williams v. First Government Mortgage & Investors Corp., 225 F.3d 738, 343 U.S. App. D.C. 222 (D.C. Cir. 2000)*. There, the D.C. Circuit upheld a jury verdict finding that the defendant had knowledge that there was no reasonable probability of payment on a refinanced mortgage requiring 57% of the plaintiff's monthly income. See *225 F.3d at 744*; see also *Johnson v. Long Beach Mortgage Loan Trust 2001-4, 451 F. Supp. 2d 16 (D.D.C. 2006)* (declining to dismiss a complaint **[**21]** under *section 28-3904(r)(1)* alleging that loan payments would require more than half of the plaintiff's income). Williams's "disposable income" (after accounting for $100 per month in health insurance) was no more than $1,200 a month and the monthly payment on his loan was $686, leaving "little more than $500 each month to buy necessities for himself and his dependents." *225 F.3d at 743-44*. The D.C. Circuit therefore found that "a reasonable jury could conclude that [the bank] made the loan to Williams knowing 'there was no reasonable probability of payment in full of the obligation.'" *Id. at 744* (quoting *D.C. Code § 28-3904(r)(1)*). The court also noted that Williams had only a sixth-grade education, limited literacy, and an inability to understand basic mathematics. *Id. at 744-45*. The court therefore found that a reasonable jury "could conclude that Williams was unable fully to understand the transaction" and that the bank knowingly took advantage of his inability reasonably to protect his interests. *Id. at 744* (quoting *D.C. Code § 28-3904(r)(5)*).

Although the current facts are somewhat more favorable to Wells Fargo than were those in *Williams*, the Court finds that there is a genuine **[**22]** issue of material fact as to whether the Hughes-Wells Fargo transaction was unconscionable. A reasonable jury could conclude that Wells Fargo knew that there was no reasonable probability of payment on the loan. To be sure, considering all the evidence in the record, especially Hughes' deposition testimony, the Court concludes that it would **[*87]** not be possible for a finder-of-fact to reasonably conclude either that Hughes did not receive a substantial benefit from the loan or that Hughes did not understand the transaction.

But as the Court has noted previously, "[t]he five factors by which the CPPA defines unconscionability are disjunctive and non-exhaustive." *Hughes, 794 F. Supp. 2d at 9*.

According to the amended complaint, at the initial interest rate of 7.875%, Hughes was to pay $1,604.18 per month for this loan, amounting to approximately 46% of his monthly income of $3,511.83; indeed, Wells Fargo's underwriting documentation indicated that Hughes would be paying 53.69% of his gross monthly income. Am. Compl. ¶ 38. Hughes now indicates that, by his calculation (based on documents reviewed by Wells Fargo prior to the transaction), his net income was only $2093.89, making the loan payments **[**23]** 77% of his net income. Pl.'s Mem. of P. & A. in Opp'n to Def. Wells Fargo's Mot. for Summ. J. [Docket Entry 115] ("Hughes Opp'n") at 14. Putting aside the adjustable rate for a moment, the loan here required payment of more than the approximately half of "disposable income" noted in Williams — and payment of an amount that was substantially higher than the previous mortgage payments that Wells Fargo knew Hughes was having trouble making. It is true that here Hughes received a substantial initial lump sum payment which, if spent wisely, could have been used to service the loan or pay other costs going forward. Yet it is difficult to see why Wells Fargo and Hughes would have structured the loan in this manner if anyone expected Hughes to use the lump sum for later mortgage payments. If this money was intended to be used for ongoing periodic payments, why pay substantial interest to receive the money as a lump sum?

As for the fact that this was an adjustable rate mortgage, it is hard to say that this aspect of the loan unequivocally favors either side, though the fact somewhat hurts Wells Fargo's case for summary judgment. Under the CPPA, the question is whether Wells Fargo knew there **[**24]** was no reasonable probability of repayment at the time it made the loan. For all Wells Fargo knew, the interest rate could have gone up (as it initially did) or down (as it later did). The Court has no basis for knowing if one contingency was more likely than the other. But given the precariousness of Hughes' financial situation, the fact that the loan payments could have gone up substantially should have been cause for concern. Although the required payments could have also decreased, it cannot be reasonable for a lender to rest hope of repayment on the contingency that interest rates happen to fall. In other words, the volatility in the loan's interest rate hurts Wells Fargo's case because it added an element of chance to an already questionable situation.

In the Court's view, then, a reasonable jury could conclude that Wells Fargo had knowledge at the time of the transaction "that there was no reasonable probability of payment in full of the obligation by the consumer." The mortgage was for approximately half of Hughes' gross monthly income and certainly more than half of his net income, that income was not extremely large, Hughes had trouble making even smaller payments in the past, **[**25]** and the mortgage's interest rate could increase at any time. The fact that Hughes received a large onetime pay-out helps Wells Fargo's case, but whether it helps enough is a question of fact for a jury.

The Court is also not persuaded by Wells Fargo's argument that Hughes' CPPA claim must fail given his misconduct in entering into the transaction, either because **[*88]** his conduct undermines any injury-in-fact or because of the doctrine of unclean hands. With respect to injury-in-fact, Wells Fargo confuses facts that may diminish or even eliminate Hughes' ability to recover on his claim with facts suggesting Hughes has no standing to bring the claim in the first place. As Wells Fargo accurately notes, in *Grayson v. AT&T Corp., 15 A.3d 219, 246-47 (D.C. 2011)*, the D.C. Court of Appeals concluded that a plaintiff had no standing to bring a CPPA claim because he could show no injury-in-fact. But that plaintiff in Grayson did not claim to have been personally injured by the defendant; rather, he "rest[ed] his claim entirely 'on the legal rights or interests of third parties,'" and was "in no different a position to bring this claim than any other unaffected third party." *Id. at 246-47* (quoting **[**26]** *Warth v. Seldin, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975))*. Here, by contrast, Hughes and Wells Fargo entered into a transaction in which Hughes claims that Wells Fargo injured him. That alleged injury gives Hughes standing, in a very direct way, to bring his claim. Wells Fargo presents a colorable argument that Hughes was not, in fact, injured by Wells Fargo in the transaction, but that is relevant to Hughes' ultimate success on the merits of his CPPA claim, not to whether Hughes has standing to bring a claim about the transaction, and is, in any case, a contested issue of fact for the jury.

Regarding Wells Fargo's contention that Hughes' "unclean hands" should bar his recovery, the Court finds that such a defense is simply unavailable under the CPPA. The Court has previously noted that ***HN11***[] "the defense of unclean hands does not fit comfortably with alleged violations of CPPA, which is a broad remedial statute intended to 'assure that a just mechanism exists to remedy all improper trade practices.'" *Hughes, 794 F. Supp. 2d at 11* (quoting *DeBerry v. First Gov't Mortg. & Investors Corp., 743 A.2d 699, 700 (D.C. 1999))*. Further consideration confirms the Court's earlier conclusion that a claim under the **[**27]** CPPA cannot be barred by the plaintiff's own misconduct.

Wells Fargo confirmed at the hearing before the Court that it is not aware of a single case in which a defense of unclean hands was accepted under the CPPA or a similar state statute. Hughes notes that in *Davis v. Wholesale Motors, Inc., 86 Haw. 405, 949 P.2d 1026, 1038-39 (Haw. Ct. App. 1998)*, the court concluded that such a defense was not available to a claim brought under the comparable Hawaii statute, *HRS § 480*. Davis noted that the Hawaii statute intended to follow comparable provisions of federal ***antitrust law***, including providing for treble damages to encourage enforcement, and relied on *Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)*. The Supreme Court concluded there that "[t]he plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition." *Perma Life, 392 U.S. at 139*.

The Court finds this reasoning persuasive with respect to the CPPA as well. The purpose of the CPPA, as stated in the statute's text, is to "(1) assure that a just mechanism exists to remedy all improper **[**28]** trade practices and deter the continuing use of such practices; (2) promote, through effective enforcement, fair business practices throughout the community; and (3) educate consumers to demand high standards and seek proper redress of grievances." *D.C. Code § 28-3901(b)*. ***HN12***[] The statute is therefore intended to promote fair business practices in the community **[*89]** at large, not just to resolve individual disputes between consumers and businesses. Accordingly, the CPPA expressly indicates that conduct may constitute a violation "whether or not any consumer is in fact misled, deceived or damaged thereby," *D.C. Code § 28-3904*, and provides for the recovery of treble damages, *D.C. Code § 28-3905(k)(1)(A)*. Hence, as with federal ***antitrust law***, the statute operates through private enforcement via suits by affected consumers, but the statute is concerned with the deterrence effect on the general business community as well as with making individual consumers whole. That is why the statute allows for plaintiffs to recover treble damages and defines violations to include instances in which a consumer is not "in fact misled, deceived, or damaged." *D.C. Code § 28-3904*. Similarly, the fact that an individual **[**29]** plaintiff may have engaged in inequitable conduct is not particularly relevant to the desired outcome of deterring unlawful behavior in the business community.

Hence, the doctrine of unclean hands should not bar Hughes' claims under the CPPA. As discussed below, he did indeed make material misrepresentations to Wells Fargo when entering into the mortgage transaction. Even so, it may still be the case that the transaction that Wells Fargo thought it was entering into was unconscionable on the terms of the contract as Wells Fargo understood them. In other words, it is no defense for Wells Fargo to argue that it tried to enter into a possibly unconscionable contract, but was prevented from doing so by Hughes' fraud. It is consistent both with the statute and with equity for Wells Fargo to be held to account for this behavior if it was, in fact, unlawful.

On the other hand, with respect to the misrepresentation of material fact claim under the CPPA, the Court now finds that Hughes' claim cannot be sustained. The basis for Hughes' misrepresentation claim is that Wells Fargo's representative told him that "he did not need to worry about the loan being an adjustable-rate mortgage, because he **[**30]** should be able to refinance the loan before the rate changed," Am. Compl. ¶¶ 43-44. ***HN13***[] The CPPA prohibits "misrepresent[ations] as to a material fact which has a tendency to mislead." *D.C. Code § 28-3904(e)*. As a preliminary matter, Wells Fargo's statement was a suggestion about something that Hughes would be able to do in the future, rather than a statement about a "fact" in a literal sense. See *Howard v. Riggs National Bank, 432 A.2d 701, 706 (D.C. 1981)* (***HN14***[] "Opinions or predictions of future events do not constitute representations of material fact upon which a plaintiff successfully may place dispositive reliance.") To be sure, Hughes' ability to refinance the loan was at least arguably in Wells Fargo's control, since Wells Fargo had the ability to renegotiate the loan's terms at a future date. Strictly speaking, however, if Hughes had been misled by Wells Fargo's statement about something Wells Fargo then failed to do in the future, Hughes would be detrimentally relying on an implicit promise by Wells Fargo, rather than a misrepresentation of a fact (i.e., a statement that was false at the time). See id. In any case, the distinction is not of much consequence here, since Hughes has **[**31]** never indicated that he actually tried to refinance the loan. The statement was therefore not a misrepresentation because it might actually have been accurate. There is no indication that Wells Fargo made the statement without intending it to be true; on the contrary, deposition testimony from Wells Fargo's representative suggests that it was Wells Fargo's standard practice to make loans of this sort with the intention of refinancing. See Hughes Opp'n Ex. 48. Hence, even if a **[*90]** statement about a future event that did not occur could be construed as a misrepresentation of fact, Hughes has presented no evidence that such a misrepresentation was actually made in this instance.

In sum, Hughes' claim under the CPPA may proceed, but in more limited form than alleged in the complaint. Hughes' CPPA unconscionability claim may proceed on the ground that Wells Fargo had knowledge that there was no reasonable probability of payment in full of the obligation by Hughes. But Hughes has presented insufficient evidence for a jury to reasonably conclude either that he did not understand the nature of the transaction with Wells Fargo or that he received no substantial benefit from the loan. Hughes has **[**32]** also presented insufficient evidence, as a matter of law, that Wells Fargo made a material misrepresentation of fact to Hughes in the transaction, and hence that CPPA claim must be dismissed.

iv. Hughes' Quiet Title Claim

Hughes seeks to quiet title against Wells Fargo on the ground that Wells Fargo obtained its security interest in the Property through unconscionable terms. Am. Compl. ¶ 84. As the Court noted previously, the quiet title count depends upon the outcome of the CPPA count. *Hughes, 794 F. Supp. 2d at 9*. ***HN15***[] Civil remedies available under the CPPA include "any [] relief which the court deems proper," which may include rescission. *D.C. Code § 28-3905(k)(1)(F)*. In addition,***HN16***[] the Court's equitable powers allow it to quiet title in favor of Hughes if Wells Fargo's actions warrant that remedy. Hence, it would be premature to dismiss Hughes's quiet title count while his CPPA unconscionability claim remains pending. See, e.g., *Armenian Genocide Museum and Mem'l, Inc. v. Cafesjian Family Found., Inc., 595 F. Supp. 2d 110, 119 (D.D.C. 2009)* ("[I]t is premature to consider dismissal of [a quiet title count], which may or may not constitute an appropriate remedy depending on the evidence **[**33]** yet to be adduced in this case.")

b. Wells Fargo's Counterclaims Against Hughes

Wells Fargo asserts five counterclaims against Hughes. First, Wells Fargo claims that, under the doctrine of equitable subrogation, its lien should be subrogated to those of the prior secured creditors whose debts were satisfied by Wells Fargo. Wells Fargo Countercls. Against Hughes ¶¶ 8-14. Second, Wells Fargo contends that it is entitled to an equitable lien on the property for the full amount of its loan to Hughes. Id. ¶¶ 15-17. Third, Wells Fargo argues that Hughes was unjustly enriched at its expense. Id. ¶¶ 18-24. Fourth, Wells Fargo maintains that Hughes committed fraud against it by concealing material facts about his transaction with Abell. Id. ¶¶ 25-30. Fifth, Wells Fargo contends that Hughes is in breach of his mortgage contract with Wells Fargo. Id. ¶¶ 25-30.

The Court will consider each of Wells Fargo's counterclaims. The Court notes at the outset, in all candor, that Wells Fargo's counterclaims against both Hughes and Abell are difficult to resolve prior to resolution of the dispute involving the earlier transaction between Hughes and Abell. Hence, the Court is unable to presently resolve all **[**34]** of the matters that ultimately might warrant judgment in Wells Fargo's favor.

i. Hughes' Argument that Wells Fargo Abandoned its Counterclaims

As a preliminary matter, Hughes argues that Wells Fargo's counterclaims are not properly before the Court. Hughes accurately points out that Wells Fargo's counterclaims **[*91]** were included in the same document as its amended answer to Hughes' original complaint. Hughes Opp'n at 38. Hughes then filed an amended complaint, and Wells Fargo filed an answer to the amended complaint that did not include any counterclaims. Hughes argues that this superseding pleading nullifies the earlier document containing the counterclaims.

The Court finds that Wells Fargo's later filing did not abandon its counterclaims. To be sure, Hughes' argument has some force. ***HN17***[] *Federal Rule of Civil Procedure 7* states that "[o]nly these pleadings are allowed" and then sets forth a list of pleadings that does not include counterclaims. ***HN18***[] *Rule 13* requires that a counterclaim be set forth in a pleading. It would be reasonable to conclude from these two rules that a counterclaim is not a distinct pleading, but rather must be included as part of another pleading, such as an answer. And it **[**35]** is certainly true that***HN19***[] "[o]nce an amended pleading is interposed, the original pleading no longer performs any function in the case." 6 Charles A. Wright, et al., Fed. Prac. & Proc. Civ. § 1476 (3d ed.). Accordingly, it is reasonable for Hughes to assert that when Wells Fargo replaced its answer with an answer that did not contain counterclaims, the pleading that was before the Court (the new answer) did not contain counterclaims.

Nonetheless, in the Court's view, this conclusion would put form over substance. ***HN20***[] An answer and a counterclaim, even if contained in the same document, serve different functions; the counterclaim shares more with a complaint, setting out claims against the other party, than it does with the answer. See *Dunkin Donuts, Inc. v. Romanias, 2002 U.S. Dist. LEXIS 28405, at *5-6 (W.D. Pa. May 29, 2002)*. It was therefore reasonable for Wells Fargo to view the answer and the counterclaims as separate pleadings. That Wells Fargo intended the counterclaim as separate is confirmed by the fact that Wells Fargo did not continue the answer's paragraph numbering in the counterclaim. It is not especially intuitive that a counterclaim is part of the pleading to which it is attached, **[**36]** nor is it obvious that counterclaims must be re-pled when an answer with counterclaims attached is superseded. And Hughes does not indicate that he was actually under the impression that Wells Fargo had dropped its counterclaims and then took action accordingly, or that he is otherwise prejudiced in any way. Hence, Wells Fargo should not be penalized for failing to restate the counterclaims when it superseded its answer.

ii. Fraud Claim

The Court begins with Wells Fargo's fraud claim because resolution of the fraud claim affects resolution of the other issues. Wells Fargo alleges that Hughes knowingly misrepresented that he owned the Property when he applied in 2006 for a "refinance" loan with Wells Fargo and that Wells Fargo relied upon his misrepresentation in evaluating and approving his loan application. Wells Fargo Countercls. Against Hughes ¶¶ 26-28. Wells Fargo argues that the record clearly and convincingly establishes that, prior to closing on the Wells Fargo transaction, Hughes was aware that he had sold his home, but failed to disclose this fact to Wells Fargo. Wells Fargo Mem. at 32-33. Wells Fargo contends that, prior to commencing the transaction, Hughes told Wells Fargo **[**37]** only that "a loan shark loaned [him] some money" to prevent foreclosure, and that Hughes further misrepresented to Wells Fargo that he possessed no other documents or information concerning his transaction with Abell, when in fact he possessed copies of **[*92]** the lease and option agreements. Id. Wells Fargo seeks judgment against Hughes in the full amount of the principal of the loan, $192,500, as well as punitive damages and fees and costs. Wells Fargo Countercls. Against Hughes ¶ 30. The principal of the loan was approximately equal (though slightly greater) than the amount Wells Fargo paid out — the sum of the amount of the two prior liens on the property, which Wells Fargo paid off (approximately $105,000 in total), more than $16,000 in Hughes' unsecured debt, which Wells Fargo paid off, and the more than $60,000 lump sum that was disbursed to Hughes immediately. Counterclaim ¶¶ 29-30. Wells Fargo contends further that the document describing Hughes' contact with the Weinstock firm — the redacted document that the Court initially found protected by the attorney-client privilege, but later released to the parties when Hughes waived the privilege —indicates that "Hughes well understood **[**38]** that someone else was claiming ownership of the Property and that the Lease Agreement and Option Agreement were not only relevant, but integral" to the claim of ownership. Wells Fargo Suppl. Mem. at 10-12.

The parties agree that ***HN21***[] the essential elements of common law fraud are: (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) with intent to deceive, and (5) on which reliance is placed. *Virginia Acad. of Clinical Psychologists v. Group Hospitalization & Med. Servs., Inc., 878 A.2d 1226, 1233 (D.C. 2005)*; *D'Ambrosio v. Colonnade Council of Unit Owners, 717 A.2d 356, 360-61 (D.C. 1998)*. Fraud must be established by clear and convincing evidence. *Virginia Acad., 878 A.2d at 1233*.

Hughes argues that he neither knew that he had transferred title to his home nor intended to defraud Wells Fargo. He notes that the essence of his complaint against Abell, Modern Management, and Baltimore is that these defendants defrauded him out of title to his home. Hughes Opp'n at 42-43. Hughes also notes that he voluntarily disclosed his transaction with Abell to Wells Fargo and then, at Wells Fargo's suggestion, wrote a letter to Wells Fargo documenting **[**39]** the transaction and contacted the Weinstock firm in order to better understand the nature of the transaction. Id. at 43. Hughes contends that these actions both belie that he intended to defraud Wells

Fargo and confirm that he did not know that he had transferred title to his home. Id. at 43-44. Hughes argues that the document from the Weinstock firm "indicates confusion, not fraud." Hughes Suppl. Mem. at 12-13.

Having reviewed the relevant documents and deposition testimony, the Court concludes that Wells Fargo has presented clear and convincing evidence that Hughes committed fraud against Wells Fargo and that no jury could reasonably find otherwise. The record contains abundant evidence that Hughes understood, when he entered into the transaction with Wells Fargo, that Abell at a minimum purported to have gained ownership of the Property. Because Hughes understood this information, the only conclusion that can reasonably be drawn from Hughes' repeated statements to Wells Fargo only that he had borrowed money to prevent foreclosure is that Hughes intended to deceive Wells Fargo. And since it is impossible to believe that Wells Fargo would have proceeded with a "mortgage" transaction **[**40]** if it had known that someone else was purporting to own the Property, Hughes' intentional misrepresentation to Wells Fargo was material to the transaction.

With respect to Hughes' understanding of his transaction with Abell, there are several documents in the record about **[*93]** which there is no dispute with respect to authenticity. The documentation accompanying the Hughes-Abell transaction includes a document bearing the title "AGREEMENT TO SELL REAL ESTATE," which both Hughes (as seller) and Abell (as purchaser) signed. See Wells Fargo Mem. Ex. 3. In addition to a significant amount of printed text, this document contains handwritten text just above the signature line that states that "the property is transfer[red] as is," "the purchaser will lease to seller for one year," "the purchaser will transfer back to seller within one year for $175,000," and that "if the seller is 2 consecutive payments late the buy back is null & void." Id. The documentation further includes a "Lease Agreement" and an "Option Agreement," both signed by Hughes, which refer to Hughes in many places as "Tenant" and Modern Management as "Landlord." See id. Exs. 4, 5. Accompanying this documentation is a note, in **[**41]** Hughes' handwriting, that states: "My home, located at 5236 5th Street N.W., Washington, D.C. 20011-4043, is in foreclosure. I sold my home, leased it back for one (1) year and allowed to repurchase my home during this year. This allowed my family and I to stay in our home and an opportunity to buy it." Id. Ex. 6. The note is then signed by Hughes. Id. The record also contains various receipts, apparently provided to Hughes by Modern Management, that refer to "rent" paid by Hughes for the 2005-2006 time period. Id. Ex. 10.

Hughes has stated that he received copies only of the lease and option agreements, not the other documentation of his transaction with Abell, and that he believed his transaction with Abell was to obtain a loan. See Hughes Opp'n at 42-43; Am. Compl. ¶¶ 20-21. In Hughes' deposition, he testified that he "didn't read through [the sale] agreement" but instead "went mainly by verbal [statements] for what I was being explained by Calvin Baltimore and he seemed to be in a hurry so I trusted what I heard." Hughes Opp'n Ex. 49. Hughes further testified that he understood that he "was being loaned money in order to enable [him] to stay in the home" and that "the loan was to **[**42]** be repaid, the monthly payments, that included mortgage payments to Chase." Id. Hughes also testified that he did not read the documents that he signed and that he did not receive a copy of the documents. Id.

The document from the Weinstock firm is entitled "Redacted Intake Notes Summary." Wells Fargo Suppl. Mem. Ex. S-1. The document appears to be a log of Hughes' interactions with the Weinstock firm and contains two unredacted entries. The first entry, dated September 7, 2006 — approximately two weeks before the completion of the Hughes-Wells Fargo transaction — states:

> Mbr made a loan from the O/P because he was about to lose the property. Now Mbr is in better shape and can afford to pay his own mortgage (Chase Mortgage)[.] O/P is stating he cannot break contract with him because he owns the property from the lease he signed with him for the loan. Mbr states he r'cvd about $60,000 but O/P is telling him he has to pay back $190,000 for the loan. Mbr wanted to refinance with Wells Fargo and that how he found out that the O/P owns his house. Mbr states he isn't on the deed but does have a lease.

The second entry, dated October 23, 2006, states:

> Mbr went over the whole story with me. Mbr **[**43]** says that he did refi the house but that O/P still says that he owes them $$. He apparently signed some docs back then that he does not have copies of. My guess is that one was a Promissory Note. There was no lien on the property. **[*94]** He does have a tenant/LL agreement that he will rent the property back from the O/P.. ????. That was going to pay the mortgage but now Mbr refi'd the house and he still has to pay the lease and the mortgage. Mbr then adv that there is a lease purchase

> option attached to the doc.. ?? So . . what docs did he sign then, ??? Mbr will fax in docs and I will do a demand ltr to the O/P to ask for all docs rel to the transaction to see what is going on here.

Wells Fargo argues that the Intake Notes "further establish that Hughes committed fraud against Wells Fargo by failing to disclose material facts to Wells Fargo, which if disclosed would have resulted in cancellation of the loan." Wells Fargo Suppl. Mem. at 4. Hughes contends, however, that the notes only indicate Hughes' confusion about the prior transaction. Pl.'s Supplemental Mem. of P. & A. in Opp'n to Def. Wells Fargo's Mot. for Summ. J. [Docket Entry 139] ("Hughes Suppl. Mem.") at 2-5, 11-14. [1]

There is not any significant dispute regarding what information Hughes conveyed to Wells Fargo about his transaction with Abell. Hughes' amended complaint in this case indicates that he told Wells Fargo that he borrowed money to stop foreclosure — not that he sold his home or even that anyone else was asserting ownership of the Property. Am. Compl. ¶ 34. The letter Hughes wrote to Wells Fargo prior to the completion of the "refinancing" transaction accordingly states that Hughes "borrowed money to bring [his] property out of foreclosure and current, and ha[s] remained current to date." Wells Fargo Mem. Ex. 28. Hughes does not indicate that he ever stated anything else to Wells Fargo.

Upon consideration of the record, the Court concludes that a jury applying the clear and convincing standard of evidence could reasonably conclude only that Hughes committed fraud against Wells Fargo. In light of the written documentation in the record, the Court finds that a finder-of-fact could not reasonably find **[**46]** Hughes' claims and accompanying testimony credible. The documents consummating the Hughes-Abell matter are extremely clear about the fact that the transaction was a sale of Hughes' home, and this fact is repeated in several instances. Still, it might perhaps be conceivable that Hughes did not actually read these documents before signing them. But there simply is no explanation for how a note describing the transaction in detail —including the words "I sold my home" — could be handwritten **[*95]** and signed by Hughes without Hughes at least comprehending how the other parties understood the transaction. Even if Hughes did not himself have a copy of this documentation, he did have a copy of the "lease" and "option" agreements (each of which made clear that Abell now purported to own the property) and he received "rental receipts" for approximately the next two years. Considering the handwritten note and these documents, which were, in fact, in Hughes' possession, it is simply not credible for Hughes to maintain that he did not understand the transaction initially or that he did not receive any written documents clearing up his misimpression. Furthermore, although Hughes may now dispute how the **[**47]** Weinstock document should be interpreted, he cannot deny that the document reveals, at the very least, that he knew Abell was claiming that he owned the Property at the time of the transaction with Wells Fargo. And it is also clear that Hughes told a different, more complete version of the facts to Weinstock than to Wells Fargo. Hence, the document from the Weinstock firm further confirms that Hughes knew that Abell was asserting ownership and yet he made no mention of that key fact to Wells Fargo.

The Court need not resolve the dispute about the transaction between Hughes and Abell — that is, whether Abell did, indeed, become the owner of the Property in that transaction — in order to conclude that Hughes misrepresented the facts, that the misrepresentation was material, or that Wells Fargo relied on the misrepresentation. Wells Fargo has shown that Hughes knowingly made a representation that he knew to be false

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[1] Hughes further **[**44]** argues that the Intake notes are inadmissible because they are unreliable and represent multiple levels of hearsay. Hughes Suppl. Mem. at 14-16. Neither of these arguments has merit. Hughes contends that the notes are unreliable because they reflect confusion and contain inconsistent statements. Id. at 14-15. But the inconsistencies in the notes can be taken into account in assessing their probative value. There is no reason why the confusion reflected in the notes need bar their inadmissibility altogether. Hughes further contends that the notes "present multiple levels of hearsay, as they purport to reflect the out of court statements of three different declarants: the intake screening person, Mr. Hughes, and O/P." Id. at 15-16. But Hughes himself seems to recognize that the hearsay of whomever wrote the notes is admissible under the business records exception. Id. at 15. And Hughes' own statements about the transaction are not hearsay at all, as they are not being admitted for their truth — that what Hughes said was true or that "O/P" actually said those things — but rather as evidence of what Hughes thought about the transaction when he spoke to Weinstock. For example, even if Hughes **[**45]** were incorrect in his representation that "he isn't on the deed but does have a lease," that would nonetheless be probative of what Hughes thought at that time about whether he was on the deed.

— that he previously had merely entered into a loan, rather than a transaction in which someone purported to gain ownership of the Property. No reasonable jury could conclude otherwise under the clear and convincing evidence standard. Whatever the resolution of the Hughes-Abell **[**48]** dispute, then, it cannot seriously be disputed that Wells Fargo would never have entered into the transaction with Hughes had Hughes honestly disclosed that he had entered into a transaction with another party through which that party claimed to have purchased the Property. Hughes' strongest counterargument is that, due to his purported confusion about the transaction, Hughes had no intent to deceive Wells Fargo, but rather simply did not understand what information Wells Fargo would deem relevant to the transaction. Intent is typically a difficult element to prove, requiring as it does the judging of not only a person's actions but his motivations. But it is simply not credible that Hughes completed the transaction with Wells Fargo without understanding the significance of someone else claiming ownership of the Property. No jury could reasonably conclude that Hughes made the misrepresentations with anything other than the intent to deceive Wells Fargo. Since a jury could not reasonably conclude other than that Wells Fargo has established a claim of fraud against Hughes by clear and convincing evidence, the Court will grant summary judgment for Wells Fargo on this claim. The Court **[**49]** notes that it is not presently reaching a determination as to the damages Wells Fargo is entitled to on this counterclaim.

iii. Equitable Subrogation Claim

Wells Fargo argues that it "is entitled to be equitably subrogated to the lien position and extent of the prior liens and deeds of trust" on the Property. Wells Fargo Countercls. Against Hughes ¶ 14. Wells Fargo currently holds a note (mortgage) secured by a deed to the property. Id. ¶ 10. However, both Hughes and Abell contend that Wells Fargo's **[*96]** mortgage deed is invalid. Hughes contends that his transaction with Wells Fargo violated the CPPA, and Abell contends that Hughes did not own the property when he purported to enter into the transaction with Wells Fargo. Wells Fargo notes that its funds were used to pay off two prior liens on the Property, one held by Chase Home Finance in the amount of $87,745.13 and one held by Independence Financial Corporation in the amount of $16,755.03. Id. ¶ 13; Wells Fargo Mem. at 30. Wells Fargo thus argues that, to the extent its deed of trust is ruled void, it is entitled to be equitably subrogated — that is, to "step into the shoes" — of the prior liens on the property that were paid off using **[**50]** its funds. Wells Fargo Countercls. Against Hughes ¶ 14. As a practical matter, this would mean that Wells Fargo would receive a lien on the property in the amount of $104,500.46, the sum of the amounts of the two previously-existing liens. Wells Fargo Mem. at 30. Wells Fargo's crossclaim against Abell seeks equitable subrogation against Abell on the same logic if Abell is ultimately found to be the owner of the Property. Wells Fargo Cross-cls. Against Abell ¶¶ 21-27.

Abell's written briefing contends that Wells Fargo is not entitled to equitable subrogation because Wells Fargo had notice of the defects in the Property's title when it commenced the transaction with Hughes. Def. Vincent Abell's Opp'n to Wells Fargo's Mot. for Summ. J. [Docket Entry 140] at 6. However, at the motions hearing before the Court on February 24, 2012, Abell indicated that he did not object to Wells Fargo's equitable subrogation claim because, assuming that he owns the property, he should not receive a windfall of the prior liens being paid off at Wells Fargo's expense. Hughes, however, does object to Wells Fargo's equitable subrogation claim. He argues that it is premature for Wells Fargo to seek equitable **[**51]** subrogation before the Court has even made a determination as to the validity of Wells Fargo's mortgage deed. Hughes Opp'n at 40. Hughes contends further that equitable relief would be inappropriate because Wells Fargo allegedly violated the CPPA in making the mortgage, and a party is not entitled to equity if he has himself behaved wrongfully. Id. at 40-41.

The Court is not inclined to accept Hughes' argument with respect to the alleged CPPA violation. Hughes is essentially making the same argument that he urged the Court to reject with respect to his own CPPA claim, namely that unclean hands bars recovery. To be sure, there may be a distinction between asserting that unclean hands bars an equitable remedy such as subrogation and claiming that inequitable conduct bars recovery under a statute such as the CPPA. Nonetheless, having allowed Hughes to proceed on his CPPA claim despite his conduct, and considering the nature of that conduct, the Court is not inclined to bar Wells Fargo from receiving equitable subrogation of its loan, regardless of how the CPPA claim is ultimately resolved. Prior to the events of this case, the Property was encumbered by two liens. Wells Fargo paid off **[**52]** those loans because, due to Hughes' fraud, it did not know that Abell was claiming ownership of the Property. Even if Hughes were to prevail on a parallel (and therefore informally "offsetting") CPPA claim, there is simply no reason why the Property's current owner should take the Property unencumbered when Wells Fargo paid off the existing liens under fraudulent circumstances. The Court believes that it is appropriate for Wells Fargo to have a lien on the Property in the amount of the two previously-existing liens that Wells Fargo satisfied, regardless of whether Abell or Hughes owns the Property and regardless **[*97]** of whether Hughes prevails on his CPPA claim.

Hughes is on somewhat firmer ground when he argues that it may be premature for the Court to grant equitable subrogation to Wells Fargo before it is determined whether Wells Fargo's mortgage deed is valid. If Hughes prevails in his assertion of title over Abell, and if the CPPA claim does not ultimately require rescission of the Wells Fargo-Hughes transaction (either because the claim is unsuccessful or because that is not the appropriate remedy), Wells Fargo may well possess a valid mortgage on the property, making equitable subrogation **[**53]** unnecessary. Furthermore, even if the Wells Fargo-Hughes transaction is unwound, making equitable subrogation necessary, which of Wells Fargo's equitable subrogation claims should be granted (the one against Hughes or the one against Abell) will depend on the outcome of the Hughes-Abell dispute.

Under these circumstances, the Court is inclined to grant both of Wells Fargo's equitable subrogation claims with recognition that this issue cannot be resolved definitively separate from Hughes' ongoing claims against Wells Fargo and Abell. Wells Fargo's motion for summary judgment will therefore be granted both as to Hughes and as to Abell, with the acknowledgment that final judgment in this case with respect to equitable subrogation will ultimately need to account for the resolution of the other disputes, consistent with this Opinion.

iv. Equitable Lien and Unjust Enrichment Claims

Wells Fargo contends that it should receive an equitable lien on the Property. Wells Fargo claims that "it would be improper and inequitable for Mr. Hughes to obtain a windfall by receiving an unencumbered interest in the Property or a priority interest in the Property" and that, therefore, "[s]hould Wells Fargo's **[**54]** lien be deemed void, then equity and the ends of justice require that the Court declare that Wells Fargo has an equitable lien securing its loan." Wells Fargo Countercls. Against Hughes ¶¶ 16-17. Hughes argues that Wells Fargo's violation of the CPPA should act as a bar to this equitable relief. Hughes Opp'n at 41.

Even if Wells Fargo is not barred from seeking an equitable lien, considering the outcomes that now seem possible in this case, it is unclear to the Court how such a lien would make sense.***HN22***[] "Liens, whether equitable or legal, are merely a means to the end of satisfying a claim for the recovery of money." *Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 262, 119 S. Ct. 687, 142 L. Ed. 2d 718 (1999)*. If Abell, rather than Hughes, is ultimately found to own the Property, Hughes' mortgage deed is probably invalid, since Abell was not a party to the transaction with Wells Fargo. Under those circumstances, it is not clear why Wells Fargo would be entitled to an equitable lien as a claim against Hughes on a property that Hughes does not actually own. If, on the other hand, the dispute between Hughes and Abell results in Hughes' ownership of the Property, then it is also not clear why an equitable lien would be appropriate. **[**55]** An equitable lien would not be necessary, of course, if Wells Fargo's mortgage deed is valid. And if the Wells Fargo-Hughes transaction violated the CPPA and the mortgage deed was deemed invalid on that ground, it is difficult to see why a lien should be placed on the property to replace a transaction that was deemed unlawful.

Given this apparent uncertainty, the Court will now deny Wells Fargo's motion for summary judgment on this count. If Wells Fargo can articulate a coherent rationale in support of an equitable lien at a **[*98]** later date, the Court will reconsider the issue at that juncture.

v. Unjust Enrichment and Breach of Contract Claims

Wells Fargo claims that Hughes would be unjustly enriched to the extent that he is successful in any claim that Wells Fargo's mortgage deed is invalid. Wells Fargo Countercls. Against Hughes ¶ 23. Wells Fargo notes that it paid off the liens on the Property, as well as Hughes' unsecured debts, and seeks judgment for the sum total amount of this debt —$121,292.46, plus interest. Id. ¶¶ 19-24. Wells Fargo also asserts a claim for breach of contract, on the theory that if the mortgage note is in fact valid, Hughes is in default for the principal amount **[**56]** of $188,952.96, plus interest, fees, and costs. Id. ¶¶ 31-37.

HN23[] There can be no claim for unjust enrichment when an express contract exists between parties. See *Schiff v. AARP, 697 A.2d 1193, 1194 (D.C. 1997)*. Wells Fargo's claims for unjust enrichment and breach of contract are therefore mutually exclusive; it cannot prevail on both claims. Furthermore, both because Abell may actually own the Property and because rescission is a remedy available under the CPPA, it is still not clear whether Wells Fargo has a valid mortgage with Hughes. On the other hand, given Hughes' conduct here, it would be inequitable for Hughes to have his debts paid off by Wells Fargo at no cost to him, even if Hughes has a parallel claim under the CPPA based on Wells Fargo's conduct. Under these circumstances, the Court feels it is most appropriate to grant Wells Fargo's motion for summary judgment on the unjust enrichment claim, again with the understanding that final judgment in this case will ultimately need to account for whether Wells Fargo has a valid contract with Hughes that makes this remedy inappropriate. [2] But since the breach of contract claim is also tied up in Hughes' dispute with Abell, the Court **[**57]** will deny summary judgment on Wells Fargo's breach of contract claim. Resolution of this count must wait for another day.

c. Wells Fargo's Crossclaims Against Abell and Abell's Crossclaim Against Wells Fargo

Wells Fargo asserts four crossclaims against Abell, who in turn asserts one crossclaim against Wells Fargo. First, Wells Fargo alleges that Abell defrauded Wells Fargo by intentionally failing to inform it that he held the deed to the Property and failing to record his deed for almost two years. Wells Fargo Cross-cls. Against Abell ¶¶ 6-15. Second, Wells Fargo seeks to quiet title against Abell on the ground that Abell obtained his deed from Hughes by improper means. Id. ¶¶ 16-20. Third, as noted above, Wells Fargo claims that, under the doctrine of equitable subrogation, its lien should be subrogated to those of the prior secured creditors whose debts were satisfied by Wells Fargo. Id. ¶¶ 21-27. Fourth, Wells Fargo contends that Abell has been unjustly enriched because Wells Fargo paid off the loans encumbering the **[**58]** Property. Id. ¶¶ 28-33. In turn, Abell's crossclaim against Wells Fargo seeks to quiet title on the ground that Abell's deed was recorded first in time to Wells Fargo's mortgage deed. Abell Cross-cl. Against Wells Fargo ¶¶ 74-75.

i. Fraud Claim

Wells Fargo alleges that Abell defrauded Wells Fargo by failing to inform it **[*99]** that he had a deed to the Property when he knew that Hughes was representing himself to be the owner of the Property. Wells Fargo Cross-cls. Against Abell ¶¶ 9-11. Wells Fargo also alleges that Abell intentionally failed to record his deed for almost two years so that Wells Fargo would believe Hughes was the record owner of the property. Id. ¶ 11. Wells Fargo seeks a judgment against Abell in the amount of the principal of its loan to Hughes, $192,500, plus interest, punitive damages, and fees and costs. Id. 15. Abell responds that he was unaware that Hughes and Wells Fargo were entering into a "refinancing" transaction, but rather thought that Hughes was seeking a loan in order to exercise the "option" agreement between Hughes and Abell. Defendant/Counter-Pl./Cross-Pl. Vincent Abell's Mem. of P. & A. in Opp'n to Wells Fargo Bank, N.A.'s Mot. for Summ. J. [Docket Entry **[**59]** 116] ("Abell Opp'n") at 3, 6. Abell further claims to have attempted to notify Wells Fargo of his claim of ownership of the Property by contacting the company that he believed was serving as title agent to the transaction. Id. at 3, 6-7. Abell informed the Court at the motions hearing that the company has since gone out of business.

The Court finds that too many material facts are in dispute for summary judgment to be granted in Wells Fargo's favor on the fraud count. It is certainly suspicious that Abell, after nearly two years, suddenly chose to record his deed to the Property one week before the Wells Fargo-Hughes transaction. But Wells Fargo has not put forward concrete evidence that Abell knew the nature of its developing transaction with Hughes. Abell's claims that he thought the transaction was, in fact, merely a loan and that he tried to notify a title company of his purported ownership are plausible, albeit questionable given the suspicious timing of his recording of his deed and the convenient fact that the company that he claims to have notified is no longer in operation. Hence, Wells Fargo's motion for summary judgment will be denied on this count.

ii. Quiet Title Claims

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[2] If the Court ultimately concludes that there is a contract between Wells Fargo and Hughes, then under Schiff the judgment for unjust enrichment will have to be vacated.

Wells **[**60]** Fargo seeks to quiet title against Abell on the ground that Abell improperly procured the deed from Hughes. Wells Fargo Cross-cls. Against Abell ¶¶ 16-20. In turn, Abell also seeks to quiet title against Wells Fargo on the ground that Abell's deed was recorded first in time and is superior in title to the Wells Fargo deed of trust. Abell Cross-cl. Against Wells Fargo ¶¶ 74-75. These quiet title counts depend on the outcome of the Hughes-Abell dispute, which is not the subject of Wells Fargo's motion for summary judgment. Wells Fargo may be entitled to a quiet title judgment against Abell, but that determination must await a finding that Abell improperly obtained the deed from Hughes. Hence, it would be premature to grant either Wells Fargo's or Abell's quiet title counts.

iii. Equitable Subrogation Claim

As discussed above, Wells Fargo claims that it would be inequitable for Abell to obtain a windfall from Wells Fargo paying off the two liens previously encumbering the property. Wells Fargo Cross-cls. Against Abell ¶¶ 21-27. As indicated above, at the motions hearing before the Court, Abell indicated that he acquiesces to Wells Fargo's equitable subrogation claim because he does not **[**61]** believe he is entitled to a windfall from Wells Fargo paying off the liens on the Property.

The Court agrees that Wells Fargo's claim of equitable subrogation should be granted, with the acknowledgment that final judgment in this case with respect to **[*100]** equitable subrogation will ultimately need to account for the resolution of the other disputes in the case, including disposition of the ownership of the Property. The Court notes that while the text of Wells Fargo's crossclaim implies that the lien on the Property should be in the full amount of Wells Fargo's mortgage agreement with Hughes, Wells Fargo's briefing seems to suggest that the lien should be in the lesser amount of the encumbrances that Wells Fargo paid off (about $104,500). Compare Wells Fargo Cross-cls. Against Abell ¶ 27 with Wells Fargo Mem. at 39. The amount of Wells Fargo's lien on the Property can be resolved at a later date based on the resolution of the other disputes.

iv. Unjust Enrichment Claim

Wells Fargo alleges that Abell's failure to record his deed and "complicity in Hughes' misrepresentation of ownership of the Property" led to Wells Fargo satisfying the liens on the Property. Wells Fargo Cross-cls. Against Abell **[**62]** ¶¶ 28- 33; see Wells Fargo Mem. at 39-40. Wells Fargo therefore seeks a judgment against Hughes for unjust enrichment in the amount of the liens that it paid off. The Court agrees that Wells Fargo should receive compensation from Abell for paying off the liens on the Property if Abell is ultimately found to be the owner of the Property. However, the Court believes it is more appropriate that Wells Fargo receive a judgment in the form of a lien on the Property, which can be paid off by Abell as a mortgage would, than a judgment in this amount against Abell. Hence, the granting of Wells Fargo's equitable subrogation claim with respect to Abell makes this unjust enrichment claim unnecessary. The Court will therefore deny Wells Fargo's motion for summary judgment with respect to the unjust enrichment claim against Abell.

d. Abell's Renewed Motion for Summary Judgment

On April 20, 2012, Abell filed a renewed motion for summary judgment on all the remaining counts that Hughes alleges against Abell and Modern Management, arguing that the statute of limitations bars these claims. Mem. of P. & A. in Supp. of Vincent Abell and Modern Mgmt. Co.'s (Renewed) Mot. for Summ. J. [Docket Entry 137] ("Abell **[**63]** Mem."). Abell acknowledges that the Court previously rejected this argument, concluding that Hughes' allegations that defendants had concealed material terms of the transaction either obscured when Hughes' claims accrued or raised the possibility of equitable tolling of the statute of limitations. *Hughes, 794 F. Supp. 2d at 12-13*. Abell states that he "respectfully disagrees" with these conclusions. Abell Mem. at 2-3. Hence, his motion is really a motion for reconsideration of the Court's previous decision.

HN24[] Although there is no Federal Rule of Civil Procedure that expressly addresses motions for reconsideration, see *Lance v. United Mine Workers of Am. 1974 Pension Trust, 400 F. Supp. 2d 29, 31 (D.D.C. 2005)*, because the Court's opinion did not fully adjudicate all the claims in the case, Abell's motion is properly characterized as a motion pursuant to *Rule 54(b)*, see *Fed. R. Civ. P. 54(b)* (where court resolves "fewer than all the claims," it may revise "its opinion at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities"). "The Court has broad discretion to hear a motion for reconsideration brought under *Rule 54(b)*," *Isse v. Am. Univ., 544 F. Supp. 2d 25, 29 (D.D.C. 2008)*, **[**64]** and reconsideration is appropriate "as justice requires," *Cobell v. Norton, 355 F. Supp. 2d 531, 540* ***[*101]*** *(D.D.C. 2005)*. "Considerations a court may take into account under the 'as justice requires' standard include whether the court 'patently' misunderstood the parties, made a decision beyond the adversarial issues presented, made an error in failing to consider controlling decisions or data, or whether a controlling or significant change in the law has occurred." *Williams v. Johanns, 555 F. Supp. 2d 162, 164 (D.D.C. 2008)*. Review under *Rule 54(b)* "amounts to determining, within the Court's discretion, whether reconsideration is necessary under the relevant circumstances." *Cobell, 355 F. Supp. 2d at 540*.

The essence of Abell's argument at this stage is that a reasonable person in Hughes' position would have been put on "inquiry notice" that Abell and Modern Management concealed material facts about the transaction. Abell Mem. at 8-15. Abell contends that even if Hughes believed, on the basis of Abell and Modern Management's alleged misrepresentations, that the transaction was a loan, not a sale, the other facts — such as the handwritten note in Hughes' handwriting indicating that he "sold **[**65]** my home" — should have put him on notice that what had been represented was not quite right. Id. at 7-12. Abell maintains that a reasonable person under these circumstances was under an obligation to investigate further. Id. at 12-13.

The Court will deny Abell's motion. As a preliminary matter, the Court notes that the motion was filed well over a year after the Court's November 2010 decision and well after the deadlines for filing dispositive motions in this case. Abell does not rely on any new facts in expressing his disagreement with the Court's prior decision. Although the Court may, consistent with *Rule 54(b)*, revise its opinion at any time prior to judgment on all claims in the case, fairness to the other parties suggests that the Court's prior decision should not be revisited so late in the day unless it was truly erroneous. And here the Court believes its original decision was correct. As indicated above, the Court believes that Hughes was at least aware that Abell was asserting ownership over the Property at the time of Hughes' transaction with Wells Fargo. Nonetheless, the Court notes that Hughes' claims against Abell, Modern Management, and Baltimore are not limited to injury **[**66]** from misrepresentations regarding who would own the Property after the transaction, but also include, for example, the allegation that there was a gross disparity between the price of the property or services sold and the value of the property or services sold. See, e.g., Am. Compl. ¶¶ 50-55. Misrepresentations made to Hughes by Abell or Modern Management may have concealed essential details of the transaction from Hughes that could be vital to his assertion of these claims. Dismissal of Hughes' claims on the basis of the statute of limitations would therefore be inappropriate on the basis of the record at this time.

IV. Conclusion

For the reasons described above, Wells Fargo's motion will be granted in part and denied in part. Wells Fargo's motion will be denied with respect to Hughes' remaining claims against Wells Fargo. With respect to Wells Fargo's counterclaims against Hughes, Wells Fargo's motion will be granted with respect to the equitable subrogation claim (Count I), denied with respect to the equitable lien claim (Count II), granted with respect to the unjust enrichment claim (Count III), granted with respect to the fraud claim (Count IV), and denied with respect to the breach **[**67]** of contract claim (Count V). With respect to Wells Fargo's crossclaims against Abell, Wells Fargo's motion will be denied with respect to the fraud claim (Count I), denied **[*102]** with respect to the quiet title claim (Count II), granted with respect to the equitable subrogation claim (Count III), and denied with respect to the unjust enrichment claim (Count IV). With respect to Abell's crossclaim for quiet title against Wells Fargo, Wells Fargo's motion will be denied. Abell's renewed motion for summary judgment will be denied in its entirety. A separate order has been issued on this date.

/s/ JOHN D. BATES

United States District Judge

Dated: June 7, 2012

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[High Tek USA, Inc. v. Heat & Control, Inc.]

United States District Court for the Northern District of California

June 11, 2012, Decided; June 11, 2012, Filed

Case No.: 12-CV-00805 YGR

Reporter

2012 U.S. Dist. LEXIS 80772 *; 2012-1 Trade Cas. (CCH) P77,964; 2012 WL 2120472

HIGH TEK USA, INC., Plaintiff, vs. HEAT AND CONTROL, INC. and DOES 1 through 50, inclusive, Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Count dismissed at, Without prejudice *High Tek USA, Inc. v. Heat & Control, Inc., 2012 U.S. Dist. LEXIS 100538 (N.D. Cal., July 18, 2012)*

Core Terms

alleges, Sherman Act, intentional interference, leave to amend, antitrust, promissory estoppel, tentative ruling, parties, scales, grant a motion, price discrimination, monopolize, promise

Counsel: **[*1]** For High Tek USA, Inc., Plaintiff: Jennifer Randlett Madden, Shaye Nicole Harrington, LEAD ATTORNEYS, Downey Brand LLP, sacramento, CA.

For Heat and Control, Inc., Defendant: Robert Scott Shwarts, Russell P. Cohen, Orrick Herrington & Sutcliffe LLP, San Francisco, CA.

Judges: YVONNE GONZALEZ ROGERS, UNITED STATES DISTRICT COURT JUDGE.

Opinion by: YVONNE GONZALEZ ROGERS

Opinion

NOTICE OF TENTATIVE RULING ON MOTION OF DEFENDANT HEAT AND CONTROL, INC. TO DISMISS, PARTIALLY GRANTING MOTION WITH LEAVE TO AMEND

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE NOTICE OF THE FOLLOWING TENTATIVE RULING ON THE MOTION TO DISMISS SCHEDULED FOR HEARING ON JULY 19, 2012 AT 2:00 P.M.

The Court has reviewed the parties' papers and is inclined to partially grant the motion to dismiss with leave to amend. This is a *tentative* ruling and the parties still have an opportunity to present oral argument. Alternatively, if the parties **JOINTLY** stipulate in writing to entry of the tentative ruling, the hearing shall be taken off calendar, and the tentative ruling shall become the Order of the Court. Otherwise, the hearing shall be continued to June 26, 2012 at 2:00 p.m.

The Court ***TENTATIVELY*** **GRANTS IN PART** and **DENIES IN PART** the Motion **[*2]** of Defendant Heat and Control, Inc. to Dismiss the Complaint **WITH LEAVE TO AMEND** as follows:

I. BACKGROUND

This case involves access to replacement parts for processing, packaging, and weighing equipment used in food production. The Complaint alleges that Defendant Heat and Control, Inc. ("H&C") is the exclusive North America distributor of scales, equipment and parts manufactured by Ishida Co., Ltd. ("Ishida"). Complaint ¶ 8. Plaintiff High Tek USA, Inc. ("High Tek") alleges that its inability to purchase Ishida parts from H&C violates federal antitrust and California unfair competition laws.

High Tek alleges seven causes of action: violations of Sections 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1* & *2* (Counts I and II); price discrimination under the Robinson-Patman Act, *15 U.S.C. § 13* (Count III); and state law claims for Intentional Interference with Contractual Relations (Count IV); Intentional Interference with Prospective Economic Advantage (Count V); Promissory Estoppel (Count VI); and violations of California's Unfair Competition Law, *Cal. Bus. & Prof. Code §§ 17200 et seq.* (Count VII). H&C has moved to dismiss on the grounds that this is a garden-variety business dispute between **[*3]** a parts supplier and its former customer, which the antitrust laws do not reach.

II. LEGAL STANDARD

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. In the antitrust context, "a court must determine whether an antitrust claim is 'plausible' in light of basic economic principles." *William O. Gilley Enters., Inc. v. Atl. Richfield Co., 588 F.3d 659, 662 (9th Cir. 2009)* (citing *Twombly, supra, 550 U.S. at 556*). If the allegations in the complaint fail to give rise to a plausible claim for relief, "'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Twombly, supra, 550 U.S. at 558* (citations omitted).

III. ANALYSIS

A. Section 1 Sherman Act — Contract in Restraint of Trade

As to Count I, alleging a violation of *Section 1* of the Sherman Act, High Tek fails to allege sufficiently each of the required elements of the claim. *Section 1* of the Sherman Act forbids contracts in restraint of trade. [1] To **[*4]** state a *Section 1* Sherman Act claim, the plaintiff must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce; (3) which actually injures competition. *Twombly, supra, 550 U.S. at 548*.

Here, the Complaint identifies H&C's contract with Ishida, which makes H&C the exclusive North America distributor of Ishida parts, but does not allege that either H&C or Ishida entered into the contract for the purpose of harming or restraining commerce. Moreover, as to the third element, the Complaint alleges only the ultimate fact that "the [unspecified] way [H&C] executes **[*5]** those contracts in North America unreasonably restrains trade" without providing any evidentiary fact of injury to competition.

Based on the foregoing analysis, the Court **Grants** the Motion to Dismiss Count I **With Leave To Amend.**

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[1] *15 U.S.C. § 1*. Trusts, etc., in restraint of trade illegal; penalty

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony ...

B. *Section 2* SHERMAN ACT — ILLEGAL MONOPOLY

As to Count II, alleging a violation of *Section 2* of the Sherman Act, Plaintiff fails to plead facts regarding the relevant product market. *Section 2* of the Sherman Act makes it unlawful to monopolize, attempt to monopolize, or combine or conspire to monopolize. [2] To state a cause of action for the offense of monopoly under *Section 2* of the Sherman Act, a plaintiff must plead three elements: (1) the relevant market that defendant has monopolized; (2) possession of monopoly power in that market; and (3) willful acquisition or maintenance of that power through competitively unreasonable means, rather than as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*.

Charges of monopolization can only be judged in the framework of the relevant market, which has two dimensions: the "relevant geographic market" and the "relevant product market." While the parties agree that the relevant geographic market is the United States, they differ on the scope of the "relevant product market." In the Complaint, High Tek alleges that the relevant product market is the purchase of Ishida parts. Complaint ¶ 29. In its Opposition Brief, High Tek adds two additional relevant markets: the aftermarket for refurbished Ishida scales and the aftermarket for servicing Ishida scales. H&C argues that the relevant product market is all food processing scales sold in the United States.

High Tek alleges no facts from which it plausibly could be inferred that the relevant product market is the purchase of Ishida parts (the aftermarket for refurbished Ishida scales and/or the aftermarket for servicing Ishida scales) [3] as opposed to all food processing scales sold in the United States. *See* *Brown Shoe Co. v. United States, 370 U.S. 294, 325-26, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* ("The **[*7]** outer boundaries of a product market are determined by the reasonable interchangeability of use . . . between the product itself and the substitutes for it."); *see also* *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 180, 126 S. Ct. 860, 163 L. Ed. 2d 663 (2006)* ("Interbrand competition, our opinions affirm, is the 'primary concern of ***antitrust law***.'"). This infirmity is fatal to its *section 1* Sherman Act claim. *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)* ("where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist.").

Because High Tek has failed to show a relevant market against which H&C's market power and the anticompetitive effects of its practices can be judged, [4] High Tek has failed to state a *Section 2* Sherman Act claim.

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[2] *15 U.S.C. § 2*. Monopolizing trade a felony; penalty

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize **[*6]** any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony ...

[3] In its Opposition Brief, High Tek attempts to explain why it believes that Ishida parts is the relevant market. For example, it argues that Ishida equipment is the "premium brand," the "gold standard" of weighing and packaging equipment, that Ishida equipment is utilized by a majority of manufacturers and distributors of packaging equipment. Facts not alleged in the Complaint will not prevent dismissal for failure to state a claim. Without deciding whether the additional facts are sufficient to state a *Section 2* Sherman Act claim, the Court will permit High Tek to amend its Complaint to allege additional **[*8]** facts.

[4] The term "monopolize," as used in the federal antitrust laws, means the power either to obtain, or to maintain, the power to remove or exclude competitors from the field of competition in a particular business or industry. Since H&C is the exclusive distributor of Ishida parts, H&C maintains its so-called monopoly power to purchase Ishida parts because of H&C's contract with Ishida to be the exclusive North American distributor for Ishida parts, not because of any of the alleged anticompetitive behavior. Additionally, High Tek's theory, that because it is a competitor that has been harmed, that H&C has harmed competition does not state a claim under the antitrust laws. "[T]he plaintiff here must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself." *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*.

Based on the foregoing analysis, the Court **GRANTS** the Motion to Dismiss Count II **WITH LEAVE TO AMEND.**

C. ROBINSON-PATMAN [*9] ACT CLAIM — PRICE DISCRIMINATION

As to Count III for violation of the Robinson-Patman Act, High Tek fails to allege each of the required elements of the claim. The Robinson-Patman Act of 1936, *15 U.S.C. § 13*, forbids price discrimination when it is apt to have an anticompetitive effect. To state a claim for a violation of *Section 2(a) of the Robinson-Patman Act*, a plaintiff must plead four elements: (1) the relevant sales were made in interstate commerce; (2) the products sold were of the same grade and quality; (3) that H&C discriminated in price as between High Tek and another purchaser; and (4) the discrimination had a prohibited effect on competition. *See* *Texaco Inc. v. Hasbrouck, 496 U.S. 543, 556, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990)*.

The Complaint alleges that H&C required High Tek to pay a 10-20% markup on all Ishida parts — something other companies who were not in direct competition with H&C were not required to pay. Complaint ¶ 15. Thus, High Tek alleges that it was *not* in competition with the purchasers who were allegedly the beneficiaries of the price discrimination. As such, High Tek has failed to state a claim for price discrimination under the Robinson-Patman Act.

Based on the foregoing analysis, the **[*10]** Court **GRANTS** the Motion to Dismiss Count III **WITH LEAVE TO AMEND.**

D. INTENTIONAL INTERFERENCE

As to Counts IV and V for intentional interference with contractual relations and intentional interference with prospective economic advantage, H&C attacks the merits of the claim but does not address the sufficiency of the allegations in the Complaint. The elements for a cause of action for intentional interference with contractual relations and intentional interference with prospective economic advantage essentially are: (1) a contract or other economic relationship between plaintiff and a third party; (2) the defendant's knowledge of the contract or relationship; (3) defendant's intentional acts designed to induce a breach or disrupt the contract or relationship; (4) actual breach or disruption; and (5) damage. *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (Cal. 2003)*; *Quelimane Co. v. Stewart Title Guaranty Co., 19 Cal. 4th 26, 55, 77 Cal. Rptr. 2d 709, 960 P.2d 513 (Cal. 1998)*.

High Tek alleges that its inability to purchase Ishida parts has halted the company's ability to conduct business. Complaint ¶ 20. H&C argues that its decision not to sell High Tek Ishida parts was justified and was not wrongful. **[*11]** Whether H&C's actions were justified or privileged is an evidentiary issue (for which H&C will have the burden of proof), not a pleading issue. As such, H&C has failed to identify a pleading defect in High Tek's intentional interference claims.

The Court **DENIES** the Motion to Dismiss Counts IV and V on this basis.

E. PROMISSORY ESTOPPEL

As to Count VI, High Tek fails to state a claim for promissory estoppel because the Complaint alleges that H&C performed the very promise the High Tek seeks to enforce. The elements for a claim of promissory estoppel are: "'(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.'" *People v. Castillo, 49 Cal. 4th 145, 156 n.10, 109 Cal. Rptr. 3d 346, 230 P.3d 1132 (Cal. 2010)* (quoting *City of Goleta v. Superior Court, 40 Cal. 4th 270, 279, 52 Cal. Rptr. 3d 114, 147 P.3d 1037 (Cal. 2006)*). If the promise sought to be enforced was performed, then the doctrine is inapplicable. *Money Store Inv. Corp. v. S. California Bank, 98 Cal. App. 4th 722, 732, 120 Cal. Rptr. 2d 58 (Cal. Ct. App. 2002)* **[*12]** ("A cause of action for promissory estoppel would be superfluous"). Moreover, because promissory estoppel is an equitable doctrine that provides a substitute for consideration to enforce a promise, if the only claimed reliance is performance of the act bargained for, the doctrine is inapplicable. *See* *Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App. 4th 256, 275, 129 Cal. Rptr. 3d 467 (Cal. Ct. App. 2011)*.

The Complaint alleges that prior to entering into a parts account, H&C required that High Tek remove language from its catalog that stated something to the effect of "High Tek is the best in the industry." Complaint ¶ 14. High Tek alleges that it detrimentally relied upon a promise of a long-term parts account, and made the requested change to its catalog. H&C provided High Tek with a parts account to purchase Ishida parts from early 2007 until December 20, 2011. *Id.* ¶¶ 14-16.

Either adequate consideration was given here, *i.e.*, H&C promised a long-term parts account if High Tek removed certain language from its catalog, or it was rendered moot by H&C's performance of its obligations under the agreement, *i.e.*, H&C granted High Tek a parts account and provided High Tek Ishida parts for four over years. To **[*13]** the extent that High Tek believes that it was entitled to a longer term contract, under California law, any agreement not to be performed within a year must be reduced to writing to be valid. *See* *Cal. Civ. Code § 1624(a)(1)* (statute of frauds).

Based on the foregoing analysis, High Tek has failed to state a claim for promissory estoppel.

F. *California Business and Professions Code §§ 17200 et seq.*

As to Count VII, for violations of California's Unfair Competition Law ("UCL"), *Cal. Bus. Prof. Code. § 17200*, High Tek claims are based upon its federal antitrust claims. California's UCL statute prohibits "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. Prof. Code. § 17200*; *Cel-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (Cal. 1999)*. With respect to Plaintiff's allegations under the unfair prong of the UCL, because High Tek simply borrows from its federal antitrust claims, and because High Tek has failed to adequately plead its antitrust claims, its UCL claim necessarily fails as well. *See* *Ingels v. Westwood One Broad. Servs., Inc., 129 Cal. App. 4th 1050, 1060, 28 Cal. Rptr. 3d 933 (Cal. Ct. App. 2005)*.

Based on the foregoing analysis, the Court **GRANTS** the Motion **[*14]** to Dismiss Count VII **WITH LEAVE TO AMEND.**

IV. CONCLUSION

Therefore, the Court *tentatively* Orders the following:

1) Defendant's Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART.**

2) Counts I, II, III, VI, and VII are **DISMISSED WITH LEAVE TO AMEND.**

3) Plaintiff shall have until July 16, 2012 to file an amended complaint.

No later than **2:00 p.m.** on **Friday, June 15, 2012,** the parties may **JOINTLY** stipulate in writing to entry of this tentative ruling. If the parties so stipulate, then the hearing shall be taken off calendar, and the tentative ruling shall become the Order of the Court. Otherwise, the hearing will take place on Tuesday, June 26, 2012 at 2:00 p.m.

IT IS SO ORDERED.

Date: June 11, 2012

/s/ Yvonne Gonzalez Rogers

YVONNE GONZALEZ ROGERS

UNITED STATES DISTRICT COURT JUDGE

Robert F. Booth Trust v. Crowley

United States Court of Appeals for the Seventh Circuit

May 30, 2012, Argued; June 13, 2012, Decided

No. 10-3285

Reporter

687 F.3d 314 *; 2012 U.S. App. LEXIS 11927 **; 2012-1 Trade Cas. (CCH) P77,931; 82 Fed. R. Serv. 3d (Callaghan) 1017; 2012 WL 2126314

ROBERT F. BOOTH TRUST and RONALD GROSS, derivatively on behalf of SEARS HOLDING CORPORATION, Plaintiffs-Appellees, v. WILLIAM C. CROWLEY, et al., Defendants-Appellees. APPEAL OF: THEODORE H. FRANK, Intervenor.

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 09 C 5314—Ronald A. Guzmán, Judge.

Robert F. Booth Trust v. Crowley, 2010 U.S. Dist. LEXIS 18355 (N.D. Ill., Feb. 26, 2010)

Core Terms

investors, antitrust, settlement, district judge, district court, intervene, derivative suit, interlocking, shareholders

LexisNexis® Headnotes

Business & Corporate Law > ... > Actions Against Corporations > Derivative Actions > Enforcement of Corporate Rights

HN1[] **Derivative Actions, Enforcement of Corporate Rights**

The theory in a derivative suit is that a corporation's board has been so faithless to investors' interests that investors must be allowed to pursue a claim in the corporation's name.

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

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

HN2[] **Private Actions, Standing**

Perpetrators of antitrust offenses lack standing to complain about their own misconduct (which inures to their profit). Under the antitrust-injury doctrine, private antitrust litigation is limited to suits by those persons for whose benefit the laws were enacted.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Interlocking Directorates

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN3[] Clayton Act, Claims

The antitrust-injury doctrine limits which private parties can pursue § 8 of the Clayton Act, *15 U.S.C.S. § 19*, claims.

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

Mergers & Acquisitions Law > Antitrust > Interlocking Directorates

HN4[] Regulated Practices, Market Definition

To resolve a case under § 8 of the Clayton Act, *15 U.S.C.S. § 19*, a district judge must define a market and decide whether a merger between a company and one of the firms interlocked by the directorships would be unlawful.

Business & Corporate Law > ... > Actions Against Corporations > Derivative Actions > Procedural Matters

Civil Procedure > ... > Class Actions > Derivative Actions > Compromise

Civil Procedure > ... > Class Actions > Derivative Actions > Notice of Derivative Action

HN5[] Derivative Actions, Procedural Matters

The settlement of derivative litigation requires notice to other investors, followed by judicial approval, *Fed. R. Civ. P. 23.1(c)*.

Civil Procedure > ... > Class Actions > Derivative Actions > General Overview

Civil Procedure > Parties > Intervention > Intervention of Right

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN6[] Class Actions, Derivative Actions

Under the law of the Seventh Circuit intervention (and thus party status) is essential to an appeal in a derivative suit. An immediate appeal is proper when a district court denies a motion for leave to intervene as of right under *Fed. R. Civ. P. 24(a)*.

Business & Corporate Law > ... > Actions Against Corporations > Derivative Actions > Procedural Matters

Civil Procedure > ... > Class Actions > Derivative Actions > Compromise

HN7[] Derivative Actions, Procedural Matters

Fed. R. Civ. P. 23.1(c) requires judicial approval of settlements in derivative suits precisely because the self-appointed investors may be poor champions of corporate interests and thus injure fellow shareholders. That the plaintiffs say they have other investors' interests at heart does not make it so.

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

Civil Procedure > Parties > Intervention > General Overview

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > ... > Class Actions > Derivative Actions > Compromise

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN8[] Class Actions, Appellate Review

A district judge ought not try to insulate his decisions from appellate review by preventing a person from acquiring a status essential to that review. District judges are to grant intervention freely to persons who want to contest settlements in class actions under Fed. R. Civ. P. 23; that is no less true of derivative actions under Fed. R. Civ. P. 23.1.

Counsel: For ROBERT F. BOOTH TRUST, derivatively on behalf of nominal defendant Sears Holdings Corporation, RONALD GROSS, Plaintiffs - Appellees: Matthew Todd Hurst, Attorney, SUSMAN, HEFFNER & HURST, Chicago, IL; Kenneth J. Vianale, Attorney, VIANALE & VIANALE, Boca Raton, FL.

For THEODORE H. FRANK, Appellant: Theodore H. Frank, Attorney, CENTER FOR CLASS ACTION FAIRNESS, Washington, DC.

For WILLIAM C. CROWLEY, EDWARD S. LAMPERT, STEVEN T. MNUCHIN, RICHARD PERRY, ANN N. REESE, Defendants - Appellees: Paul Vizcarrondo, Attorney, WACHTELL, LIPTON, ROSEN & KATZ, New York, NY.

Judges: Before EASTERBROOK, Chief Judge, and BAUER and POSNER, Circuit Judges.

Opinion by: EASTERBROOK

Opinion

[*316] EASTERBROOK, *Chief Judge*. When Sears, Roebuck & Co. merged with Kmart Corp. in 2005, the holding company formed as the parent (Sears for short) inherited directors from both businesses. This suit concerns two of them: William C. Crowley and Ann N. Reese. Crowley also serves on the boards of AutoNation, Inc., and AutoZone, Inc., and Reese on the board of Jones Apparel Group, Inc. Two of Sears's shareholders **[**2]** contend that the consolidated business competes with those other firms and that §8 of the Clayton Act, 15 U.S.C. §19, forbids the interlocking directorships.

This is a shareholders' derivative action rather than a suit directly under §8. HN1[] The theory in a derivative suit is that a corporation's board has been so faithless to investors' interests that investors must **[*317]** be allowed to pursue a claim in the corporation's name. Sears is incorporated in Delaware, whose law determines whether investors may litigate derivatively on its behalf. See *Kamen v. Kemper Financial Services, Inc., 500 U.S. 90, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991)*. Sears asked the district court to dismiss the suit, observing that Delaware usually allows investors to sue derivatively only if, after a demand for action, the board cannot make a disinterested decision. See *Braddock v. Zimmerman, 906 A.2d 776, 784-85 (Del. 2006)* (collecting authority). The two investors—Robert F. Booth Trust and Ronald Gross—filed this suit without first demanding that the board address the §8 issue. Sears observed that a majority of the board has no stake in the §8 question and can decide where the corporation's interests lie. But the district court refused to dismiss the **[**3]** suit, accepting the investors' assertion that a demand would have been futile. *2010 U.S. Dist. Lexis 18355 (N.D. Ill. Feb. 26, 2010)*.

Later the judge concluded that, despite *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*, and its successors, §8 can be enforced through derivative litigation, even though cooperation with a competitor should benefit the investors. The concern of ***antitrust law***, after all, is that producers will cooperate and raise prices to the detriment of consumers. Higher prices mean lower output and a social loss through misallocation of resources. Yet no consumer has complained about the other directorships held by members of Sears's board, nor has the Department of Justice or the Federal Trade Commission raised an eyebrow. It seems odd to allow investors, who stand to gain if producers with market power cooperate, to invoke an antitrust doctrine that is designed for strangers' benefit. The problem is not only that ***HN2***[] perpetrators of antitrust offenses lack standing to complain about their own misconduct (which inures to their profit), but also that, when such people do invoke the antitrust laws, likely they have other objectives in view. In *Brunswick* **[**4]** the antitrust claim had been used to give one producer an advantage by shuttering a rival, at the expense of customers; the Supreme Court replied that this abuse of ***antitrust law*** must not be tolerated. It created the antitrust-injury doctrine, under which private antitrust litigation is limited to suits by those persons for whose benefit the laws were enacted. See also *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*; *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*.

Plaintiffs rely on *Protectoseal Co. v. Barancik, 484 F.2d 585 (7th Cir. 1973)*, for the proposition that private plaintiffs can enforce §8. We don't doubt this—but *Protectoseal* was not a shareholders' derivative suit, and ***HN3***[] the antitrust-injury doctrine, which the Supreme Court adopted four years after *Protectoseal*, limits which private parties can pursue §8 claims.

Antitrust suits are notoriously costly. See *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557-60, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. ***HN4***[] To resolve a case under §8, a district judge must define a market and decide whether a merger between Sears and one of the firms interlocked by the directorships would be unlawful. After the district judge held that this case must **[**5]** proceed, the investors and Sears proposed a settlement: one of the two contested directors would resign, and the lawyers representing the investors could request as much as $925,000 in fees under a "clear sailing" clause that prohibited Sears from objecting. Perhaps Sears concluded that it was better to jettison one **[*318]** director and pay up to $925,000 in legal fees to opposing counsel than to dig in its heels and pay its own lawyers more than $1 million to defend an antitrust suit. But Theodore H. Frank, another of Sears's investors, thought the settlement a bad deal. It cost the firm cash out of pocket plus a director the shareholders had re-elected in 2009 (four years after the Kmart merger), without eliminating the risk of a later §8 suit by someone else (since one of the two directors would remain).

HN5[] The settlement of derivative litigation requires notice to other investors, followed by judicial approval, see *Fed. R. Civ. P. 23.1(c)*. Frank moved for leave to intervene so that he could oppose the settlement and appeal if necessary—for ***HN6***[] under the law of this circuit intervention (and thus party status) is essential to an appeal in a derivative suit. See *Felzen v. Andreas, 134 F.3d 873 (7th Cir. 1998)*, **[**6]** affirmed by an equally divided Court under the name *California Public Employees' Retirement System v. Felzen, 525 U.S. 315, 119 S. Ct. 720, 142 L. Ed. 2d 766 (1999)*. But the district court denied this motion, stating that Booth Trust and Gross adequately represent Frank's interests. Frank immediately appealed, which is proper when a district court denies a motion for leave to intervene as of right under *Fed. R. Civ. P. 24(a)*. See *Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 70 S. Ct. 322, 94 L. Ed. 299 (1950)*.

After the district judge denied Frank's motion to intervene, it also rejected the proposed settlement, though on grounds that allowed the parties to try again. Plaintiffs have asked us to dismiss the appeal as moot. Yet the case remains pending, and the parties have submitted another settlement for the district judge's approval. Even though the interlocks are gone—Crowley is no longer on Sears's board, and Reese has left the board of Jones Apparel—the prospect of future interlocks prevents the suit from being moot. See *United States v. W.T. Grant Co., 345 U.S. 629, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)*. Frank wants to oppose any settlement (indeed, wants the district court to dismiss the suit) and appeal if one should be approved. Both the merits and the propriety **[**7]** of intervention are live issues. The motion to dismiss is denied.

The district judge's reason for denying Frank's motion to intervene—that Booth Trust and Gross adequately represent his interests—is unsound. Frank's position is entirely incompatible with the stance taken by Booth Trust and Gross. ***HN7***[] *Rule 23.1(c)* requires judicial approval of settlements in derivative suits precisely because the self-appointed investors may be poor champions of corporate interests and thus injure fellow shareholders. That the plaintiffs *say* they have other investors' interests at heart does not make it so. The district judge did not find that plaintiffs are right, and Frank wrong, about where the corporate interest lies. And even if the judge had concluded that the plaintiffs have the better of their dispute with Frank, still the judge should have granted his motion to intervene—for given *Felzen* the only way he can get appellate review is to become a party. ***HN8***[] A district judge ought not try to insulate his decisions from appellate review by preventing a person from acquiring a status essential to that review. In *Crawford v. Equifax Payment Services, Inc., 201 F.3d 877, 881 (7th Cir. 2000)*, we told district **[**8]** judges to grant intervention freely to persons who want to contest settlements in class actions under *Fed. R. Civ. P. 23*; that is no less true of derivative actions under *Rule 23.1*.

Our conclusion that Frank is entitled to intervene makes it unnecessary to decide whether *Felzen* survives *Devlin **[*319]** v. Scardelletti, 536 U.S. 1, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002)*. *Devlin* holds that a member of a class certified under *Rule 23*, who asks the district court not to approve a settlement, need not intervene in order to appeal an adverse decision. Our opinion in *Felzen* gives several reasons why investors in a derivative suit differ from members of a certified class. See *134 F.3d at 875-76*. For example: a class member holds a personal claim for relief, which could be extinguished or cashed out by a settlement; but an investor does not hold any kind of personal stake in a derivative suit. The chose in action belongs to the corporation. Intervention separates an objecting investor from the thousands or even millions of shareholders, bondholders, employees, suppliers, and customers who could be affected, more or less directly, by the resolution of a derivative action.

The Supreme Court affirmed *Felzen* without opinion by a vote of **[**9]** 4-4. *Devlin* was decided by a vote of 6-3. This suggests that one or two Justices see a difference between the Rule 23 situation and the *Rule 23.1* situation. It is thus hard for a court of appeals to be confident that the Supreme Court as a whole would conclude that *Devlin* controls derivative actions as well as class actions. We think it best to leave the status of *Felzen* to another day—a day that, if district judges grant party status to serious objectors as they should, need never arrive.

We could stop at this point and leave the parties to slug it out in the district court, with an appeal by whoever loses (or objects to a settlement). But this litigation is so feeble that it is best to end it immediately, as both Sears and Frank unsuccessfully asked the district judge to do. The only goal of this suit appears to be fees for the plaintiffs' lawyers. It is impossible to see how the investors could gain from it—and therefore impossible to see how Sears's directors could be said to violate their fiduciary duty by declining to pursue it. See *Schechtman v. Wolfson, 244 F.2d 537, 540 (2d Cir. 1957)* (refusing, for this reason, to award attorneys' fees to the plaintiffs in a derivative suit **[**10]** based on a §8 claim).

We have mentioned that Booth Trust and Gross did not make a demand on the directors before filing suit, and that neither plaintiff nor any other investor (in his role as investor) suffers antitrust injury. Plaintiffs say that investors still can gain from this suit, because removing interlocking directors from the board will eliminate any chance that the United States will file a §8 suit to remove them. We don't get it. In order to avoid a *risk* of antitrust litigation, the company should be put through the litigation wringer (this suit) *with certainty* ?! How can replacing a 1% or even a 20% chance of a bad thing with a 100% chance of the same bad thing make investors better off?

Actually, the chance of suit by the United States or the FTC is not even 1%. The national government rarely sues under §8. *Borg-Warner Corp. v. FTC, 746 F.2d 108 (2d Cir. 1984)*, which began in 1978, may be the most recent contested case. See ABA Section of ***Antitrust Law***, I ***Antitrust Law*** *Developments* 425-31 (6th ed. 2007). When the Antitrust Division or the FTC concludes that directorships improperly overlap, it notifies the firm and gives it a chance to avoid litigation (or to convince the **[**11]** enforcers that the interlock is lawful). For more than 30 years, this process has enabled antitrust enforcers to resolve §8 issues amicably-either avoiding litigation or entering consent decrees contemporaneous with a suit's initiation. It is an abuse of the legal system to cram unnecessary litigation down the throats of firms whose directors serve on multiple boards, and then use the high costs of **[*320]** antitrust suits to extort settlements (including undeserved attorneys' fees) from the targets.

Plaintiffs told the district judge that a demand on directors would have been futile—and surely they are right, because, if they had made a demand, conscientious directors acting in investors' interests *would* have nixed this suit. That's a reason to require demand, not to excuse it. The suit serves no goal other than to move money from the corporate treasury to the attorneys' coffers, while depriving Sears of directors whom its investors freely elected. Directors other than Crowley and Reese would not have violated their fiduciary duty of loyalty by concluding that these two directors benefit the firm. Usually serving on multiple boards demonstrates breadth of experience, which promotes competent **[**12]** and profitable management. If the Antitrust Division or the FTC sees a problem, there will be time enough to work it out. Derivative litigation in the teeth of the demand requirement and the antitrust-injury doctrine is *not* the way to handle this subject.

The judgment of the district court is reversed, and the case is remanded with instructions to grant Frank's motion for leave to intervene and to enter judgment for defendants.

End of Document

In re N.J. Title Ins. Litig.

United States Court of Appeals for the Third Circuit

April 19, 2012, Argued; June 14, 2012, Filed

No. 10-3343

Reporter

683 F.3d 451 *; 2012 U.S. App. LEXIS 12057 **; 2012-1 Trade Cas. (CCH) P77,921; 2012 WL 2149471

IN RE: NEW JERSEY TITLE INSURANCE LITIGATION; Edward Lamb; Frances Lamb; Pat Pepe; Olga Pepe; Cynthia Worth; Pearl & Plumeri Associates, LLC; Julie Baier; Ian Kornbluth; Ayanna Pacheco; Terrence Pacheco; Anne Marie Sweeney; Mark Esposito; Christine Esposito, Appellants

Prior History: [1]** On Appeal from the United States District Court for the District of New Jersey. (D.C. No. 2-08-cv-01425). District Judge: Honorable Garrett E. Brown, Jr.

In re N.J. Title Ins. Litig., 2010 U.S. Dist. LEXIS 67273 (D.N.J., July 6, 2010)

Core Terms

rates, filed rate doctrine, antitrust, title insurance, strand, agencies, regulating, nonjusticiability, insurers, courts, damages, nondiscrimination, Sherman Act, implicated, injunctive relief, leave to amend, rate-making, policies, shipper, meaningful review, unreasonably high, discriminatory, imminent, unfairly, approve, cases

Counsel: Katrina Carroll, Joseph J. De Palma (Argued), Mayra V. Tarantino, Newark, NJ; Jeffrey B. Gittleman, Gerald J. Rodos, Barrack, Rodos & Bacine, Philadelphia, PA; Steven J. Greenfogel, Meredith, Cohen, Greenfogel & Skirnick, Philadelphia, PA, Attorneys for Appellants.

Roger B. Kaplan, Kenneth A. Lapatine, Stephen L. Saxl, James I. Serota (Argued), Greenberg Traurig, New York, NY; Kevin J. Arquit, Barry R. Ostrager, Patrick T. Shilling, Simpson, Thacher & Bartlett, New York, NY; Christine I. Gannon, Liza M. Walsh, Connell Foley, Roseland, NJ; Guy V. Amoresao, Gibbons, Newark, NJ; Craig A. Linder, Gibson, Dunn & Crutcher, New York, NY; Joseph N. Froehlich, David G. Greene, Kevin J. Walsh, Locke Lord Bissell & Liddell, New York, NY; Margaret A. Keane, Dewey & LeBoeuf, East Palo Alto, CA; David M. Foster, Fulbright & Jaworski, Washington, DC; Erica A. Reed, Fulbright & Jaworski, New York, NY; Attorneys for Appellees.

Judges: Before: McKEE, Chief Judge, SLOVITER, Circuit Judge and O'CONNOR, Associate Justice (Ret.)*

Opinion by: SLOVITER

Opinion

[*453] OPINION OF THE COURT

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* Hon. Sandra Day O'Connor, Associate **[**2]** Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

SLOVITER, *Circuit Judge*.

In their challenge to New Jersey's title insurance regulations, Appellants would have this court disregard a decision of the United States Supreme Court and the numerous cases that have relied on it. We are not about to do that. Appellants' efforts belong in another venue.

I.

Background

Appellants, title insurance purchasers, on behalf of themselves and similarly situated consumers, appeal the District Court's orders dismissing their state and federal antitrust claims against numerous New Jersey title insurance companies. Appellants claim that the Appellee insurers collectively fixed title insurance rates in violation of the Sherman Act and the New Jersey Antitrust Act. The District Court held that Appellants' complaint is barred by the filed rate doctrine, a lack of standing, and federal and state antitrust liability exemptions.

In New Jersey, the Department of Banking and Insurance ("DOBI") approves and regulates title insurance rates. *See* *N.J. Stat. Ann. § 17:1C-19(a)(1)*. Insurers may collectively file rates for approval with the DOBI through a licensed **[**3]** "rating organization." *Id*. *§ 17:46B-46*. Appellees are members of and file their rates through the New Jersey Land Title Insurance Rating Bureau ("NJTIRB")—a "voluntary association of title insurers" acting under New Jersey law. App. at 31, 74. The NJLTIRB "operates, more or less, as a clearing house for its constituent members by collecting their proposed rates and supporting data and submitting them to the [DOBI]." *In re N.J. Title Ins. Litig., No. 08-1425, 2009 U.S. Dist. LEXIS 92310, 2009 WL 3233529, at *1 (D.N.J. Oct. 5, 2009)*. New Jersey thus specifically "authorize[s] cooperative action between or among title insurance companies in rate making." *N.J. Stat. Ann. § 17:46B-41*.

Once insurers submit rate filings with the DOBI, the Commissioner "shall make such review of the filing as may be necessary to carry out the provisions of [the Title Insurance Act]." *Id*. *§ 17:46B-42(c)*. The Commissioner may approve the rates, *id*. *§ 17:46B-45(a)*, or, after holding a hearing, issue an order disapproving the rates, *id*. *§ 17:46B-45(b)*. Additionally, the Commissioner can only approve rates that "are not unreasonably high, and are not inadequate for the safeness and soundness of the insurer, and are not unfairly discriminatory." **[**4]** *Id*. *§ 17:46B-45(a)*. Once the DOBI issues its approval, each member of the "title insurance rating organization shall adhere to the filings made on its behalf." *Id*. *§ 17:46B-47*. Members, however, can seek to modify their individual rates through a "deviation filing." *Id*. Moreover, aggrieved parties can challenge title insurance rates through an administrative hearing, after which the Commissioner may deem the rates "no longer effective."[1] *Id*. *§ 17:46B-45(c)*.

[*454] On September 19, 2008, Appellants filed a putative class action complaint, alleging that Appellees engaged in collective price fixing in violation of *Section 1* of the Sherman Act and the New Jersey Antitrust Act. Appellants alleged that "[t]hrough NJLTIRB, [Appellees] and their co-conspirators **[**5]** have agreed upon and engaged in concerted efforts to (i) collectively set and charge uniform and supra-competitive rates for title insurance and attendant services in New Jersey, (ii) embed within these title insurance rates payoffs, kickbacks, and other charges that are unrelated to the issuance of title insurance or the business of insurance, and (iii) hide these . . . 'costs' from regulatory scrutiny by funneling them to and through title agents." App. at 42, 44. Appellants sought immediate injunctive relief and treble damages.

[1] Specifically, *N.J. Stat. Ann. § 17:46B-45(c)* provides that "[a]ny person or organization aggrieved with respect to any filing which is in effect, may make written application to the commissioner for a hearing thereon," which the commissioner will review to determine if a hearing is necessary. *Id*. at *§ 17:46B-45(c)*. At oral argument, Appellants admitted that they have not challenged the Appellees' title insurance rates in a formal administrative hearing.

The District Court dismissed Appellants' complaint under *Fed. R. Civ. P. 12(b)(6)* but granted Appellants leave to amend their claims. Specifically, the Court concluded that Appellants' claims are barred by the filed rate doctrine, which precludes antitrust suits based on rates currently filed with federal or state agencies. *See* *In re N.J. Title Ins. Litig., 2009 U.S. Dist. LEXIS 92310, 2009 WL 3233529, at *3*. On November 4, 2009, Appellants filed a nearly identical amended complaint which the Court also dismissed under *12(b)(6)*. *See* *In re N.J. Title Ins. Litig., No. 08-1425, 2010 U.S. Dist. LEXIS 67273, 2010 WL 2710570, at *1 (D.N.J. July 6, 2010)*. The Court held that: (1) Appellants lack standing to seek injunctive **[**6]** relief under Article III of the Constitution and *Section 16* of the Clayton Act; (2) Appellants' Sherman Act claim is barred by the McCarran-Ferguson Act's antitrust exemption; (3) Appellants' New Jersey Antitrust Act claim is barred by *N.J. Stat. Ann. § 56:9-5(b)(4)*'s antitrust exemption; and (4) the subsequent amendment of Appellants' complaint would be futile. Plaintiffs appeal.

II.

Discussion

The District Court had jurisdiction pursuant to *28 U.S.C. §§ 1331* and *1367*. This court has appellate jurisdiction under *28 U.S.C. § 1291* and reviews *de novo* the District Court's dismissal of Appellants' initial and amended complaints. *Utilimax.com, Inc. v. PPL Energy Plus, LLC, 378 F.3d 303, 306 (3d Cir. 2004)*. In addition, we review the District Court's refusal to grant Appellants leave to amend their final complaint for abuse of discretion. *Shane v. Fauver, 213 F.3d 113, 115 (3d Cir. 2000)*.

A. *The Filed Rate Doctrine*

Courts often trace the filed rate doctrine to *Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922)*. In that case, a shipper alleged that certain railroad carriers conspired to fix freight transportation rates in violation of the Sherman Act. *Id. at 160-61*. **[*455]** The shipper **[**7]** sought damages based on the unusually high rates. *Id*. The Supreme Court, however, denied the shipper's claim because the carriers had been authorized to charge the challenged rates by the Interstate Commerce Commission ("ICC"). *Id. at 162*. The Court reasoned that it would be improper to hold carriers civilly liable for enforcing rates that the ICC had already approved as legal. *Id. at 162-63*. In addition, the Court expressed a concern for rate discrimination, stating that the shipper's potential damages "might, like a rebate, operate to give him a preference over his trade competitors." *Id. at 163*. Finally, the Court considered the impracticability of awarding damages based on a lower hypothetical rate, which would require "reconstituting the whole rate structure"— a task that the Court viewed the ICC as more competent to handle. *Id. at 164* ("[I]t is the Commission which must determine whether a rate is discriminatory [*i.e*., legal]; at least, in the first instance.").

The filed rate doctrine stood undisturbed by the Supreme Court for almost three quarters of a century when the Court re-examined the doctrine in *Square D Co. v. Niagara Frontier Tariff Bureau Inc., 476 U.S. 409, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986)*. **[**8]** There, various corporations alleged that the respondents conspired with their rate making bureau to fix freight transportation rates in violation of the Sherman Act. *Id. at 410-11*. The petitioners sought treble damages based on the fixed rates. *Id. at 410*. They argued that "unlike *Keogh*, respondents' rates . . . were not challenged in a formal ICC hearing," thus claiming that the agency's approval was insufficient to trigger the filed rate doctrine. *Id. at 417*; *see also id*. at n.19. Rejecting that argument, the Court reasoned that respondents' rates were "duly submitted, lawful rates under the Interstate Commerce Act in the same sense that the rates filed in *Keogh* were lawful." *Id. at 417*. Therefore, the Court concluded that the petitioners cannot bring a treble-damages antitrust action. *See* *id. at 417, 424*. Moreover, the Court approvingly quoted the Second Circuit's interpretation of *Keogh*:

> "Rather than limiting its holding to cases where, as in *Keogh*, rates had been investigated and approved by the ICC, the [*Keogh*] Court said broadly that shippers could not recover treble-damages for overcharges whenever tariffs have been filed."

Id. at 417 n.19 (quoting Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 760 F.2d 1347, 1351 (2d Cir. 1985)).

This **[**9]** court has recognized that the filed rate doctrine "bars antitrust suits based on rates that have been filed and approved by federal agencies." Utilimax.com, 378 F.3d at 306. Other courts of appeals have also extended the doctrine to rates filed with state agencies. *See, e.g.,* Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 20 (2d Cir. 1994) ("[C]ourts have uniformly held, and we agree, that the rationales underlying the filed rate doctrine apply equally strongly to regulation by state agencies."); H.J. Inc. v. NW. Bell Tel. Co., 954 F.2d 485, 494 (8th Cir. 1992) ("[W]e see no reason to distinguish between rates promulgated by state and federal agencies."). Moreover, although the doctrine "has its origins in . . . cases interpreting the Interstate Commerce Act," it "has been extended across the spectrum of regulated utilities." Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981).

Appellants argue that the filed rate doctrine does not preclude their antitrust claims because those claims do not implicate the doctrine's underlying policies. Although we have not previously outlined the policies underlying the filed rate doctrine, the Court of Appeals for the Second Circuit has explained that the **[**10]** doctrine is designed to advance two "companion principles": (1) "preventing carriers from engaging in price discrimination as between ratepayers," and (2) "preserving the exclusive role of . . . agencies in approving rates . . . by keeping courts out of the rate-making process," a function that "regulatory agencies are more competent to perform." Marcus v. AT&T Corp., 138 F.3d 46, 58 (2d Cir. 1998). These "companion principles" are often called the "nondiscrimination strand" and the **[*456]** "nonjusticiability strand." Id. The "nonjusticiability strand" recognizes that "(1) legislatively appointed regulatory bodies have institutional competence to address rate-making issues; (2) courts lack the competence to set . . . rates; and (3) the interference of courts in the rate-making process would subvert the authority of rate-setting bodies and undermine the regulatory regime." Sun City Taxpayers' Assoc. v. Citizens Utils. Co., 45 F.3d 58, 62 (2d Cir. 1995). The "nondiscrimination strand" recognizes that "victorious plaintiffs would wind up paying less than non-suing ratepayers." Wegoland Ltd., 27 F.3d at 21.

The policies underlying the filed rate doctrine are also reflected in Supreme Court precedent. **[**11]** In Montana-Dakota Utilities Co. v. Northwestern Public Service Co., for example, the Court refused to grant relief to a petitioner who claimed that its predecessor company had paid unreasonably high electric rates to the respondent. 341 U.S. 246, 247-48, 71 S. Ct. 692, 95 L. Ed. 912 (1951). Addressing the issue of damages, the Court stated that "the problem is whether it is open to the courts to determine what the reasonable rates during the past should have been." Id. at 251. Although the Court did not explicitly mention the filed rate doctrine, it relied on the nonjusticiability principle to deny relief, concluding that "reduc[ing] the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the [Agency] Commission." Id.

In Arkansas Louisiana Gas Co., on the other hand, the Court relied heavily on the nondiscrimination strand to deny relief. 453 U.S. at 571. There, the plaintiffs, natural gas producers, sued a customer to recover an unfiled gas rate under the parties' purchase agreement. Id. at 573-74. The parties' agreement contained a "favored nations clause," which allowed the plaintiffs to charge the defendant at a rate higher than the filed rate if the defendant ever **[**12]** "purchased . . . gas from another party at a rate higher than the one it was paying [the plaintiffs]." Id. at 573. Relying on the filed rate doctrine, the Court recognized that "'[t]he considerations underlying the doctrine . . . are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant.'" Id. at 577-78 (quoting City of Cleveland v. Fed. Power Comm'n, 525 F.2d 845, 854, 174 U.S. App. D.C. 1 (D.C. Cir. 1976)). The Court denied plaintiffs' requested relief, however, specifically because awarding damages based on "a rate never filed . . . and thus never found to be reasonable" would "undermine the congressional scheme of uniform rate regulation." Id. at 579.

As a preliminary matter, Appellants argue that the District Court erred by concluding that "the mere filing and approval of rates with a regulating agency" triggers the filed rate doctrine. Appellant's Br. at 11. According to Appellants, that approach is only proper where *stare decisis* requires the doctrine's application to the regulatory scheme at issue. *See id*. at 12-13. Thus, before extending the doctrine to a "new **[**13]** regulatory context"—i.e., New Jersey title insurance—Appellants argue that the District Court should have determined whether the doctrine's underlying policies are implicated. *Id*. at 11-14. Yet Appellants offer no authority showing that those policies are elements in determining whether to extend the doctrine to new areas. The Supreme Court has indicated that the doctrine applies whenever rates are properly filed with a regulating agency. *Compare* Square D Co., 476 U.S. at 422 (applying the doctrine **[*457]** to rates governed by the Interstate Commerce Act and noting that "*Keogh* simply held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation"), *with* Ark. La. Gas Co., 453 U.S. at 577 (extending the doctrine to rates governed by the Natural Gas Act because they were "properly filed with the appropriate federal regulatory authority"). Furthermore, the Second Circuit has held that "the doctrine is applied strictly . . . whenever *either* the nondiscrimination strand or the nonjusticiability strand . . . is implicated." Marcus, 138 F.3d at 59 (emphasis added).

Appellants **[**14]** argue that this action does not implicate the nonjusticiability strand because it does "not second-guess any ratemaking determination made by the DOBI." Appellants' Br. at 14. They alleged in their complaint that the DOBI has neither "actively supervised the Defendants' collective rate setting scheme" nor "subjected the Defendants to any analysis designed to determine whether [their] filed rates for title insurance and attendant services conformed to . . . statutory requirements." App. at 81. Appellants therefore claim that the doctrine's policy of deferring to agency rate-making expertise (*i.e*., nonjusticiability) is irrelevant because the DOBI did not exercise any "meaningful review" of the challenged rates. *See* Appellants' Br. at 15.

Appellees counter that the nonjusticiability strand is "actually . . . grounded in concerns about the institutional competence of federal courts to set rates," not "the expertise of state regulatory agencies." Appellees' Br. at 21-22. Thus, they contend that the policy is applicable in this case because Appellants requested the District Court to award damages based on the rates that "would have been paid in the absence of . . . antitrust violations." **[**15]** *Id*. at 23 (quoting Am. Compl. at ¶ 69, App. at 45). Moreover, Appellees argue that *Square D* rejected the idea that the filed rate doctrine only applies if an agency conducts "meaningful review" of the challenged rates. *Id*. at 24.

Appellants' argument is meritless because the nonjusticiability strand recognizes that federal courts are ill-equipped to engage in the rate making process, which does not depend on whether agencies actually use their superior expertise. *See, e.g.,* Montana-Dakota Utils. Co., 341 U.S. at 251 (finding that it is not "open to the courts to determine what the reasonable rates during the past should have been"); Sun City Taxpayers' Assoc., 45 F.3d at 62 ("[C]ourts lack the competence to set utility rates. . . ."); Wegoland Ltd., 27 F.3d at 21 ("Courts are simply ill-suited to systematically second guess the regulators' decisions and overlay their own resolution."). Indeed, Appellants argue that "[t]here is no reason a court cannot determine what [rates] the DOBI would have approved since it does nothing but rubber stamp rates filed by [Appellees]" but, at the same time, suggest that the District Court should have determined what the "competitive rates" would have **[**16]** been in order to award damages. Appellants' Reply Br. at 9. Therefore, even accepting Appellants' logic, their antitrust claims would require the District Court to determine the reasonable rate absent the alleged conspiracy—"a function that . . . regulatory agencies are more competent to perform." Marcus, 138 F.3d at 58. Additionally, to the extent that the justiciability principle is aimed at "preserv[ing] . . . the agency's primary jurisdiction over reasonableness of rates," Hall, 453 U.S. at 577-78, the adjudication of Appellants' complaint would intrude upon that jurisdiction because it challenges rates that the DOBI has already approved as "not unreasonably high . . . or unfairly discriminatory." N.J. Stat. Ann. § 17:46B-45(a).[2]

[*458] Appellants seek to reinforce their argument that the nonjusticiability strand is only implicated where agencies have meaningfully reviewed the challenged rate by relying on Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992). In that case, consumers alleged that various title insurance companies conspired to "fix price levels

[2] Although Appellants state in their complaint that the DOBI has not obtained the type of data necessary to determine whether Appellees' title insurance rates "conformed to . . . statutory requirements," App. at 81, they nonetheless concede that the DOBI approved Appellees' rates, *see* App. at 82. Under New Jersey law, such approval necessarily requires a determination that the rates are "not unreasonably high, and are not inadequate for the safeness and **[**17]** soundness of the insurer, and are not unfairly discriminatory." N.J. Stat. Ann. § 17:46B-45(a); *see also* N.J. Builders Ass'n v. Sheeran, 168 N.J. Super. 237, 402 A.2d 956, 961 (N.J. Super. Ct. App. Div. 1979) (noting that N.J. Stat. Ann. § 17:46B-45 evidently requires the DOBI Commissioner to conduct "some degree" of fact-finding).

for title search and examination services." *Id. at 387*. Although the insurers filed their rates with regulating agencies, the relevant statutory schemes required "only 'non-disapproval' of the rates" before they became effective "and d[id] not require compliance with strict guidelines." *Id. at 394*. The court therefore observed that if the challenged rates "were **[**18]** the product of unlawful activity prior to their being filed and were not subjected to meaningful review by the state, then the fact that they were filed does not render them immune from challenge." *Id.* Furthermore, the court reasoned that "[t]he absence of meaningful state review allows the insurers to file any rates they want." *Id.* Thus, it concluded that "the act of filing does not legitimize a rate arrived at by improper action" and refused to apply the filed rate doctrine. *Id.*

Appellants' reliance on *Brown* is unpersuasive. *Brown* adopts a particularly narrow and unprecedented view of the filed rate doctrine. The regulatory schemes at issue in *Brown* also required only "non-disapproval" of the challenged rates, and it is unclear from the court's opinion whether the regulating agencies had to conduct any review of the rates at all. Here, by contrast, the DOBI affirmatively approved Appellees' insurance rates and was legally required to do so before the rates became effective. *See N.J. Stat. Ann. § 17:46B-45(a)*. Under New Jersey law, the DOBI is required to review filings to make sure they "produce rates that are not unreasonably high, . . . are not inadequate for the safeness and soundness **[**19]** of the insurer, and are not unfairly discriminatory." *Id*. Accordingly, even if *Brown* adopted a "meaningful review" standard for applying the doctrine, the DOBI would easily meet that requirement, as it: (1) affirmatively approved the challenged rates, and (2) was required to review the rates before issuing its approval. Finally, given Appellants' policy argument, their reliance on *Brown* seems misplaced because the Ninth Circuit's opinion does not mention the nonjusticiability or nondiscrimination strands.

The Supreme Court moreover has rejected the notion that agencies must "meaningfully review" rates under the filed rate doctrine. In *Square D*, the petitioners argued that the doctrine should not bar their antitrust claim because the ICC did not conduct a hearing before approving the disputed rates. *Square D Co., 476 U.S. at 417 n.19*. The Court, however, clarified that *Keogh* is not limited to situations where rates "'had been investigated and approved by the ICC,'" but applied "'whenever tariffs have been filed.'" *Id*. (quoting *Square D Co., 760 F.2d at 1351*); *see also Montana-Dakota Utils. Co., 341 U.S. at 251* (holding that the petitioner "can claim **[*459]** no rate as a legal right . . . other **[**20]** than the filed rate, whether fixed or merely accepted by the [Agency] Commission"). Similarly, other courts of appeals have held that the filed rate doctrine does not require "meaningful" agency review. *Goldwasser v. Ameritech Corp., 222 F.3d 390, 402 (7th Cir. 2000)* (rejecting the argument that the doctrine should not apply if reviewing agencies "rarely exercise their muscle and thus give no meaningful review to the rate structure"); *Town of Norwood v. New Eng. Power Co., 202 F.3d 408, 419 (1st Cir. 2000)* ("It is the *filing* of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine."). Accordingly, the nonjusticiability strand fully supports the District Court's application of the filed rate doctrine in this case.

Appellants claim that their action does not implicate the doctrine's nondiscrimination strand because it "has been brought on behalf of all those similarly situated to the named Plaintiffs, thus eliminating any discrimination issues." Appellants' Br. at 17. Appellees, on the other hand, argue that the nondiscrimination policy is relevant because "not every [title insurance] purchaser will necessarily become a member of **[**21]** the class or obtain recovery," and "some class members may opt out, while others may fail to receive actual notice or may be excluded from the class." Appellees' Br. at 28.

Various courts have recognized that class-actions reduce discrimination concerns. In *Square D*, for instance, the Supreme Court indicated that "the development of class actions . . . might alleviate the . . . concern about unfair rebates" and seems to undermine some of the reasoning supporting the filed rate doctrine. *476 U.S. at 423*. Similarly, the Second Circuit has noted that "concerns for discrimination are substantially alleviated in [a] putative class action." *Wegoland Ltd., 27 F.3d at 22*. Thus, Appellants are correct that their action does not clearly impact the doctrine's nondiscrimination strand. However, we hold that the nonjusticiability policy alone warrants the doctrine's application to Appellants' treble damages Sherman Act and New Jersey Antitrust Act claims.[3] *See* Marcus, 138 F.3d at 59 (noting that the doctrine applies strictly "whenever either the nondiscrimination strand or the nonjusticiability strand . . . is implicated").

This result is also appropriate under New Jersey law. *See* Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 701 (3d Cir. 1993) ("Federal courts that decide state law claims are required to apply the substantive law of the state whose laws govern the action." (internal quotation marks and citation omitted)); *see also* Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 992-93 (9th Cir. 2000) (applying state law in rejecting application of the filed rate doctrine to cases involving rates set by state agencies).

Appellants argue that New Jersey precedent, particularly Richardson v. Standard Guaranty Ins. Co., 371 N.J. Super. 449, 853 A.2d 955 (N.J. Super. Ct. App. Div. 2004), does not support the doctrine's application to their New Jersey Antitrust Act claim. In Richardson, the plaintiff alleged that the sales practices of various credit card and insurance companies fraudulently induced her to purchase several insurance policies. Id. at 961. The court held that the plaintiff's action—which **[**23]** alleged, inter alia, that the defendants had "unfairly or inaccurately **[*460]** calculated premiums"—was barred by the filed rate doctrine. Id. As Appellants point out, the court indicated that the "under-enforcement of ratemaking regulations may constitute a basis for a less rigorous application of the filed rate doctrine." Id. at 964. The court, however, emphasized that the statutory framework at issue required the rate regulator (the DOBI) to "examine [rate] filings for their fairness and their ability to disclose terms relevant to consumers." Id. Thus, the court ultimately concluded that "the filed rate doctrine should be applied." Id. at 965.

Relying on Richardson, Appellants argue that the filed rate doctrine should not bar their state claim because New Jersey's title insurance regulations are under-enforced. More specifically, they claim that "the DOBI has not enacted a single regulation [governing title insurance], despite a Legislative mandate to do so." Appellants' Br. at 43-44. Even assuming those allegations to be true, Appellants' argument is unpersuasive. In particular, the regulations in Richardson required credit insurers to file policy rates with the DOBI and required the Commissioner **[**24]** to review those rates for excessiveness. 853 A.2d at 964. A similar regulatory scheme is present here, since insurers must file their rates with the DOBI, *see* N.J. Stat. Ann. § 17:46B-42(a), and the DOBI must review those rates to ensure that they are not "unreasonably high" or "unfairly discriminatory," *see id*. § 17:46B-45(a). Accordingly, state law does not preclude the doctrine's application to Appellants' New Jersey Antitrust Act claim.[4]

B. *Standing to Sue*

Appellants contend that the District Court erred by dismissing their injunctive relief claims[5] under Article III of the Constitution and Section 16 of the Clayton Act for lack of standing.[6] "Section 16 of the Clayton Act, which authorizes injunctive relief **[**25]** in private antitrust cases, focuses on 'threatened loss or damage' resulting from a violation of the antitrust laws, and it authorizes an injunction when and under the same conditions as injunctions are granted by 'courts of equity.'" Weiss v. York Hosp., 745 F.2d 786, 829 (3d Cir. 1984) (footnote and citations

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[3] It is well established that the filed rate doctrine can serve as a defense **[**22]** against both federal and state actions. *See, e.g.,* Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 228, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998) (holding that the "respondent's state-law claims are barred by the filed rate doctrine").

[4] Appellants also argue that "the filed rate doctrine has been the subject of sustained criticism by the [New Jersey] courts and has *never* been applied to the New Jersey title insurance regulatory regime." Appellants' Br. at 40. However, as the District Court correctly noted, New Jersey courts have recently affirmed the vitality of the filed rate doctrine. *See, e.g.,* Richardson, 853 A.2d at 963 ("[T]he doctrine maintains a substantial role in administrative ratemaking . . . .").

[5] Appellants sought, inter alia, a "final injunction . . . enjoining Defendants **[**26]** from engaging in collective rate setting with regard to all future title insurance rate filings with the Department of Insurance." App. at 86.

[6] As the District Court recognized, the filed rate doctrine does not bar injunctive relief claims against future rates. *See* Square D. Co., 476 U.S. at 422 & n.28 (noting that the filed rate doctrine specifically precludes antitrust claims for treble damages).

omitted). To establish standing under *Section 16*, Appellants must "demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. Similarly, to establish Article III standing, Appellants must show: "(1) injury-in-fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, **[*461]** that the injury will be redressed by a favorable decision." *Danvers Motor Co., Inc. v. Ford Motor Co., 432 F.3d 286, 290-91 (3d Cir. 2005)*.

Appellants argue that they have standing to pursue their Sherman Act and New Jersey Antitrust Act injunctive relief claims because Appellees' "collusion has deprived, and will continue to deprive [them] of the benefits of free, open and unrestricted competition" in the title insurance market. Appellants' Br. at 31-32. Further, Appellants argue that their injuries are imminent and thus confer standing because: (1) New Jersey requires Appellees to file any new rates with the DOBI; and (2) "people who have already purchased real estate are most likely to do so again and . . . homeowners, on average, change residence every seven years."[7] *Id*. at 36. Appellees, on the other hand, argue that Appellants lack standing because they have not alleged that "any new rate submission to the DOBI by NJLTIRB **[**27]** is imminent, [or] that any particular Plaintiff will purchase title insurance in the future." Appellees' Br. at 46.

Appellants do not have standing because they have failed to allege **[**28]** any impending injury. In their complaint, Appellants alleged that:

> (a) price competition in the sale of title insurance and attendant services has been and will be suppressed, restrained and eliminated;
> (b) prices for title insurance and attendant services have been and will be raised, fixed, maintained and stabilized at artificially high and non-competitive levels; and,
> (c) purchasers of title insurance have been and will be deprived of the benefit of free and open competition.

App. at 85. However, as the District Court correctly observed, Appellants did not allege that Appellees have collectively "filed new proposed insurance rates" or "intend to do so in the near future." *In re N.J. Title Ins. Litig., 2010 U.S. Dist. LEXIS 67273, 2010 WL 2710570, at *6*. Additionally, Appellants did not assert that they intend to re-purchase title insurance. Although they emphasize that New Jersey law requires insurers to file new rates with the DOBI, that mandate does not make their claims any less speculative because it does not indicate when Appellees will file new rates. Likewise, Appellants' claim that home owners generally relocate every seven years does not show that any Appellant plans to buy title insurance in the future, **[**29]** thus failing to raise their claims above the speculative level. Therefore, Appellants have neither established "actual or imminent" injury-in-fact under Article III, *Danvers Motor Co., 432 F.3d at 291*, nor an "impending violation of the antitrust laws" under the Clayton Act.[8] *Zenith Radio Corp., 395 U.S. at 130*.

[*462] C. *Dismissal with Prejudice*

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[7] Appellants must establish standing based on future harm, since their previous title insurance purchases do not constitute a continuing injury. As the District Court held, the existing rates do not constitute a cognizable legal injury under the filed rate doctrine. *Keogh, 260 U.S. at 163* (stating that "[u]nless and until suspended or set aside, th[e filed] rate is made, for all purposes, the legal rate"); *see also* *Wegoland Ltd., 27 F.3d at 18* ("[T]he doctrine holds that any 'filed rate' . . . is per se reasonable and unassailable in judicial proceedings brought by ratepayers."). Thus, Appellants must establish standing based on the possibility of future unfair rates. *See* Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law**: An Analysis of Antitrust Principles and Their Application* ¶ 247d (3d ed. 2006) ("[T]here is no reason to think *Keogh* would prohibit an injunction against an antitrust violation attending some tariff that would or might be filed in the future. Such a tariff has not been 'filed' at all.").

[8] Because Appellants lack standing to pursue their claims, we will not reach their arguments that the District Court erred by concluding that Appellants' injunctive relief claims are barred by the McCarran-Ferguson Act and *N.J. Stat. Ann. § 56:9-5(b)(4)* antitrust liability exemptions.

Finally, Appellants argue that if they lack standing, we must hold that the District Court abused its discretion by denying them leave to amend their complaint and "substitute an appropriate plaintiff." Appellants' Br. at 37-38. *Federal Rule of Civil Procedure 15(a)(2)* provides that courts "should freely give leave [to amend] when justice so requires." Further, this court has "held that even when a plaintiff does not seek leave to amend, if a complaint is vulnerable to 12(b)(6) dismissal, a District Court must permit a curative amendment, unless an amendment would be inequitable **[**30]** or futile." *Alston v. Parker, 363 F.3d 229, 235 (3d Cir. 2004)*.

The District Court did not abuse its discretion by denying Appellants leave to amend their complaint. Appellants lack standing to assert their injunctive relief claims specifically because there is no imminent threat that the NJTIRB will file future rates. Thus, even if Appellants substituted a plaintiff with concrete plans to purchase title insurance, s/he would still lack standing—thus making the amendment of Appellants' complaint futile.[9] The District Court therefore did not abuse its discretion by dismissing Appellants' action with prejudice.

III.

Conclusion

For the foregoing reasons, we will affirm the District Court's orders.

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[9] Although the District Court dismissed Appellants' complaint with prejudice because "the McCarran-Ferguson Act and *N.J. Stat. Ann. § 56:9-5(b)(4)* bar [Appellants'] federal and state antitrust claims," *In re N.J. Title Ins. Litig., 2010 U.S. Dist. LEXIS 67273, 2010 WL 2710570, at *12*, we may affirm the District Court's decision on different grounds. *See* *Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 904 n.1 (3d Cir. 1997)*.

McCray v. Fid. Nat'l Title Ins. Co.

United States Court of Appeals for the Third Circuit

April 19, 2012, Argued; June 14, 2012, Filed

No. 10-3576

Reporter

682 F.3d 229 *; 2012 U.S. App. LEXIS 12059 **; 2012-1 Trade Cas. (CCH) P77,922; 2012 WL 2149489

DAWN A. MCCRAY; WILLIAM H. WILLIAMSON; DARALICE GRAYO, on behalf of themselves and all others similarly situated, Appellants v. FIDELITY NATIONAL TITLE INSURANCE COMPANY; CHICAGO TITLE INSURANCE COMPANY; TICOR TITLE INSURANCE COMPANY; TICOR TITLE INSURANCE COMPANY OF FLORIDA; SECURITY UNION TITLE INSURANCE COMPANY; FIDELITY NATIONAL FINANCIAL INC.; FIRST AMERICAN TITLE INSURANCE COMPANY; UNITED GENERAL TITLE INSURANCE COMPANY; TA TITLE INSURANCE COMPANY; CENSTAR TITLE INSURANCE COMPANY; FIRST AMERICAN CORPORATION; COMMONWEALTH LAND TITLE INSURANCE COMPANY; LAWYERS TITLE INSURANCE COMPANY; TRANSNATION TITLE INSURANCE CORPORATION; LANDAMERICA FINANCIAL GROUP INC.; STEWART TITLE GUARANTY COMPANY; STEWART INFORMATION SERVICES CORPORATION; OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY; OLD REPUBLIC INTERNATIONAL CORPORATION; DELAWARE TITLE INSURANCE RATING BUREAU

Subsequent History: US Supreme Court certiorari denied by, Motion granted by *McCray v. Fid. Nat'l Title Ins. Co., 2013 U.S. LEXIS 1519 (U.S., Feb. 19, 2013)*

Prior History: **[**1]** On Appeal from the United States District Court for the District of Delaware. (D.C. No. 1-08-cv-00775). District Judge: Honorable Stewart Dalzell.

McCray v. Fid. Nat'l Title Ins. Co., 2010 U.S. Dist. LEXIS 76616 (D. Del., July 29, 2010)

Core Terms

rates, filed rate doctrine, title insurance, antitrust, district court, insurers, injunctive relief, regulations, strand, nonjusticiability, damages, filings, agencies, courts, bureau, costs, interstate commerce, prospective loss, Sherman Act, defendants', disapproved, rate-making, implicate, carriers, expenses, cases, void

Counsel: Steven J. Greenfogel, Meredith, Cohen, Greenfogel & Skirnick, Philadelphia, PA; Richard M. Hagstrom (Argued), Zelle, Hofmann, Voelbel & Mason, Minneapolis, MN; John S. Spadaro, Hockessin, DE; David R. Woodward, Heins, Mills & Olson, Minneapolis, MN, Attorneys for Appellants.

Kevin J. Arquit, Barry R. Ostrager (Argued), Patrick T. Shilling, Simpson, Thacher & Bartlett, New York, NY; David A. Felice, Ballard Spahr, Wilmington, DE; Darryl J. May, Ballard Spahr, Philadelphia, PA; Brian T. Feeney, Greenberg Traurig, Philadelphia, PA; Kenneth A. Lapatine, Stephen L. Saxl, James I. Serota, Greenberg Traurig, New York, NY; David M. Foster, Fulbright & Jaworski, Washington, DC; Basil C. Kollias, Cooch & Taylor, Wilmington, DE; John D. Balaguer, White & Williams, Wilimington, DE; David G. Greene, Kevin J. Walsh, Locke Lord, New York, NY; Peter J. Duhig, Buchanan Ingersoll & Rooney, Wilmington, DE; Jennings F. Durand, Carolyn H. Feeney, Dechert, Philadelphia, PA; Jayson R. Wolfgang, Buchanan Ingersoll & **[**2]** Rooney, Harrisburg, PA, Attorneys for Appellees.

Judges: Before: McKEE, Chief Judge, SLOVITER, Circuit Judge and O'CONNOR, Associate Justice (Ret.)[*].

Opinion by: SLOVITER

Opinion

[*233] OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

Appellants' challenge to the Delaware title insurance program trenches on the challenge raised by other parties to the New Jersey title insurance program, a challenge that we rejected today in our opinion in *In Re: New Jersey Title Insurance Litigation*. The same result follows here to the extent the analysis set forth here unavoidably duplicates that in *In Re: New Jersey Title Insurance Litigation*.

I.

Background

Dawn McCray, William Williamson and Daralice Grayo ("Appellants"), on behalf of themselves and similarly situated consumers, appeal the District Court's orders dismissing their federal antitrust claims against numerous Delaware title insurance companies ("Appellees"). Appellants assert that Appellees fixed the prices of title insurance in Delaware in violation of the Sherman Act and seek treble damages and injunctive relief. The District Court held that Appellants' claims **[**3]** are barred by the filed rate doctrine and the McCarran-Ferguson Act. We will affirm the District Court's judgment with respect to the filed rate doctrine and hold that Appellants lack standing to seek injunctive relief.

Title insurers in Delaware are required to file their insurance rates with the state's Department of Insurance ("DOI"). *See Del. Code Ann. tit. 18, § 2504(a)* (2012). Insurers may comply with the state's rate **[*234]** filing requirements through a licensed rating organization. *Id*. *§§ 2510-12*. Appellee title insurers are members of and file their rates through the Appellee Delaware Title Insurance Rating Bureau ("DTIRB" or "the bureau"), which is licensed by the DOI. "DTIRB claims to obtain, compile, and analyze statistical data from its members relating to their title insurance premiums, losses and expenses." J.A. at 216.

Delaware insurers must propose their own "effective date" for new insurance rates. Tit. 18, *§ 2504(a)*. However, they must file those rates with the DOI Commissioner "not less than 30 days prior to the proposed effective date." *Id*. *§ 2506(c)*. The Delaware Code requires the Commissioner to "review filings as soon as reasonably possible." *Id*. *§ 2506(a)*. The Commissioner **[**4]** must consider various factors to determine whether the rates comport with the law and ensure that the rates are not "excessive, inadequate or unfairly discriminatory." *Id*. *§ 2503(a)*. Filings "shall be deemed to meet the statutory requirements unless disapproved by the Commissioner within 30 days." *Id*. *§ 2506(c)*. If the Commissioner determines that "additional time is needed to review a rate filing," s/he "shall . . . notify the filer that the review . . . shall be extended" and can extend the review up to ninety days, "unless the insurer . . . agree[s] to a longer term." *Id*.

[*] Hon. Sandra Day O'Connor, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

In addition to rates, the DOI typically requires insurers to "develop and file . . . advisory prospective loss costs and supporting actuarial and statistical data."[1] J.A. at 206. Prospective loss costs are "the portion of a rate that does not include provisions for expenses (other than loss adjustment expenses) or profit, and are based on historical aggregate losses and loss adjustment expenses." *Id*. At DTIRB's request, the DOI temporarily exempted DTIRB's members from its "prospective loss costs" and supporting data requirement.[2] In particular, the DOI recognized that "there is no credible historic data, particularly **[**5]** with regard to expenses, that the rating bureau could use in preparing the initial rates." J.A. at 137. It therefore granted the bureau an "exception to the requirements of using the rating format (loss cost) prescribed in Bulletin No. 5." *Id*. Nevertheless, the Commissioner required DTIRB to "have an approved statistical plan in place," that would "enable the [DOI] to monitor rate adequacy," *id*., which the bureau did until at least 2007.

On October 15, 2008, Appellants **[**6]** filed a class action complaint, alleging that Appellees engaged in collective price-fixing in violation of *Section 1* of the Sherman Act.[3] Appellants claim that Appellees used DTIRB as a vehicle for setting uniform rates, which "consist[] of costs unrelated **[*235]** to the issuance of title insurance, including kickbacks and other financial inducements title insurers provide to title agents" and other parties. J.A. at 56. Appellants allege that as a result, the title insurance market is non-competitive and dominated by a relatively small number of insurers.[4] Furthermore, Appellants assert that despite growing profits and efficiencies, Appellees' rates have not changed since 2004.

The District Court dismissed Appellants' complaint under *Federal Rule of Civil Procedure 12(b)(6)* **[**7]** but granted Appellants leave to amend their request for injunctive relief. Specifically, the court concluded that Appellants' Sherman Act claim is barred by the filed rate doctrine, which precludes antitrust suits challenging rates currently filed with federal or state agencies. *McCray, 636 F. Supp. 2d at 327* (citations omitted). Because the doctrine does not bar certain injunctive relief claims, the Court granted Appellants leave to amend their complaint, as they "d[id] not describe in much detail the type of injunctive relief they [sought]." *Id. at 334*.

Appellants filed a nearly identical amended complaint, which the District Court also dismissed under *Rule 12(b)(6)*. The Court held that Appellants' injunctive relief claim is barred by *Section 1012(b)* of the McCarran Ferguson Act, which exempts conduct from antitrust liability if it constitutes the "business of insurance" and is "regulated by state law." *See McCray v. Fidelity Nat'l Title Ins. Co., No. 08-775, 2010 U.S. Dist. LEXIS 76616, 2010 WL 3023164 (D. Del. July 29, 2010)*. The Court determined that Appellees' conduct met both those requirements. Appellants appeal.

II.

Discussion

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[1] This directive is set forth in Department of Insurance Forms and Rates Bulletin No. 5. Loss Cost Filing Requirements, Forms and Rates Bulletin No. 5 (Dep't of Ins. amended Nov. 27, 1995), *http://delawareinsurance.gov*/ departments/documents/ bulletins/formbull5.pdf [hereinafter Bulletin No.5]. The DOI Commissioner may issue orders, notices and bulletins regulating Delaware insurance practices. *See Del. Code Ann. tit. 18, § 312(a)-(c)*.

[2] The exemption is set forth in Department of Insurance Forms and Rates Bulletin No. 27. Title Insurance Filing Requirements, Forms and Rates Bulletin No. 27 (Dep't of Ins. Sept. 2, 2010), *http://delawareinsurance.gov*/ departments/documents/bulletins/ formbull27.pdf [hereinafter Bulletin No. 27].

[3] Appellants also named Appellees' parent companies as defendants and asserted an unjust enrichment claim. The District Court dismissed that claim as well as the parent companies under *Federal Rule of Civil Procedure 12(b)(6)*. *See McCray v. Fidelity Nat'l Title Ins. Co., 636 F. Supp. 2d 322 (D. Del. 2009)*. Appellants do not pursue those claims on appeal.

[4] Appellees allegedly account for about 98 percent of the title insurance premiums paid in Delaware.

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1367. This court **[**8]** has appellate jurisdiction under 28 U.S.C. § 1291 and reviews *de novo* the District Court's dismissal of Appellants' initial and amended complaints. Utilimax.com, Inc. v. PPL Energy Plus, LLC, 378 F.3d 303, 306 (3d Cir. 2004).

A. *The Filed Rate Doctrine*

Appellants argue that the District Court erred by applying the filed rate doctrine to dismiss their damages claims.[5] The District Court invoked the doctrine to dismiss Appellants' demand for: (1) "treble damages as provided by Section 4 of the Clayton Act, 15 U.S.C. § 15," and (2) the return of "overpayments made by [Plaintiffs and the Class] for defendants' title insurance policies." J.A. at 65.

Courts often trace the filed rate doctrine to *Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922)*. In that case, a shipper alleged that certain railroad carriers conspired to fix freight transportation rates in violation of the Sherman Act. *Id. at 160-61*. The shipper sought damages **[*236]** based on the unusually high rates. *Id*. The Supreme Court, however, denied the shipper's claim because the carriers had filed the challenged rates with the Interstate Commerce Commission ("ICC"), which authorized them. *Id. at 162*. The Court reasoned that it would be improper to hold carriers civilly liable for enforcing rates that the ICC had already approved as legal. *Id. at 162-63*. In addition, the Court expressed a concern about rate discrimination, stating that the shipper's potential damages "might, like a rebate, operate to give him a preference over his trade competitors." *Id. at 163*. Finally, the Court considered the impracticability of awarding damages based on a lower **[**10]** hypothetical rate, which would require "reconstituting the whole rate structure"—a task that the Court viewed the ICC as more competent to handle. *Id. at 164* ("[I]t is the Commission which must determine whether a rate is discriminatory; at least, in the first instance.").

The Court re-examined the filed rate doctrine in *Square D Co. v. Niagara Frontier Tariff Bureau Inc., 476 U.S. 409, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986)*. In that case, various corporations alleged that the respondents conspired with their rate making bureau to fix freight transportation rates in violation of the Sherman Act. *Id. at 410-11*. The petitioners sought treble damages based on the fixed rates. *Id. at 410*. They argued that "unlike *Keogh*, respondents' rates . . . were not challenged in a formal ICC hearing," thereby claiming that the agency's approval was insufficient to trigger the filed rate doctrine. *Id. at 417*; *see also id. at n.19*. Rejecting that argument, the Court reasoned that respondents' rates were "duly submitted, lawful rates under the Interstate Commerce Act in the same sense that the rates filed in *Keogh* were lawful." *Id. at 417*. Therefore, the Court concluded that "petitioners may not bring a treble-damages antitrust action." **[**11]** *Id*.

This court has recognized that the filed rate doctrine "bars antitrust suits based on rates that have been filed and approved by federal agencies." *Utilimax.com, 378 F.3d at 306 (3d Cir. 2004)*. Other courts of appeals have also extended the doctrine to rates filed with state agencies. *See, e.g., Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 20 (2d Cir. 1994)* ("[C]ourts have uniformly held, and we agree, that the rationales underlying the filed rate doctrine apply equally strongly to regulation by state agencies."); *H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485, 494 (8th Cir. 1992)* ("[W]e see no reason to distinguish between rates promulgated by state and federal agencies."). Moreover, although the doctrine "has its origins in . . . cases interpreting the Interstate Commerce Act," it "has been extended across the spectrum of regulated utilities." *Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981)*.

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[5] Appellants also argue that District Court erred by applying the filed rate doctrine to dismiss their injunctive relief claim. The District Court correctly observed that the filed rate doctrine precludes injunctive relief to the extent that such relief "seeks to prevent the defendants from relying on the filed rate." *McCray, 636 F. Supp. 2d at 334*; *see Burlington N., Inc. v. United States, 459 U.S. 131, 138-42, 103 S. Ct. 514, 74 L. Ed. 2d 311 (1982)* (vacating an injunction that ordered a reduction in rates). Because Appellants did not clearly state the type of injunctive relief **[**9]** they sought in their initial complaint and requested only that the "unlawful conduct be enjoined," J.A. at 65, the District Court properly dismissed the claim and granted Appellants leave to clarify their demand for relief.

Appellants argue that the filed rate doctrine does not apply to Delaware title insurance rates because the doctrine is limited to comprehensive regulatory regimes, such as the Interstate Commerce Act ("ICA"). Additionally, Appellants emphasize that the interstate commerce industry, among others, **[**12]** no longer requires rate filing and argue that such deregulation "weighs heavily against the district court's first time extension of the doctrine to Delaware's title insurance regime." Appellants' Br. at 19. However, the fact that one industry has been partially deregulated does not mean that the filed rate doctrine is no longer valid in other areas. Because Appellants offer no authority to **[*237]** the contrary, their argument necessarily fails.

Appellants further contend that the filed rate doctrine should not apply because "there is no clear repugnancy between the antitrust laws and Delaware's title insurance regulations." Appellants' Br. at 21. That argument, however, is also meritless and requires little attention from this court. As the District Court observed, Appellants' "repugnancy" argument relies on characterizing the filed rate doctrine as a complete bar against antitrust liability. *See McCray, 636 F. Supp. 2d at 328*; *see also Carnation Co. v. Pac. Westbound Conference, 383 U.S. 213, 217-18, 383 U.S. 932, 86 S. Ct. 781, 15 L. Ed. 2d 709 (1966)* (recognizing that collective ratemaking activities should not be immunized from antitrust scrutiny unless there is "plain repugnancy between the antitrust and regulatory provisions" (internal **[**13]** quotation marks and citation omitted)). But the doctrine itself does not eliminate "scrutiny under the antitrust laws by the Government and . . . possible criminal sanctions or equitable relief." *Square D, 476 U.S. at 422*. Furthermore, the Supreme Court has stated that it "disagree[s]" with the "view that the issue in *Keogh* . . . is properly categorized as an 'immunity' question," thus making Appellants' repugnancy argument inapplicable. *Id.; see also Essential Commc'ns Sys., Inc. v. Am. Tel. & Tel. Co., 610 F.2d 1114, 1121 (3d Cir. 1979)* ("[T]he filed tariff doctrine does not confer immunity from antitrust liability generally.").

Alternatively, Appellants argue that the filed rate doctrine does not apply because Delaware's title insurance laws do not require the DOI to "meaningfully regulate title insurance rate filings." Appellants' Br. at 22. Appellees, on the other hand, argue that the filed rate doctrine is not limited to situations where the agency has meaningfully regulated or reviewed the challenged rates. Moreover, even if there is such a requirement, Appellees argue that Delaware's title insurance laws are comprehensive enough to warrant the doctrine's application.

To support **[**14]** their "meaningful regulation" argument, Appellants rely on two Ninth Circuit cases—*Wileman Bros. & Elliott, Inc. v. Giannini, 909 F.2d 332 (9th Cir. 1990)*, and *Brown v. Ticor Title Insurance Co., 982 F.2d 386 (9th Cir. 1992)*. In *Wileman*, the plaintiffs claimed that the defendant competing fruit producers had issued unfair marketing standards without authorization from the Secretary of Agriculture. *909 F.2d at 333*. Seeking to invoke the filed rate doctrine, the defendants argued that the Secretary "tacitly approved" the challenged standards because he never disapproved them and had the right to do so at any time. *Id. at 337*. However, the court reasoned that in *Square D*, "governmental approval was required before there could be any effect from the collective activity and it was such approval that legitimized the allotments and the rates." *Id*. The court also reasoned that the Secretary's non-disapproval did "not guarantee any level of review" and was "equally consistent with lack of knowledge or neglect." *Id. at 338*. It therefore refused to apply the filed rate doctrine and held that "[t]he **[**15]** mere fact of failure to disapprove . . . does not legitimize otherwise anticompetitive conduct." *Id. at 337-38*.

The Ninth Circuit went a step further in *Brown*. There, the defendant title insurance companies actually filed their rates with regulatory agencies, but the law required "only 'non-disapproval' of the rates" before they became effective "and d[id] not require compliance with strict guidelines." *982 F.2d at 394*. Relying on its holding in *Wileman*, the court refused to apply the **[*238]** filed rate doctrine. The court reasoned that "[t]he absence of meaningful state review allows the [defendants] to file any rates they want." *Id*. In addition, the court explained that if the challenged rates "were the product of unlawful activity prior to their being filed and were not subjected to meaningful review by the state, then the fact that they were filed does not render them immune from challenge." *Id*. It therefore concluded that "the act of filing does not legitimize a rate arrived at by improper action." *Id*.

Appellants argue that *Brown* and *Wileman*, along with other district court cases, represent the correct approach to the filed rate doctrine—applying the doctrine only where agencies had to **[**16]** engage in meaningful review of the challenged rates. Although Appellants do not indicate what level of review is necessary, they suggest that the doctrine, at a minimum, does not apply if "[r]ates are collectively set by the insurers themselves and automatically become effective unless disapproved by the agency." Appellants' Br. at 22.

Despite *Brown* and *Wileman*, the Supreme Court has never indicated that the filed rate doctrine requires a certain type of agency approval or level of regulatory review. Instead, the doctrine applies as long as the agency has in fact authorized the challenged rate.[6] As the District Court observed, the relevant statute in *Keogh* only required common carriers to provide ten days public notice before charging new rates, and did not require the ICC to expressly approve such rates before they went into effect. *See* 24 Stat. 381-84 (49th Cong. Feb. 4, 1887). Similarly, the statute in *Square D* did not require the ICC to affirmatively approve freight transportation rates. *See Square D. v. Niagara Frontier Tariff Bureau, Inc., 760 F.2d 1347, 1349 (2d Cir. 1985)* (characterizing the central issue as "whether *Keogh* . . . has been overruled so far as its language extends **[**17]** to rates filed with but not investigated and approved by the [ICC]"). *Square D* also endorsed the appellate court's statement that the doctrine applies "'whenever tariffs have been filed.'" *Square D, 476 U.S. at 417 n.19* (citation omitted); *see also Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 251, 71 S. Ct. 692, 95 L. Ed. 912 (1951)* (holding that the petitioner "can claim no rate as a legal right . . . other than the filed rate, whether fixed or merely accepted by the [Agency] Commission"). Finally, the First Circuit has held that the filed rate doctrine only requires rates to be filed, not affirmatively approved or scrutinized. *See Town of Norwood v. New Eng. Power **[*239]** Co., 202 F.3d 408, 419 (1st Cir. 2000)* ("It is the *filing* of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine.").

Indeed, neither this court nor the Supreme Court has suggested that a distinction should exist between agency authorization through "approval" or "non-disapproval" of filed rates. Moreover, in this case such a distinction would be meaningless because the **[**19]** DOI was required to review the challenged rates. Delaware law states that "[t]he Commissioner shall review filings as soon as reasonably possible after they have been made in order to determine whether they meet the [statutory] requirements." *Del. Code Ann. tit. 18, § 2506(a)*. Further, the Commissioner must consider various factors to make sure rate filings are not "excessive, inadequate or unfairly discriminatory." *Id*. *§ 2503(a)*. Therefore, even though rate filings are "deemed to meet the statutory requirements unless disapproved by the Commissioner within 30 days," the Commissioner is required to review the rates during that period and may extend the review if "additional time is needed."[7] *Id*. *§ 2506(c)*.

Appellants next argue that the filed rate doctrine should not apply because Appellants cannot obtain retroactive relief directly from the DOI. To support this argument, Appellants rely on a series of "price squeeze" cases, which hold that the filed rate doctrine is inapplicable if a single regulator does not have authority over the challenged rates and thus cannot grant full relief. *See, e.g., City of Kirkwood, 671 F.2d at 1178-79*; *Borough of Lansdale v. PP & L,*

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[6] Appellants argue that interpreting the filed rate doctrine as lacking a "meaningful review" requirement would eradicate the state action doctrine. Under the state action doctrine, private entities participating in state-administered price regulation can assert antitrust immunity if, inter alia, "the State provides active supervision of anticompetitive conduct **[**18]** undertaken by private actors." *FTC v. Ticor Title Ins. Co., 504 U.S. 621, 631, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)*. Therefore, "[t]he mere potential for state supervision" is not sufficient to invoke the state action doctrine. *Id. at 638*. However, there is no apparent requirement to reconcile the filed rate and state action doctrines, as courts have generally applied them independently. *See, e.g., Trigen-Okla. City Energy Corp. v. Okla. Gas & Elec. Co., 244 F.3d 1220, 1224-25 (10th Cir. 2001)* (dismissing claims under state action doctrine and as a result declining to reach filed rate doctrine); *City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1182 (8th Cir. 1982)* (independently analyzing the filed rate doctrine and the state action doctrine). Moreover, the doctrines do not completely overlap because the filed rate doctrine, unlike the state action doctrine, does not provide complete immunity from antitrust liability. *See Essential Commc'ns, 610 F.2d at 1121*.

[7] Appellants suggest that the DOI could not genuinely review the challenged rates because DTIRB did not provide sufficient data to support its filings. However, Appellants do not provide any authority showing that the filed rate doctrine is dependent on the thoroughness of an agency's fact-finding. *See Goldwasser v. Ameritech Corp., 222 F.3d 390, 402 (7th Cir. 2000)* (rejecting the argument that the doctrine should not apply where agencies "rarely exercise their muscle and thus give **[**20]** no meaningful review to the rate structure"). Additionally, since filing its rates in 2004, DTIRB has provided a statistical plan that enables the DOI to monitor the bureau's rate adequacy.

Inc., 503 F. Supp. 2d 730, 740-42 (E.D. Pa. 2007). Yet, as the District Court held, those cases are irrelevant because the DOI is "fully empowered to regulate the one rate at issue." McCray, 636 F. Supp. 2d at 331. Moreover, Appellants fail to present any authority showing that plaintiffs must have access to an alternative regulatory remedy before courts may apply the filed rate doctrine.[8]

Finally, Appellants argue that the filed rate doctrine does not apply because Appellees' filings do not comply with Delaware law. The filed rate doctrine applies to rates "properly filed with the appropriate . . . regulatory authority." Ark. La. Gas Co., 453 U.S. at 577. The Supreme Court explained the properly filed requirement in Security Services, Inc. v. Kmart Corp., 511 U.S. 431, 114 S. Ct. **[*240]** 1702, 128 L. Ed. 2d 433 (1994). In that case, the petitioner—a corporation that agreed to deliver goods for Kmart—sued Kmart to enforce the petitioner's filed delivery rates. The Court, however, held that the rates were unenforceable, *see* id. at 444, because they had **[**22]** become "void as a matter of law under the Interstate Commerce Commission's regulations," id. at 433. The Court reasoned that the petitioner's rates were "incomplete" and therefore "insufficient to support a reliable calculation of charges." Id. at 443. More precisely, the rates included per mile delivery prices, but relied on an outside source to "calculat[e] charges for a given shipment." Id. at 433. Because that source was no longer available to the petitioner, the Court concluded that the rates were missing an "essential element," id. at 440, and were thus void, *see* id. at 443-44.

Although we have not yet interpreted *Kmart*, other courts have understood the decision to mean that the filed rate doctrine does not apply where: (1) "there is an absence of a calculable rate," Whitaker v. Frito-Lay, Inc., 88 F.3d 952, 961 (11th Cir. 1996); or (2) the rates are void per se under a statutory or regulatory scheme, *see* Norwest Transp., Inc. v. Horn's Poultry, Inc., 37 F.3d 1237, 1239 (7th Cir. 1994) (finding *Kmart* inapplicable because the regulations at issue did not "make the previously filed tariffs void"); *see also* Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc., 989 F.2d 281, 283-84 (8th Cir. 1993) **[**23]** (applying both factors).

According to Appellants, the filed rate doctrine should not apply under *Kmart* because Appellees' filings "lack essential cost data," which is required under the DOI's regulations. Appellants' Br. at 32. The DOI typically requires insurers to "file . . . prospective loss costs" and supporting data along with their proposed rates. Bulletin No. 5. However, the DOI waived that requirement with regard to Appellees' first rate filings. Bulletin No. 27. Because Appellees never filed additional rates, Appellants assert that the challenged rates no longer conform with the DOI's regulations, making the filed rate doctrine inapplicable. In response, Appellees contend that their failure to file additional rates does not show that the existing "rates were not properly filed" because the DOI "waived loss cost requirements for DTIRB's initial rate filing."[9] Appellees' Br. at 38 (internal quotation marks and citation omitted).

Appellees' rates do not fall under the Kmart improper filing exception. First, Appellants do not claim that Appellees' filings make it impossible for consumers to calculate the chargeable rates. *See* Kmart Corp., 511 U.S. at 443. To the contrary, in their complaint, Appellants provide a detailed explanation of DTIRB's title insurance rates and state that "[t]hese uniform rates are set forth in DTIRB's rating manual and on many of defendants' websites." J.A. at 222. In addition, there is no indication that DTIRB's rates are void per se under a statutory or regulatory scheme. *See* Norwest Transp., Inc., 37 F.3d at 1239. Although the DOI usually requires insurers to accompany their rates with "prospective loss costs" and supporting data, the DOI waived that requirement with respect to **[*241]** Appellants' first rate filing and was permitted to do so under Delaware law. *See* Del. Code Ann. tit. 18, § 2505 ("[T]he

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[8] Indeed, Appellants concede that "cases have noted that the availability of an alternative regulatory remedy is not a 'prerequisite' for application of **[**21]** the filed rate doctrine." Appellants' Br. at 28 n.9 (citing Wegoland, Ltd. v. NYNEX Corp., 806 F. Supp. 1112 (S.D.N.Y. 1992)). And in any event, Delaware allows interested parties to challenge insurance rates by making written application to the Commissioner for an administrative hearing. The Commissioner will determine if a hearing is justified, after which the Commissioner may deem the filings "no longer effective." Del. Code Ann. tit. 18, § 2520(a)-(c). At oral argument, counsel for Appellants conceded that they did not administratively challenge DTIRB's rates.

[9] Appellees also argue that the DOI's supporting data requirement governs "filings by rating bureaus for lines of insurance *other* than title insurance." Appellees' Br. at 7 n.3. However, nothing in Bulletin No. 5 indicates that the regulation is limited **[**24]** to certain types of insurance. *See* Bulletin No. 5 (stating that the bulletin applies generally to "participating insurers").

Commissioner may, by written order, suspend or modify the requirement of filing as to any kind of insurance . . . ").[10] Furthermore, by requiring Appellees to "have **[**25]** an approved statistical plan in place" that will "enable the [DOI] to monitor rate adequacy," Bulletin No. 27, the DOI complied with its statutory duty to "require the insurer to furnish the information upon which it supports the filing." Tit. 18, *§ 2504(b)*. Overall, Appellees have "properly filed" their rates with the "appropriate . . . regulatory authority," thus justifying the District Court's application of the filed rate doctrine.[11] *Ark. La. Gas Co., 453 U.S. at 577*.

B. *Policies Underlying the Filed Rate Doctrine*

In their reply brief, Appellants argue that the policies underlying the filed rate doctrine do not require its application in this case. Although we have generally held that "[a]n appellant waives an argument in support of reversal if he does not raise that argument in his opening brief," *AT & T v. FCC, 582 F.3d 490, 495 (3d Cir. 2009)*, *rev'd on other grounds*, *131 S. Ct. 1177, 179 L. Ed. 2d 132 (2011)*, it is well settled that "where an appellee raises a[n] argument not addressed by the appellant in its opening brief, the appellant may reply." *Bennett v. Tucker, 827 F.2d 63, 69-70 n.2 (7th Cir. 1987)*. This court may thus consider Appellants' policy argument because Appellees raised it for the first time in their brief.

The filed rate doctrine is designed to advance two "companion principles": (1) "preventing carriers **[**28]** from engaging in price discrimination as between ratepayers," and (2) "preserving the exclusive role of . . . agencies in approving rates **[*242]** . . . by keeping courts out of the rate-making process," a function that "regulatory agencies are more competent to perform." *Marcus v. AT&T Corp., 138 F.3d 46, 58 (2d Cir. 1998)*. These "companion principles" are often called the "nondiscrimination strand" and the "nonjusticiability strand." *Id*. The "nonjusticiability strand" recognizes that "(1) legislatively appointed regulatory bodies have institutional competence to address rate-making issues; (2) courts lack the competence to set . . . rates; and (3) the interference of courts in the rate-making process would subvert the authority of rate-setting bodies and undermine the regulatory regime." *Sun City Taxpayers' Assoc. v. Citizens Utils. Co., 45 F.3d 58, 62 (2d Cir. 1995)*. The "nondiscrimination strand" recognizes that "victorious plaintiffs would wind up paying less than non-suing ratepayers." *Wegoland, 27 F.3d at 21*.

Appellants argue that the nonjusticiability strand does not compel the doctrine's application in this case. More precisely, Appellants claim that nonjusticiability concerns arise **[**29]** only "when there is an *active* regulator." Reply Br. at 6. Here, Appellants claim that the DOI neither "*sets* the rates nor *exercises any meaningful review* of the rates." *Id*. Thus, they contend that the District Court would not interfere with "the regulatory authority of the DOI" by awarding damages based on hypothetical legal rates. *Id*. at 7. Appellees assert that such a damage award would

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[10] At oral argument, counsel for Appellant argued that Appellees' rate filings are invalid because the Appellees jointly formulated the proposed rates even though Bulletin No. 5 required each insurer to "individually determine and file the rates it will use as a result of its own independent company decision-making process." Bulletin No. 5. However, Bulletin No. 27 "allow[ed] an exception to the requirements of using the rating format (loss cost) prescribed in Bulletin No. 5," which necessarily included the directive to individually determine and file rates. Bulletin No. 27. Indeed, the DOI issued Bulletin No. 5 in order to "specif[y] the framework under which . . . insurers . . . will operate in a loss cost system." **[**26]** Bulletin No. 5. Because that system was temporarily lifted in Bulletin No. 27, Appellants cannot rely on its requirements to insist that Appellants' rate filings are improper. In addition, title 18, *section 2501* of the Delaware Code states that, among other things, "[t]he purpose of this chapter is to . . . authorize and regulate cooperative action among insurers in rate making."

[11] Appellants also argue that the *Kmart* improper filing exception applies because: (1) the DITRB's filings include hidden costs based on "kickbacks and other inducements unrelated to the business of insurance," Appellants' Br. at 32 (internal quotation marks and citation omitted); and (2) the Tenth Circuit addressed a similar situation in *TON Services, Inc. v. Qwest Corp., 493 F.3d 1225 (10th Cir. 2007)*, and refused to apply the filed rate doctrine, *see* Appellants' Br. at 33. These arguments are meritless. With regard to Appellants' "hidden costs" argument, it is well established that "there is no fraud exception to the filed rate doctrine." *AT & T Corp. v. JMC Telecom, LLC, 470 F.3d 525, 535 (3d Cir. 2006)*. Thus, the fact that Appellees allegedly hid expenses and engaged in other fraudulent conduct does not **[**27]** make the doctrine inapplicable. Furthermore, Appellants' second argument is unpersuasive both because *TON Services* is non-binding authority and because the insurers in that case, unlike Appellees, failed to file new rates and failed to file supporting data for existing rates absent legal permission from the regulating agency. *See 493 F.3d at 1237*.

implicate the nonjusticiability strand because it would "second-guess the [DOI's] specialized knowledge." Appellees' Br. at 27.

The nonjusticiability strand supports the doctrine's application in this case. In their initial complaint, Appellants requested treble damages and "returned overpayments" based on Appellees' allegedly inflated title insurance rates. J.A. at 65. To award such damages, the District Court would have to calculate the legal rate but for DTIRB's antitrust violations. That task alone is enough to implicate the nonjusticiability principle, which is primarily concerned with preventing courts from engaging in the ratemaking process. *See, e.g.,* Montana-Dakota Utils., 341 U.S. at 251 (finding that it is not "open to the courts to determine what the reasonable rates during the past should **[**30]** have been"). In addition, the District Court's interference in the rate making process would "subvert the authority" of the DOI by second-guessing its rate determination, thus further implicating the nonjusticiability strand. Sun City Taxpayers' Assoc., 45 F.3d at 62.

The nondiscrimination strand, on the other hand, is not implicated by Appellants' claims. Appellants brought the underlying suit on behalf of "themselves and all others similarly situated." J.A. at 45. Accordingly, it is unlikely that a victory would allow Appellants to pay less than other ratepayers. *See* Square D, 476 U.S. at 423 (noting that "the development of class actions . . . might alleviate the . . . concern about unfair rebates"); Wegoland, 27 F.3d at 22 ("[C]oncerns for discrimination are substantially alleviated in [a] putative class action."). Nonetheless, we hold that the filed rate doctrine applies to Appellants' claims based on the nonjusticiability principle alone. *See* Marcus, 138 F.3d at 59 (stating that the doctrine applies "whenever either the nondiscrimination strand or the nonjusticiability strand . . . is implicated").

C. *Standing*

With respect to Appellants' injunctive relief claims, they argue that **[**31]** the District Court erred by concluding that Appellees' "actions are statutorily exempt from antitrust liability pursuant to the **[*243]** McCarran-Ferguson Act."[12] Appellants' Br. at 35. We will not reach this issue because Appellants lack standing to seek injunctive relief.[13]

"Absent Article III standing, a federal court does not have subject matter jurisdiction to address a plaintiff's claims, and they must be dismissed." Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 188 (3d Cir. 2006). Article III standing requires "(1) injury-in-fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Danvers Motor Co., Inc. v. Ford Motor Co., 432 F.3d 286, 290-91 (3d Cir. 2005). "Allegations of 'possible future injury' are not sufficient to satisfy Article III." Reilly v. Ceridian Corp., 664 F.3d 38, 42 (3d Cir. 2011) (citation omitted). Instead, "'[a] threatened injury must be certainly impending,' and 'proceed with a high **[**33]** degree of immediacy.'" *Id*. (citations omitted). In the context of class actions, Article III standing "is determined vis-a-vis the named parties." Krell v. Prudential Ins. Co. of Am., 148 F.3d 283, 306 (3d Cir. 1998).

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[12] The filed rate doctrine does not bar injunctive relief claims with respect to future rates. *See* Square D, 476 U.S. at 422 & n.28 (noting that the filed rate doctrine precludes antitrust claims for treble damages); Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application ¶ 247d (3d ed. 2006) ("[T]here is no reason to think *Keogh* would prohibit an injunction against an antitrust violation attending some tariff that would or might be filed in the future. Such a tariff has not been 'filed' at all."). However, the McCarran-Ferguson Act exempts conduct from antitrust liability if it: (1) constitutes "the business of insurance," (2) is "regulated pursuant to state law," and (3) does not "constitute acts of boycott, coercion or intimidation." Ticor Title Ins. Co. v. FTC, 998 F.2d 1129, 1133 (3d Cir. 1993) (internal quotation marks and citation omitted).

[13] Although Appellees **[**32]** do not address standing, "we are required to raise issues of standing sua sponte if such issues exist." Steele v. Blackman, 236 F.3d 130, 134 n.4 (3d Cir. 2001) (citing FOCUS v. Allegheny Cnty. Court of Common Pleas, 75 F.3d 834, 838 (3d Cir. 1996)).

Appellants lack standing to seek injunctive relief because they failed to allege an injury-in-fact.[14] In their amended complaint, Appellants "challenge[d] the defendants' collective price-setting of rates . . . as *per se* illegal price-fixing" and sought "injunctive relief . . . due to the significant threat of future losses and injuries resulting from those antitrust violations." J.A. at 213. However, Appellants did not indicate when such "future losses and injuries" will occur. Instead, they vaguely alleged that "[a]s a proximate result of defendants' unlawful conduct, plaintiffs and the Class will suffer future loss or damages in that they will be required to pay supra-competitive prices for title insurance policies." J.A. at 230. Those allegations, taken as true, do not indicate that a named party has "actual or imminent" plans to purchase title insurance. Nor do they establish that DTIRB intends to file new rates in the future.[15] **[*244]** On the contrary, Appellants state in **[**34]** their amended complaint that "[t]here is a remarkable absence of rate changes by title insurers over the past several years," and "Defendants' current rates, for example, have been in place since February 2004 without any change." J.A. at 225. Therefore, because it is "merely speculative" that Appellants' injury will be "redressed by a favorable decision," we lack appellate jurisdiction to address Appellants' injunctive relief claims.

III.

Conclusion

For **[**35]** the foregoing reasons, we will affirm the District Court's orders.

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[14] When reviewing a complaint for standing, we determine "whether the allegations on the face of the complaint, taken as true, allege facts sufficient to invoke the [court's] jurisdiction." *Reilly, 664 F.3d at 41* (internal quotation marks and citation omitted).

[15] DTIRB's current rates do not constitute a legal injury under the filed rate doctrine. *Keogh, 260 U.S. at 163* (stating that "[u]nless and until suspended or set aside, th[e filed] rate is made, for all purposes, the legal rate"); *see also* *Wegoland, 27 F.3d at 18* ("[T]he doctrine holds that any 'filed rate' . . . is per se reasonable and unassailable in judicial proceedings brought by ratepayers."). Thus, Appellants must establish standing based on the possibility of future unfair rates.

Agnew v. NCAA

United States Court of Appeals for the Seventh Circuit

January 9, 2012, Argued; June 18, 2012*, Decided

No. 11-3066

Reporter

683 F.3d 328 *; 2012 U.S. App. LEXIS 12256 **; 2012-1 Trade Cas. (CCH) P77,939; 2012 WL 2248509

JOSEPH AGNEW, et al., Plaintiffs-Appellants, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant-Appellee.

Prior History: [1]** Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 1:11-cv-00293—Jane E. Magnus-Stinson, Judge.

Agnew v. NCAA, 2011 U.S. Dist. LEXIS 98744 (S.D. Ind., Sept. 1, 2011)

Core Terms

NCAA, Sherman Act, athletic, Bylaws, student-athletes, anticompetitive, procompetitive, relevant market, bachelor's degree, plaintiffs', amateurism, football, eligibility rules, college football, regulations, cognizable, players, sports, district court, schools, effects, multi-year, team, motion to dismiss, labor market, preservation, quick-look, anti trust law, survival, markets

LexisNexis® Headnotes

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

HN1[] **Sherman Act, Scope**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

HN2[] **Clayton Act, Claims**

See *15 U.S.C.S. § 15*.

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* This opinion has been circulated among all judges of this court in regular active service pursuant to Circuit Rule 40(e). No judge requested to hear this case en banc.

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

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

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

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

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

In reviewing the sufficiency of a complaint, a court must accept all well pled facts as true and draw all permissible inferences in favor of the plaintiff. The Federal Rules of Civil Procedure require only that a complaint provide the defendant with fair notice of what the claim is and the grounds upon which it rests. However, a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under the Federal Rules of Civil Procedure, in which case a dismissal of the complaint is proper. The United States Supreme Court has described this notice-pleading standard as requiring a complaint to contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. While factual allegations must be accepted as true, legal conclusions may not be considered. Dismissals under *Fed. R. Civ. P. 12(b)(6)* are questions of law and thus are reviewed de novo. A district court's decision to dismiss a complaint with prejudice is reviewed for abuse of discretion.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Burdens of Proof > Allocation

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

HN4[] **Sherman Act, Claims**

The purpose of the Sherman Act is to protect consumers from injury that results from diminished competition. Thus, a plaintiff must allege, not only an injury to himself, but an injury to the market as well. Accordingly, a plaintiff must prove three elements to succeed under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in a relevant market; and (3) an accompanying injury.

Antitrust & Trade Law > Sherman Act > Claims

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

HN5[] **Sherman Act, Claims**

Most *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, cases focus not on whether a relevant market exists, but on the other aspect of the second required showing—whether a restraint of trade in a given market was actually unreasonable.

Antitrust & Trade Law > Sherman Act > Claims

HN6[] **Sherman Act, Claims**

Since the Sherman Act is meant to protect the benefits of competition, the determination of whether a restraint is unreasonable must focus on the competitive effects of challenged behavior relative to such alternatives as its abandonment or a less restrictive substitute. Courts have established three categories of analysis—per se, quick-look, and Rule of Reason—for determining whether actions have anticompetitive effects, though the methods often blend together. All of these methods of analysis are meant to answer the same question: whether or not the challenged restraint enhances competition.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

HN7[] Per Se Rule Tests, Manifestly Anticompetitive Effects

In the context of the Sherman Act, the standard framework for analyzing an action's anticompetitive effects on a market is the Rule of Reason. Under a Rule of Reason analysis, the plaintiff carries the burden of showing that an agreement or contract has an anticompetitive effect on a given market within a given geographic area. As a threshold matter, a plaintiff must show that the defendant has market power—that is, the ability to raise prices significantly without going out of business—without which the defendant could not cause anticompetitive effects on market pricing. If the plaintiff meets his burden, the defendant can show that the restraint in question actually has a procompetitive effect on balance, while the plaintiff can dispute this claim or show that the restraint in question is not reasonably necessary to achieve the procompetitive objective.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

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

HN8[] Per Se Rule Tests, Manifestly Anticompetitive Effects

In the context of the Sherman Act, the second framework utilized by courts—the per se rule—for analyzing an action's anticompetitive effects on a market is employed when a practice facially appears to be one that would always or almost always tend to restrict competition and decrease output. Restraints that would fall under this category are illegal as a matter of law for reasons of efficiency; in essence, it is simply not worth the effort or resources of a Rule of Reason analysis when the court can predict with confidence that the Rule of Reason will condemn a restraint. Under the per se framework, a restraint is deemed unreasonable without any inquiry into the market context in which the restraint operates. Horizontal price fixing and output limitation are classic examples of behavior that is considered anticompetitive per se.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

HN9[] Per Se Rule Tests, Manifestly Anticompetitive Effects

In the context of the Sherman Act, the third framework for analyzing an action's anticompetitive effects on a market is the quick-look analysis, which is used where the per se framework is inappropriate, but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an agreement, and proof of market power is not required. Put another way, the quick-look approach can be used when an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets, but there are nonetheless reasons to examine potential procompetitive justifications. Among other situations, the quick-look approach is used when a restraint would normally be considered illegal per se, but a certain degree of cooperation is necessary if the product at issue is to be preserved. Under this approach, if no legitimate justifications for facially anticompetitive behavior (such as price-fixing) are found, no market power analysis is necessary and the court condemns the practice without ado. But if justifications are found, a full Rule of Reason analysis may need to take place.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Burdens of Proof > Allocation

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

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

HN10[] Sherman Act, Claims

In the context of the Sherman Act, a plaintiff's threshold burden under the Rule of Reason analysis involves the showing of a precise market definition in order to demonstrate that a defendant wields market power, which, by definition, means that the defendant can produce anticompetitive effects. The quick-look doctrine permits plaintiffs to forgo any strict showing of market power, and thus a specific definition of the relevant market. Where a practice has obvious anticompetitive effects—as does price-fixing—there is no need to prove that the defendant possesses market power. This does not mean, however, that there need not be a relevant market on which actions have an anticompetitive effect. The entire point of the Sherman Act is to protect competition in the commercial arena; without a commercial market, the goals of the Sherman Act have no place. If a plaintiff can show that a defendant has engaged in naked restrictions on price or output, he can dispense with any showing of market power until a procompetitive justification is shown, but the existence of a relevant market cannot be dispensed with altogether. It is the existence of a commercial market that implicates the Sherman Act in the first instance.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

HN11[] Sherman Act, Claims

In the context of the Sherman Act, a showing of market power is not necessary in a case involving clear restrictions on price and output unless and until a full Rule of Reason analysis takes place.

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

HN12[] Sherman Act, Scope

The Sherman Act applies to the National Collegiate Athletic Association bylaws generally. The Sherman Act applies to commercial transactions, and the modern definition of commerce includes almost every activity from which an actor anticipates economic gain.

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

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

HN13[] Sherman Act, Scope

The transactions between National Collegiate Athletic Association schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act.

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

Evidence > Inferences & Presumptions > Presumptions

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

HN14[] Sherman Act, Scope

In the context of the Sherman Act, the first—and possibly only—question to be answered when National Collegiate Athletic Association (NCAA) bylaws are challenged is whether the NCAA regulations at issue are of the type that have been blessed by the United States Supreme Court, making them presumptively procompetitive.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Evidence > Inferences & Presumptions > Presumptions

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

HN15[] Per Se Rule Tests, Manifestly Anticompetitive Effects

In the context of the Sherman Act, a certain amount of collusion in college football is permitted because it is necessary for the product to exist. Accordingly, when a National Collegiate Athletic Association (NCAA) bylaw is clearly meant to help maintain the revered tradition of amateurism in college sports or the preservation of the student-athlete in higher education, the bylaw will be presumed procompetitive since a court must give the NCAA ample latitude to play that role. But if a regulation is not, on its face, helping to preserve a tradition that might otherwise die, either a more searching Rule of Reason analysis will be necessary to convince the court of its procompetitive or anticompetitive nature, or a quick look at the rule will obviously illustrate its anticompetitiveness.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Evidence > Inferences & Presumptions > Presumptions

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

HN16[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

In the context of the Sherman Act, most—if not all—eligibility rules fall comfortably within the presumption of procompetitiveness afforded to certain National Collegiate Athletic Association (NCAA) regulations. Beyond the obvious fact that the United States Supreme Court explicitly mentioned eligibility rules as a type that fits into the same mold as other procompetitive rules, they are clearly necessary to preserve amateurism and the student-athlete in college football. Indeed, they define what it means to be an amateur or a student-athlete, and are therefore essential to the very existence of the product of college football. There may not be such a thing as a student-athlete, for instance, if it was not for the NCAA rules requiring class attendance, and thus no detailed analysis would be necessary to deem such rules procompetitive. The same goes for bylaws eliminating the eligibility of players who receive cash payments beyond the costs attendant to receiving an education—a rule that clearly protects amateurism.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

HN17[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

In the context of the Sherman Act, financial aid rules do not always assist in the preservation of amateurism or the existence of student-athletes.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

HN18[] **Sherman Act, Claims**

Naked price and output controls can obviate the need for a detailed market analysis in a Sherman Act case, but that does not eliminate the need for a relevant commercial market to exist altogether. In an area that is not obviously commercial, and thus where the Sherman Act's application is not clearly apparent, it is incumbent on the plaintiff to describe the rough contours of the relevant commercial market in which anticompetitive effects may be felt, even when a quick-look approach is all that is called for.

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

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

HN19[] Sherman Act, Scope

In the context of the Sherman Act, the difference between a market for educational services and a market for bachelor's degrees is of vital importance. A student is owed educational instruction upon payment of tuition, though what a student does with that instruction and whether that instruction leads to a degree is up to the student. A bachelor's degree, on the other hand, is not bought outright. It is the opportunity to earn a bachelor's degree that one pays for (or performs athletic services for, as the case may be).

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

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

HN20[] Sherman Act, Scope

Labor markets are cognizable under the Sherman Act.

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

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

HN21[] Sherman Act, Scope

The fact that certain procompetitive, legitimate trade restrictions exist in a given industry does not remove that industry from the purview of the Sherman Act altogether. Rather, all National Collegiate Athletic Association actions that are facially anticompetitive must have procompetitive justifications supporting their existence.

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

Evidence > Burdens of Proof > Allocation

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

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

HN22[] Standards of Review, Abuse of Discretion

A district court's denial of plaintiffs' request to amend their complaint is reviewed for abuse of discretion, which is a heavy burden. Under *Fed. R. Civ. P. 15(a)*, a complainant may amend his complaint as a matter of course in response to a motion to dismiss, but any subsequent amendments can only be made with consent of the opposing party or the court's leave. A district court is not required to grant such leave when a plaintiff has had multiple opportunities to state a claim upon which relief may be granted.

Civil Procedure > Appeals > Appellate Briefs

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN23[] **Appeals, Appellate Briefs**

It is a basic principle that a complaint may not be amended by the briefs in opposition to a motion to dismiss, nor can it be amended by the briefs on appeal.

Counsel: For JOSEPH AGNEW, PATRICK COURTNEY, Plaintiffs - Appellants: Steve W. Berman, Attorney, HAGENS BERMAN SOBOL SHAPIRO, Seattle, WA; Elizabeth A. Fegan, Attorney, HAGENS BERMAN SOBOL SHAPIRO, LLP, Oak Park, IL.

For NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant - Appellee: Gregory L. Curtner, Attorney, SCHIFF HARDIN LLP, Ann Arbor, MI.

Judges: Before FLAUM and KANNE, Circuit Judges, and CHANG, District Judge.[**]

Opinion by: FLAUM

Opinion

[*332] FLAUM, *Circuit Judge*. Joseph Agnew and Patrick Courtney ("plaintiffs") have at least two things in common: they were both highly successful high school football players that earned scholarships to play for National Collegiate Athletic Association ("NCAA") Division I football programs, and they both suffered career-ending football injuries during their college tenures. The athletic scholarships held by plaintiffs at the time of their injuries were good for one year only, and needed to be renewed **[**2]** to be valid for any subsequent seasons. When plaintiffs' injuries prevented them from playing football, their scholarships were not renewed. Plaintiffs claim that two NCAA regulations—the cap on the number of scholarships given per team and the prohibition of multi-year scholarships[1]—prevented them from obtaining scholarships that covered the entire cost of their college education. These regulations, according to plaintiffs, have an anticompetitive effect on the market for student-athletes, and therefore violate § 1 of the Sherman Act. *15 U.S.C. § 1*. The NCAA filed a motion to dismiss and the district court granted that motion, finding that plaintiffs failed to allege a relevant market on which the NCAA's Bylaws had an anticompetitive effect. Plaintiffs appealed the dismissal. While we depart from some of the district court's reasoning,

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[**] The Honorable Edmond E. Chang, Judge of the United States District Court for the Northern District of Illinois, sitting by designation.

[1] On February 17, 2012, a new NCAA regulation permitting multi-year scholarships became final. *See* Steve Wieberg, *Multiyear Scholarship* ***[**3]*** *Rule Narrowly Survives Override Vote*, USA TODAY (Feb. 17, 2012, 7:00 p.m.), *http://www.usatoday.com*/sports/college/story/2012-02-17/multiyear-scholarships-survives-close-vote/53137194/1. Since plaintiffs seek damages for prior actions taken by the NCAA and its member schools, the repeal of the multi-year scholarship prohibition does not render this case nonjusticiable.

we ultimately conclude that plaintiffs' complaint did not sufficiently identify a commercial market—an obvious necessity for Sherman Act violations—and thus we affirm the district court's dismissal of plaintiffs' suit.

I. Background

In 2006, after receiving several offers from a number of college football teams, Agnew enrolled at Rice University on an athletic scholarship. In exchange for agreeing to play football at Rice, Agnew received a year of education, room, and board at no charge. That scholarship was renewed for Agnew's second year at Rice. During his sophomore year, Agnew suffered a series of football-related injuries. The injuries, along with a coaching change at Rice, resulted in the school's decision not to renew Agnew's scholarship for his junior year. Agnew successfully appealed this decision and received one more year-long scholarship, but he was unable to acquire a scholarship for his senior year. As a result, he was forced to pay full price for the last year of his undergraduate education.

Courtney endured a similar **[**4]** experience. In 2009, Courtney decided to attend North Carolina A&T on full athletic scholarship to play football. As with Agnew, the scholarship was only a year long. During training camp Courtney was injured, and as a result, his scholarship was not renewed. Due to his financial circumstances and the high cost of out-of-state tuition, Courtney was forced to transfer to a different school and pay tuition out-of-pocket.

Plaintiffs allege that their failure to acquire a scholarship equal to the full cost of obtaining a bachelor's degree is the result **[*333]** of the NCAA's regulation of participating schools' athletic scholarships. Plaintiffs specifically cite two NCAA bylaws (the "Bylaws") as the source of their injury: (1) the one-year scholarship limit, which prohibits NCAA member schools from offering student-athletes multi-year scholarships, 2009-10 NCAA Division I Manual, Bylaw 15.3.3.1 (2009-10); and (2) the cap on the number of athletic scholarships a school can offer for each team in a given year, *see, e.g.*, 2009-10 NCAA Division I Manual, Bylaw 15.5.4. According to plaintiffs, NCAA member schools compete intensely over the premier student-athletes in the country, and if the Bylaws had **[**5]** not been passed, schools would need to offer multi-year scholarships to stay competitive in the market for elite athletes. They assert that multi-year scholarships used to be the norm before the Bylaws went into effect. The current ban on such scholarships, they claim, forces student-athletes who do not have their scholarships renewed to pay more for their undergraduate education. Plaintiffs further contend that the limit on the number of athletic scholarships a school can offer reduces the total number of athletic scholarships offered, thus preventing some students—perhaps those that are injured but would have been offered a multiyear scholarship but for the Bylaws—from obtaining a bargained for education. Plaintiffs therefore maintain that the Bylaws violate § 1 of the Sherman Act. *15 U.S.C. § 1*.

On October 25, 2010, plaintiffs filed suit against the NCAA in the United States District Court for the Northern District of California.[2] In response, the NCAA filed a motion to dismiss and a motion to transfer simultaneously. The motion to dismiss was fully briefed, but in February 2011, the Northern District of California decided not to rule on the motion and to transfer the case to the **[**6]** Southern District of Indiana. The parties set a schedule for rebriefing applying Seventh Circuit case law, and before the briefs were submitted, plaintiffs filed an amended complaint. The complaint alleged that the Bylaws resulted in a horizontal agreement to fix prices and reduce output, which caused a reduction of the supply of bachelor's degrees and an increase in the price for bachelor's degrees for those that did not have their scholarships renewed.

In its motion to dismiss, the NCAA argued that plaintiffs' complaint should be dismissed for three reasons: (1) it failed to identify a relevant market, a necessity for a valid Sherman Act claim; (2) it failed to allege facts sufficient to show that the NCAA injured competition in a relevant market; and (3) it failed to allege facts sufficient to show an injury **[**7]** as a result of anticompetitive acts committed by the NCAA. On September 1, 2011, the district court granted the NCAA's motion to dismiss. The court held that plaintiffs failed to identify a cognizable market in which trade was improperly restrained, and that even if plaintiffs did adequately allege that there is a product market for

[2] Agnew originally filed the lawsuit as a class action, but had not filed a motion to certify a class at the time of the dismissal of the claims at issue. Thus, when plaintiffs' claims were dismissed, the entire lawsuit was dismissed, since there were no other parties with legally protected interests in the litigation. *See Wiesmueller v. Kosobucki, 513 F.3d 784, 786 (7th Cir. 2008)*.

bachelor's degrees or a labor market for student-athletes—as plaintiffs contended during oral argument—those markets are not cognizable in the context of the Sherman Act. Since the NCAA's first argument was sufficient to dismiss plaintiffs' claims, the court did not pass on the NCAA's other arguments. The district court also held that plaintiffs' claims would **[*334]** be dismissed with prejudice for two reasons. First, plaintiffs already had the opportunity to amend their complaint after being exposed to the NCAA's arguments in the Northern District of California, and yet they chose not to clearly identify a relevant commercial market. Second, plaintiffs did not show how they could alter their complaint to make it sufficient since, according to the district court, the markets discussed at oral argument are not cognizable under the Sherman Act. Plaintiffs have appealed **[**8]** the district court's decision to dismiss its claims as well as its decision to dismiss with prejudice.

II. Discussion

Plaintiffs' suit was brought pursuant to statutory provisions found in the Sherman Act and the Clayton Act. Under § 1 of the Sherman Act, ***HN1***[] "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." *15 U.S.C. § 1*. Plaintiffs' civil cause of action is rooted in the Clayton Act, which states that ***HN2***[] "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained." *15 U.S.C. § 15*. Plaintiffs allege that the Bylaws are a restraint on trade in the labor market for student-athletes and the product market for bachelor's degrees, and thus violated plaintiffs' statutory rights under the Sherman Act. The NCAA contends that plaintiffs' complaint did not identify any market, including a bachelor's degree or labor market, in which the Bylaws restrained trade. The NCAA further argues that even if plaintiffs' complaint did sufficiently identify a product market for bachelor's degrees **[**9]** or a labor market for student-athletes, those markets are not commercial, and therefore are not cognizable under the Sherman Act. If this is true, then any NCAA actions affecting those markets—to the extent that they are markets—are not subject to antitrust laws.

HN3[] In reviewing the sufficiency of a complaint, we must accept all well pled facts as true and draw all permissible inferences in favor of the plaintiff. *Active Disposal, Inc. v. City of Darien, 635 F.3d 883, 886 (7th Cir. 2011)*. The Federal Rules of Civil Procedure require only that a complaint provide the defendant with "fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. We have explained, however, that a complaint may be "so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under [the Federal Rules of Civil Procedure]," in which case a dismissal of the complaint is proper. *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC, 499 F.3d 663, 667 (7th Cir. 2007)*. The Supreme Court has described this notice-pleading standard as requiring **[**10]** a complaint to "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*). While factual allegations must be accepted as true, legal conclusions may not be considered. *Id*. Dismissals under Rule 12(b)(6) are questions of law, and thus are reviewed de novo. *Autry v. Nw. Premium Servs., Inc., 144 F.3d 1037, 1039 (7th Cir. 1998)*. A district court's decision to dismiss a complaint with prejudice is reviewed for abuse of discretion. *Stanard v. Nygren, 658 F.3d 792, 797 (7th Cir. 2011)*.

A. Sherman Act Framework

HN4[] The purpose of the Sherman Act is to protect consumers from injury that **[*335]** results from diminished competition. *Banks v. NCAA, 977 F.2d 1081, 1087 (7th Cir. 1992)*. "Thus, the plaintiff must allege, not only an injury to himself, but an injury to the market as well." *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984)*. Accordingly, a plaintiff must prove three elements to succeed under § 1 of the Sherman Act: "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in [a] relevant market; and (3) **[**11]** an accompanying injury." *Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993)*. There is no question that all NCAA member schools have agreed to abide by the Bylaws; the first showing of an agreement or contract is therefore not at issue in this case.

The district court's dismissal of plaintiffs' claims focused solely on the second necessary showing—whether there has been an unreasonable restraint of trade in a relevant market. The court did not ultimately reach the question of whether the restraints were reasonable, since it found that plaintiffs did not allege a relevant market on which a restraint of trade could operate. ***HN5***[] Most § 1 cases focus not on whether a relevant market exists, but on the other aspect of the second required showing—whether a restraint of trade in a given market was actually unreasonable. While our central discussion will revolve around whether a relevant market was—or even could have been—identified in plaintiffs' complaint, a brief explanation of how courts determine if restraints are unreasonable will be helpful in understanding why plaintiffs are mistaken in their belief that a relevant market need not be identified at all in this **[**12]** case.

HN6[] Since the Sherman Act is meant to protect the benefits of competition, the determination of whether a restraint is unreasonable must focus on "the competitive effects of challenged behavior relative to such alternatives as its abandonment or a less restrictive substitute." Phillip Areeda, ***Antitrust Law*** ¶ 1500, at 362-63 (1986). Courts have established three categories of analysis—per se, quick-look, and Rule of Reason—for determining whether actions have anticompetitive effects, though the methods often blend together. *Cal. Dental Ass'n. v. FTC, 526 U.S. 756, 779, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)* ("The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'Rule of Reason' tend to make them appear."); *see also* *United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993)*. All of these methods of analysis are meant to answer the same question: "whether or not the challenged restraint enhances competition." *Cal. Dental, 526 U.S. at 780*; *NCAA v. Bd. of Regents, 468 U.S. 85, 104, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*.

HN7[] The standard framework for analyzing an action's anticompetitive effects on a market is the Rule of Reason. *Cf.* *Chicago Prof'l Sports Ltd. P'ship v. NBA, 961 F.2d 667, 673 (7th Cir. 1992)*. **[**13]** Under a Rule of Reason analysis, the plaintiff carries the burden of showing that an agreement or contract has an anticompetitive effect on a given market within a given geographic area. *See* *Reifert v. S. Cent. Wis. MLS Corp., 450 F.3d 312, 321 (7th Cir. 2006)*. As a threshold matter, a plaintiff must show that the defendant has market power—that is, the ability to raise prices significantly without going out of business—without which the defendant could not cause anticompetitive effects on market pricing. *Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 666 (7th Cir. 1987)*. If the plaintiff meets his burden, the defendant can show that the restraint in question actually has a procompetitive **[*336]** effect on balance, while the plaintiff can dispute this claim or show that the restraint in question is not reasonably necessary to achieve the procompetitive objective. Areeda, ***Antitrust Law***, ¶1507b, at 397 (1986).

HN8[] The second framework utilized by courts—the per se rule—is employed when a "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Bd. of Regents, 468 U.S. at 100* (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*). **[**14]** Restraints that would fall under this category are illegal as a matter of law for reasons of efficiency; in essence, it is simply not worth the effort or resources of a Rule of Reason analysis when "the Court [can] predict with confidence that the Rule of Reason will condemn [a restraint]." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (quoting *Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*). Under the per se framework, a restraint is deemed unreasonable without any inquiry into the market context in which the restraint operates. *Bd. of Regents, 468 U.S. at 100*. Horizontal price fixing and output limitation are classic examples of behavior that is considered anticompetitive per se. *Id*.

HN9[] The third framework is the "quick-look" analysis, which is used where the per se framework is inappropriate, but where "no elaborate industry analysis is required to demonstrate the anticompetitive character of . . . an agreement," and proof of market power is not required. *Bd. of Regents, 468 U.S. at 109* (quoting *Nat'l Soc'y of Prof'l Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*). Put another way, the quick-look approach can be used when "an observer with even **[**15]** a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets," *Cal. Dental, 526 U.S. at 770*, but there are nonetheless reasons to examine potential procompetitive justifications. *See* Herbert Hovenkamp, ***Antitrust Law***, ¶ 1911c, at 273 (1998). Among other situations, the quick-look approach is used when a restraint would normally be considered illegal per se, but "a certain degree of cooperation is necessary if the [product at issue] is to be preserved." *Bd. of Regents, 468 U.S. at 117*; *see also* Hovenkamp, ***Antitrust Law***, ¶ 1911c, at 274 (1998). Under this approach, if no legitimate justifications for facially anticompetitive behavior (such as price-fixing) are found, no market power analysis is necessary and the court "condemns the practice without ado." *Chicago Prof'l Sports, 961 F.2d at 674*. But if justifications are found, a full Rule of Reason analysis may need to take place. *Cf.* *Chicago Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 600 (7th Cir. 1996)*.

Plaintiffs contend that the third framework—the quick-look approach—is the appropriate method for analyzing whether the NCAA's actions have **[**16]** had an anticompetitive effect on a commercial market. This argument finds support in *Board of Regents*, where the Supreme Court held that since college athletics is "an industry in which horizontal restrictions on competition are essential if the product is to be available at all," it is inappropriate to apply a per se rule to NCAA regulations, even if they amount to horizontal price fixing and output limitation. *468 U.S. at 100-01*; *accord* *Chicago Prof'l Sports, 961 F.2d at 674*. According to plaintiffs, the NCAA's restriction on the **[*337]** number of scholarships a school can provide is a clear limitation on output (that is, the number of scholarships and, therefore, bachelor's degrees) and the NCAA's restriction of scholarships to one year is a clear limitation on price (that is, the price of bachelor's degrees and the cost that schools must pay for student-athletes). They therefore argue that despite the inapplicability of per se rule cases, a quick-look approach is warranted in this case, as it was in *Board of Regents*. Plaintiffs next argue that the quick-look framework absolves them of the burden of describing a relevant market on which the Bylaws have had an anticompetitive effect. The **[**17]** Supreme Court, in *Board of Regents*, stated that "when there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required," and "naked restraint[s] on price and output require[] some competitive justification even in the absence of a detailed market analysis." *468 U.S. at 109-10* (internal quotation marks and citation omitted); *see also* *Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998)* ("Under a quick look Rule of Reason analysis, anticompetitive effect is established, even without a determination of the relevant market, where the plaintiff shows that a horizontal agreement to fix prices exists . . . .").

Out of context, while these quotations seem to support plaintiffs' view of the quick-look doctrine, they are misleading. The quotes from *Board of Regents* and *Law* are not referring to the need for a relevant market to exist, but rather to the plaintiff's burden of showing that an agreement had anticompetitive effects on a particular market. As noted above, ***HN10***[] a plaintiff's threshold burden under the Rule of Reason analysis involves the showing of a precise market definition in order to demonstrate that a defendant wields market power, which, by definition, **[**18]** means that the defendant can produce anticompetitive effects. *See* *Valley Liquors, Inc., 822 F.2d at 666*. The quick-look doctrine permits plaintiffs to forgo any strict showing of market power, and thus a specific definition of the relevant market. *See* *Law, 134 F.3d at 1020* ("[W]here a practice has obvious anticompetitive effects—as does price-fixing—there is no need to prove that the defendant possesses market power."). This does not mean, however, that there need not be a relevant market on which actions have an anticompetitive effect. The entire point of the Sherman Act is to protect competition in the commercial arena, *Banks, 977 F.2d at 1087*; without a commercial market, the goals of the Sherman Act have no place. If a plaintiff can show that a defendant has engaged in naked restrictions on price or output, he can dispense with any showing of market power until a procompetitive justification is shown—but the existence of a relevant market cannot be dispensed with altogether. *Cf.* *Law, 134 F.3d at 1020*. It is the existence of a commercial market that implicates the Sherman Act in the first instance.[3]

[3] Aside from the fact that the plaintiffs misunderstand the need for the existence **[**19]** of a relevant market, it is unclear why they would adamantly seek to avoid the topic of market power. This appears to be a clear monopsony case, since the NCAA is the only purchaser of student athletic labor. In any event, ***HN11***[] a showing of market power is not necessary in a case involving clear restrictions on price and output unless and until a full Rule of Reason analysis takes place. *See* *Bd. of Regents, 468 U.S. at 109-10*.

The stage is therefore set. To succeed in its challenge of the district court's dismissal, plaintiffs must prove two points: (1) that there is a cognizable market on which the NCAA's actions could have had **[*338]** anticompetitive effects (thus implicating the Sherman Act); and (2) that plaintiffs did, in fact, identify that market in their complaint.[4]

B. Applicability of the Sherman Act to NCAA's Bylaws

The district court held that the bachelor's degree market and the student-athlete labor market, to the extent that they exist at all, could never be cognizable markets under the Sherman Act regardless of the clarity of plaintiffs' complaint. First, the district court found that we foreclosed any possibility that a labor market for student-athletes could be cognizable in *Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992)*. The district court went on to reject the possibility of a cognizable market for bachelor's degrees, finding two points to be particularly relevant: **[**21]** (1) that one cannot buy a bachelor's degree outright, but rather must meet certain requirements to receive the degree even after tuition has been paid; and (2) that student-athletes are not given bachelor's degrees for playing sports, but rather are given the opportunity to fulfill certain requirements that could lead to the bestowal of a bachelor's degree. Plaintiffs challenge the district court's findings.

It is undeniable that a market of some sort is at play in this case. A transaction clearly occurs between a student-athlete and a university: the student-athlete uses his athletic abilities on behalf of the university in exchange for an athletic and academic education, room, and board. As the Supreme Court made clear long ago, however, the Sherman Act was intended for, and thus only applies to, commercial transactions. *Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)*. *See also* Brown, 5 F.3d at 665 ("It is axiomatic that section one of the Sherman Act regulates only transactions that are commercial in nature."); Areeda & Hovenkamp, ***Antitrust Law***, ¶260b, at 250 (2000). In determining whether the exchange of free or reduced-rate education for athletic participation constitutes **[**22]** a cognizable market, then, we must determine whether such a transaction can be considered commercial. To begin with, the NCAA is not exempt from the strictures of the Sherman Act merely because it is a nonprofit entity, as *Board of Regents* makes clear. *See* 468 U.S. at 100. There is no clear line as to what constitutes a "commercial transaction," but one leading commentator has suggested that "today the term 'commerce' is much broader than it was [in the past] . . ., including almost every activity from which [an] actor anticipates economic gain." Areeda & Hovenkamp, ***Antitrust Law***, ¶260b, at 250 (2000).

The Sherman Act clearly applies to at least some of the NCAA's behavior. *See Bd. of Regents, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70*; *see also Law, 134 F.3d 1010* (holding that **[*339]** the Sherman Act applies to the NCAA's regulation of the salaries of coaches). The question for us, however, is whether and when the Sherman Act applies to the NCAA and its member schools in relation to their interaction with student-athletes. The Supreme Court has not weighed in on this issue directly, but *Board of Regents*, the seminal case on the interaction between the NCAA and the Sherman Act, implies that *all* regulations passed by the **[**23]** NCAA are subject to the Sherman Act. *468 U.S. at 117*. In *Board of Regents*, the Supreme Court ruled that the NCAA's restrictions on televising football games were a violation of § 1 of the Sherman Act. In so holding, the Court stated the following:

> It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants,

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[4] Of course, plaintiffs must show more than this to actually progress past the motion-to-dismiss stage. As stated *supra*, a successful Sherman Act plaintiff must prove the existence of "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury." *Denny's Marina, 8 F.3d at 1220*. It is unquestionable that the member schools of the NCAA agreed to **[**20]** follow the NCAA's Bylaws, thus meeting the first element of a Sherman Act claim. Since the district court concluded that plaintiffs did not identify a relevant market in their complaint, it did not address whether plaintiffs adequately alleged that the Bylaws are an unreasonable restraint of trade or that they suffered an accompanying injury. Likewise, we need not analyze plaintiffs' assertions regarding the reasonableness of the NCAA's restraints or plaintiffs' alleged injury, since we ultimately conclude that plaintiffs failed to allege a relevant market in their complaint.

> or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

Id. This presumes the applicability of the Sherman Act to NCAA bylaws, since no procompetitive justifications would be necessary for noncommercial activity to which the Sherman Act does not apply. Nonetheless, courts have struggled with the applicability of the Sherman Act to NCAA regulations.

Specifically, the Third and Fifth Circuits have confronted the issue at hand. The Third **[**24]** Circuit decided the issue definitively, but limited its holding to the NCAA's eligibility rules. *See* *Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998)*. In *Smith*, the Third Circuit upheld the dismissal of a suit claiming that an NCAA bylaw "prohibiting a student-athlete from participating in intercollegiate athletics while enrolled in a graduate program at an institution other than the student-athlete's undergraduate institution" violated the Sherman Act. *Id. at 182*. The court first held that the NCAA's eligibility rules are not related to the NCAA's commercial interests, and thus the Sherman Act does not apply to the NCAA's promulgation of such rules. *Id. at 185-86*; *see also* *Gaines v. NCAA, 746 F.Supp. 738, 743-44 (M.D. Tenn. 1990)* (distinguishing between the NCAA's commercial rules and noncommercial rules, and finding that eligibility rules are of the latter type, and thus not subject to the Sherman Act). In an alternative holding, the Third Circuit also reasoned that even if the NCAA's actions were subject to the Sherman Act, the plaintiff's suit should have been dismissed based on a Rule of Reason analysis. *Smith, 139 F.3d at 186*. The court observed that NCAA eligibility rules "allow for **[**25]** survival of the product, amateur sports, and allow for an even playing field," thus making them procompetitive on balance. *Id. at 187*. Contrary to the Third Circuit, the Fifth Circuit assumed without deciding that the Sherman Act applies to the NCAA's promulgation of eligibility rules in *McCormack v. NCAA. 845 F.2d 1338, 1343-44 (5th Cir. 1988)*. The Fifth Circuit nonetheless ruled that a particular NCAA eligibility rule—the restriction on benefits awarded to student-athletes—easily survived a Rule of Reason analysis, even at the dismissal stage. *Id*. As in *Smith*, the Fifth Circuit cited the eligibility rules' ability to create the product of college football, preserve that product, and preserve "a mixture containing some amateur elements." *Id. at 1344-45*.

While this Circuit has not definitively decided whether a cognizable market exists **[*340]** between universities and student-athletes under the Sherman Act, our case of *Banks v. NCAA* included a discussion of the issue in the form of dicta found in the majority opinion (Coffey and Grant, JJ.) and in a partial concurrence and dissent (Flaum, J.). *See generally* *977 F.2d 1081*. In *Banks*, a former University of Notre Dame football player challenged **[**26]** the NCAA's rule barring any players who have hired an agent or entered a professional draft. *Id. at 1082*. The majority held that the plaintiff's complaint failed to allege an anticompetitive effect on a relevant market, and thus affirmed the district court's dismissal of the plaintiff's claim. *Id. at 1093* ("[W]e need not reach the merits of whether the no-draft rule is a 'material term of employment' as the dissent argues because Banks has failed to allege how the no-draft and no-agent rules are restraints of trade . . . ."). In dicta, the majority determined that even if the plaintiff had properly alleged anticompetitive effects of the NCAA bylaw in question, his claim would have failed. *Id. at 1090-91*. The opinion reasoned that the no-draft and no-agent bylaws were both eligibility requirements, which are essential to preserving the existence of a football league consisting of student-athletes as well as maintaining a clear line of demarcation between college sports and professional sports. *Id. at 1089-90*. Further, the majority expressed doubt that a labor market for NCAA athletes exists at all, since "the value of [a] scholarship is based upon the school's tuition and room and board, **[**27]** not by the supply and demand for players." *Id. at 1091*. The dissent, conversely, believed that the plaintiff had alleged anticompetitive effects on the nationwide labor market for college football players, a market that is cognizable under the Sherman Act, and that a view of the NCAA's eligibility rules as noncommercial was "an outmoded image of intercollegiate sports that no longer jibes with reality." *Id. at 1095, 1099* (Flaum, J., dissenting). Successful college football programs often lead to large profits, and to acquire those profits, schools must pay in-kind benefits, namely, grant-in-aid, access to training facilities, and instruction from premier coaching. *Id. at 1096, 1099*. Significantly, the dissent noted that the no-agent and no-draft rules are not necessarily Sherman Act violations, but believed that the plaintiff's complaint should have survived a motion to dismiss, and the procompetitive justifications of the eligibility rules at stake should have been examined more closely. *Id. at 1098*.

We start with the view that ***HN12***[] the Sherman Act applies to the NCAA bylaws generally. As indicated above, the Sherman Act applies to commercial transactions, and the modern definition of commerce **[**28]** includes "almost every activity from which [an] actor anticipates economic gain." Areeda & Hovenkamp, ***Antitrust Law***,

¶260b, at 250 (2000). No knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program. Despite the nonprofit status of NCAA member schools, the transactions those schools make with premier athletes—full scholarships in exchange for athletic services—are not noncommercial, since schools can make millions of dollars as a result of these transactions.[5] Indeed, this is likely one reason that some schools **[*341]** are willing to pay their football coaches up to $5 million a year rather than invest that money into educational resources. *See* Kristin DeRamus et al., *College Football Coach Salary Database*, 2006-2011, (Nov. 17, 2011 11:02 AM), USA TODAY, *http://www.usatoday.com/sports*/ college/football/story/2011-11-17/cover-college-football-coaches-salaries-rise/51242232/1 (putting top salary for a college head football coach at roughly $5.2 million). That is not to suggest that all universities with a football program are solely **[**29]** driven by economic benefit; the profits derived from athletics can aid a university in many positive ways that fall in line with the mission of the university as a whole. But that does not prevent many universities, through their football teams, from entering the recruiting market, setting their recruiting budget, and making recruiting decisions with economic interests in mind. Similarly, student-athletes contemplating scholarship offers likely include economic factors in their decision-making process, such as the value of a given degree or the increased potential for entry into professional football. It follows that the NCAA's bylaws can have an anticompetitive or a procompetitive effect on collegiate athletics generally and the national college football recruiting market specifically, and those effects can have an economic component. Thus, ***HN13***[] the transactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act. *See White v. NCAA*, CV 06-999-RGK (C.D. Cal. Sept. 20, 2006) (holding that under the Sherman Act, "Major College Football" is a relevant market in which "colleges and **[**30]** universities compete to attract prospective student-athletes").

None of this is to suggest that all NCAA bylaws, or even *any* NCAA bylaws, are violative of the Sherman Act. On the contrary, *Board of Regents* implies that the Sherman Act does apply to NCAA regulations, but most regulations will be a "justifiable means of fostering competition among amateur athletic teams," and are therefore procompetitive. *468 U.S. at 117*. In fact, the Supreme Court seemed to create a presumption in favor of certain NCAA rules when it stated:

> It is reasonable to assume that most of the regulatory controls of the NCAA are . . . procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints . . . that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of **[**31]** participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

Id. We construe this language as a license to find certain NCAA bylaws that "fit into the same mold" as those discussed in *Board of Regents* to be procompetitive "in the twinkling of an eye," *Bd. of Regents, 468 U.S. at 110 n.39* (citation and quotation marks omitted)—that is, at the motion-to-dismiss stage. *See Am. Needle v. N.F.L., 130 S.Ct. 2201, 2216-17, 176 L. Ed. 2d 947 (2010)* (observing that certain agreements between members of a joint venture are "likely to survive the Rule of Reason" such that they do not require "a detailed analysis," and thus the Rule of Reason "can . . . be applied in the twinkling of an eye"). Thus, ***HN14***[] the first—and possibly only—question to be answered when NCAA bylaws are challenged is whether the NCAA regulations at issue are of the type that have been blessed by the Supreme Court, making them presumptively procompetitive. We now turn to that question.

[*342] The parties disagree on the scope of the presumption favoring certain NCAA regulations. Plaintiffs argue that the presumption should be limited to NCAA eligibility rules. They distinguish *Banks,* ***[**32]*** *Smith*, and *McCormack* on the grounds that the regulations upheld in those cases, unlike the regulations here, were eligibility rules. *See Banks, 977 F.2d 1081* (suggesting in dicta that procompetitive justifications for NCAA eligibility rules would undoubtedly outweigh any anticompetitive effects if the Sherman Act does, in fact, apply to said rules); *Smith,*

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[5] To illustrate, *Forbes* reported that the University of Texas' college football team was worth $129 million in 2011 and generated $71 million in profits. Chris Smith, *College Football's Most Valuable Teams*, FORBES (Dec. 22, 2011, 11:43 a.m.), *http://www.forbes.com/sites/chrissmith/2011/12/22/college-footballs-most-valuable-teams/*.

139 F.3d 180 (same); *McCormack, 845 F.2d at 1345* (reasoning at the motion to dismiss stage that "[t]he eligibility rules create the product and allow its survival in the face of commercializing pressures," and thus "do not violate the antitrust laws"). The NCAA, on the other hand, argues that the procompetitive presumption should not be limited to eligibility rules. Despite the Fifth Circuit's clear conceptualization of the limitation on collegiate athlete compensation as an eligibility rule, *see McCormack, 845 F.2d at 1343*, the NCAA argues that the regulation at issue in *McCormack* is better characterized as a financial aid rule, similar to the Bylaws at issue in this case. It therefore argues that any procompetitive presumption that might have been at play in *McCormack* should apply here.

In considering the parties' arguments and **[**33]** attempting to discern the scope of the presumption established by *Board of Regents*, it is important to consider the context in which that presumption was discussed. Directly preceding the language that allegedly establishes the presumption is a reminder that the NCAA's collusive behavior is only permissible because "a certain degree of cooperation is necessary if the type of competition that [the NCAA] and its member institutions seek to market is to be preserved." *Bd. of Regents, 468 U.S. at 117*. The Supreme Court made this point in greater detail in a separate section of its opinion, where it explained why "horizontal restraints on competition are essential if the product [of collegiate sports] is to be available at all." *See id. at 98-105*. The Court explained that any league sport will require the joint establishment of certain rules, such as the "size of the field" or the "number of players on a team." *Id. at 101*. College football, the court reasoned, requires even more joint activity, since

> the NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more **[**34]** popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.

Id. at 101-02. Herein lies the scope of the procompetitive presumption for certain NCAA regulations. ***HN15***[] A certain amount of collusion in college football is permitted because it is necessary for the product to exist. Accordingly, when an NCAA bylaw is clearly meant to help maintain the "revered tradition of amateurism in college sports" or the "preservation of the student-athlete in higher education," the bylaw will be presumed **[*343]** procompetitive, since we must give the NCAA "ample latitude to play that role." *Id. at 120*. But if a regulation is **[**35]** not, on its face, helping to "preserve a tradition that might otherwise die," either a more searching Rule of Reason analysis will be necessary to convince us of its procompetitive or anticompetitive nature, or a quick look at the rule will obviously illustrate its anticompetitiveness. *See id*. In *Board of Regents*, for instance, the Supreme Court ruled that the limitation on the type of television contracts that member schools are allowed to enter into does not aid in the preservation of amateurism or student-athletes, and is thus a violation of the Sherman Act. *Id*. The Court rejected the argument that the television plan equalized competition on the field and reasoned that, in any event, "the NCAA imposes a variety of other restrictions designed to serve amateurism which are much better tailored to the goal of competitive balance . . . [and] which are 'clearly sufficient' to preserve competitive balance to the extent it is within the NCAA's power to do so." *Id. at 117-20*.

HN16[] Most—if not all—eligibility rules, on the other hand, fall comfortably within the presumption of procompetitiveness afforded to certain NCAA regulations, as both parties agree.[6] Beyond the obvious fact that the Supreme **[**36]** Court explicitly mentioned eligibility rules as a type that "fit[s] into the same mold" as other procompetitive rules, they are clearly necessary to preserve amateurism and the student-athlete in college football. Indeed, they define what it means to be an amateur or a student-athlete, and are therefore essential to the very existence of the product of college football. *Accord Banks, 977 F.2d at 1089-90* ("[T]he no-draft rule and other like

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[6] We need not touch upon the debate of whether all eligibility rules or just *most* eligibility rules are due a presumption, as the Bylaws at issue in this case are not, in fact, eligibility rules.

NCAA regulations preserve the bright line of demarcation between college and 'pay for play' football."); Smith, 139 F.3d at 187 ("[T]he NCAA's eligibility rules allow for the survival of the product, amateur sports, and allow for an even playing field."); McCormack, 845 F.2d at 1344-45 ("The NCAA markets college football as a product distinct from professional football. The eligibility rules create the product and allow its survival in the face of commercializing pressures."). There may not be such a thing as a student-athlete, for instance, if it was not for the NCAA rules requiring class attendance, and thus no "detailed analysis," Am. Needle, 130 S.Ct. at 2216-17, would be necessary to deem such rules procompetitive. *Cf.* Bd. of Regents, 468 U.S. at 102. **[**37]** The same goes for bylaws eliminating the eligibility of players who receive cash payments beyond the costs attendant to receiving an education—a rule that clearly protects amateurism. *Cf.* McCormack, 845 F.2d 1338.[7]

The Bylaws at issue in this case, however, are not eligibility rules, nor do we conclude that they "fit into the same mold" as eligibility rules. *See* In re NCAA I-A Walk-on Football Players Litigation, 398 F.Supp.2d 1144, 1149 (W.D.Wash. 2005) (finding that the cap on the number of scholarships a college team can grant does not implicate student-athlete eligibility "in **[*344]** the same manner as rules **[**38]** requiring students to attend class or rules revoking eligibility for entering a professional draft"). These Bylaws—a one-year limit to scholarships and a limit on scholarships per team—are not inherently or obviously necessary for the preservation of amateurism, the student-athlete, or the general product of college football. Issuing more scholarships (thus creating more amateur players) and issuing longer scholarships cannot be said to have an obviously negative impact on amateurism. Nor is there an obvious effect on the ability of college football to survive without the Bylaws in question. The NCAA argues that multi-year scholarships would make it too difficult for less wealthy schools to compete in the recruiting market, but this claim is weakened by the fact that the restriction on multi-year scholarships was only instituted in 1973, Zachary Stauffer, *NCAA Approves New Rules—But Do They Matter?*, FRONTLINE (Oct. 28, 2011, 4:58 p.m.), http://www.pbs.org/wgbh/pages/frontline/ sports/money-and-march-madness/ncaa-approves-new-rules-but-do-they-matter/, and has recently been rescinded, *see* Steve Wieberg, *supra*. In any event, the claim is far too great a leap to make without evidentiary **[**39]** proof at the full Rule of Reason stage. Similarly, the rules limiting the number of scholarships available for every NCAA team may have procompetitive effects, such as the prevention of elite programs stockpiling athletes, but it is not intuitive that the recruiting market would be unable to handle this potential pitfall on its own. The Bylaws at issue, especially the prohibition against multi-year scholarships, seem to be aimed at containing university costs, not preserving the product of college football, though evidence presented at a later stage could prove that the Bylaws are, in fact, key to the survival of the student-athlete and amateurism.

It is true that the prohibition against multi-year scholarships is, in a sense, a rule concerning the amount of payment a player receives for his labor, and thus may seem to implicate the split between amateur and pay-for-play sports. After all, student-athletes are paid, but their payment is limited to reimbursement for costs attendant to receiving an education. For the purposes of college sports, and in the name of amateurism, we consider players who receive nothing more than educational costs in return for their services to be "unpaid **[**40]** athletes." It is for this reason, though, that the prohibition against multi-year scholarships does not implicate the preservation of amateurism, for whether or not a player receives four years of educational expenses or one year of educational expenses, he is still an amateur. It is not until payment above and beyond educational costs is received that a player is considered a "paid athlete." The NCAA could (but does not) argue that payment of more than one year's educational costs for only one year of athletic services—a scenario that may unfold if a player with a multi-year scholarship is released from the team or injured—would result in the destruction of amateurism. Once again, this assertion is belied by the fact that multi-year scholarships were wholly permissible before 1973, *see* Zachary Stauffer, *supra*, and amateurism, by all accounts, was alive and well in college sports in the first seven decades of the twentieth century. *See, e.g.*, Mechelle Voepel, *College athletes are already getting paid*, ESPN.COM (July 18, 2011), http://sports.espn.go.com/ncaa/columns/story?columnist= voepel_mechelle&id=6739971.

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[7] One should not mistake the analysis we discuss here as requiring proof of the procompetitive nature of the NCAA's "no payment" rules on a case-by-case basis. This analysis involves a determination of whether a rule is, on its face, supportive of the "no payment" and "student-athlete" models, not whether "no payment" rules are themselves procompetitive—under *Board of Regents*, they clearly are.

As for the NCAA's argument that, according to *McCormack*, both eligibility **[**41]** rules *and* financial aid rules are deserving of a procompetitive presumption, we disagree. The NCAA's limitation on **[*345]** athlete compensation *beyond* educational expenses, which was implicated in *McCormack*, directly advances the goal of maintaining a "clear line of demarcation between intercollegiate athletics and professional sports," *Banks, 977 F.2d at 1089* (quoting *Gaines, 746 F.Supp. at 744*), and thus is best categorized as an eligibility rule aimed at preserving the existence of amateurism and the student-athlete. The Bylaws at issue in this case, on the other hand, are not directly related to the separation of amateur athletics from pay-for-play athletics, as explained in the preceding paragraphs. Nor do they help preserve the existence of the student-athlete (as a facial matter, anyway), since they actually limit the number of athletes awarded financial aid and the amount of financial aid that an athlete can be awarded. Thus, ***HN17***[] financial aid rules do not always assist in the preservation of amateurism or the existence of student-athletes, so the regulations at issue cannot be presumptively procompetitive simply because they relate to financial aid.

The lack of a procompetitive presumption **[**42]** in favor of the two Bylaws under consideration does not equal a finding that they are anticompetitive; it simply means that they cannot be deemed procompetitive at the motion-to-dismiss stage. In fact, some of the procompetitive arguments made by the NCAA, if supported by evidence, could lead to a finding that the Bylaws are reasonable restrictions on trade. The district court did not reach the issue of whether the NCAA Bylaws were an unreasonable restriction on trade, but rather held that plaintiffs did not—and could not—allege a relevant market cognizable under the Sherman Act. As we have made clear, we disagree that plaintiffs *could not* have alleged a relevant cognizable market, but we ultimately conclude that plaintiffs *did not* identify such a market in their complaint, *see infra* Part C, and that the district court's dismissal was justified.

C. Adequacy of Plaintiffs' Complaint

As already noted, ***HN18***[] naked price and output controls can obviate the need for a detailed market analysis in a Sherman Act case, *Bd. of Regents, 468 U.S. at 109*, but that does not eliminate the need for a relevant commercial market to exist altogether. *Apex Hosiery, 310 U.S. at 492-93*. In an area that is not obviously **[**43]** commercial, and thus where the Sherman Act's application is not clearly apparent, we believe it is incumbent on the plaintiff to describe the rough contours of the relevant commercial market in which anticompetitive effects may be felt, even when a quick-look approach is all that is called for. It must therefore be determined whether the actual markets allegedly identified in plaintiffs' complaint—the market for bachelor's degrees and the market for student-athlete labor—were actually identified, and if so, whether they adequately describe the relevant market on which the Bylaws may have had an anticompetitive effect. The district court held that plaintiffs failed to identify in their complaint either of the markets they now present, and we agree.

Plaintiffs come closest to identifying a relevant commercial market in their discussion of bachelor's degrees, but we nonetheless conclude that the complaint falls short. Plaintiffs admit that before filing their amended complaint in the lower court, they removed two important portions from their original complaint: (1) a section heading entitled "Relevant Market," and (2) a sentence stating that "bachelor's degrees from accredited colleges **[**44]** and/or universities constitute a distinct product market." It is clear, therefore, that they believed a relevant market need **[*346]** not be identified or they attempted to hedge their bets by keeping their market allegations vague. Plaintiffs' complaint did state that "NCAA member institutions compete with each other to attract and enroll highly skilled athletes to their institution for obtaining bachelor's degrees," which at least suggests the existence of *some* market, but the confines of that market are far too unclear. For instance, it is not apparent whether plaintiffs believe that the Bylaws affect an overall market for bachelor's degrees, which would impact scholarship athletes and non-athletes alike, or some subsidiary market that only concerns athletes attempting to obtain educational degrees in exchange for athletic services. This may seem like nitpicking, but if a Sherman Act claim of this nature progresses past the quick-look stage and enters a full-fledged Rule of Reason analysis, the scope of the market becomes of central importance.

Moreover, even if we deemed plaintiffs' complaint to put the NCAA on sufficient notice of the relevant market affected by the Bylaws, we would still **[**45]** have doubts about plaintiffs' ability to survive a motion to dismiss. As mentioned above, the customer base in a product market for bachelor's degrees would include many more people than scholarship athletes. Bachelor's degrees are issued to literally thousands of people, only a small portion of which are scholarship athletes, and an even smaller portion of which are athletes whose scholarships were not renewed. The anticompetitive impact of an NCAA bylaw would therefore likely be very minimal. Another problem with the alleged market for bachelor's degrees, which was discussed by the district court, is the fact that degrees are not automatically received or guaranteed upon payment of tuition. As many unhappy undergraduates can attest, payment of tuition does not ensure the receipt of a degree. Plaintiffs cite *Brown* in support of their proposed market, where the Third Circuit found a cognizable market for educational services provided by Ivy League colleges. 5 F.3d 658. But **HN19**[] the difference between a market for educational services and a market for bachelor's degrees is of vital importance. A student is owed educational instruction upon payment of tuition, though what a student does with **[**46]** that instruction and whether that instruction leads to a degree is up to the student. A bachelor's degree, on the other hand, is not bought outright. It is the *opportunity* to earn a bachelor's degree that one pays for (or performs athletic services for, as the case may be). Thus, plaintiffs' complaint did not identify a product market for bachelor's degrees, but even if it did, we would likely find that such a market—to the extent that it exists—is not cognizable under the Sherman Act.

The proper identification of a labor market for student-athletes, on the other hand, would meet plaintiffs' burden of describing a cognizable market under the Sherman Act. As an initial matter, **HN20**[] labor markets are cognizable under the Sherman Act. *Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332, 335-36 (7th Cir. 1967)*. The *Banks* majority, in dicta, opined that the market for scholarship athletes cannot be considered a labor market, since schools do not engage in price competition for players, nor does supply and demand determine the worth of student-athletes' labor. 977 F.2d at 1091. We find this argument unconvincing for two reasons. First, the only reason that colleges do not engage in price competition **[**47]** for student-athletes is that other NCAA bylaws prevent them from doing so. **HN21**[] The fact that certain procompetitive, legitimate trade restrictions exist in a given industry does not remove that industry from the purview of the Sherman Act altogether. **[*347]** Rather, all NCAA actions that are facially anticompetitive must have procompetitive justifications supporting their existence.[8] Second, colleges do, in fact, compete for student athletes, though the price they pay involves in-kind benefits as opposed to cash. For instance, colleges may compete to hire the coach that will be best able to launch players from the NCAA to the National Football League, an attractive component for a prospective college football player. Colleges also engage in veritable arms races to provide top-of-the-line training facilities which, in turn, are supposed to attract collegiate athletes. Many future student-athletes also look to the strength of a college's academic programs in deciding where to attend. These are all part of the competitive market to attract student-athletes whose athletic labor can result in many benefits for a college, including economic gain.

Unfortunately for plaintiffs, nothing resembling a discussion of a relevant market for student-athlete labor can be found in the amended complaint. Indeed, the word labor is wholly absent. Plaintiffs claim that they "allege[d] that there was 'no practical alternative' available for students wishing to pursue an education in exchange for their playing ability," but the paragraph that they cite to in their amended complaint explains the lack of "practical alternatives" for colleges wanting to field teams outside of the NCAA's framework, not the lack of "practical alternatives" for student-athletes. Plaintiffs appear to have made the strategic decision to forgo identifying a specific relevant market. Whatever the reasons for that strategic decision, they cannot now offer post hoc arguments attempting to illuminate a buried market allegation. We therefore affirm the district court's dismissal **[**49]** of plaintiffs' claims.

D. Dismissal with Prejudice

HN22[] The district court's denial of plaintiffs' request to amend their complaint is reviewed for abuse of discretion, *Stanard, 658 F.3d at 797*, which is a "heavy burden." *Jackson v. Bunge Corp., 40 F.3d 239, 246 (7th Cir.*

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[8] Again, this does not necessarily mean that any challenge **[**48]** of any NCAA bylaw will survive the motion-to-dismiss stage. Many NCAA bylaws can be deemed procompetitive "in the twinkling of an eye." *Cf.* *Bd. of Regents, 468 U.S. at 109 n.39* (quoting P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981)).

1994). Under *Rule 15(a) of the Federal Rules of Civil Procedure*, a complainant may amend his complaint as a matter of course in response to a motion to dismiss, but any subsequent amendments can only be made with consent of the opposing party or the court's leave. We have stated that a district court is not required to grant such leave when a plaintiff has had multiple opportunities to state a claim upon which relief may be granted. *Emery v. Am. Gen. Finance, Inc., 134 F.3d 1321, 1322-23 (7th Cir. 1998)*. By our count, plaintiffs had three opportunities to identify a relevant market in which the NCAA allegedly committed violations of the Sherman Act. Plaintiffs obviously could have established a relevant market from the outset, but they also had the opportunity to amend their complaint and include an identification of a cognizable market after the full briefing and argument of the NCAA's motion to dismiss in the California **[**50]** district court. Further, plaintiffs actually took advantage of their ability to amend their complaint in the Indiana district court, yet even after confronting the NCAA's claim that a relevant market had not been identified, they still did not include a clear identification of the market in which the NCAA allegedly acted in an anticompetitive **[*348]** manner. Further, ***HN23***[] "[i]t is a basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss, nor can it be amended by the briefs on appeal." *Thomason v. Nachtrieb, 888 F.2d 1202, 1205 (7th Cir. 1989)*. We therefore cannot find that the district court abused its discretion in dismissing plaintiffs' claims with prejudice.

III. Conclusion

For the foregoing reasons, we AFFIRM the decision of the district court.

Amos v. Aspen Alps 123, LLC

Supreme Court of Colorado

June 18, 2012, Decided

Supreme Court Case No. 10SC187

Reporter

2012 CO 46 *; 280 P.3d 1256 **; 2012 Colo. LEXIS 428 ***; 2012 WL 2244839

Petitioners: Betty G. Amos and the Estate of Thomas R. Righetti, v. Respondents: Aspen Alps 123, LLC, and Equitable Bank.

Subsequent History: Rehearing denied by *Amos v. Aspen Alps 123, LLC, 2012 Colo. LEXIS 536 (2012)*

Prior History: **[***1]** Certiorari to the Court of Appeals. Court of Appeals Case No. 08CA2009.

Amos v. Aspen Alps 123, LLC, 2010 Colo. App. LEXIS 4 (Colo. Ct. App., Jan. 7, 2010)

Disposition: Judgment Affirmed in Part and Reversed in Part.

Core Terms

bid, rigging, notice, bidders, foreclosure sale, auction, trial court, Equitable, public trustee, foreclosure, court of appeals, void, requirement of notice, personal representative, Antitrust, actual notice, trust deed, fiduciary, conspiracy, parties, pool, constructive notice, interested party, authorization, foreclosing, compliance, default, deed, real property, moving party

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

The Colorado Supreme Court reviews a trial court's grant of summary judgment de novo. Summary judgment is appropriate when no issues of material fact exist and the moving party is entitled to judgment as a matter of law, *Colo. R. Civ. P. 56(c)*. The nonmoving party is entitled to the benefit of all favorable inferences that may be drawn from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party.

Real Property Law > Financing > Foreclosures > General Overview

HN2[] Financing, Foreclosures

Colo. R. Civ. P. 120 governs the process by which an interested person may request that a court enter an order authorizing the sale of real property when the power of sale is contained in a deed of trust to a public trustee. To request an Order Authorizing Sale, the interested person files a verified motion with the trial court. Rule 120 states that the motion shall be accompanied by a copy of the instrument containing the power of sale, shall describe the property to be sold, and shall specify the default or other facts claimed by the moving party to justify invocation of the power of sale. The Rule further provides that in the instance of foreclosure of the real property secured by a deed of trust to a public trustee: the motion shall state the name and last known address, as shown by the records of the moving party, of the grantor of such deed of trust, of the current record owner of the property to be sold, and of any person known or believed by the moving party to be personally liable upon the indebtedness secured by the deed of trust, as well as the names and addresses of those persons who appear to have acquired a record interest in such real property, subsequent to the recording of such deed of trust and prior to the recording of the notice of election and demand for sale, whether by deed, mortgage, judgment or any other instrument of record.

Real Property Law > Financing > Foreclosures > General Overview

HN3[] Financing, Foreclosures

Colo. R. Civ. P. 120(b) provides a notice requirement which states that a copy of the motion shall be served to each person named in the motion (other than persons for whom no address is stated) at the address or addresses stated in the motion.

Real Property Law > Financing > Foreclosures > General Overview

HN4[] Financing, Foreclosures

When a procedural irregularity did not injure or harm the complaining party, a foreclosure sale will not be set aside. Notice should further the purposes of the requirement: to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Colo. R. Civ. P. 120's requirement to provide notice to all interested persons was devised to provide actual notice to those with an interest in the pendency of the action and afford them an opportunity to be heard. Rule 120's notice provisions are fashioned to ensure that notice is timely. In addition, Rule 120 ensures that the hearing provides the allegedly defaulting party an opportunity to be heard at a meaningful time and in a meaningful manner concerning the matters constituting the alleged defaults.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] Sherman Act, Claims

A party may bring a civil claim under the Colorado Antitrust Act to recover damages for bid rigging, Colo. Rev. Stat. § 6-4-114 (2011).

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

HN6[] Standing, Requirements

The statute provides a civil private right of action for violation of the Colorado Antitrust Act in *Colo. Rev. Stat. § 6-4-114*: Any person injured in its property by reason of any violation of this article may sue therefor and, if successful, shall recover any actual damages sustained by such person.

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

HN7[] Regulated Practices, Private Actions

See *Colo. Rev. Stat. § 6-4-121*.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

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

HN8[] Standards of Review, Clearly Erroneous Review

In an appeal of a judgment entered after a trial to the court, the Colorado Supreme Court defers to the trial court's credibility determinations and will disturb its findings of fact only if they are clearly erroneous and are not supported by the record, *Colo. R. Civ. P. 52*. When the facts are undisputed, the reviewing court will not defer to the trial court's factual findings, but will instead conduct a de novo review and make an independent judgment on the merits.

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

HN9[] Regulated Practices, Private Actions

The Colorado Antitrust Act prohibits bid rigging under *Colo. Rev. Stat. § 6-4-106: (1)* It is illegal for any person to contract, combine, or conspire with any person to rig any bid, or any aspect of the bidding process, in any way related to the provision of any commodity or service. The term "commodity" includes land and real property, *Colo. Rev. Stat. § 6-4-103* (2011).

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

HN10[] Per Se Rule & Rule of Reason, Per Se Violations

There are no cases in Colorado interpreting *Colo. Rev. Stat. § 6-4-106*. The Colorado Supreme Court therefore looks to federal antitrust cases as its guide when interpreting the Colorado Antitrust Act, *Colo. Rev. Stat. 6-4-119* (2011). The Sherman Act differs from Colorado's Antitrust Act in that the federal law does not contain a provision specifically prohibiting bid rigging. Nonetheless, a federal body of case law exists interpreting the Sherman Act to prohibit bid rigging, and classifying bid rigging as a per se violation of section 1 of the Act.

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

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

HN11[] **Regulated Practices, Private Actions**

The Colorado Supreme Court looks to federal cases involving bid rigging as a guide to its determination of what constitutes bid rigging. Most of the federal cases involving bid rigging arise as criminal prosecutions that do not involve real property.

Headnotes/Summary

Headnotes

Real Property — *Rule 120* and Public Trustee Sale/Court Foreclosures; Antitrust - Bid Rigging

Syllabus

The supreme court affirms the court of appeals' judgment holding that notice was sufficient under *Rule 120*. The supreme court concludes that when the parties received actual notice which afforded them an opportunity to present their objections and no prejudice resulted, a completed foreclosure sale will not be disturbed for a failure to strictly comply with *C.R.C.P. 120*'s notice requirements.

Further, the supreme court determines that, based on the limited trial record in this case, the plaintiffs failed to establish bid rigging in violation of the Colorado Antitrust Act, *section 6-4-106, C.R.S.* (2011), as a defense. Accordingly, the supreme court reverses the court of appeals' judgment holding that illegal bid rigging had occurred.

Counsel: Attorneys for Petitioners: Holland & Hart, LLP, Wiley E. Mayne, Steven T. Collis, Denver, Colorado; Holland & Hart, LLP, Christopher J. Heaphey, Aspen, Colorado.

Attorneys for Respondent, Aspen Alps 123, LLC: Garfield & Hecht, P.C., Matthew C. Ferguson, Christopher D. Bryan, Aspen, Colorado.

Attorneys for Respondent, Equitable Bank: Duncan, **[***2]** Ostrander & Dingess, P.C., Richard F. Rodriguez, James Birch, Denver, Colorado.

Judges: JUSTICE RICE delivered the Opinion of the Court. CHIEF JUSTICE BENDER concurs in part and dissents in part. JUSTICE COATS dissents.

Opinion

[1257]** *en banc*

[*P1] In this appeal, we address whether a failure to strictly comply with *C.R.C.P. 120*'s notice requirements mandates setting aside a completed foreclosure sale. We conclude that when the parties received actual notice which afforded them an opportunity to present their objections and no prejudice resulted, we will not disturb a completed foreclosure sale. Accordingly, we affirm the court of appeals' judgment with respect to *Rule 120* notification.

[*P2] We also examine whether the principals of Aspen Alps 123, LLC (Aspen Alps) engaged in bid rigging in violation of the Colorado Antitrust Act, *section 6-4-106, C.R.S.* (2011). We determine that the limited record before us fails to establish bid rigging and, therefore, we reverse the court of appeals on the issue of bid rigging.

I. Facts and Proceedings Below

[*P3] This case involves the public trustee foreclosure sale under *C.R.C.P. 120* of a condominium unit in Aspen. Prior to the foreclosure sale, Betty Amos and her late husband, Thomas **[***3]** Righetti, owned the unit. Amos borrowed approximately $1.6 million from Equitable Bank securing the loan with a Deed of Trust on the condominium unit in favor of Equitable Bank and granted by Amos and Righetti.

[*P4] In September 2002, Righetti died. Amos and Righetti's daughter, Brandy Righetti, were named as co-personal representatives of the Estate of Thomas Righetti.

[*P5] In 2006, Amos' loan fell into default and Equitable Bank decided to foreclose on the property. Equitable Bank filed a *Rule 120* **[**1258]** Motion for Order Authorizing Sale and sent notice of the proceeding to Amos in her individual capacity. Equitable Bank did not send notice of the *Rule 120* proceeding to the Estate or to Brandy Righetti. Neither Amos nor the Estate opposed the order authorizing sale.

[*P6] The public trustee held a foreclosure sale on February 27, 2007. Neither Amos nor the Estate submitted a bid. After Equitable Bank bid the amount of its debt, three individuals -- Seguin, Mayer, and Griffin (representing Flaum) -— bid competitively until Seguin had bid $1.86 million. At that point, Griffin proposed to the others that, instead of "bidding the property up further and further," they cease bidding against each other and buy **[***4]** the property jointly. All agreed and formed Aspen Alps 123, LLC after the auction. The public trustee deemed Aspen Alps as the successful bidder. On August 14, 2007, the public trustee issued the deed quieting title in the property to Aspen Alps.

[*P7] Amos then brought this action against the public trustee and Equitable Bank to enjoin the issuance of the deed to Aspen Alps, and to compel the trustee to allow her to redeem.[1] Concurrently, she filed a notice of lis pendens. When the trial court refused to grant a preliminary injunction in Amos' favor, she filed a second notice of lis pendens. Amos then amended her complaint to include a claim that Equitable Bank failed to strictly comply with the notice requirements of *Rule 120*.

[*P8] Prior to trial, Amos also filed a summary judgment motion asserting that Equitable Bank failed to comply with the foreclosure procedure set forth in *Rule 120*. The trial court determined that Equitable Bank sent Righetti's notice to the wrong address and thus did not strictly comply with the Rule. Nonetheless, the trial court found that the error was a mere technicality and that the plaintiffs failed to show any prejudice since they received actual notice. Accordingly, the trial court declined to declare the sale null and void.

[*P9] Shortly before trial, Amos attempted to add a third claim alleging bid rigging, antitrust violations, and conspiracy by the principals of Aspen Alps. The trial court denied Amos' motion to amend, but allowed evidence of bid rigging as a defense to counterclaims[2] asserted by Aspen Alps.

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[1] Under *Rule 120* in 2007, Amos had 75 days (until May 14, 2007) in which to redeem. She claimed that she sent an intent-to-redeem letter to the public trustee before the redemption deadline. The public trustee, however, never received the letter. On May 8, six days prior to the redemption deadline, Amos' attorney notified the public trustee of Amos' intent to redeem. And, on May 14, Amos wired the necessary funds to the public trustee. Aspen Alps, however, exercised **[***5]** its statutory right to veto the redemption and directed the public trustee to deny Amos' attempt to redeem.

[2] Aspen Alps asserted counterclaims, including, for declaratory judgment that Aspen Alps properly purchased the property at the foreclosure sale and that it held free and marketable title, and to quiet title in the property.

[*P10] The case proceeded to a trial to the court and the **[***6]** court dismissed Amos' redemption claim under *C.R.C.P. 41(b)*. The trial court also determined that the principals of Aspen Alps had not engaged in illegal bid rigging and that both lis pendens filed by Amos were spurious documents and slandered title to the property.

[*P11] Amos appealed. The court of appeals held that a foreclosing party must strictly comply with the notice requirements of *Rule 120*, but excused Equitable Bank's failure to send notice to Brandy Righetti or to the Estate. The court of appeals reasoned that Equitable Bank sent notice to Amos, a co-personal representative and agent of the Estate. Accordingly, because the Estate had constructive notice of the foreclosure and was not prejudiced, there was no basis for setting aside the foreclosure sale. The court of appeals also held that the principals of Aspen Alps had engaged in illegal bid rigging because their agreement to purchase the property together was anti-competitive. Consequently, it set aside the deed to Aspen Alps. The court of appeals did not, however, void the foreclosure sale. Instead, it remanded to the trial court with instructions for that court to exercise its equitable discretion to determine whether to award **[***7]** the deed to the high bidder or void the foreclosure sale.

[1259]** **[*P12]** Amos sought certiorari review by this Court.[3] We now affirm the court of appeals' judgment with respect to the *Rule 120* notice requirement, and reverse its decision with respect to bid rigging.

II. Analysis

A. Notice Requirement

[*P13] First, we examine whether a failure to strictly comply with *Rule 120*'s notice requirements mandates setting aside a completed foreclosure sale. ***HN1***[] We review a trial court's grant of summary judgment de novo. *A.C. Excavating v. Yacht Club II Homeowners Ass'n, 114 P.3d 862, 865 (Colo. 2005)*. Summary judgment is appropriate when no issues of material fact exist and the moving party is entitled to judgment as a matter of law. *C.R.C.P. 56(c)*; **[***8]** *A.C. Excavating, 114 P.3d at 865*. The nonmoving party is entitled to the benefit of all favorable inferences that may be drawn from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party. *A.C. Excavating, 114 P.3d at 865*.

[*P14] ***HN2***[] *C.R.C.P. 120* governs the process by which an interested person may request that a court enter an order authorizing the sale of real property when the power of sale is contained in a deed of trust to a public trustee. To request an Order Authorizing Sale, the interested person files a verified motion with the trial court. *Rule 120* states that the motion "shall be accompanied by a copy of the instrument containing the power of sale, shall describe the property to be sold, and shall specify the default or other facts claimed by the moving party to justify invocation of the power of sale." The Rule further provides that in the instance of foreclosure of the real property secured by a deed of trust to a public trustee:

> the motion shall state the name and last known address, as shown by the records of the moving party, of the grantor of such deed of trust, of the current record owner of the property to **[***9]** be sold, and of any person known or believed by the moving party to be personally liable upon the indebtedness secured by the deed of trust, as well as the names and addresses of those persons who appear to have acquired a record interest in such real property, subsequent to the recording of such deed of trust and prior to the recording of the notice of election and demand for sale, whether by deed, mortgage, judgment or any other instrument of record.

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[3] We granted review on the following issues:

> 1. When bidders at a public foreclosure sale conspired to rig the bidding in violation of the Colorado Antitrust Act and the resulting deed is void, may the court nevertheless award the foreclosed property to one of the conspirators rather than void the sale?
>
> 2. Whether a foreclosing bank's material failure to comply with *C.R.C.P. 120*'s requirements to identify and give notice to all interested parties voids the resulting foreclosure sale.

C.R.C.P. 120(a). **HN3**[] The Rule then provides a notice requirement which states that a copy of the motion shall be served "to each person named in the motion (other than persons for whom no address is stated) at the address or addresses stated in the motion." C.R.C.P. 120(b).

[*P15] First, we hold that the trial court correctly found that Equitable Bank failed to strictly comply with Rule 120's notice requirements by serving Righetti at the wrong address. Amos and Righetti were the grantors of the Deed of Trust in favor of Equitable Bank. Equitable Bank mailed notice to the deceased Righetti at the address on the Deed of Trust, but that notice contained a typographical error so that the street address numbers were transposed, rendering the mail undeliverable. **[***10]** Pursuant to Rule 120 and the terms of the Deed of Trust, Equitable Bank was required to provide notice to Righetti at his last known address. Because Equitable Bank failed to do so, it did not strictly comply with the Rule.[4]

[*P16] This brings us to the question before the Court on certiorari review: whether a completed foreclosure sale must be set aside for a failure to strictly adhere to Rule 120's notification requirements when actual notice was received. Jurisdictions across the country are divided as to whether **[**1260]** the standard for foreclosure notification is actual notice or strict compliance.[5] This Court addressed public trustee foreclosure notice requirements in *Dews v. District Court, 648 P.2d 662, 664 (Colo. 1982)*, and found that the "provisions of Rule 120 must be strictly complied with by one seeking foreclosure under a power of sale through the public trustee." At issue in Dews was the fact that the Rule 120 foreclosure notices were not timely sent to the debtor. *Id. at 663*. Rather than being mailed at least 15 days prior to the proceeding as required by the Rule, the notices were mailed out **[***11]** 14 days prior to the proceeding. Id. As a result, the debtors received notice of the Rule 120 proceeding only two to three days before they were required to respond. Id. Due to the foreclosing party's failure to strictly comply with Rule 120's notice provisions and the resulting untimely notice, this Court voided the order authorizing the sale and required a new Rule 120 proceeding. *Id. at 664*. The question then is whether Dews requires a completed foreclosure sale be declared void due to a foreclosing party's failure to strictly comply with Rule 120. We do not read Dews to mandate such a result.

[*P17] The petitioners urge this Court to void the completed foreclosure sale for a deviation from the notice requirement -- namely, that the notice was addressed only to Amos individually and not to Amos individually and as personal representative of Righetti's Estate -- when they had actual notice of the Rule 120 hearing and pending foreclosure, and where the foreclosing party and trustee otherwise fully complied with Rule 120. We **[***13]** decline to do so. **HN4**[] When, as here, a procedural irregularity did not injure or harm the complaining party, a foreclosure sale will not be set aside. "Notice should further the purposes of the requirement: 'to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Lehner v. United States, 685 F.2d 1187, 1191 (9th Cir. 1982)* (citing *Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)*). Rule 120's requirement to provide notice to all interested persons was devised to provide actual notice to those with an interest in the pendency of the action and afford them an opportunity to be heard. Charles D. Calvin, Legislative History: C.R.C.P. Rule 120, 8 Colo. Law. 785, 788 (1979) (citing *Mullane, 339 U.S. at 314*). Rule 120's notice provisions are fashioned to ensure that notice is timely. *Dews, 648 P.2d at 664*. In

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[4] Equitable Bank does not claim to have mailed notice to the Estate or to Brandy Righetti.

[5] Compare *Long v. Bd. of Governors, 117 F.3d 1145, 1158 (10th Cir. 1997)* ("To establish a due process violation, an individual must show that he or she has sustained prejudice as a result of the allegedly insufficient notice."); *Baker v. Latham Sparrowbush Assocs., 72 F.3d 246, 254 (2d Cir. 1995)* ("If a party receives actual notice that apprises it of the pendency of the action and affords an opportunity to respond, the due process clause is not offended."); *Lyon v. Estate of Cornell, 269 A.D.2d 737, 738, 703 N.Y.S.2d 325 (N.Y. App. Div. 2000)* ("Once actual notice is received, strict compliance with the statute **[***12]** is no longer required."); *Amresco Independence Funding, Inc. v. SPS Props., LLC, 129 Wn. App. 532, 119 P.3d 884, 886-87 (Wash. Ct. App. 2005)* ("Despite the strict compliance requirement, a plaintiff must show prejudice before a court will set aside a trustee sale."), with *Ameribank, N.A. v. Quattlebaum, 269 Ga. 857, 505 S.E.2d 476, 478 (Ga. 1998)* (strict compliance required even though "departure may not result in injustice in this case"); *Sec. Pacific Fin. Corp. v. Bishop, 109 Idaho 25, 704 P.2d 357, 359 (Idaho Ct. App. 1985)* (strict compliance with deed of trust foreclosure statutes required); *Equivest Ltd. P'ship v. Foster, 253 Mich. App. 450, 656 N.W.2d 369, 374 (Mich. Ct. App. 2002)* ("We . . . feel constrained to" require strict compliance with tax sale notice provisions, "even if doing so produces anomalous results.").

addition, *Rule 120* ensures that the hearing provides the allegedly defaulting party an opportunity to be heard at a meaningful time and in a meaningful manner concerning the matters constituting the alleged defaults. Id.

[*P18] Here, it is undisputed that Equitable Bank provided notice to Amos at her last known **[***14]** address -- the same address at which the Estate received correspondence. It is also undisputed that Amos received that notice. The record additionally establishes that Amos served as the co-personal representative of the Estate. Therefore, the Estate -- with Amos as a personal representative -- received constructive notice of the foreclosure through the actual, timely notice provided to Amos. See *C.R.C.P. 4(e)(4)*. Upon receiving notice of the *Rule 120* proceeding, Amos forwarded the notice to her attorneys who, together with Amos, chose not to challenge **[**1261]** the default. Thus, Amos, and thereby the Estate, was afforded timely notice and a meaningful opportunity to appear and defend the foreclosure action.[6]

[*P19] The instant case differs **[***15]** from Dews which came before this Court on a *C.A.R. 21* petition before a foreclosure sale had occurred. *648 P.2d at 662-63*. Moreover, the allegedly defaulting party in Dews received notice only days before the proceeding and therefore was not given timely notice or afforded a meaningful opportunity to be heard. *Id. at 664*.

[*P20] Here, the failure to provide notice to Righetti as required under *Rule 120* did not result in harm to Righetti or his Estate. Amos and the Estate had sufficient notice of the *Rule 120* proceeding and could have chosen to defend the foreclosure action. Instead, after consulting with counsel, Amos made an informed decision not to contest the default on her own behalf or on behalf of the Estate. To determine that the notice fails here because it was addressed only to Amos individually and not to Amos individually and as personal representative of Righetti's Estate would ignore the purpose underlying notice: "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane, 339 U.S. at 314*. We will not elevate form over substance and void a completed foreclosure sale at this late juncture when the Estate had **[***16]** constructive notice, made no timely objection to the *Rule 120* hearing, and no injury resulted. Thus, we affirm the court of appeals with respect to its *Rule 120* determination.

B. Bid Rigging

[*P21] We now turn to the issue of bid rigging.[7] First, we describe the unusual procedural posture of this case. Next, we discuss what constitutes bid rigging under the Colorado Antitrust Act, taking guidance from the Sherman Act. Finally, we determine that the trial court's findings and conclusion that the plaintiffs failed to prove bid rigging as a defense are supported by the record.

1. Procedural History

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[6] The petitioners challenge the trial court's finding that the Estate and Brandy Righetti were not entitled to notice under *Rule 120*. Even assuming that *C.R.C.P. 120* required Equitable Bank to provide notice to the Estate or to Brandy Righetti as co-personal representative of the Estate, we would reach the same result because the Estate received constructive notice through the actual notice provided to Amos. Thus, the same lack of prejudice analysis would apply.

[7] The parties disagree about whether the issue of bid rigging is before the Court, or whether we are confined to the issue on which we granted certiorari review: whether, when bidders at a public foreclosure sale conspired to rig the bidding in violation of the Colorado Antitrust Act and the resulting deed is void, the foreclosed property may be awarded to one of the conspirators rather than void the sale. This Court has the authority to review issues encompassed within the certiorari issue. *C.A.R. 53(a)(1)* ("The statement of an issue presented will be deemed to include every subsidiary issue clearly comprised therein."). **[***17]** Here, the issue of whether bid rigging occurred must be resolved to reach the issue on certiorari.

[*P22] This issue comes before the Court in an unusual procedural posture. ***HN5***[] A party may bring a civil claim under the Colorado Antitrust Act to recover damages for bid rigging. See *§ 6-4-114, C.R.S.* (2011).[8] Here, the trial court denied the plaintiffs' motion to amend their complaint a third time to include a claim for bid rigging. The trial court reasoned that the plaintiffs had unduly delayed adding the potential claim, and failed to show good cause for amending their complaint only forty-five days before trial and after the close of discovery. Further, the trial court found that prejudice could result from the introduction of the claim so close to trial, and from the lack of discovery on bid rigging.

[*P23] The trial court did, however, permit plaintiffs to present evidence of bid rigging as a defense **[***18]** to Aspen Alps' counterclaims despite acknowledging that the plaintiffs were attempting "to admit evidence of bid rigging through the back door." The trial court allowed the defense, finding that the evidence was relevant because in order to **[**1262]** recover on its counterclaims, Aspen Alps would need to establish valid title to the property. Though valid title is presumed when, as here, title is conferred by the official act of a public official, the trial court determined that evidence of bid rigging could rebut the presumption. Therefore, the trial court determined, bid rigging could be introduced as a defense. Even so, the trial court did not allow the plaintiffs to reopen discovery to further develop the defense, determining that the plaintiffs "could have and should have discovered this defense long before." Instead, the trial court only permitted the plaintiffs to designate previously taken deposition testimony from Mayer, one of the parties bidding at the auction, and from Tiffany Wincura, Public Trustee of Pitkin County. Thus, bid rigging was introduced as only a defense, late in the case, with limited discovery.

[*P24] With this limited record before it, the court of appeals determined that **[***19]** bid rigging had occurred. The court of appeals then relied on *section 6-4-121, C.R.S.* (2011),[9] to reverse the quiet title decree, but declined to void the foreclosure sale. Instead, the court of appeals remanded the case to the trial court to determine in its equitable discretion whether the sale should be void or if the high bidder at the foreclosure sale should be awarded the deed to the property. We reverse.

2. Standard of Review

[*P25] ***HN8***[] In an appeal of a judgment entered after a trial to the court, we defer to the trial court's credibility determinations and will disturb its findings of fact only if they are clearly erroneous and are not supported by the record. *C.R.C.P. 52*; *Ranta Constr., Inc. v. Anderson, 190 P.3d 835, 843 (Colo. App. 2008)*. When the facts are undisputed, the reviewing **[***20]** court will not defer to the trial court's factual findings, but will instead conduct a de novo review and make an independent judgment on the merits. *Hinojos v. Lohmann, 182 P.3d 692, 694-95 (Colo. App. 2008)*.

3. Requirements for Bid Rigging

[*P26] ***HN9***[] The Colorado Antitrust Act prohibits bid rigging under *section 6-4-106*: "(1) It is illegal for any person to contract, combine, or conspire with any person to rig any bid, or any aspect of the bidding process, in any

[8] ***HN6***[] The statute provides a civil private right of action for violation of the Act in *section 6-4-114*: "Any person injured in its . . . property by reason of any violation of this article may sue therefor and, if successful, shall recover any actual damages sustained by such person."

[9] *Section 6-4-121* provides:

> ***HN7***[] All contracts or agreements made by any person while a member of any combination, [or] conspiracy . . . prohibited under this article which are founded upon, or are the result of, or grow out of, or are connected with any violation of this article, either directly or indirectly, shall be void, and no recovery thereon or benefit therefrom shall be had by or for any such person. . . .

way related to the provision of any commodity or service." The term "commodity" includes land and real property. *§ 6-4-103, C.R.S.* (2011).

[*P27] ***HN10***[] There are no cases in Colorado interpreting *section 6-4-106*. We therefore look to federal antitrust cases as our guide when interpreting the Colorado Antitrust Act. *§ 6-4-119, C.R.S.* (2011) ("It is the intent of the general assembly that, in construing this article, the courts shall use as a guide interpretations given the federal courts to comparable federal antitrust laws."); *People ex rel. Woodard v. Colo. Springs Bd. of Realtors, Inc., 692 P.2d 1055, 1061 (Colo. 1984)* ("[B]ecause our statute is intended to protect the public from illegal restraints of trade beyond the reach of federal law, decisions **[***21]** of federal courts construing the Sherman and Clayton Acts, although not controlling, are entitled to careful scrutiny in resolving issues arising under Colorado's antitrust statute."). The Sherman Act differs from Colorado's Antitrust Act in that the federal law does not contain a provision specifically prohibiting bid rigging. Compare *15 U.S.C. § 1 (2006)* ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."), with *§ 6-4-106*. Nonetheless, a federal body of case law exists interpreting the Sherman Act to prohibit bid rigging, and classifying bid rigging as a per se violation of section 1 of the Act. See, e.g., *United States v. Koppers Co., 652 F.2d 290, 294 (2d Cir. 1981)*; *United States v. Bensinger Co., 430 F.2d 584, 589 (8th Cir. 1970)*; *Love v. Basque Cartel, 873 F. Supp. 563, 576 (D. Wyo. 1995)*.

[1263]** **[*P28]** Thus, ***HN11***[] we look to federal cases involving bid rigging as a guide to our determination of what constitutes bid rigging. Most of the federal cases involving bid rigging arise as criminal prosecutions that do not involve real property. See, e.g., *United States v. Reicher, 983 F.2d 168 (10th Cir. 1992)* **[***22]** (reviewing a criminal prosecution under the Sherman Act for bid rigging); *United States v. W.F. Brinkley & Son Constr. Co., 783 F.2d 1157 (4th Cir. 1986)* (same); *United States v. Lyons, 670 F.2d 77 (7th Cir. 1982)* (same). We have some guidance, however, from two cases involving claims of bid rigging in foreclosure sales: *United States v. Guthrie, 814 F. Supp. 942, 943 (E.D. Wash. 1993)*, and *Love v. Basque Cartel, 873 F. Supp. at 563*.

[*P29] In Guthrie, Guthrie was convicted under the Sherman Act for rigging bids at two real estate foreclosure sales. *814 F. Supp. at 943*. Guthrie approached potential bidders prior to the scheduled foreclosure sales and requested that they forego bidding at the sale in return for payment. *Id. at 943-44*. Guthrie was subsequently the only bidder at the foreclosure sales and won by submitting a bid $1 above the minimum bid level. *Id. at 944*. The court determined that Guthrie had engaged in bid rigging, which it defined as "an agreement between two or more persons to eliminate, reduce, or interfere with competition for a job or contract that is to be awarded on the basis of bids." *Id. at 950*.

[*P30] In Love, the court dismissed claims of bid rigging cautioning that "[b]id **[***23]** rigging should not be confused with joint bidding, which allows bidders to pool their resources to place bids on property which they would otherwise be unable to afford." *873 F. Supp. at 577*. The plaintiffs asserted that bid rigging occurred when a group agreed to buy an entire property for a set price rather than buying the parcels the members of the group had originally tried to obtain. *Id. at 577-78*. Because the defendants joined to purchase the property in its entirety, the plaintiffs asserted that the defendants were able to purchase the entire property for an artificially low price. *Id. at 578*. The court rejected the argument, determining that "its adoption would essentially outlaw joint bids of any kind since it could always be said that joint bidding agreements removed potential bidders from the bidder pool and thus suppressed competition." Id. The court also considered the fact that the plaintiffs failed to present evidence that they or anyone else were foreclosed from bidding. Id.

[*P31] The Love court also relied on *Kearney v. Taylor, 56 U.S. 494, 520, 14 L. Ed. 787 (1853)*, to find the bidders conduct "consonant with the Supreme Court's support for joint bidding." *Love, 873 F. Supp. at 578*. In **[***24]** Kearney the United States Supreme Court announced that joint bidding is necessary and even desirable:

> The property at stake might be beyond the means of the individual, or might absorb more of them than he would desire to invest in the article, or be of a description that a mere capitalist, without practical men as associates, would not wish to encumber himself with.

56 U.S. at 520. Thus, the Court reasoned that it must "look beyond the mere fact of an association of persons formed for the purpose of bidding at this sale, as it may be not only unobjectionable, but oftentimes meritorious, if not necessary, and examine into the object and purposes of it." Id. at 520-21. If the purpose of the association is not to prevent competition, but to enable or induce those in the association to participate in the bidding, then the sale should be upheld. Id. at 521.

[*P32] With this guidance in mind, we turn to the issue of bid rigging in the case at hand.

4. Application

[*P33] In this case, the trial court concluded that the plaintiffs failed to establish bid rigging as a defense. Rather, the three individual bidders exercised their right to contract by pooling their resources to place bids on a property which **[***25]** they would otherwise be unable to afford. See Love, 873 F. Supp. at 577. The trial court based its conclusion on several key findings of fact. First, Seguin, Mayer, and Flaum (via Griffin) were each unable to individually bid any higher than the $1.86 million winning bid at the foreclosure sale. Mayer ceased bidding before the three decided to form the LLC because the bid surpassed her available funds. Similarly, Flaum testified that $1.8 **[**1264]** million was the maximum amount of authority that Griffin had to bid. Seguin's bid of $1.86 million was the highest bid and was offered before the agreement to stop bidding and form Aspen Alps to jointly buy the property was made. In addition, the plaintiffs failed to establish that any competitors were shut out of the bidding process as Mayer, Seguin, and Flaum were the only bidders. Based on these findings of fact, the trial court concluded that the actions constituted joint bidding, not bid rigging. Consequently, the trial court held that the plaintiffs failed to establish bid rigging as a defense. We agree.

[*P34] Because of the late introduction of the bid rigging theory and the lack of discovery on the issue, the plaintiffs offered extremely limited **[***26]** testimony regarding bid rigging. Evidence at trial established that only three people bid at the foreclosure sale: Mayer, Seguin, and Griffin (on behalf of Flaum). Unlike the defendant in Guthrie, the three did not know each other before the day of the foreclosure sale. Also, the three bid competitively. Mayer stopped bidding at $1.75 million because she did not have any more funds available to bid. Flaum authorized Griffin to bid only up to $1.8 million. Seguin submitted the high bid at $1.86 million. The final bid was also significantly higher than the starting bid of $1.495 million. Mayer testified that it was at that point in the bidding that Griffin said "we could be bidding this up further and further," and suggested that the three form Aspen Alps to purchase the property instead of bidding against one another.[10] The Pitkin County Public Trustee, Tiffany Wancura, testified that Mayer, Griffin, and Seguin decided to form Aspen Alps and purchase the property together rather than continue to bid against each other. While a prior agreement is not necessary to prove bid rigging, based on this testimony, we can conclude that, unlike in Guthrie, there was not an agreement prior to the **[***27]** foreclosure sale to rig the bid.

[*P35] Moreover, this case resembles Love and Kearney in that testimony shows that Mayer, Griffin, and Seguin pooled their resources to purchase the property. The bidding had exceeded Mayer's funds as well as Griffin's funds. Then Griffin proposed joint ownership of the property. In examining the purpose of the combined bid, we cannot say based on the limited evidence in the record that the purpose of the individuals joining to purchase the property was to eliminate, reduce, or interfere with competition. Thus, the record does not support a determination that bid rigging occurred.

[*P36] As such, the record supports the trial court's determination that bid rigging was not established; therefore, we find no reason to disturb the judgment on appeal. Consequently, we reverse the court of appeals.

III. Conclusion

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[10] The trial court admitted the statements under the CRE 801(d)(2)(E) hearsay exception.

[*P37] For the foregoing reasons, we affirm the court of appeals' judgment with respect to *Rule 120* notification. We reverse the court of appeals on the issue of bid rigging.

CHIEF JUSTICE BENDER concurs in part and dissents in part.

JUSTICE COATS dissents.

Concur by: BENDER (In part)

Dissent by: BENDER (In **[***28]** part); COATS

Dissent

CHIEF JUSTICE BENDER concurs in part and dissents in part.

[*P38] The majority holds that unlawful bid rigging does not occur when all of the bidders in an ongoing foreclosure auction agree that "instead of 'bidding the property up further and further,' they cease bidding against each other and buy the property jointly." Maj. op. at ¶ 6. I disagree with this holding because I believe that this anti-competitive scheme was intended to stop further bidding and thus constitutes an illegal bid rigging conspiracy in violation of *section 6-4-106(1), C.R.S.* (2011). Thus, I respectfully dissent from Part II.B of the majority's opinion. However, because I agree with the majority's resolution of the *Rule 120* notification issue, I concur in Part II.A. Hence, I concur in part and dissent in part.

I.

[*P39] The material facts in this case are undisputed. There were three principle bidders[11] **[**1265]** at the auction for the foreclosed condo below: Seguin, Meyer, and Griffin (representing Flaum). The three bidders bid competitively until Seguin bid $1.86 million. At that point, Griffin approached both Seguin and Meyer and proposed that rather than "bidding the property up further and further," they all stop bidding **[***29]** and instead agree to purchase the property jointly. Seguin and Meyer agreed and no further bids were submitted. After the auction, Seguin, Meyer, and Flaum formed Aspen Alps 123, LLC, and, shortly thereafter, the public trustee issued a deed quieting title to the real property in Aspen Alps.

II.

[*P40] Based upon these undisputed facts, I respectfully disagree with the majority's holding that bid rigging did not occur in this case. In the words of the bidders themselves, after the auction began, all of the bidders present at the auction unlawfully colluded to "stop the bidding process" and thus kept the sale price from rising "further and further." Accordingly, in my view, the parties engaged in an anti-competitive conspiracy in violation of *section 6-4-106(1)*.[12]

[*P41] "[A]n agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its **[***30]** face." *Nat'l Soc. of Prof'l Eng'rs v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)* (quoting *United States v. Container Corp., 393 U.S. 333, 337, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969))*. More specifically, an

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[11] The creditor bank, Equitable Bank, submitted an initial bid in the amount of its debt, which was then outmatched by the remaining bidders.

[12] I agree with the majority that, under *section 6-4-119, C.R.S.* (2011), we must interpret *section 6-4-106(1)*'s prohibition on bid rigging consistent with federal ***antitrust law***. Maj. op. at ¶ 27.

auction "will be set aside where a person, desirous of purchasing, prevents others by his improper conduct from bidding against him . . . ." 7A C.J.S. Auction & Auctioneers § 14 (1980). Because bid rigging is per se unlawful, the relevant inquiry is whether an agreement existed to rig the bid, and not whether the agreement was successful. *United States v. Guthrie, 814 F.Supp. 942, 949 (E.D. Wash. 1993)*.

[*P42] The majority reasons that the bidders' agreement did not constitute unlawful bid rigging, but was instead lawful "pooling" of the bidders' resources to create a joint bid similar to the arrangement that the Wyoming Federal District Court found to be lawful in *Love v. Basque Cartel, 873 F.Supp. 563 (D. Wyo. 1995)*. Maj. op. at ¶ 33. Specifically, the Love court warned that "[b]id rigging should not be confused with joint bidding, which allows bidders to pool their resources to place bids on property which they would otherwise be unable to afford." *873 F.Supp. at 578*. I disagree with the majority's reliance on Love because **[***31]** that case is easily distinguished from the present matter.

[*P43] In Love, the court based its ruling that the joint bidding agreement constituted lawful bid pooling on three reasons. First, the Love court was persuaded by the fact that the parties to the joint bidding agreement were never in competition because each was only interested in owning a distinct parcel of the larger ranch that their joint bid succeeded in winning. *Id. at 577-78*. Second, the Love court reasoned that it was significant that the was no evidence that others that were present at the auction were prevented from matching or exceeding the joint bidders' final bid. *Id. at 578*. Finally, the Love court held that the agreement constituted lawful joint bidding because the evidence showed that in the absence of the joint bidding agreement, the reserve would not have been met for several of the parcels and therefore the auction would have failed. *Id. at 579*.

[*P44] Each of these rationales is inapplicable to the auction in this case. First, there was only one parcel, the condo, and all three bidders were bidding competitively against one another to obtain the property in its entirety. Second, unlike in Love, where there were other **[***32]** bidders that may have competed against the joint bidders, here, all of the bidders present at the auction colluded to stop bidding. Their collusive behavior, which **[**1266]** occurred while the auction was underway, destroyed any incentive among the bidders to match or to exceed the final bid. Finally, the reserve (or minimum bid amount) was met well before the parties conspired to stop bidding up the price of the auction. Thus, the success of the auction, in surpassing the reserve, was not contingent upon the parties' ability to submit a combined bid. Although I am mindful of Love's warning that ""[b]id rigging should not be confused with joint bidding," *id. at 577*, Love should not control this case. I acknowledge that, under certain circumstances, a combined bid may actually serve to foster competition by allowing joint bids to reach ever higher. In this case, however, the combined bid served to cut off all competition and, in the words of one of the bidders, "stop the bidding process."

[*P45] Indeed, in direct contradiction to the facts in Love, the uncontroverted evidence here shows that the bidders did not come together to make the final, winning bid. Rather, after several rounds of bidding, Seguin, **[***33]** in his individual capacity, bid $1.86 million, and then, once that bid was submitted, Griffin (representing Flaum) approached Meyer and Seguin and "proposed to the others that, instead of 'bidding the property up further and further,' they cease bidding against each other and buy the property jointly." Maj. op. at ¶ 6. Unlike in Love, where, prior to the final round of bidding, the bidders pooled their bids to reach a price that they otherwise could not afford, here, Seguin could have afforded the final bid price independent of the financial contributions of the other bidders.

[*P46] Seguin won the auction with his individual bid, and it was not until after the close of the auction that the parties came together to form Aspen Alps. At the time that their anti-competitive agreement occurred, Seguin held the high bid independent of the others. Thus, the incentive for him to join in the agreement was to prevent the auction price from getting bid up "further and further." Seguin was able to buy-off his competitors by agreeing to "form an LLC and stop the bidding process." In my view, their agreement represented a classic bid rigging scheme. It constituted an "'agreement between competitors pursuant **[***34]** to which contract offers are to be submitted to or withheld from a third party.'" *Love, 873 F.Supp. at 576* (quoting *United States v. Mobile Materials, Inc., 881 F.2d 866, 869 (10th Cir. 1989)*, cert. denied *493 U.S. 1043, 110 S. Ct. 837, 107 L. Ed. 2d 833 (1990))*.

[*P47] The majority reasons that this scheme did not constitute bid rigging because the non-winning bidders, Flaum (who was represented by Griffin at the auction) and Meyer, each provided self-serving testimony that they could not afford to match Seguin's final, winning bid. Maj. op. at ¶¶ 34-35. In my view, this misapprehends federal bid rigging jurisprudence, which has long recognized that the existence of a conspiracy to rig an auction is neither dependent on the success of the conspiracy nor on any showing that the agreement injured the seller by negatively impacting the final sale price. See ABA Section of ***Antitrust Law***, Model Jury Instructions in Criminal Antitrust Cases 61 (2009) ("Bid Rigging"). Rather, the relevant inquiry is whether the "aim and result" of the conspiracy was "the elimination of one form of competition." Id. Thus, the sole issue in determining whether a joint bidding scheme constitutes unlawful bid rigging is whether it produces an anti-competitive **[***35]** result. In the present matter, the parties explicitly agreed to stop bidding to prevent the auction price from rising. This is the definition of anti-competitive behavior. Id. ("A conspiracy to rig bids may be an agreement among competitors about . . . who should be the successful bidder . . . or who should refrain from bidding . . . that affects, limits, or avoids competition among them.").

[*P48] Finally, I do not agree with the majority's implication that the fact that the bidders' agreement was made during—rather than before—the auction supports the conclusion that this scheme did not constitute bid rigging. Although the majority acknowledges that "a prior agreement is not necessary to prove bid rigging," maj. op. at ¶ 34, it nevertheless uses this fact to distinguish the present matter from Guthrie, in which the federal district court for the Eastern District of Washington denied a defendant's motion for judgment of acquittal on bid rigging **[**1267]** charges because the defendant had contacted other potential bidders and offered them money to refrain from participating in upcoming auctions. *814 F.Supp. at 943-44, 950*. In my view, from a competitiveness standpoint, this case presents a more troublesome **[***36]** situation than existed in Guthrie. In Guthrie, because the alleged bid rigging occurred prior to the auctions, there was no guarantee that the defendant had bought off every potential bidder that might attend the auction. See *id. at 943-44*. In contrast, because the bidders' agreement in this case was not made until after the auction was already underway, the three bidders were assured that their agreement eliminated all competition.

III.

[*P49] I would hold that the bidders' agreement constituted unlawful bid rigging in violation of *section 6-4-106* and proceed to address the remedy issue consistent with *section 6-4-121, C.R.S.* (2011), which, in my opinion, would void this unlawful transfer. Accordingly, I respectfully dissent from Part II.B of the majority's opinion.

JUSTICE COATS, dissenting.

[*P50] Unlike the majority I would not be so quick to relieve the Bank of its obligation to at least substantially comply with the statutory prerequisites for a court-authorized foreclosure sale. Even if I were to agree, however, that constructive notice bars a challenge to the validity of a foreclosure sale once it has already taken place, I would nevertheless disagree with the majority's imputation of notice **[***37]** to the Righetti Estate, under the circumstances of this case. Because I would void the judicial authorization and subsequent foreclosure sale in this case, without regard to the claim of bid-rigging, solely on the basis of a challenge by the not-yet-closed estate of a deceased tenant in common that went completely unidentified in the Bank's verified motion for authorization to proceed, I respectfully dissent.

[*P51] I understand the majority to hold that a foreclosure sale will not be set aside for failure of the party seeking foreclosure to include an interested party of record in its motion for judicial authorization, as required by *Rule 120* and *section 38-38-105, C.R.S.* (2011), as long as that interested party had constructive notice of the foreclosure proceeding but nevertheless failed appear and oppose the sale sometime before it actually took place. Without further analysis, the majority finds that the Righetti Estate had constructive notice of the foreclosure proceeding, apparently considering it self-evident that if Righetti's widow had actual notice, and she was a personal representative of the estate, then the estate must have been on constructive notice. Not only is this proposition **[***38]** not self-evident, I actually consider it to be erroneous, as a matter of law, or logic, or both.

[*P52] Apparently agreeing that an inference of notice to the estate and its beneficiaries could hardly be considered self-evident, the court of appeals attempted to justify it by expressly reasoning that as a fiduciary a personal representative is also an agent, whose knowledge is imputed to her principal according to accepted principles of agency law. While an agency is a fiduciary relationship in which the agent has fiduciary obligations to his principal, it is not necessarily the case, however, that a fiduciary relationship also involves an agency relationship. Whether a fiduciary is additionally the agent of his principal depends entirely on the circumstances of the particular relationship and involves a separate legal inquiry. *Restatement (Third) of Agency § 1.01 cmt. g* (2006). By way of example, the Comments to the Restatement make clear that "a trustee is not an agent of the settlor or beneficiaries unless the terms of the trust subject the trustee to the control of either the settlor or the beneficiaries. Principals in agency relationships have power to terminate authority and thus remove **[***39]** the agent; trust beneficiaries, in contrast, do not have power to remove the trustee." Id.

[*P53] Not only, therefore, is it erroneous to assume that a fiduciary relationship is necessarily governed by agency principles, but the close analogy between estates and trusts militates against finding an agency relationship in the former, any more than in the latter, in the absence of express provisions of a statute or will to the contrary. As with a trustee, **[**1268]** heirs or devisees lack the power to terminate a personal representative, in the absence an express provision of the will, and by statute in this jurisdiction, the liability of a personal representative for breach of his fiduciary duties is precisely the same as that of "a trustee of an express trust." *§ 15-12-714, C.R.S.* (2011). While a trustee, or personal representative, by the very nature of a fiduciary relationship, has a heightened duty of care to beneficiaries of the trust or will, it would literally stand the relationship on its head to conclude that the beneficiaries are for that reason alone also liable to third parties for the fiduciary's action or inaction.[13]

[*P54] In any event, Righetti's widow was not the personal representative of the Righetti Estate but merely a co-representative, along with the **[***41]** decedent's daughter. By statute, co-representatives do not independently have the powers of a personal representative but rather share those powers, which must be exercised cooperatively, with the consent of the other co-representatives. § 15-12-717. Because the statute expressly bars one co-representative from exercising the power of an agent to bind the estate with regard to the administration or distribution of estate property, it is not clear to me that a lone co-representative retains any greater power to waive interests of the estate. Even if I agreed with the majority that a foreclosure sale should not be voided merely because an interested party with actual notice of the proceedings was not designated, as statutorily required, in the motion for judicial authorization, I would still not decline to void this particular sale.

[*P55] The majority's exclusive focus on notice, however, points to an even more fundamental objection to its rationale. From both its explanation and the authorities on which it relies, it appears that the majority is concerned only that the minimum notice requirements of procedural due process were satisfied. By contrast, not only do I not believe the notice requirements **[***42]** of our statute and rule are designed to ensure only this minimal degree of notice, I do not even consider notice the sole concern of our insistence on judicial authorization as a prerequisite to the exercise of a power of sale.

[*P56] In this jurisdiction, before a public trustee may conduct a foreclosure sale, the holder of the evidence of debt must obtain a court order complying with *C.R.C.P. 120*. In addition to providing notice, that rule requires the filing of a verified motion in the district court stating the names and addresses of the various interested parties and anyone liable upon the secured indebtedness. Id. Before the motion may be granted, the court must examine it and be satisfied that the moving party is entitled to an order authorizing a sale on the facts. Id. Any sale held without an

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[13] To the extent the majority's "see" cite to the "Personal Service" provisions **[***40]** of ***C.R.C.P. 4*** is intended to imply that a personal representative is a designated agent of her estate for purposes of service of process, I consider that suggestion not only mistaken but also irrelevant. As a general matter, the manner of presenting claims against an estate is prescribed at *section 15-12-804, C.R.S.* (2011), but proceedings to enforce a mortgage or other lien against property of an estate are expressly exempted from this provision and are governed instead by *C.R.C.P. 120*, which contains service requirements of its own, separate and distinct from those of Rule 4. In any event, ***Rule 4(e)(4)*** delineates persons upon whom delivery of process naming a particular entity will be considered adequate, not persons from whom notice of an ongoing proceeding will be imputed to that entity, regardless of adequate service. In this case, it is undisputed that neither the estate itself nor anyone in the capacity of personal representative for the estate was ever even named in the motion for a foreclosure sale, much less served with notice of the sale.

order issued in compliance with the statute and rule is statutorily declared invalid. See *§ 38-38-105(2)(a), C.R.S.* (2011).

[*P57] In this case, the Bank not only failed to serve the estate, whose representative the Bank knew to stand in the shoes of the decedent debtor and owner by tenancy in common of the subject property; perhaps even more importantly, it failed to designate the estate as a necessary **[***43]** interested party in its verified motion for court authorization, as required by *Rule 120*. Without being made aware that the decedent's widow was not the sole owner through a right of survivorship, as implied by the motion naming only her, and instead that the decedent's half interest in the property would pass through his estate to unnamed beneficiaries, the district court **[**1269]** lacked the required information to assess the merits of the motion, as contemplated by statute and rule. While compliance with the dictates of the rule is clearly required for a valid sale by both statute and case law, regardless of the nature of the complaining party, it seems particularly ironic for the majority to excuse compliance with regard to an estate, statutorily subject to claims only upon written notice to, or litigation against, the personal representative, or filing with the clerk of the probate court, regardless of actual notice. See *In re Estate of Ongaro, 998 P.2d 1097, 1100 (Colo. 2000)* (requiring compliance with *section 15-12-804*, notwithstanding the personal representative's awareness of a potential claim).

[*P58] For one final touch of irony in this case, no reader of the court of appeals opinion below **[***44]** can fail to appreciate that the majority finds itself relieving the Bank of its obligation to comply with the requirements of *Rule 120* for failure of any demonstration of prejudice only because the decedent's widow, who produced the required payment to the public trustee within the statutory redemption period, was held strictly, without any required showing of prejudice, to compliance with an additional 15-day notice requirement, which she missed by some 9 days.

[*P59] Because I believe there has always been and yet remains very good reason for validating a foreclosure sale by the public trustee only upon compliance with the express procedural requirements of the rule and a valid court order, I would not abandon those requirements at all, much less in a case such as this. I therefore respectfully dissent.

In re Flonase Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

June 18, 2012, Decided; June 18, 2012, Filed

CIVIL ACTION NO. 08-CV-3301

Reporter

284 F.R.D. 207 *; 2012 U.S. Dist. LEXIS 83950 **; 2012-1 Trade Cas. (CCH) P77,942

In re: FLONASE ANTITRUST LITIGATION, THIS DOCUMENT RELATES TO: Indirect Purchaser Action

Subsequent History: Later proceeding at *In re Flonase Antitrust Litig., 879 F. Supp. 2d 454, 2012 U.S. Dist. LEXIS 91155 (E.D. Pa., 2012)*

Prior History: *In re Flonase Antitrust Litig., 2012 U.S. Dist. LEXIS 186531 (E.D. Pa., May 3, 2012)*

Core Terms

generic, Purchasers, Indirect, class member, prices, brand, consumers, reimbursed, damages, methodology, class period, class certification, unjust enrichment, but-for, named plaintiff, antitrust, insured, monopolization, predominance, co-pay, drugs, class action, generic drug, overcharge, coinsurance, entities, delayed, dollar, sales, class-wide

Counsel: **[**1]** EDWARD W. MULLINIX, Special Master, Pro se, SCHNADER HARRISON SEGAL & LEWIS, PHILADELPHIA, PA.

For IBEW - NECA LOCAL 505 HEALTH & WELFARE PLAN, Plaintiff: ANTHONY J. BOLOGNESE, JOSHUA H. GRABAR, LEAD ATTORNEYS, BOLOGNESE & ASSOCIATES, LLC, PHILADELPHIA, PA; ERIC B. FASTIFF, JORDAN ELIAS, JOSEPH R. SAVERI, LEAD ATTORNEYS, LIEFF CABRASER HEIMAN & BERNSTEIN, LLP, SAN FRANCISCO, CA; J CECIL GARDNER, LEAD ATTORNEY, THE GARDNER FIRM, MOBILE, AL; MICHAEL M. BUCHMAN, LEAD ATTORNEY, POMERANTZ HAUDEK, NEW YORK, NY; BENJAMIN F. JOHNS, JOSEPH G. SAUDER, CHIMICLES & TIKELLIS LLP, HAVERFORD, PA; JOSEPH H. MELTZER, TERENCE S. ZIEGLER, KESSLER TOPAZ MELTZER & CHECK LLP, RADNOR, PA; LORI A. FANNING, MARVIN A. MILLER, MATTHEW E. VAN TINE, MILLER LAW LLC, CHICAGO, IL.

For A.F. OF L.-A.G.C. BUILDING TRADES WELFARE PLAN, Plaintiff: ANTHONY J. BOLOGNESE, JOSHUA H. GRABAR, LEAD ATTORNEYS, BOLOGNESE & ASSOCIATES, LLC, PHILADELPHIA, PA; MICHAEL M. BUCHMAN, LEAD ATTORNEY, POMERANTZ HAUDEK, NEW YORK, NY; BENJAMIN F. JOHNS, JOSEPH G. SAUDER, CHIMICLES & TIKELLIS LLP, HAVERFORD, PA; ERIC B. FASTIFF, JORDAN ELIAS, JOSEPH R. SAVERI, LIEFF CABRASER HEIMAN & BERNSTEIN, LLP, SAN FRANCISCO, CA; JOSEPH H. MELTZER, TERENCE **[**2]** S. ZIEGLER, KESSLER TOPAZ MELTZER & CHECK LLP, RADNOR, PA; LORI A. FANNING, MARVIN A. MILLER, MATTHEW E. VAN TINE, MILLER LAW LLC, CHICAGO, IL.

For INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRONWORKERS LOCAL NO. 79 HEALTH FUND, Plaintiff: ANTHONY J. BOLOGNESE, JOSHUA H. GRABAR, LEAD ATTORNEYS, BOLOGNESE & ASSOCIATES, LLC, PHILADELPHIA, PA; J. GERARD STRANCH, IV, JAMES G. STRANCH, III, JOE P. LENISKI, JR., LEAD ATTORNEYS, BRANSTETTER STRANCH & JENNINGS PLLC, NASHVILLE, TN; MICHAEL M. BUCHMAN, LEAD ATTORNEY, POMERANTZ HAUDEK, NEW YORK, NY; BENJAMIN F. JOHNS, JOSEPH G. SAUDER, CHIMICLES & TIKELLIS LLP, HAVERFORD, PA; ERIC B. FASTIFF, JORDAN ELIAS, JOSEPH R. SAVERI, LIEFF CABRASER HEIMAN & BERNSTEIN, LLP, SAN

FRANCISCO, CA; JOSEPH H. MELTZER, TERENCE S. ZIEGLER, KESSLER TOPAZ MELTZER & CHECK LLP, RADNOR, PA; JUSTIN N. BOLEY, PRO HAC VICE, KENNETH A. WEXLER, PRO HAC VICE, WEXLER WALLACE LLP, CHICAGO, IL; LORI A. FANNING, MARVIN A. MILLER, MATTHEW E. VAN TINE, MILLER LAW LLC, CHICAGO, IL.

For MC - UA LOCAL 119 HEALTH AND WELFARE PLAN, Plaintiff: ANTHONY J. BOLOGNESE, JOSHUA H. GRABAR, LEAD ATTORNEYS, BOLOGNESE & ASSOCIATES, LLC, PHILADELPHIA, PA; BENJAMIN **[**3]** F. JOHNS, JOSEPH G. SAUDER, CHIMICLES & TIKELLIS LLP, HAVERFORD, PA; ERIC B. FASTIFF, JORDAN ELIAS, JOSEPH R. SAVERI, LIEFF CABRASER HEIMAN & BERNSTEIN, LLP, SAN FRANCISCO, CA; JOSEPH H. MELTZER, KESSLER TOPAZ MELTZER & CHECK LLP, RADNOR, PA; MARVIN A. MILLER, MATTHEW E. VAN TINE, MILLER LAW LLC, CHICAGO, IL; MICHAEL M. BUCHMAN, POMERANTZ HAUDEK, NEW YORK, NY.

For PAINTERS DISTRICT COUNCIL NO. 30 HEALTH & WELFARE FUND, Plaintiff: ANDREW SZOT, LEAD ATTORNEY, PRO HAC VICE, LORI A. FANNING, LEAD ATTORNEY, MARVIN A. MILLER, MATTHEW E. VAN TINE, MILLER LAW LLC, CHICAGO, IL; ANTHONY J. BOLOGNESE, JOSHUA H. GRABAR, LEAD ATTORNEYS, BOLOGNESE & ASSOCIATES, LLC, PHILADELPHIA, PA; BENJAMIN F. JOHNS, JOSEPH G. SAUDER, LEAD ATTORNEYS, NICHOLAS E. CHIMICLES, CHIMICLES & TIKELLIS LLP, HAVERFORD, PA; MICHAEL M. BUCHMAN, LEAD ATTORNEY, POMERANTZ HAUDEK, NEW YORK, NY; ERIC B. FASTIFF, JORDAN ELIAS, JOSEPH R. SAVERI, LIEFF CABRASER HEIMAN & BERNSTEIN, LLP, SAN FRANCISCO, CA; JOSEPH H. MELTZER, TERENCE S. ZIEGLER, KESSLER TOPAZ MELTZER & CHECK LLP, RADNOR, PA.

For SHEET METAL WORKERS LOCAL 441 HEALTH & WELFARE PLAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,Plaintiff: ANTHONY J. BOLOGNESE, **[**4]** JOSHUA H. GRABAR, LEAD ATTORNEYS, BOLOGNESE & ASSOCIATES, LLC, PHILADELPHIA, PA; BENJAMIN F. JOHNS, CHIMICLES & TIKELLIS LLP, HAVERFORD, PA; JOSEPH H. MELTZER, TERENCE S. ZIEGLER, KESSLER TOPAZ MELTZER & CHECK LLP, RADNOR, PA; MARVIN A. MILLER, MATTHEW E. VAN TINE, MILLER LAW LLC, CHICAGO, IL; MICHAEL M. BUCHMAN, POMERANTZ HAUDEK, NEW YORK, NY.

For AMY KEHOE, Plaintiff: MICHAEL M. BUCHMAN, LEAD ATTORNEY, POMERANTZ HAUDEK, NEW YORK, NY; BENJAMIN F. JOHNS, JOSEPH G. SAUDER, CHIMICLES & TIKELLIS LLP, HAVERFORD, PA; ERIC B. FASTIFF, JORDAN ELIAS, JOSEPH R. SAVERI, LIEFF CABRASER HEIMAN & BERNSTEIN, LLP, SAN FRANCISCO, CA; JOSEPH H. MELTZER, TERENCE S. ZIEGLER, KESSLER TOPAZ MELTZER & CHECK LLP, RADNOR, PA; LORI A. FANNING, MARVIN A. MILLER, MATTHEW E. VAN TINE, MILLER LAW LLC, CHICAGO, IL; JOSHUA H. GRABAR, BOLOGNESE & ASSOCIATES, LLC, PHILADELPHIA, PA.

For SMITHKLINE BEECHAM CORPORATION, doing business as GLAXOSMITHKLINE PLC, Defendant: EDWARD D. ROGERS, STEPHEN J. KASTENBERG, LEAD ATTORNEYS, ARTHUR MAKADON, JASON A. LECKERMAN, BALLARD, SPAHR, ANDREWS AND INGERSOLL, PHILA, PA; LESLIE E. JOHN, LEAD ATTORNEY, JESSICA MOLTISANTI ANTHONY, JOB MICHAEL ITZKOWITZ, SUSANNA R. GREENBERG, BALLARD **[**5]** SPAHR ANDREWS & INGERSOLL LLP, PHILADELPHIA, PA.

For ROXANNE LABORATORIES, INC., Movant: JONATHAN M. WATKINS, PEARSON SIMON WARSHAW & PENNY LLP, SAN FRANCISCO, CA.

Judges: ANITA B. BRODY, J.

Opinion by: ANITA B. BRODY

Opinion

[*210] **MEMORANDUM**

Plaintiffs A.F. of L.-A.G.C. Building Trades Welfare Plan ("AFL"), IBEW-NECA Local 505 Health & Welfare Plan ("IBEW"), Painters District Council No. 30 Health & Welfare Fund ("Painters"), and Andrea Kehoe ("Kehoe"), collectively "Indirect Purchasers," are indirect purchasers of the prescription drug Flonase and its generic equivalent. Flonase is the brand-name version of fluticasone propionate ("FP")—a steroid nasal spray produced by Defendant SmithKline Beecham Corporation, doing business as GlaxoSmithKline PLC ("GSK"). Indirect Purchasers allege that GSK filed sham citizen petitions with the Food and Drug Administration ("FDA") to delay the entry of a cheaper, generic version of Flonase into the market. Indirect Purchasers have moved to certify a class of consumers and third-party payors ("TPPs") [1] under the monopolization, **[*211]** unfair and deceptive trade practices ("UDTP"), and unjust enrichment laws of five states. [2] Also before me are three *Daubert* motions seeking to exclude expert **[**6]** reports and testimony critical to this class certification determination: (1) GSK's Motion to Exclude the Expert Report and Testimony of Gordon Rausser; (2) Indirect Purchasers' Motion to Exclude the Report and Testimony of Bruce Stangle; and (3) Indirect Purchasers' Motion to Exclude the Report and Testimony of Robert Navarro.

GSK asserts that Indirect Purchasers have failed to meet certain requirements for class certification under *Federal Rule of Civil Procedure 23*—in particular, that **[**7]** common issues do not predominate over individual issues for purposes of establishing antitrust impact and damages. GSK contends that only through individual proof and inquiries can the fact of injury or the extent of damage for each class member's purchase and/or reimbursement of Flonase or its generic equivalent be determined.

I am satisfied that Indirect Purchasers have demonstrated that common issues will predominate and that the Rule 23 requirements have been met. In reaching that conclusion, however, certain adjustments to Indirect Purchasers' proposed class definition will be necessary. As opposed to the larger proposed class, a more limited indirect purchaser class will be certified that excludes those class members who did not purchase a generic equivalent of Flonase after it became available. Furthermore, I will only certify the class under the state laws which Indirect Purchasers have demonstrated standing to invoke. Therefore, I will grant in part and deny in part Indirect Purchasers' motion for class certification.

I. BACKGROUND[3]

A. Hatch-Waxman and the Generic Drug Approval [**8] Process

In order to market a drug in the United States, a company must obtain FDA approval by filing a "New Drug Application" ("NDA") to demonstrate the safety and efficacy of its product. *21 U.S.C. § 355(b)*. The NDA process is usually lengthy and expensive, and in 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 ("Hatch-Waxman Act") to expedite the approval process for generic drugs. Under Hatch-Waxman, to receive FDA approval for a generic drug, a prospective manufacturer need only file an Abbreviated New Drug Application ("ANDA"), which relies on the safety and efficacy data previously provided in the NDA for its branded equivalent. *21 U.S.C. § 355(j)*. Instead of clinical trials, an ANDA requires a demonstration of a certain level of bioequivalence [4] to a listed drug. The FDA issues and regularly modifies bioequivalence guidance for various categories of generic drugs in order to inform the public of the bioequivalence standards that ANDAs must

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[1] AFL, IBEW, and Painters are all TPPs that underwrite prescription drugs costs for their plan members, i.e. insured consumers. They will be referred to collectively in this opinion as "named plaintiff TPPs."

[2] Jurisdiction over this action is proper under the Class Action Fairness Act of 2005, which grants federal district courts original jurisdiction over "any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interests and costs, and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant." *28 U.S.C. § 1332(d)(2)*; see *Kaufman v. Allstate N.J. Ins. Co., 561 F.3d 144, 148 (3d Cir. 2009)*.

[3] The facts are stated based on evidence offered to support Indirect Purchasers' Fourth Amended Complaint.

[4] To establish **[**9]** bioequivalence, the generic version must contain the same active ingredient(s), dosage form, route of administration, and strength.

meet in order to be approved. Generic drugs certified by the FDA as bioequivalent to the brand drug are completely interchangeable with that branded drug and are referred to as "AB-rated."

While an ANDA is pending before the FDA, any interested party can file a citizen petition with the FDA to register a complaint about the pending application. *21 C.F.R. §§ 10.25(a)*, *10.30*. Until 2007, the FDA was required to consider and respond to every citizen petition. [5] For this reason, filing a **[*212]** citizen petition necessarily delayed the approval of any pending ANDA—only after the FDA responded to all pending citizen petitions could an ANDA be approved. The citizen petition process often was abused by pharmaceutical companies attempting to prolong their monopoly in the market.

B. Flonase and GSK's Alleged Misconduct

In October 1994, the FDA approved GSK's NDA to treat nasal inflammation caused by seasonal and non-seasonal allergies. GSK released Flonase in the United **[**10]** States in 1995, and it quickly became the most prescribed nasal steroid inhalant in the United States. By 2000, Flonase commanded 38% of brand-name inhaled nasal steroid sales in the United States, resulting in over $600 million in sales. By 2005, the peak year for Flonase sales and the last full year of GSK's market exclusivity, Flonase sales exceeded $1.3 billion.

GSK's single patent on Flonase expired on November 13, 2003. However, GSK obtained a statutory extension of market exclusivity from the FDA to August 2004. By the time Flonase's market exclusivity was set to expire in 2004, GSK had identified a number of generic pharmaceutical manufacturers—including Roxane Laboratories, Inc. ("Roxane")—intent on filing ANDAs and bringing competitive generic FP nasal sprays to the market. This case concerns GSK's alleged "brand maturation strategy," crafted to maintain Flonase's market dominance in the face of inevitable generic competition.

Indirect Purchasers offer evidence that GSK's alleged "brand maturation strategy" included four tactics to delay the entry of generic FP nasal sprays into the market: (1) GSK improperly influenced the FDA's bioequivalence guidance process; (2) GSK filed **[**11]** several frivolous citizen petitions with the FDA regarding pending generic FP ANDAs in order to force the FDA to respond and delay approval; (3) GSK drafted an FP monograph for submission to the United States Pharmacopeia—which lists tests, procedures, and acceptance criteria in order to set standards for the quality, purity, strength, and consistency of the pharmaceutical ingredients in an approved drug—in attempt to raise the bar for FP market entry; and (4) GSK supplemented its original NDA in an attempt to delay the FDA from approving any ANDAs before approving GSK's supplements.

Roxane's generic version of Flonase did not enter the market until March 6, 2006. Indirect Purchasers argue that GSK used each of these four tactics to delay the market entry of AB-rated generic equivanlents of Flonase, and that, absent GSK's exclusionary conduct, generic FP would have entered the market in August 2004. As a result, Indirect Purchasers claim that they were prevented from purchasing and/or reimbursing for less-expensive generic FP between August 2004 and March 2006, and that they were forced to pay inflated prices for generic FP between March 2006 and March 2009. [6]

C. Procedural History

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[5] In 2007, after the citizen petitions at issue in this case were filed, Congress passed a law allowing the FDA to summarily dismiss citizen petitions, in order to prevent pharmaceutical companies from using this process to delay generic entry into the market. See *21 U.S.C. § 355(q)(1)(A)(ii)*.

[6] Indirect Purchasers also **[**12]** allege that consumers and TPPs were forced to pay and/or reimburse for Flonase at a supracompetitive price as a result of GSK's conduct. However, for reasons discussed *infra*, I will exclude the proposed class members proceeding under this "branded overcharge" theory.

Indirect Purchasers initiated this case in September 2008. In December 2011, they filed their motion for class certification now before me. During this time, as a result of two Third Circuit opinions and GSK's filing of several motions to dismiss and motions for summary judgment, the claims and issues presented in this motion for class certification have been narrowed to a significant degree. A review of this procedural history follows.

On September 3, 2008, Indirect Purchasers filed a first amended class action complaint ("FAC") against GSK asserting claims of monopolization, UDTP, and unjust enrichment under numerous state laws. On October 17, 2008, GSK moved to dismiss the FAC. In addressing this motion on April 15, 2009, I concluded that it was appropriate to analyze issues regarding Indirect Purchasers' standing prior to class certification. I granted **[*213]** GSK's motion for two reasons: (1) although Indirect **[**13]** Purchasers could establish standing to bring their claims in the states where they resided or had a principal place of business, they failed to state a claim under any of those state laws; and (2) Indirect Purchasers could not establish standing merely by relying on claims of putative class members. *See In re Flonase Antitrust Litig., 610 F. Supp. 2d 409, 413 (E.D. Pa. 2009)* ("Unless at least one named Plaintiff can state a claim for relief under each count Plaintiffs do not have standing to bring claims as part of a putative class action."). I dismissed the FAC without prejudice, so that Indirect Purchasers could amend their complaint and, as Indirect Purchasers specifically noted, "named Plaintiffs from additional states could join the case" to address issues of standing. *Id.*

On May 21, 2009, Indirect Purchasers filed a second amended class action complaint ("SAC") asserting state law claims under the laws of seven states and adding Kehoe, an individual consumer from Massachusetts, as a named plaintiff. GSK moved to dismiss the SAC by again contending that Indirect Purchasers had not sufficiently plead an injury to have standing to bring their state law claims, or, alternatively, **[**14]** failed to state a claim under those state laws. On January 21, 2010, I held that Indirect Purchasers had sufficiently plead standing "in states where they reside, and where they purchased Flonase or reimbursed for purchases of Flonase." *In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 534 (E.D. Pa. 2010)*. Additionally, *inter alia*, Indirect Purchasers' unjust enrichment claim under Florida law was dismissed because, unlike most unjust enrichment state law, Florida requires that a plaintiff confer a direct benefit upon a defendant in order to state a claim for unjust enrichment. *Id. at 544*.

Indirect Purchasers filed a third amended class action complaint ("TAC") on March 1, 2010, asserting the following state law claims: monopolization under the laws of Arizona, Iowa, North Carolina, and Wisconsin; (2) unfair and deceptive trade practices under the laws of Arizona, Florida, Massachusetts, and North Carolina; and (3) unjust enrichment under the laws of Arizona, Iowa, Massachusetts, and Wisconsin. GSK subsequently filed three different motions for summary judgment in October 2010. I denied GSK's motions for summary judgment on *Noerr-Pennington* and causation grounds in June and July **[**15]** 2010, respectively. GSK's third motion for summary judgment against Indirect Purchasers rested on the following three arguments: (1) Indirect Purchasers failed to provide sufficient evidence to raise a genuine issue of material fact as to whether they have standing to bring their state law claims; (2) choice of law rules require that the Indirect Purchasers' claims be governed by the laws of their home states, rather than the laws of the states in which they purchased and/or reimbursed for purchases of Flonase; and (3) Indirect Purchasers failed to provide sufficient evidence to support several of their state law claims.

On September 26, 2011, I granted in part and denied in part GSK's motion. In addressing GSK's standing argument, I again noted that in a class action, [t]he initial inquiry . . . is whether the lead plaintiff individually has standing." *Winer Family Trust v. Queen, 503 F.3d 319, 326 (3d Cir. 2007)*; *see also O'Shea v. Littleton, 414 U.S. 488, 494, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)*. And although GSK's standing contentions had previously been addressed, at the summary judgment stage the standing inquiry changed because Indirect Purchasers could no longer rely on their allegations; instead, they needed **[**16]** to put forth evidence to establish standing. *See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 902, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)*. Considering this burden, I granted GSK's motion as to the following named Plaintiffs' claims for lack of standing: (1) IABORI's monopolization and UDTP claims under North Carolina law and (2) Painters' monopolization and unjust enrichment claims under Iowa law; and (3) Painters' UDTP claim under Florida law. [7]

[7] As a result of this ruling, named plaintiff International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers Local No. 79 Health Fund ("IABORI ") was dismissed from this action.

[*214] I also conducted a thorough choice of law analysis and concluded that Indirect Purchasers' claims were best considered under the laws of the states in which Flonase or its generic equivalent were purchased (the "purchase states"), as opposed to the states in which Indirect Purchasers resided or had a principal place of business (the "home states"). *In re Flonase Antitrust Litig., 815 F. Supp. 2d. 867, 882-85 (E.D. Pa. 2011)*. Finally, GSK's motion was granted as to Painters' Arizona UDTP claim because no genuine issue of fact had been raised regarding whether GSK had deceived **[**17]** Indirect Purchasers as required under Arizona UDTP law. *Id. at 885-86*.

Indirect Purchasers have since filed a fourth amended class action complaint. [8] The following named Plaintiffs and state law claims remain [9]:

Type of Claim	State	Relevant Plaintiff(s)
Monopolization	Arizona	Painters
Monopolization	Wisconsin	Painters
UDTP	Florida	AFL, IBEW
UDTP	Massachussets	Kehoe
Unjust Enrichment	Arizona	Painters
Unjust Enrichment	Massachussets	Kehoe
Unjust Enrichment	Wisconsin	Painters

In December 2011, Indirect Purchasers moved for class certification. [10] On February **[*215]** 22, 2012, a hearing was held to establish the parameters of the class sought for certification. In that hearing, Indirect Purchasers

[8] Indirect Purchasers' fourth amended class action complaint includes claims under North Carolina's monopolization statute, *N.C. Gen. Stat. § 75-2.1, et seq.*, and North Carolina's UDTP statute, *N.C. Gen. Stat. § 75-1.1, et seq.* I have already found that none of the named plaintiffs in this case can establish standing to bring an action under these North Carolina statutes. For the reasons outlined *infra*, I do not find that Indirect Purchasers can seek certification of a class pursuant to the monopolization and UDTP statutes of North Carolina.

Additionally, Indirect Purchasers' fourth amended class action complaint includes a claim under Arizona's UDTP statute, *Ariz. Rev. Stat. § 44-1522, et seq.* However, I previously granted GSK's motion for **[**18]** summary judgment as to Indirect Purchasers' Arizona UDTP claim because Indirect Purchasers had failed to raise a genuine issue of material fact as to whether GSK engaged in deception, as required by the Arizona statute. *In re Flonase Antitrust Litig., 815 F. Supp. 2d. 867, 885-86 (E.D. Pa. 2011)*; *see also* *Kuehn v. Stanley, 208 Ariz. 124, 91 P.3d 346, 351 (Ariz. Ct. App. 2004)*. At this stage in the litigation, with discovery already closed and without any evidence raising a genuine issue as to whether GSK engaged in deception, I do not find that Indirect Purchasers can now seek certification of a class pursuant to Arizona's UDTP statute.

[9] The remaining state law claims have been outlined in "Appendix A" at the end of this opinion. The statutes at issue are often labeled "*Illinois Brick* repealers" in light of the Supreme Court's decision prohibiting federal antitrust suits by indirect purchasers. *Ill. Brick Co. v. Illinois, 431 U.S. 720, 728, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. Numerous states across the country have subsequently passed "*Illinois Brick* repealers" enabling an indirect purchaser to bring an antitrust claim under state law. Furthermore, in those states with a repealer statute, indirect purchasers are not barred from **[**19]** recovery for unjust enrichment damages.

My previous opinions have detailed "*Illinois Brick* repealers" and the similar theories underlying each of Indirect Purchasers' remaining state law claims. *See* *In re Flonase Antitrust Litig., 815 F. Supp. 2d. 867, 882-85 (E.D. Pa. 2011)*; *In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 534 (E.D. Pa. 2010)*; *In re Flonase Antitrust Litig., 610 F. Supp. 2d 409, 413 (E.D. Pa. 2009)*.

[10] Indirect Purchasers first moved for class certification on December 12, 2008. Since that time, I have twice denied Indirect Purchasers' motion for class certification without prejudice to re-brief the issue in light of opinions by the Third Circuit, first in *In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305 (3d Cir. 2008)*, **[**20]** then in *Sullivan v. DB Investments, Inc., 667 F.3d 273 (3d Cir. 2011)*. In December 2011, Indirect Purchasers re-filed their previous two motions for class certification and accompanying memoranda and expert declarations, along with new supplemental memoranda. GSK responded to Indirect Purchasers' motion in the same fashion. All of the re-filed motions, memoranda, and declarations that have been filed since December 2011 have been taken into consideration.

generally asserted that: (1) the laws of North Carolina, GSK's home state, should be applied for choice of law purposes, and (2) their proposed class could consist of class members in states where no named plaintiff had established standing.

With regard to choice of law, for the reasons set forth in my September 26, 2011 opinion on GSK's motion for summary judgment and stated on the record in the February 22, 2012 hearing, I find that the Indirect Purchasers' claims are best considered under the laws of the states where they either purchased FP, or where TPP's plan members purchased FP and were reimbursed for those purchases.

Regarding standing and class certification, the Third Circuit has held that "to be a class representative on a particular claim, the plaintiff himself must have a cause of action on that claim." *Zimmerman v. HBO Affiliate, 834 F.2d 1163, 1169 (3d Cir. 1987)*. Although Indirect Purchasers are correct that named plaintiffs may generally represent other **[**21]** plaintiffs with common but not identical claims, *see* *Sullivan, 667 F.3d at 302*, Indirect Purchasers cannot attempt to expand their class to include states in which no named plaintiff has demonstrated injury after the completion of discovery and three rounds of dispositive motions addressing the issue of standing. *See* *Griffin v. Dugger, 823 F.2d 1476, 1483 (11th Cir. 1987)* ("Each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one plaintiff has suffered the injury that gives rise to that claim."); *In re Packaged Ice Antitrust Litig., 779 F. Supp. 2d 642, 657 (E.D. Mich. 2011)* (detailing the numerous federal district courts that have held that named plaintiffs lack standing to assert claims under the laws of the states in which they do no reside or in which they suffered no injury); *In re Wellbutrin XL Antitrust Litigation, 260 F.R.D. 143, 156-158 (E.D. Pa. 2009)* (reviewing extensively the applicable case law and subsequently rejecting plaintiffs' argument that named plaintiffs with standing in one state may represent absent plaintiffs from states in which the named plaintiff does not have standing).

Therefore, as a result of my choice **[**22]** of law and standing decisions, and as stated on the record in the February 22, 2012 hearing, I find that the indirect purchaser class can only consist of individuals and entities that purchased and/or reimbursed for FP in Arizona, Florida, Massachusetts, and Wisconsin (the "class states")—states in which at least one named plaintiff has demonstrated injury.

From February 27-29, 2012, a hearing was held on Indirect Purchasers' motion for class certification, with both sides offering the testimony of their respective experts, and the three *Daubert* motions lodged against each expert. The parties have since filed post-hearing briefs, particularly focused on whether Indirect Purchasers have demonstrated that common issues predominate over individual issues for purposes of establishing antitrust impact and damages.

III. LEGAL STANDARD

Subsection (a) of Fed. R. Civ. P. 23 lists four prerequisites for any class action: numerosity, commonality, typicality, and adequacy. *Fed. R. Civ. P. 23(a)*. *Subsection (b)* specifies additional requirements for each type of class action. For certification under *subsection (b)(3)*, the movant must also show "that the questions of law or fact common to class members **[**23]** predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. These requirements are called predominance and superiority.

In In re Hydrogen Peroxide, the Third Circuit clarified the standard of review for motions for class certification. The court held that "proper analysis under *Rule 23* requires rigorous consideration of all the evidence and arguments offered by the parties." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 321 (3d Cir. 2008)*. A district court must "consider carefully all relevant evidence and make a definitive determination that the requirements of *Rule 23* have been met before certifying a class." *Id. at 320*. **[*216]** Further, "the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits . . . [and] [f]actual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence." *Id. at 307, 320*. Finally, "[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous **[**24]** analysis Rule 23 demands." *Id. at 323*. "[A] district court may find it unnecessary to consider certain expert opinion with respect to a certification requirement, but it may not decline to resolve a genuine legal or factual dispute" relevant to class certification. *Id. at 324*.

IV. Discussion

The following are certified as a class pursuant to *Federal Rule of Civil Procedure 23* for the class period of August 2004 through March 2009:

A. With respect to the monopolization and UDTP claims

(1) *For the Class Period from August 2004 through March 2006* All persons or entities throughout the United States and its territories who from August 2004 through March 2006 purchased, paid for, and/or reimbursed for branded Flonase in any of the following four states—Arizona, Florida, Massachusetts, or Wisconsin. These persons or entities must have also purchased, paid for, and/or reimbursed for an AB-rated generic fluticasone propionate nasal spray equivalent of branded Flonase ("generic FP") from March 2006 to March 2009 in the same designated state in which the Flonase purchase was made.

(2) *For the Class Period from March 2006 through March 2009* All persons or entities throughout the United States and **[**25]** its territories who from March 2006 to March 2009 purchased, paid for, and/or reimbursed for generic FP in the following states—Arizona, Florida, Massachusetts, or Wisconsin.

B. With respect to the unjust enrichment claims

(1) All persons or entities throughout the United States and its territories who from August 2004 through March 2006 purchased, paid for, and/or reimbursed for branded Flonase in any of the following three states—Arizona, Massachusetts, or Wisconsin. These persons or entities must have also purchased, paid for, and/or reimbursed for generic FP from March 2006 to March 2009 in the same designated state in which the Flonase purchase was made.

C. For purposes of the class definition, the Flonase and/or generic FP drugs must have been intended for consumption by the class members, their families or their members, employees, plan participants, beneficiaries, or insureds.

D. The following are excluded from the class:

(1) GSK and its respective subsidiaries and affiliates;

(2) all governmental entities (except for government funded employee benefit plans);

(3) all persons or entities that purchased FP nasal spray, including Flonase, for purposes of resale or directly from GSK **[**26]** to the extent and solely to the extent of such purpose for resale or as a direct purchase;

(4) insured individuals covered by plans imposing a flat dollar co-pay that was the same dollar amount for generic as for brand name drug purchases;

(5) fully insured health plans, i.e. plans that purchased insurance from another third-party payor covering 100% of the plan's reimbursement obligations to its members; and

(6) insured individuals who purchased only generic FP (never branded Flonase) and whose health plans imposed a flat dollar co-pay applicable to generic drugs.

E. From August 2004 through March 2009 will be referred to as the "Class Period."

[*217] A. *Rule 23(a)* Requirements

I will first consider the *Rule 23(a)* requirements of numerosity, commonality, typicality, and adequacy. These prerequisites must be satisfied to bring any class action.

1. Numerosity

The first prerequisite in *Rule 23(a)* requires that the proposed class be "so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)*. Although "no minimum number of plaintiffs is required to maintain a suit as a class action," in general sufficient numerosity exists "if the named plaintiff demonstrates that the potential **[**27]** number of plaintiffs exceeds 40 . . . ." *Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001)*. This requirement is plainly satisfied as Indirect Purchasers seek to certify a class of tens of thousands of consumer class members and hundreds of TPP class members. *See In re Wellbutrin XL Antitrust Litig., No. 08-2433, 282 F.R.D. 126, 2011 U.S. Dist. LEXIS 90697, 2011 WL 3563835, at *7 (E.D. Pa. Aug. 15, 2011)* ("*Wellbutrin XL*"). GSK conceded the numerosity requirement. Accordingly, IPPs have established the numerosity requirement of *Rule 23(a)*.

2. Commonality

The second prerequisite in *Rule 23(a)* requires that "there are questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*. To establish commonality, plaintiffs must demonstrate that their claims "depend upon a common contention," the resolution of which "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes, __ U.S. __, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)*. "However, where an action is to proceed under *Rule 23(b)(3)*, the commonality requirement is subsumed by the predominance requirement" because "it is far more demanding than the *Rule 23(a)(2)* commonality requirement." *Danvers Motor Co., Inc. v. Ford Motor Co., 543 F.3d 141, 148 (3d Cir. 2008)* **[**28]** (internal quotation marks omitted). It is therefore appropriate to "analyze the two factors together, with particular focus on the predominance requirement." *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 528 (3d Cir. 2004)*.

Although Indirect Purchasers assert state law claims of monopolization, UDTP, and unjust enrichment, proof of the essential elements of these claims will be common across the class and focused on GSK's behavior, not that of the individual class members. The common issues presented in each of the class members' claims include: (1) whether GSK unlawfully monopolized or attempted to monopolize the market for Flonase; (2) whether GSK unlawfully possessed and/or extended its monopoly power over the Flonase market; (3) whether GSK's actions caused the price of FP to be maintained at supra-competitive levels; (4) whether GSK's citizen petitions were intended to prevent generic entry and/or constitute unlawful conduct; (5) whether the class members suffered antitrust injury; and (6) whether GSK was unjustly enriched to the detriment of the class members. Resolving the allegations surrounding GSK's alleged conduct in delaying generic entry will resolve issues that **[**29]** are "central to the validity of each one of the claims in one stroke." Therefore, I find the commonality requirement satisfied here.

3. Typicality

The third prerequisite in *Rule 23(a)* requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Fed. R. Civ. P. 23(a)(3)*. "Typicality entails an inquiry whether the named plaintiff's individual circumstances are markedly different or the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." *Hassine v. Jeffes, 846 F.2d 169, 177 (3d Cir. 1988)* (citations and internal quotation marks omitted). "The typicality requirement is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees." *Georgine v. Amchem Prods., Inc., 83 F.3d 610, 631 (3d Cir. 1996)*. "The inquiry assesses whether the named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented." *Id.* "Factual differences will not defeat typicality if the named plaintiffs' **[*218]** claims arise from the **[**30]** same event or course of conduct that gives rise to the claims of the class members and are based on the same legal theory." *Danvers Motor Co., Inc., 543 F.3d at 150* (emphasis omitted).

In this case, Indirect Purchasers allege that the same unlawful conduct injured both the class representatives and the absent class members. IPPs' state law claims for monopolization, UDTP, and unjust enrichment arise from an identical course of conduct—GSK's allegedly monopolistic "brand maturation strategy." GSK implemented this strategy without reference to individual purchasers, and all members of the proposed class seek to recover for the resulting overcharge injury, or unjust enrichment at their expense, based on the same legal theories. *In re Terazosin Hydrochloride Antitrust Litig., 220 F.R.D 672, 688 (S.D. Fla. 2004)* ("[I]f one class representative is able to prove that Defendants' alleged anticompetitive acts caused an overcharge for [the brand drug], or that Defendants were unjustly enriched at Indirect Purchaser Plaintiffs' expense, such proof will likewise prove the case on liability for every other class member."). GSK does not contest the typicality requirement. I find that Indirect Purchasers **[**31]** have satisfied *Rule 23(a)(3)*.

4. Adequacy of Representation

The fourth prerequisite in *Rule 23(a)* requires that "the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. The adequacy determination "depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." *New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 313 (3d Cir. 2007)*. Indirect Purchasers' lead counsel has presented evidence of its extensive experience in complex antitrust actions, including cases involving delayed entry of generic pharmaceuticals. After reviewing Indirect Purchasers' submissions, I find that the first prong of the adequacy inquiry is satisfied, as Indirect Purchasers' counsel are "qualified, experienced, and generally able to conduct the proposed litigation." *New Directions, 490 F.3d at 313*.

The absence-of-conflict requirement "seeks to uncover conflicts of interest between named parties and the class they seek to represent." *Warfarin, 391 F.3d at 532*. "A class representative must **[**32]** be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625-26, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (internal quotation marks omitted). Adequacy will not be denied simply "because of a potential conflict of interest that may not become actual." *Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 680 (7th Cir. 2009)*. GSK has not raised any conflicts with the class. Each class member purchased and/or reimbursed for FP at some point during the Class Period at a supracompetitive price. Each class member holds a strong common interest in establishing GSK's liability for these alleged overcharges.

Because the class suffers from no conflicts and is represented by qualified counsel, I conclude that the class meets both prongs of the adequacy requirement of *Rule 23(a)(4)*.

B. *Rule 23(b)* Requirements

Once the *Rule 23(a)* requirements are met, other requirements under *Rule 23(b)* must be satisfied based on the type of class action. Indirect Purchasers seek certification under section (b)(3), requiring proof of predominance and superiority. Indirect Purchasers must demonstrate "that the questions of law or fact common to class members predominate **[**33]** over any questions affecting only individual members," and "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*.

1. Predominance

The parties in this matter directed their arguments regarding certification almost exclusively to the question of predominance. Predominance "'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" **[*219]** *In re Ins. Broker Antitrust Litig., 579 F.3d 241, 266 (3d Cir. 2009)* (quoting *Amchem, 521 U.S at 623*). "Issues common to the class must predominate over individual issues." *Hydrogen Peroxide, 552 F.3d at 311*. "Individual questions need not be absent . . . . [*Rule 23(b)(3)*] requires only that those questions not predominate over the common questions affecting the class as a whole." *Messner v. Northshore Univ. Healthsystem, 669 F.3d 802, 815 (7th Cir. 2011)*. "Because the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual, a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues **[**34]** predominate in a given case." *Hydrogen Peroxide, 552 F.3d at 311* (internal quotation marks and citation omitted). "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Id.* (citing *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 172 (3d Cir. 2001))*.

The predominance inquiry "begins, of course, with the elements of the underlying cause of action." *John Fund, Inc. v. Halliburton Co., U.S. , 131 S.Ct. 2179, 2184, 180 L.Ed.2d 24 (2011)*. Importantly, the parties agree that the essential elements of Indirect Purchasers' remaining state monopolization and UDTP claims are the same, paralleling their federal counterparts, the Sherman Act and the Federal Trade Commission Act. *See App. A.* (outlining the elements of the monopolization and UDTP state statutes). To satisfy *Rule 23(b)(3)*, Indirect Purchasers must show that common evidence can establish: (1) liability on each of their claims; (2) injury-in-fact, and (3) measurable damages. I will address each of these elements in turn.

a. Common Proof on Liability

Indirect Purchasers have successfully plead, and survived summary judgment on, the following **[**35]** state law claims: (1) monopolization under the laws of Arizona and Wisconsin, (2) unfair and deceptive trade practices under the laws of Florida and Massachusetts, and (3) unjust enrichment under the laws of Arizona, Massachusetts, and Wisconsin. To prove liability on each of these state law claims, each class member will rely on the same evidence focused on GSK's allegedly anticompetitive conduct aimed at preventing a generic version of Flonase from entering the market. The issues relevant to proving liability—relevant market, monopoly power, exclusionary conduct, and causation—can be proven through class-wide, common evidence because these issues focus on GSK's conduct, not on the actions of the individual class members. *See Warfarin, 391 F.3d at 528* (explaining that liability for anticompetitive conduct centers on the defendants' conduct, not the actions of individual class members). Although Indirect Purchasers also assert three state unjust enrichment claims, they will utilize the same operative evidence to establish GSK's liability for these claims, as with their monopolization and UDTP claims. *See Sullivan v. DB Investments, Inc., 667 F.3d 273, 301 (3d Cir. 2011)* (emphasizing **[**36]** that any minor variations between state laws will not defeat class certification "as long as a sufficient constellation of common issues binds class members together"); *Terazosin, 220 F.R.D. at 697-98* (certifying a class of indirect purchasers in part because "the same common operative facts that form the basis for each of the state classes' antitrust claims form the basis for the unjust enrichment claims"). [11] GSK admitted that, with regard **[*220]** to proving liability, the evidence would be the

[11] I recognize that the elements of the remaining state unjust enrichment claims are not exactly the same as those of the monopolization and UDTP state statutes. In general, to state a claim for unjust enrichment, a plaintiff must show that the defendant received a benefit from the plaintiff, that the defendant accepted and retained the benefit conferred, and that it would be inequitable for the defendant to retain that benefit without paying. *See Powers v. Lycoming Engines, 245 F.R.D. 226, 231 (E.D. Pa. 2007)*; *Undoing the Otherwise* ***[**37]*** *Perfect Crime—Applying Unjust Enrichment to Consumer Price-Fixing Claims*, Daniel R. Karon, *108 W. Va. L. Rev. 395, 409 (2005)*. Indirect Purchasers have successfully plead, and survived summary judgment on, unjust enrichment claims under the laws of Arizona, Massachusetts, and Wisconsin. While there are minor variations amongst these claims, *see App. A*, I do not find, nor does GSK assert, that the variation among the remaining state unjust enrichment laws is material to this decision on certification.

To prove their unjust enrichment claims, all class members will rely on common evidence focused on whether: (1) GSK's conduct delayed generic competition; (2) the delay of generic entry enriched GSK as a result of overcharges and monopoly profits in the Flonase market from August 2004 to March 2006; (3) this additional enrichment came at the expense of the class; and (4) whether, as a matter of equity, the retention of this benefit would be unjust. "As is the nature of unjust enrichment claims, this common evidence will focus on the defendant's gain and not on the plaintiff's loss." *Terazosin, 220 F.R.D. at 698*.

same for each of Indirect Purchasers' state law claims. Therefore, I find that common issues of fact and law will predominate on this element of Indirect Purchasers' case.

b. Antitrust Impact

Indirect Purchasers next must demonstrate individual injury, i.e. antitrust impact or fact of damage (as opposed to the extent of damage). "In antitrust cases, impact often is critically important for the purpose of evaluating *Rule 23(b)(3)*'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof." *Hydrogen Peroxide, 552 F.3d at 311*. The Third Circuit has explained plaintiff's burden in establishing antitrust impact at the class certification stage:

> Plaintiffs' burden . . . is not to prove the element of antitrust impact, although in order to prevail on the merits each class **[**39]** member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members. Deciding this issue calls for the district court's rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial.

552 F.3d at 311-12.

Indirect Purchasers contend that class members were injured through overcharges for purchases and/or reimbursements of FP during the Class Period, as a result of delayed generic entry into the market. To support their argument on common impact and damages, Indirect Purchasers present expert declarations and testimony from Gordon Rausser, Ph.D., an economics professor at the University of California-Berkeley. [12] Rausser opines that general economic principles and actual market data establish common impact in this case, and that through a "yardstick" methodology—comparing prices in the actual world with prices in a hypothetical "but-world" without GSK's misconduct—he can demonstrate that across all types of end-payors and all distribution **[**40]** channels, injury and damages occurred in this case as a result of GSK's delaying generic entry.

This common evidence is capable of establishing two types of injury in the purchase of FP during the Class Period: (1) "switcher overcharge," from August 2004 through March 2006, that applies to class members who purchased Flonase before generic entry and would have switched to the less expensive generic FP if it had been available; and (2) "generic overcharge," from March 2006 to March 2009, that applies to class members who purchased generic FP at a supracompetitive price because delayed generic entry prevented earlier generic price competition and a lower initial generic price. I will refer to the first group of class members as "switchers" and to the second group of class members as "generic only."

GSK challenges Indirect Purchasers' claim that antitrust impact is capable of proof at **[*221]** trial through evidence that is common to **[**41]** the class rather than individual to each class member. Specifically, GSK raises three arguments: (1) Rausser's methodology, which relies on aggregated data, masks considerable variation in the actual prices paid by class members, the purchasing patterns of class members, and the prescription drug formularies possessed by TPP class members, and therefore cannot determine whether a given class member was in fact

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The class proceeding under unjust enrichment claims will only be limited to **[**38]** the extent that (1) "generic only" class members (March 2006—March 2009 generic FP purchasers only) and (2) class members who only purchased and/or reimbursed for FP in the state of Florida cannot recover damages based on a theory of unjust enrichment. *See In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 544 (E.D. Pa. 2010)* (dismissing Indirect Purchasers' unjust enrichment claim under Florida law because Florida requires that a plaintiff confer a direct benefit upon a defendant in order to state a claim for unjust enrichment).

[12] Rausser's opinions can be found in three separate expert declarations (January 2010, May 2010, and October 2010 Declarations), two depositions (March 2010, January 2012), and his testimony at Indirect Purchasers' class certification hearing on February 27-29, 2012.

injured; (2) uninjured class members remain in the class; and (3) complex and individualized inquiries are necessary to prove impact, as well as damages. In rebutting Dr. Rausser, GSK relies on the expert opinions of Dr. Robert Navarro, a trained pharmacist and expert in pharmacy benefit programs, and Dr. Bruce Stangle, an economist. [13]

I will first discuss how Indirect Purchasers have demonstrated that impact to the class is capable of proof through their common evidence. **[**42]** Then I will address how GSK's arguments fail to show that individual inquiries will predominate in determining impact to this class.

(1) Impact to All Class Members

To meet their burden in demonstrating impact to purchasers of generic FP, Indirect Purchasers must show that generic FP prices would have been lower absent GSK's conduct through common evidence. Rausser described how certain general principles demonstrate that impact for generic FP purchasers occurs through basic market mechanisms, and how the actual market data confirms that these market mechanisms were present in this case. First, he explained that by delaying generic entry, GSK can capture an extended exclusivity period for a brand drug like Flonase during which time large numbers of consumers are willing to pay elevated prices because the drug is effective for them and less expensive alternatives are unavailable. In this case, the price per unit of Flonase showed a steady increase from the beginning of the Class Period until just prior to generic entry, moving from around $60/bottle to $70/bottle. When the first generic drug then enters the market, that generic drug is invariably priced at a discount to the brand drug's **[**43]** price at that same time. Upon generic entry in March 2006, both Roxane and GSK introduced generic FP drugs at a price 25% below the price of Flonase. While the initial generic price was lower than the brand price, absent GSK's conduct it would have been even lower because it would have been discounted off the brand price in August 2004, not the higher brand price in March 2006.

Rausser further explained that by delaying generic entry, GSK prevented generic price competition that would have resulted in lower generic FP prices for those class members purchasing generic FP between March 2006 and March 2009 in this case. Specifically, he noted that after its initial discount off the brand price, the generic FP price steadily declined over the first eighteen months after entry with only two generic drugs on the market. Rausser explained that this decline was consistent with extensive historical data and academic studies detailing how generic price declines, while spurred on by new generic drug entries, are not dependent on additional generic drugs entering the market. As more drug manufacturers launch additional generic drugs, competition intensifies and drives the generic price down further. **[**44]** In 2007, when a third generic drug (Apotex) launched, the generic price dropped even further; a fourth generic drug (Hi-Tec) arrived on the market in 2009 initiating yet another generic price decrease.

These basic market principles, confirmed by historical data and actual market data in this case, demonstrate how class members would have paid less for generic FP "but-for" GSK's exclusionary conduct.

To meet their burden in establishing "switcher overcharge," Indirect Purchasers must show through common evidence not only that generic FP prices would have been lower than Flonase prices between August 2004 and March 2006 (the period during **[*222]** which GSK prevented generic entry), but also that those class members who purchased Flonase prior to generic entry would have switched to the generic product if it had been available. Many of the same market mechanisms described above explain the cost differential that existed between brand and generic FP. Upon generic entry, the first generic drug is invariably priced at a significant discount to the brand. Two years after generic entry, as a result of generic drug competition, Rausser stated that the generic price is on average 70% less than the brand **[**45]** price. In this case, although the average price of Flonase decreased after

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[13] Stangle's opinions can be found in three expert declarations (April 2010, June 2010, February 2012) and one deposition (May 2010). Navarro issued one expert declaration in April 2010 and was deposed in May 2010. Both Stangle and Navarro testified during the class certification hearings on February 27-29, 2012.

generic entry—dropping to approximately the same price as the generic three months after entry—from that point on, the generic price stayed consistently and significantly below the price of Flonase.

For the "switcher" class members that actually purchased and/or reimbursed for generic FP after entry in March 2006, it is reasonable to assume—based on their observed decisions between the brand and generic—that if the generic had been available earlier, they would have purchased and/or reimbursed for it over the higher-priced brand drug. *See* In re Cardizem CD Antitrust Litig., 200 F.R.D. 326, 343 (E.D. Mich. 2001) ("Evidence that class members have purchased a generic [drug] after it became available gives rise to the inference that they would have similarly done so in the 'but-for' world at the 'but-for' price. There is no need for individual analysis of switching behavior as to these putative class members."); *see also* Wellbutrin XL, 2011 U.S. Dist. LEXIS 90697, 2011 WL 3563835, at *14 (making similar finding regarding TPPs that purchased and/or reimbursed for a generic drug after it became available). This inference is further supported **[**46]** by the rapid conversion to generic drugs that occurred in this case. Rausser stated that one month after generic entry in March 2006, Flonase had lost 88% of the total bottle sales of FP at pharmacies. Within the first year following entry, 95% of the FP sales became generic. By the end of the Class Period, Flonase made up only 1% of the FP market, as the generic captured the remaining 99%. The erosion of brand-name Flonase was even faster than GSK had initially expected, and was one of the most rapid Rausser had ever examined.

Such rapid conversion can be explained not only by the purchase price differential between the drugs, but also by state generic substitution laws that make the substitution of generic drugs for prescribed brand drugs either mandatory or within the discretion of a pharmacist. Furthermore, TPPs offer prescription drug formularies, i.e. tiered pricing, with lowers co-pays and coinsurance to encourage insured consumers to purchase a generic equivalent over the brand drug.

This common evidence is capable of demonstrating that the "switchers" would have purchased the generic drug over Flonase prior to March 2006 absent GSK's exclusionary conduct. It further shows the **[**47]** price of generic FP would have been lower than that of Flonase. [14]

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[14] Indirect Purchasers repeatedly emphasize that this evidence of general economic principles and actual market data is the same evidence that a group of direct purchasers relied on in seeking certification in a related action, alleging injury through overcharges as a result of delayed generic entry into the market. *See* ***American Sales Co., Inc. v. SmithKline Beecham Corp., 274 F.R.D. 127 (E.D. Pa. 2010)***. Because in November 2010 I granted that motion for class certification, Indirect Purchasers claim that their proposed class should be certified. However, this motion for class certification presents certain issues and complexities that were absent in my certification of a direct purchaser class. For one, GSK neither contested that motion nor asserted a *Daubert* challenge against the direct purchaser plaintiffs' two certification experts. More importantly, though, the issues of antitrust impact and damages are different in the context of an indirect purchaser class, largely as a result of the cost and payment structure present in the pharmaceutical industry and the fact that the indirect purchaser class is much larger than **[**48]** thirty member direct purchaser class.

To the extent Indirect Purchasers assert that impact can be proven based solely on GSK's alleged exclusionary conduct, in accordance with the presumption of impact established in Bogosian v. Gulf Oil Co., 561 F.2d 434 (3d Cir. 1977), I do not find such a presumption compatible with the record of this case. *See* In re OSB Antitrust Litig., No. 06-826, 2007 U.S. Dist. LEXIS 56617, 2007 WL 2253425, at *6-7 (E.D. Pa. Aug. 3, 2007) (noting that courts in the Third Circuit apply the *Bogosian* doctrine almost exclusively in direct, not indirect, purchaser actions, and explaining that even in direct purchaser actions "the Third Circuit also requires proof of actual classwide economic injury - a 'belt and suspenders' approach to establishing impact."). In addition, the continued existence of the *Bogosian* presumption appears uncertain within the Third Circuit. *See* Hydrogen Peroxide, 552 F.3d at 326 ("We emphasize that actual, not presumed, conformance with the Rule 23 requirements is essential.").

Regardless, Indirect Purchasers do not rely exclusively on general economic principles and GSK's alleged anticompetitive conduct to demonstrate impact. As discussed *infra*, Rausser utilizes a yardstick **[**49]** methodology and sensitivity analysis, relying on available industry nationwide and state-specific data, to show that impact to these class members is capable of proof through common evidence.

[*223] *(2) Rausser's Yardstick Methodology*

To further demonstrate impact, as well as damages, Rausser proposes to utilize a "yardstick" methodology through which he can compare prices paid for FP in the actual world (i.e. with GSK's alleged misconduct delaying generic entry until March 2006) with the prices paid in a hypothetical "but-for" world (i.e. with generic entry nineteen months earlier in August 2004).

To construct the actual world of FP prices in each class state, Rausser utilized monthly nationwide data on the actual volume and dollar sales of Flonase and generic FP that took place within each distribution channel throughout the Class Period. These distribution channels are pharmacy (or retail), mail order, long-term care, clinics, HMOs, home health care, non-federal hospitals, and miscellaneous. He then computed the average brand and generic price each month within each channel by simply dividing the dollar sales with the volume data.

Rausser subsequently constructed a "but-for world" to estimate **[**50]** how the prices paid for FP would have changed if generic entry had not been delayed. In doing this, he used the market data of what actually occurred in the FP market after generic entry, along with generic economic principles and historical studies in generic pricing and entry. Rausser first assumed that, as in the actual world, GSK's generic product (Par) would have launched simultaneously with Roxane's generic FP drug because historically brand drug companies usually decide to launch their own authorized generic alongside the first non-authorized generic as a means to offset any losses inevitably resulting from generic entry. He conservatively assumed that the launch dates for the third and fourth generic FP drugs—Apotex in October 2007 and Hi-Tech in February 2008—would not be accelerated in the "but-for" world.

Rausser explained that his analysis of the rhinitis drug market revealed no other substantial differences between the markets before and after generic entry that would have caused a material change in the pricing of Flonase or its generic substitutes. The competitive therapies available were substantially the same, consumer demand did not materially change, and reimbursement **[**51]** practices were essentially the same.

To construct the "but for" price of Flonase and generic FP across the Class Period, Rausser used the price changes, discounts and conversion rates observed in the actual market data after March 2006 as a yardstick for estimating what the effect of generic entry would have been in 2004. Rausser explained that he set the initial "but-for" generic price at 25% below the Flonase price in August 2004; this discount is consistent with industry practice and with the initial price discount set in this case. Rausser then used price data observed in the available industry market data to map out the generic prices in the "but-for" world. Generic prices eventually leveled out in the actual world in March 2009 at $20, and Rausser used this same price in his "but for" world as a benchmark for the end of the Class Period

From this yardstick analysis, Rausser showed that the "but-for" generic prices would have been lower than the actual generic FP prices between March 2006 and March 2009, as well as the actual Flonase prices between August 2004 and March 2006.

However, within the prescription drug market, Rausser noted that two characteristics might be thought to **[**52]** distinguish the price experience of one class member from another: (1) type of end-payor, i.e. uninsured consumer, insured consumer, or TPP; and (2) sales channel (i.e., retail/pharmacy, mail order) through which the class member paid and/or reimbursed for FP. Rausser contends **[*224]** that available market data enables him to examine each of these distinctions and conclude that there is no significant group of class members who were not impacted as a result of GSK's conduct.

To test the robustness of his methodology considering these distinctions, Rausser conducted a sensitivity analysis. First, he analyzed the uninsured consumers' prices across each sales channel and for each generic manufacturer (Roxane, Par, Apotex, Hi-Tech). Rausser concluded that his average was robust for this group of consumers—of course, uninsured consumers capture the entire price difference between Flonase and generic FP across all sales channels.

Next, Rausser analyzed the insured consumers, whose cost burden for an FP purchase derives from the contractual arrangement with their TPP. As a result of this contractual arrangement, an insured consumer may pay a percentage of a drug's purchase price (coinsurance), a flat **[**53]** dollar amount of the purchase price (co-pay), or the full purchase price (if they have not met their deductible or have exceeded their annual benefit maximum). The payment amount can also vary between brand and generic drug purchases, as set by a TPP's formulary or tiers. For example, a three tier formulary could include generic, preferred brand, non-preferred brand tiers, each with different co-pay or coinsurance amounts. Generally, Rausser noted, co-pay and coinsurance rates are lower for generic drugs than for brand drugs, as TPPs often place brand drugs on a less favorable formulary status than generic drugs.

In testing the impact of plan provisions in each class state, Rausser separated out insured consumer cost-sharing by state by using data on the net consumer contribution for commercial and Medicare third-party payer plans. This data showed that, in each of the four class states, insured consumers contributed more money per claim for brand purchases prior to generic entry than for generic purchases. In each class state, the difference was greater than eight dollars per claim. Moreover, because this data revealed net consumer contributions, it took into account all the complexities **[**54]** of a plan's provisions, i.e. co-pay, coinsurance, deductible. Rausser noted that his analysis of insured consumer contributions excluded two groups of consumers whose plan provisions do not allow for injury—specifically, insured consumers with the same flat dollar co-pay for brand and generic drug purchases ("one-tier plans"), and insured consumers with a flat dollar co-pay for generic drug purchases and who only purchased generic FP, not Flonase, during the Class Period. [15]

Finally, Rausser analyzed the robustness of his yardstick methodology for TPPs, whose **[**55]** net cost for FP purchases during the Class Period is determined by subtracting the applicable consumer contribution (i.e. co-pay, coinsurance) and drug manufacturer rebates from the gross drug cost. [16] As the literature and actual market data indicated, generic entry has the following effect on each of these three variables: lowers the gross FP price, lowers the co-pay/coinsurance rate, and reduces the number of manufacturer rebates. Therefore, Rausser explained, the effect of generic entry on the net cost to TPPs depends on whether the decline in gross FP drug price exceeds the reductions in co-pays, coinsurance, and manufacturer rebates.

[*225] Rausser tested whether TPPs still suffer injury when extreme values are used for the reduction in co-pay/coinsurance rates and manufacturer rebate rates. For example, the average difference in the co-pay/coinsurance amount between brand and generic drugs averaged $15. Rausser analyzed whether impact still occurred for a TPP if that differential was actually $40. The average rebate price reduction for Flonase after generic entry was 12%. Rausser examined whether TPPs were still injured if the rebates offered were 50% of the gross drug price. Even using these extreme values, Rausser stated that TPPs still suffer monetary loss during the Class Period as a result of GSK's conduct. [17]

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[15] In a similar delayed generic entry case, the presence of these consumers in a proposed class of consumers and TPPs was a critical reason behind the court's denial of class certification. *See* Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, No. 04-5898, 2010 U.S. Dist. LEXIS 105646, 2010 WL 3855552, at *26 (E.D. Pa. Sept. 30, 2010). At the early stages of this litigation, Indirect Purchasers' proposed class included these consumers. Stangle and Navarro pointed out the existence of these uninjured parties in their initial expert declarations. Indirect Purchasers subsequently amended their class definition to exclude these consumers.

[16] Rausser explained that rebates are offered by manufacturers of branded drugs to create incentives for moving volume. Rebates, of course, offset the net cost of a brand drug; therefore, they only make sense economically if the revenue decrease GSK experiences is more than outweighed by the volume increase that they are able to capture as a result. Because generic entry triggers a steady decrease in brand drug volume, drug manufacturers typically reduce the number of rebates offered after generic entry. This case was no different, as Rausser reviewed **[**56]** internal GSK data demonstrating such a reduction in rebates after generic entry.

[17] It must be noted that Rausser's analysis of TPPs does not include fully-insured TPPs, which have been excluded from the class because they do not bear the cost burden for an FP purchase. At the early stages of this litigation, Indirect Purchasers' proposed class included these TPPs—one named plaintiff, in fact, was a fully-insured TPP. Again, Stangle and Navarro

Additionally, Rausser examined the actual transaction data from the named Plaintiff TPPs. Utilizing his yardstick methodology, Rausser demonstrated that each of the TPPs suffered at least some injury in each of the class states in which it purchased and/or reimbursed for Flonase or generic FP.

Through this common evidence and Rausser's methodology, Indirect Purchasers have demonstrated that they can establish impact to this class of consumers and TPPs through class-wide evidence. GSK raises several objections to Rausser's methodology and Indirect Purchasers' assertions, which are addressed below.

(3) GSK's Objections: Aggregated Data and its Effect on TPP Cost-Sharing Provisions

GSK attacks the reliability of Dr. Rausser's methodology for its use of aggregated data sources, which this section addresses, that allegedly mask the presence of injury and exaggerate the extent of damages for the class. According to GSK, this aggregated data, particularly concerning pricing and distribution of purchases, fails to represent **[**58]** the actual FP prices paid by class members in the class states or the actual distribution of purchases reimbursed by TPP class members in the class states. As a result, GSK argues that Rausser's methodology cannot adequately assess injury or measure damages for TPPs at the state level.

In addressing the argument regarding the use of aggregated data and its effect on TPP cost-sharing provisions, GSK relies on the expert opinions and declarations of Dr. Robert Navarro, a trained pharmacist and expert in pharmacy benefit programs, and Dr. Bruce Stangle, an economist. Dr. Navarro explained that TPPs and prescription benefit managers ("PBMs") offer widely variable prescription drug programs. Several commonly used mechanisms and incentives can influence the amount of cost-sharing and price for any given prescription drug transaction. Navarro outlined each of these, including patient copayment/coinsurance, deductibles, benefit caps, drug formularies, participating pharmacy networks, and use of mail service. Each of these provisions is highly varied among the named Plaintiff TPPs, and, Navarro opined, this variation is consistent with that seen among TPPs across the country. Furthermore, Navarro **[**59]** explained that each of these plan features can alter the cost burden imposed on insured consumers and TPPs.

As a result of this variation in the structure of prescription drug benefit programs, Stangle opined that it was impossible for Rausser's class-wide methodology to assess fact of injury. He explained that the various plan provisions detailed by Navarro (i.e. co-pays, deductibles, benefit maximums) must be considered in the impact analysis. Stangle opined that only through an analysis of individual transactions, considering each TPP's provisions, could impact be established.

Rausser's sensitivity analysis, though, tested his methodology against each of these various plan provisions. Using state-specific data, Rausser showed that even considering **[*226]** all the various plan provisions that determine an insured consumer's cost burden for an individual FP purchase, insured consumers' net contribution per claim would have been much lower in each class state absent GSK's conduct. GSK ignores the fact that this data takes into account more than simply co-pays and coinsurance. By looking at the net contribution per claim, this data factors in all the plan provisions—including deductibles—that **[**60]** Stangle and Navarro highlighted as factors that could alter the price experience for consumers and undermine Rausser's analysis. [18]

Rausser additionally analyzed whether extreme drug formularies—in particular, a co-pay/coinsurance differential of $40 between brand and generic drugs, as opposed to the average $15 differential—could alter impact to TPPs in this case. [19] He concluded that TPPs still suffered impact. He also examined whether impact would still occur for

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explained the presence and uninjured nature of these TPPs in their **[**57]** initial declarations. Indirect Purchasers subsequently amended their class definition to exclude these TPPs. All of the remaining named plaintiff TPPs are self-insured plans.

[18] Moreover, some of these plan provisions, though present in a particular TPP prescription drug program, are unlikely to effect this analysis because they are rarely triggered. For instance, Stangle admitted that it is unlikely that benefit maximums will ever affect an individual plan member. Named plaintiff Painters utilizes a participating pharmacy network, requiring its plan members to absorb more of a drug's cost if purchased outside that network. In reviewing all of Painters' actual claims data, Rausser noted that no prescriptions were filled in non-participating pharmacies during the Class Period.

TPPs if GSK offered extreme rebates (50% off the gross Flonase price as opposed to the average 12%), contrary to pharmaceutical **[**61]** industry practice. Again he found that his methodology did not mask injury, as the TPPs continued to be impacted.

In response, GSK grasps onto the possibility that certain TPPs might be uninjured—even benefitted—by delayed generic entry if they only reimbursed for a few FP purchases. Specifically, GSK points to the following testimony by Rausser: "[I]n the early part of the 'but for' period, because the [TPP] is losing the rebates and there is a more favorable co-pay for generics in the early part of the damage period . . . it takes a while before the [TPPs] catch up with what . . . they have foregone . . . in the first part of the period." (2/28 AM H'rg Tr. 31-32). Rausser noted that if a TPP only had a couple transactions in the first nineteen months of the Class Period you could not show injury for them. GSK asserts that many TPPs **[**62]** could potentially exhibit this same reimbursement pattern because many class member TPPs, like the named plaintiff TPPs, may be from outside the class states and may have made only a few reimbursements for FP purchases during the Class Period. Stangle emphasized that Rausser's methodology could not account for these TPPs because he applied an average distribution of purchases/reimbursements for TPPs across the Class Period.

It is apparent that underlying GSK's contention is its belief that the Third Circuit's decision in *Hydrogen Peroxide* requires Indirect Purchasers to demonstrate, by a preponderance of the evidence, that impact can be established for *every* class member through common proof. GSK cites to a statement, however, that concerns plaintiffs' burden at the *merits* stage of the litigation—"individual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation." *Hydrogen Peroxide, 552 F.3d at 311*; *see In re Neurontin Antitrust Litig., No. 02-md-1390, 2011 U.S. Dist. LEXIS 7453, 2011 WL 286118, at *8 n.23 (D.N.J. Jan. 25, 2011)* (considering a similar argument by defendants **[**63]** and noting that this passage relates to plaintiffs' burden at the merits stage of the litigation).

The Seventh Circuit has explained this distinction regarding uninjured class members in the following manner:

> [A] class will often include persons who have not been injured by the defendant's conduct . . . . Such a possibility or indeed inevitability does not preclude class certification, despite statements in some cases that it must be reasonably clear at the **[*227]** outset that all class members were injured by the defendant's conduct. Those cases focus on the class definition; if the definition is so broad that it sweeps within it persons who could not have been injured by the defendant's conduct, it is too broad.

Kohen v. Pacific Inv. Management Co. LLC, 571 F.3d 672, 677 (7th Cir. 2009) (citations omitted). I agree with the analysis in *Kohen* and with other courts that "have routinely observed that the inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class." *In re Cardizem CD Antitrust Litig., 200 F.R.D. 297, 320-21 (E.D. Mich. 2001)* (citing *In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 523 (S.D.N.Y. 1996))*; **[**64]** *see also Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. 293, 309-310 (D.D.C. 2007)* (same); *In re K-Dur Antitrust Litig., No. 01-1652, 2008 U.S. Dist. LEXIS 118396, 2008 WL 2699390, at *18 (D.N.J. April 14, 2008)* (same).

GSK's speculative concern does not undermine the ability of Rausser's methodology and the available common evidence to demonstrate widespread injury to the class. For one, Rausser has shown that all named plaintiff TPPs—who fit a similar profile, i.e. out-of-state TPP with a select number of FP reimbursements—suffered injury as a result of GSK's alleged misconduct. Additionally, by removing from the class all TPPs and consumers that only purchased and/or reimbursed for Flonase, never generic FP, during the Class Period, *see infra*, this concern largely disappears. Therefore, I am satisfied that the class definition is not so overly broad as to defeat certification.

GSK also asserted that Rausser's methodology was flawed because its use of aggregated data masked varied pricing at the end-payor level in each of the class states. With regard to pricing, Stangle criticized Rausser's use of

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[19] Stangle challenged the sufficiency of Rausser's sensitivity analysis by claiming that it only accounted for a two-tier drug formulary. However, Rausser explained that by using such an extreme value ($40 differential in consumer contribution between brand and generic drugs), his sensitivity analysis encompassed more than a two-tier prescription drug plan.

a national average price for both the actual and "but-for" FP prices. Stangle labeled these national **[**65]** average prices as "synthetic prices"—computations derived from national data on FP volume and sales dollars—that mask the actual transaction prices paid by class members in the class states. [20]

Stangle spent significant time comparing the actual state price data of named plaintiff TPPs with Rausser's national average generic price, both in the actual and "but-for" worlds. However, Stangle only offered one concrete example of Rausser's national average generic price masking injury—named plaintiff AFL. Stangle looked at the actual transaction prices for AFL in Florida for generic FP after generic entry in March 2006 to construct his own "but for" generic price lines for assessing impact to AFL. Based on this analysis, he concluded that AFL actually benefitted from the alleged delay of generic entry in the state of Florida. Yet, **[**66]** as Rausser explained, Stangle's analysis was lacking in two critical respects: (1) Stangle failed to consider that earlier generic entry in August 2004 would typically mean a lower initial generic price, because the generic price in August 2004 would be discounted off the Flonase price at that same time, not the higher Flonase price in March 2006; and (2) Stangle failed to account for the full price decline that occurred over the first nineteen months after generic entry. [21] Instead, he averaged the generic prices that occurred for the first year after generic entry and applied that same average price across the first nineteen months of the "but-for" world. By making these two corrections, Rausser showed that AFL suffered injury in Florida during the Class Period. [22]

[*228] Stangle also compared Rausser's national average generic price to the prices actually paid for the FP generic in ten states, based on data from the named plaintiff TPPs. [23] Although Stangle demonstrated that the prices exhibited some level of variation around Rausser's national average generic FP price, GSK fails to explain how any price variation that may exist for FP purchases is masking injury, i.e. that class members would have actually paid and/or reimbursed more for FP absent GSK's conduct. In fact, in analyzing the state-specific **[**68]** prices paid by AFL and IBEW during specific time increments, Rausser demonstrated that the price variation across the states was less than 1%. Much of the price variation is merely a reflection of the changes in brand and generic prices over time. [24] And because Rausser computed average prices for each month—he did not compute average prices over time—his analysis factored in price variation across the Class Period.

Rausser also testified that although he lacked state-specific FP pricing data, he did consider what differential between state prices and national prices would need to exist for his national average to mask injury. He explained

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[20] Rausser does not argue with the notion that he uses an average price. As he explained: "It's a price that's used throughout the pharmaceutical industry. I look at the total dollars, I look at the extended units, and I've got a price for which those extended units moved through the market. It is an average price, there is no question about that." (H'rg Tr. 33.)

[21] Rausser pointed out a third mistake in Stangle's analysis: the inclusion of a transaction that fell outside the Class Period. While correcting for this mistake also changed the calculation such that AFL was injured in Florida, this mistake/correction does not carry the same weight as the other two corrections noted above in attempting to ascertain whether Rausser's methodology is capable of establishing impact to this **[**67]** class.

[22] GSK and Stangle repeatedly note the significant variation between the actual generic prices paid in a given state and Rausser's "but-for" generic price. For example, they noted that although Rausser's "but-for" generic price never exceeds $50/bottle, named plaintiff Painters reimbursed for generic FP purchases in 2006 at prices as high as $63.97/bottle. Therefore, GSK appears to argue that the "but-for" prices in 2004 should match up more closely with the actual prices paid in the class states in 2006. However, this contention again fails to recognize that earlier generic entry in 2004 would allow for a lower generic entry price than in 2006.

[23] The ten states are Alabama, Arizona, Florida, Illinois, Indiana, Kentucky, Mississippi, New Mexico, Tennessee, and Wisconsin.

[24] The rest of the price variation, as Rausser explained, existed because Stangle included prices from the mail-order distribution channel, all of which were found in named plaintiff Painters' internal data. Rausser demonstrated that these prices also exhibited little price variation. Furthermore, although the prices in the mail-order channel do not exactly parallel those seen in the retail channel, Rausser analyzed each of the distribution channels for FP and found that consumers of FP were injured by GSK's exclusionary conduct. Unlike Rausser's average brand price for Flonase after generic entry, discussed *infra*, I do not find that Rausser's average **[**69]** generic price is masking the absence of injury for class members purchasing FP in certain distribution channels.

that prices would have to move outside the realm of the data outliers to reach a point where there was no injury. Furthermore, as noted above, Rausser conducted a sensitivity analysis, using state-specific data, to test whether his national average price masked injury for TPPs or insured consumers.

Courts, under certain circumstances, have found averaged data to be unreliable on the question of common impact and class-wide damages. *See* *Reed v. Advocate Health Care, 268 F.R.D. 573, 591 (N.D. Ill. 2009)* (explaining that "averaging by definition glides over what may be important differences") (internal quotation marks and citation omitted); *In re Graphics Processing Units Antitrust Litig. 253 F.R.D. 478, 502 (N.D. Cal. 2008)* (same). [25] Regarding the use of averages in econometric analyses, the American Bar Association has noted:

> Sometimes the prices used **[**70]** by economists are averages of a number of different prices charged to different customers or for somewhat different products. Using such averages can lead to serious analytical problems. For example, averages can hide substantial variation across individual cases, which may be key to determining whether there is common impact. In addition, average prices may combine the prices of different package sizes of the same product or of somewhat different **[*229]** products. When this happens, the average price paid by a customer can change when the mix of products that the customer buys changes-even if the price of the single product changed.

ABA Section of ***Antitrust Law***, *Econometrics: Legal, Practical, and Technical Issues* 220 (2005). It is critical to note that this case does not involve several different products or different markets of supply and demand. The allegations in this case involve two bioequivalent substitutable drugs with a supply and demand market that exhibited no significant changes during the relevant time periods. Within this homogenous market, Rausser has demonstrated through common evidence that between March 2006 and March 2009, after generic FP became available, the actual price **[**71]** for generic FP was higher than the corresponding generic FP price would have been in the "but-for" world, and that between August 2004 and March 2006, the "but-for" generic FP prices would have been lower than the actual Flonase prices.

I recognize, though, that certain **[**72]** variables—in particular co-pay/coinsurance and deductibles—can alter the FP price experience for a given class member, such that an average price differential by itself may not answer the question of impact for the class members under all circumstances. *See* *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, No. 04-5898, 2010 U.S. Dist. LEXIS 105646, 2010 WL 3855552 (E.D. Pa. Sept. 30, 2010)* (*"Wellbutrin SR"*) ("Just because an average price was increased or decreased by the alleged foreclosure does not mean that all members of the proposed class paid supracompetitive prices or that any damage for an individual end-payor or that any damage for an individual end-payor could be calculated in any formulaic way by common proof."). But as I have already thoroughly discussed above, Rausser did much more than simply compare a monthly average FP price in the actual and "but-for" worlds to demonstrate common impact. He conducted a sensitivity analysis to test whether his methodology was robust in assessing impact for all three types of class members. He also showed that each named plaintiff TPP was injured during the Class Period, applying the available common data and his yardstick methodology. **[**73]** I am satisfied that the data variation in this case is not so extreme as to mask the absence of injury for a significant number of class members. [26]

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[25] GSK cites to *Reed*, in particular, where plaintiffs relied on Rausser's expert testimony, and the court did not find that he had applied his econometric principles and methods reliably to the particular facts of that case. Yet this case and *Reed* are simply inapposite. *Reed* involved allegations of wage-suppression by a class of hospital-based registered nurses. The court noted that numerous factors could affect the wages of an individual nurse—age, nurse performance and merit, sign-on or retention bonuses, and non-wage compensation (i.e. employee benefits, overtime). Defendants presented evidence that, because of these various factors, the wages paid varied greatly and, more importantly, certain nurses actually received pay increases during the class period. Although Dr. Rausser's methodology failed to control for all the relevant factors in *Reed*, I find Rausser's methodology to be sufficient for the facts of this case.

[26] In *Weiss v. AstraZeneca*, No. BC323107 (Ca. Sup. Ct. 2008), Rausser criticized the usefulness of similar aggregated data from third-party vendors to establish impact and class-wide damages to a class of uninsured consumers, insured consumers, and third-party payors. Much of the testimony, admittedly, appears contradictory to that set forth by Rausser in the instant case. Rausser explained that *Weiss* required a different analysis because the class was alleging that a drug manufacturer issued

Finally, GSK contests whether Indirect Purchasers must show that **[**74]** the overcharges for FP had been "passed through" to the indirect purchaser class, as opposed to merely demonstrating that the actual FP prices paid by the class were greater than the prices it would have paid but-for GSK's delaying generic entry. Rausser testified that in a case alleging foreclosed competition like this one, conducting a formal pass-through analysis to trace the economic damages throughout the distribution chain was unnecessary. Rather, he explained that by comparing the actual and "but-for" FP prices as he did in his yardstick methodology, he could observe the clear price differential in the actual and "but-for" worlds that shows impact. He further stated that unlike a price-fixing case, where an end-payor can mitigate or even avoid the prices increases through various measures, in a foreclosed competition case, impact can be measured in terms of what product the end-payor was actually forced to buy because of the delayed entry, versus what product(s) they would have purchased, absent the forestalling of competition. I agree that in the instant case Indirect Purchasers need not conduct a formal **[*230]** pass-through analysis, and that Rausser's methodology is sufficient. *See* ***[**75]*** *In re Cardizem CD Antitrust Litig., 200 F.R.D. 326, 344 (E.D. Mich. 2001)* ("[A]n indirect purchaser must estimate only the 'but-for' price that it should have paid, which is a far less exacting exercise than apportioning the overcharge throughout the entire chain of distribution") (quoting Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of Illinois Brick in Modern Antitrust Analysis*, *68 Geo. Wash. L. Rev. 1, 29 (1999)*); *see also* *Wellbutrin XL, 2011 U.S. Dist. LEXIS 90697, 2011 WL 3563835, at *15* (finding pass-through unnecessary to establish antitrust impact).

I find that Indirect Purchasers have shown that impact is capable of proof at trial through evidence that is common to the class rather than individual to its members for "generic only" and "switcher" overcharges.

(4) Proposed Class Members That Never Purchased Generic FP

Indirect Purchasers proposed class included certain types of consumers and TPPs that either were not impacted by GSK's conduct, or will be unable to show impact through the class-wide evidence presented. These include the following class members: (1) uninsured consumers who purchased Flonase after generic entry; (2) all consumers who purchased Flonase prior to generic entry and **[**76]** did not purchase Flonase or generic FP after entry; and (3) TPPs that only purchased and/or reimbursed for Flonase, never generic FP, during the Class Period. Each of these class members possesses a common attribute—they never purchased and/or reimbursed for generic FP during the Class Period. For the reasons detailed below, I am unwilling to certify these class members.

(i) Uninsured Consumers Who Purchased Flonase After Generic Entry

Consumers purchasing Flonase after generic entry are known as "brand loyalists." Indirect Purchasers' proposed class excludes "brand loyal consumers," defined as insured consumers who purchased only the branded version of Flonase after generic entry. GSK pointed out that this exclusion failed to include uninsured consumers who purchased only the branded version of Flonase after generic entry, i.e. uninsured "brand loyal consumers."

The only plausible theory by which "brand loyalists" can show damage in a delayed generic entry case is "branded overcharge"—paying supracompetitive prices for Flonase because earlier generic entry would have lowered Flonase prices. Stangle declared that according to Dr. Rausser's own data, brand prices actually increased in **[**77]** some distribution channels—in particular, the retail/pharmacy channel—after generic entry, even though Rausser's national average brand price exhibited a decrease in brand prices after generic entry. The limited data from Indirect Purchaser TPPs—showing only twenty purchases of Flonase after generic entry—further confirmed this trend as the large majority of those purchases were at a price equal to or greater than the price of Flonase just prior to generic entry. Rausser admitted that Flonase prices within the retail channel stayed high and increased slightly over the course of the damage period. Rausser further admitted that such uninsured consumers would not

misleading advertisements concerning the effectiveness of one drug compared to another drug with a chemically different makeup, different dosage requirements, and a relatively similar price. On the other hand, this case concerns allegations of foreclosed generic competition, involving two bioequivalent substitutable drugs with vastly different prices. I am satisfied that the market dynamics of the two cases are sufficiently different so as not to undermine Rausser's testimony in this case.

have been injured as a result of GSK's conduct. He also acknowledged that Flonase prices may have risen in at least one other channel during certain periods after generic entry.

In this particular instance, therefore, Rausser's national average Flonase price after generic entry does mask price increases, and in turn fact of injury, across certain distribution channels for uninsured consumers. Because his methodology is not reliable in establishing injury for uninsured consumers that purchased Flonase after generic entry, I excluded **[**78]** these members from Indirect Purchasers' proposed class.

(ii) Consumers Who Purchased Flonase Before Generic Entry and Made No Brand or Generic Purchases After Generic Entry

A select number of consumers who purchased Flonase before generic entry made no drug purchases, either brand or generic, after generic entry. For these consumers, there were no observed transactions in which they chose between the brand and the generic **[*231]** drug. [27] Indirect Purchasers argue that nearly all of these consumers would have switched to generic FP if generic entry had occurred in August 2004. GSK contends that, without resorting to individualized proof of a consumer's personal medical-decisionmaking, Indirect Purchasers cannot establish which class members would have switched to generic FP and which class members would have continued purchasing Flonase.

To demonstrate that these consumers would have converted to generic FP in the "but-for" world, Rausser **[**79]** points out that 91% of FP volume switched from brand to generic after generic entry. He also noted that each of the four class states have generic substitution laws that facilitate conversion to the generic drug, either by mandate or at a pharmacist's discretion. Finally, given the cost difference between the generic and brand drugs, whether in co-pay/coinsurance rates for insured consumers or full purchase price for uninsured consumers, general economic principles hold that in choosing between equivalent products, consumers will choose the less-expensive one.

This common evidence, however, is cannot establish which of these consumers would have switched to the generic. Indirect Purchasers attempt to transpose a volume statistic—generic conversion rate of FP prescriptions—on a group of entirely different customers, who did not exhibit a preference for the generic during the Class Period. Rausser acknowledged that this data only concerned volume conversion and failed to display the number of individuals who switched to the generic.

Regardless of what other features might exist to encourage generic conversion, I do not find that injury is capable of being established for these individual **[**80]** through evidence common to the class. An individual consumer might continue to purchase Flonase for various reasons, i.e. the nature of her health insurance coverage, a perceived difference in the relative quality between Flonase and generic FP, or some other personal reason. Only through knowledge of an individual consumer's personal medical decision-making can this determination be made. For these reasons, I have excluded these consumers from the class.

(iii) TPPs That Never Purchased and/or Reimbursed for Generic FP

GSK has repeatedly stressed that, based on the difficulties noted above with regard to consumers that only purchased Flonase, Indirect Purchasers have failed to meet their burden to show that impact is capable of proof through common evidence for TPPs that only paid and/or reimbursed for Flonase during the Class Period. [28]

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[27] Both Stangle and Rausser agreed that approximately 21.5% of insured consumers fit this purchasing pattern. Neither expert offered an estimate as to how many uninsured consumers only purchased Flonase before generic entry and made no purchases after generic entry.

[28] Navarro and Stangle noted that it is quite possible that TPPs may have only reimbursed for Flonase purchases during the Class Period; for example, a TPP may have shut down in the period between May 2004 and May 2006, or it may only have a

Indirect Purchasers, meanwhile, have continually ignored any explanation as to why TPPs that never paid for and/or reimbursed for generic FP remain in the class. Asked about a TPP's burden regarding brand loyal consumers, Rausser stated that a TPP is going to end up paying exactly what it paid in both the actual and "but-for" world in reimbursing for **[**81]** those insured consumers' purchases. He explained that the injury for a TPP derives from the cumulative effect on the TPP across all its reimbursed transactions—in other words, transactions that produce "switcher" or "generic only" overcharges in the "but-for" world.

For a TPP that only paid and/or reimbursed for Flonase during the Class Period, this argument rests on the underlying assumption that in the "but-for" world, at least some of the TPP's reimbursements would be for purchases of the generic product. Whether a TPP would have continued to reimburse for Flonase, or would have switched to make some reimbursements for generic FP, turns on the personal medical **[*232]** decision-making of its plan members, who decide to make the purchases underlying those reimbursements. Therefore, the same significant individual **[**82]** issues are present in the impact analysis for TPPs that only reimbursed for Flonase, as they are for consumers that only bought Flonase prior to generic entry. *See* *Wellbutrin XL, 2011 U.S. Dist. LEXIS 90697, 2011 WL 3563835, at *13-14* (rejecting plaintiffs' argument that a probability analysis can establish impact for TPPs that never reimbursed for generic purchases because significant individual issues concerning a plan member's purchasing behavior undermine the reliability of the analysis).

For the foregoing reasons, I find that Indirect Purchasers have failed to establish that impact is capable of proof through common evidence for class members that never purchased and/or reimbursed for generic FP during the Class Period.

c. Measurable Damages

The last prong of the predominance inquiry is whether Indirect Purchasers "have demonstrated by a preponderance of the evidence that they will be able to measure damages on a class-wide basis using common proof." *Behrend v. Comcast Corp., 655 F.3d 182, 204 (3d Cir. 2011)* (citing *Hydrogen Peroxide, 552 F.3d at 325*). "Some variation of damages among class members does not defeat certification." *Id.* (citing 7AA Charles Alan Wright, et al., *Federal Practice and Procedure* § 1781 **[**83]** (3d ed. 2005) (noting that for antitrust class certification "it uniformly has been held that differences among the members as to the amount of damages incurred does not mean that a class action would be inappropriate.")). "Complex and individual questions of damages, however, weigh against finding predominance." *Id.* (citations omitted).

"The usual measure in an overcharge case is the difference between the illegal price that was actually charged and the price that would have been charged 'but for' the violation multiplied by the number of units purchased." *Behrend, 655 F.3d at 203*. Due to the "inherent difficulty of identifying a 'but-for world,'" the Third Circuit has explained that such damages need not be "measured with certainty," but rather may be "demonstrated as 'a matter of just and reasonable inference.'" *Id. at 203-204* (quoting *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 51 S. Ct. 248, 75 L. Ed. 544 (1931))*; *see also* *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 483 (3d Cir. 1998)* (holding that for class certification purposes, "[i]t is not necessary to show with total certainty the amount of damages sustained"); *In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1176 (3d Cir. 1993)* **[**84]** (noting that a "relaxed measure of proof is afforded to the amount" of damages).

i. Monopolization and UDTP Overcharge Damages To measure class-wide damages, Rausser relies on the same "yardstick" methodology he utilized to establish common impact. Through the use of "yardsticks," Rausser compares the prices actually paid by purchasers of FP to what prices would have been paid in the "but-for" world. The model is relatively straightforward as aggregate class-wide damages equal the difference between the costs paid by class members for FP in the actual world versus the costs class members would have paid for FP in the

few reimbursements in a class state during the Class Period, all concentrated between May 2004 and May 2006, because it is an out-of-state TPP.

"but-for" world; Rausser calculates these costs and isolates certain sales because of the class exclusions (i.e. federal facilities, Medicare reimbursements, HMO direct purchasers, GSK rebates) through the use of available industry data. [29]

The before-and-after "yardstick" methodology has been accepted by courts as a means to measuring damages in both indirect and direct purchaser antitrust **[**85]** actions. GSK does not attack the validity of the methodology generally, but instead attacks the data on which Rausser relies to implement his methodology—specifically, again, that the data is not representative of state-specific pricing. To calculate damages within each of the class states, Rausser utilized state-specific data on FP prescriptions in retail and mail-order channels to allocate the nationwide data on FP unit sales and dollars to each of the class **[*233]** states. GSK is correct that through this allocation, Rausser is essentially implementing nationwide prices in measuring state damages. However, Rausser did utilize certain state-specific data to more precisely calculate damages in the class states (i.e. co-pay data, prescription data by payer type). He also demonstrated, based on the named plaintiff TPPs' transaction data in several class states, that FP prices exhibited minimal variance from state to state. Although, as Stangle pointed out, Rausser's national average generic price is consistently below the state prices observed in the named plaintiff TPPs' data, Rausser explained that named plaintiff TPPs' data comes from a small set of individual transactions, and is not representative **[**86]** of the full volume of FP purchases in the class states that will drive the damages calculation. While of course Rausser's methodology would have been even more reliable had he been provided with state-specific FP pricing, "it is important not to let a quest for perfect evidence become the enemy of good evidence." *Messner, 669 F.3d at 808*.

GSK's other challenges to Rausser's methodology "are concerns that relate primarily to the allocation of damages among individual class members, not to the computation of aggregate damages on a class-wide basis. Assuming the jury renders an aggregate judgment, allocation will become an intra-class matter accomplished pursuant to a court-approved plan of allocation, and such individual damages allocation issues are insufficient to defeat class certification." *Terazosin, 220 F.R.D. at 699*; *see also* *In re Potash Antitrust Litig., 159 F.R.D. 682, 697 (D. Minn. 1995)* ("The amount of damages largely involves individualized questions. This is typically true in antitrust actions, however, and does not preclude certification."). [30]

I am satisfied that although the magnitude of overcharges will vary across class members, Indirect Purchasers have set forth a just and reasonable estimate of the class-wide overcharge damages in each of the four class states.

ii. Unjust Enrichment Damages

In addition to his yardstick methodology measuring damages resulting from the anticompetitive overcharge, Rausser has also proposed a methodology to calculate unjust enrichment damages for the class by comparing GSK's actual profits to what its profits would have been in the "but-for" world. This methodology would rely on common evidence in the form of profit and loss statements for Flonase possessed by GSK. Rausser further explained that this data could be adjusted to calculate state-specific damages by relying on available state-specific data on FP prescriptions and their penetration in the class state markets.

Neither of GSK's experts challenged the reliability of Rausser's proposed methodology to calculate unjust **[**88]** enrichment damages in Arizona, Massachusetts, and Wisconsin. GSK asserts that because Rausser has failed to show an actual calculation of unjust enrichment damages, based on his proposed methodology, his methodology is unreliable and incapable of measuring class-wide damages. However, at this stage of the litigation,

[29] Rausser also explained that common data was available to enable him to "back out" of his damages calculation transactions by consumers purchasing only Flonase during the Class Period.

[30] Both *Rule 23(c)(1)(C)*, which allows for the amendment of class certification orders at any time before final judgment, and *Rule 23(d)*, **[**87]** which authorizes courts to make appropriate orders to facilitate class action proceedings, provide adequate methods through which I can address any potential difficulties associated with damage allocations as they may arise.

this bare contention is simply insufficient. *See* In re Wellbutrin SR Direct Purchaser Antitrust Litig., 2008 U.S. Dist. LEXIS 36719, 2008 WL 1946848, at *9 (E.D. Pa. May 2, 2008) (explaining that the court's inquiry is "limited to whether or not the proposed methods are so insubstantial as to amount to no method at all") (quoting Potash, 159 F.R.D. at 697); In re Vitamins Antitrust Litig., 209 F.R.D. 251, 268 (D.D.C. 2002) ("At the certification stage, the preliminary inquiry in assessing the proposed methods of proving damages is limited: The inquiry is not whether the methods are valid, but is only to assess whether the methods are available to prove damages on a class-wide basis."). I find that, based on Rausser's testimony and declarations and the available common data possessed by GSK, that Indirect Purchasers have demonstrated that unjust enrichment **[*234]** damages can be calculated on a class-wide **[**89]** basis using common evidence.

2. Superiority

Rule 23(b)(3) also requires that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Assessing superiority requires a court "to balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication." Georgine v. Amchem Prods., Inc., 83 F.3d 610, 632 (3d Cir. 1996). The Supreme Court explained in *Amchem* that, similar to the predominance requirement, the requirement of superiority ensures that resolution by class action will "'achieve economies of time, effort, and expense, and promote . . . uniformity of decision without sacrificing procedural fairness or bringing about other undesirable results.'" Amchem, 521 U.S. at 615 (quoting Advisory Committee's Note on Fed. R. Civ. P. 23).

GSK reiterates its arguments regarding predominance in contending that a class action is not superior to other available methods of adjudication. However, both fairness and efficiency dictate that I certify the class in this case; otherwise, the numerous individual class members would be forced to file suit individually, **[**90]** producing numerous identical issues in each case that would waste judicial resources and leave all parties vulnerable to unfair inconsistencies. I agree with the vast majority of district courts that in a delayed generic entry case such as this, class action treatment is superior to other available methods of adjudication. Therefore, I find that the requirements of Rule 23(b)(3) have been met.

C. *Daubert* Motions

Both Indirect Purchasers and GSK moved to exclude the other party's respective expert(s) (Rausser, Stangle, Navarro) on class certification issues. The party offering an expert must demonstrate, by a preponderance of the evidence, that the expert's qualifications and opinions comply with Federal Rule of Evidence 702. *See* Daubert v. Merrell Dow Pharms., 509 U.S. 579, 592-93, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (citation omitted). Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) **[**91]** the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. Rule 702 has "a liberal policy of admissibility." Pineda v. Ford Motor Co., 520 F.3d 237, 243 (3d Cir. 2008) (citation omitted).

The Third Circuit has explained that to survive a *Daubert* challenge, an expert must satisfy three "restrictions on expert testimony: qualification, reliability, and fit." Schneider ex rel. Estate of Schneider v. Fried, 320 F.3d 396, 404 (3d Cir. 2003) (citations omitted). The qualification inquiry examines whether a witness possesses specialized expertise. The Third Circuit "has interpreted this requirement liberally, holding that a broad range of knowledge, skills, and training qualify an expert." *Id.* (citing In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 742 (3d Cir. 1994)).

For an expert's testimony to be reliable, it "must be based on [] methods and procedures . . . rather than subjective belief or speculation." *In re TMI Litig., 193 F.3d 613, 670 (3d Cir. 1999)*. "[T]he admissibility inquiry thus focuses on principles and methodology, not on the conclusions generated by principles **[**92]** and methodology." *Id. at 665*. Furthermore, an "expert's testimony must be accompanied by a sufficient factual foundation before it can be submitted to the jury." *Elcock v. Kmart Corp., 233 F.3d 734, 754 (3d Cir. 2000)* (citation omitted).

Finally, *Rule 702* requires that the expert testimony fit the issues in the case. Testimony "fits" a case when it is "relevant **[*235]** for the purposes of the case and . . . assist[s] the trier of fact." *Schneider, 320 F.3d at 404*.

The Third Circuit has not explicitly addressed the question of whether expert testimony must satisfy *Daubert* at the class certification stage. Nevertheless, the Supreme Court has strongly suggested that a full *Daubert* examination may be necessary at class certification. *See* *Dukes, ___ U.S. ___, 131 S. Ct. at 2553-54* ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so . . . ." (internal citation omitted)). Furthermore, in *Hydrogen Peroxide*, the Third Circuit explained that "opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under *Daubert* **[**93]** or for any other reason." *552 F.3d at 323*. "Inherent in that statement is the conclusion that a court could, at the class certification stage, exclude expert testimony under *Daubert.*" *Behrend, 665 F.3d at 215 n.18* (Jordan, J., concurring in the judgment in part and dissenting in part).

Regardless, I will not exclude any of the expert testimony and declarations on class certification, even making a full *Daubert* examination. Both parties concede the issue of expert qualification and focus their arguments on the reliability and fit of each expert's testimony and declarations. From a review of this opinion, it is clear that the expert opinions of Rausser, Stangle, and Navarro were reliable, relevant, and significant contributions to the issues raised by Indirect Purchasers' class certification. Therefore, I will deny all of the following *Daubert* motions: (1) GSK's Motion to Exclude the Expert Report and Testimony of Gordon Rausser; (2) Indirect Purchasers' Motion to Exclude the Report and Testimony of Bruce Stangle; and (3) Indirect Purchasers' Motion to Exclude the Report and Testimony of Robert P. Navarro.

V. CONCLUSION

For the reasons explained above, I conclude that Indirect Purchasers **[**94]** have carried their burden under *Rules 23(a)* and *(b)(3)*. In reaching that conclusion, however, the indirect purchaser class was limited to class members that purchased/or reimbursed for generic FP during the Class Period. I will therefore grant in part and deny in part Indirect Purchasers' motion for class certification. Additionally, I will deny the three *Daubert* motions that seek to exclude each party's respective expert(s) on class certification.

/s/ Anita B. Brody

ANITA B. BRODY, J.

APPENDIX A

State Monopolization Claims

Arizona	
	Arizona's monopolization statute, *Ariz. Rev. Stat. § 44-1401, et seq.*, permits any "person threatened with injury or injured in his business or property" to sue for redress of a violation of the statute." *Ariz. Rev. Stat. § 44-1408(B)*. The statute includes a federal guidance clause, which notes that it is "the intent of the legislature that in construing this article, the courts may use as a guide interpretations given by the federal courts to comparable

State Monopolization Claims

federal antitrust statutes." *Id.* § 44-1412. Indirect purchasers have standing to sue under this statute. Bunker's Glass Co. v. Pilkington, PLC, 206 Ariz. 9, 75 P.3d 99 (Ariz. 2003).

Wisconsin

Wisconsin's monopolization statute, Wis. Stat. § 133.01, et seq., aims to prohibit "unfair and discriminatory business practices which destroy or hamper competition," *id.*, and provides for penalties against every person "who monopolizes, or attempts to monopolize." *Id.* § 133.03. Section 133.18 permits any person injured directly or indirectly by an antitrust violation to seek treble damages. Id. § 133.18. The statute was also "intended as a reenactment of the first two sections of the federal Sherman Antitrust Act . . . ." Grams v. Boss, 97 Wis. 2d 332, 294 N.W.2d 473, 480 (Wisc. 1980).

State UDTP Claims

Florida

Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.201, et seq., declares unlawful any "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." Fla. Stat. § 501.204(1). A "claim for damages under FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." Rollins, Inc. v. Butland, 951 So.2d 860, 869 (Fla. Dist. Ct. App. 2006). To ascertain whether a FDUTPA violation has occurred, a court may utilize rules promulgated "pursuant to the Federal Trade Commission Act" and the "standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts." Fla. Stat. § 501.203(3). While Florida bars indirect purchasers from asserting claims under its antitrust act, they may state claims under FDUTPA. *See* Mack v. Bristol-Myers Squibb Co., 673 So.2d 100, 103, 107-08 (Fla. Dist. Ct. App. 1996).

Massachusetts

Massachusetts UDTP statute, Mass. Gen. Laws ch. 93A, et seq., provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are ... unlawful. *Id.* § 2. The claim has three elements, as a plaintiff "must establish (1) that the defendant has committed a violation of [Mass. Gen. Laws ch. 93A, § 2]; (2) injury; and (3) a causal connection between the injury suffered and the defendant's unfair or deceptive method, act, or practice." Herman v. Admit One Ticket

	State Monopolization Claims
	Agency LLC, 454 Mass. 611, 912 N.E.2d 450, 454 (Mass. 2009). Although Massachusetts bars indirect purchasers from bringing claims under its ***antitrust law***, it does not bar indirect purchaser standing under its UDTP act. *See Ciardi v. F. Hoffmann-La Roche Ltd., 436 Mass. 53, 762 N.E. 2d 303, 308-10 (Mass. 2002)*.
	State Unjust Enrichment Claims
Arizona	"In Arizona, five elements must be proved to make a case of unjust enrichment: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) absence of justification for the enrichment and the impoverishment and (5) an absence of a remedy provided by law." *Trustmark Ins. Co. v. Bank One, 202 Ariz. 535, 48 P.3d 485, 492 (Ariz. Ct. App. 2002)*.
Massachusetts	To state a claim for unjust enrichment in Massachusetts, a plaintiff must give proof of "some misconduct, fault or culpable action on the part of the defendant as 'wrongdoer' which renders his retention of a benefit at the expense of another contrary to equity and good conscience." *DeSanctis v. Labell's Airport Parking Inc., 1991 Mass App. Div. 37, 40, 1991 WL 71921 (Mass. Dist. Ct. 1991)*.
Wisconsin	In Wisconsin, "[t]o recover on a claim for unjust enrichment, three elements must be proven: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under circumstances that makes its retention inequitable." *Tri-State Mechanical, Inc. v. Northland College, 2004 WI App 100, 273 Wis. 2d 471, 681 N.W.2d 302, 306 (Wis. Ct. App. 2004)*.

[*237] ORDER

AND [95] NOW**, this 18th day of June 2012, upon consideration of the Indirect Purchaser Plaintiffs' Motion for Class Certification (ECF No. 321) and Amended Motion for Class Certification (ECF No. 323), and the accompanying memoranda in support of and in opposition to these motions, the supplemental memoranda, the hearings on February 22 and February 27-29, 2012, the post-hearing briefs, the expert declarations, the *Daubert* motions and accompanying memoranda, and for the reasons set forth in the memorandum of today's date, it is **ORDERED** that Indirect Purchasers' motion for class certification is **GRANTED IN PART** and **DENIED IN PART.**

It is **FURTHER ORDERED** that:

I. The following indirect purchaser litigation class is certified pursuant to *Federal Rule of Civil Procedure 23(a)* and *23(b)(3)* for the class period of August 2004 to March 2009:

A. With respect to the monopolization and UDTP claims

(1) *For the Class Period from August 2004 through March 2006*

All persons or entities throughout the United States and its territories who from August 2004 through March 2006 purchased, paid for, and/or reimbursed for branded Flonase in any of the following four states—Arizona, Florida, Massachusetts, or Wisconsin. **[**96]** These persons or entities must have also purchased, paid for, and/or reimbursed for an AB-rated generic fluticasone propionate nasal spray equivalent of branded Flonase ("generic FP") from March 2006 to March 2009 in the same designated state in which the Flonase purchase was made.

(2) *For the Class Period from March 2006 through March 2009*

All persons or entities throughout the United States and its territories who from March 2006 to March 2009 purchased, paid for, and/or reimbursed for generic FP in the following states—Arizona, Florida, Massachusetts, or Wisconsin.

B. With respect to the unjust enrichment claims

(1) All persons or entities throughout the United States and its territories who from August 2004 through March 2006 purchased, paid for, and/or reimbursed for branded Flonase in any of the following three states—Arizona, Massachusetts, or Wisconsin. These persons or entities must have also purchased, paid for, and/or reimbursed for an AB-rated generic fluticasone propionate nasal spray equivalent of branded Flonase ("generic FP") from March 2006 to March 2009 in the same designated state in which the Flonase purchase was made.

C. For purposes of the class definition, the Flonase **[**97]** and/or generic FP drugs must have been intended for consumption by the class members, their families or their members, employees, plan participants, beneficiaries, or insureds.

D. The following are excluded from the class:

(1) GSK and its respective subsidiaries and affiliates;

(2) all governmental entities (except for government funded employee benefit plans);

(3) all persons or entities that purchased FP nasal spray, including Flonase, for purposes of resale or directly from GSK to the extent and solely to the extent of such purpose for resale or as a direct purchase;

(4) insured individuals covered by plans imposing a flat dollar co-pay that was the same dollar amount for generic as for brand name drug purchases;

(5) fully insured health plans, i.e. plans that purchased insurance from another third-party payor covering 100% of the plan's reimbursement obligations to its members; and

(6) insured individuals who purchased only generic FP (never branded Flonase) and whose health plans imposed a flat dollar co-pay applicable to generic drugs.

[*238] E. From August 2004 through March 2009 will be referred to as the "Class Period."

II. Class claims, issues, and defenses are those outlined in the memorandum **[**98]** of today's date.

III. The following class members are appointed as class representatives for claims under the laws of the following states:

State	Class Representative
Arizona	Painters
Wisconsin	Painters
Florida	AFL, IBEW
Massachussetts	Kohoe

IV. **By July 9, 2012**, the parties shall submit a proposed class notice to the Court.

It is **FURTHER ORDERED** that GSK's Motion to Exclude the Expert Report and Testimony of Gordon Rausser (ECF No. 307), Indirect Purchaser Plaintiffs' Motion to Exclude the Report and Testimony of Bruce Stangle (ECF No. 338), and (3) Indirect Purchaser Plaintiffs' Motion to Exclude the Report and Testimony of Robert P. Navarro (ECF No. 339) are all **DENIED.**

/s/ Anita B. Brody

ANITA B. BRODY, J.

Bel Canto Design, Ltd. v. MSS HiFi, Inc.

United States District Court for the Southern District of New York

June 20, 2012, Decided; June 20, 2012, Filed

11 Civ. 6353 (CM)

Reporter
2012 U.S. Dist. LEXIS 86628 *; 2012 WL 2376466

BEL CANTO DESIGN, LTD., Plaintiff, -against- MSS HIFI, INC. and JOHN BOEY a/k/a JOHNNY BOEY, Defendants.

Prior History: *Bel Canto Design, Ltd. v. MSS HiFi, Inc., 837 F. Supp. 2d 208, 2011 U.S. Dist. LEXIS 146701 (S.D.N.Y., Dec. 15, 2011)*

Core Terms

Counterclaimants, products, authorized dealer, dealers, terminated, anti-trust, conspiracy, manufacturer, allegations, Dealership, warranty, competitors, selling, restraint of trade, eBay, motion to dismiss, adverse effect, practices, prices, rule of reason, Sherman Act, disparagement, distributors, consumers, seek damages, Lanham Act, anti-competitive, unauthorized, Counts, amplifiers

Counsel: **[*1]** For Bel Canto Design, Ltd., a Minnesota Corporation, Plaintiffs, Counter Defendants: Benjamin J Court, Messerli & Kramer P.A., Minneapolis, MN; Edward Steven Rudofsky, Zane & Rudofsky, New York, NY; John Harper, III, Messerli & Kramer P.A., Mpls, MN; Mark A Larsen, PRO HAC VICE, Larsen Christensen & Rico, PLLC, Salt Lake City, UT.

For MSS HiFi, Inc., a New York corporation, Defendants, Counter Claimants: Sam Peter Israel, LEAD ATTORNEY, Sam P. Israel, P.C., New york, NY; Troy J Hutchinson, LEAD ATTORNEY, Benjamin E Gurstelle, Briggs & Morgan, PA, Minneapolis, MN.

For John Boey, also known as Johnny Boey, Defendant: Troy J Hutchinson, LEAD ATTORNEY, Benjamin E Gurstelle, Briggs & Morgan, PA, Minneapolis, MN.

Judges: Colleen McMahon, U.S.D.J.

Opinion by: Colleen McMahon

Opinion

DECISION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO DISMISS THE COUNTERCLAIM

McMahon, J.:

INTRODUCTION

Plaintiff/Counterclaim-Defendant Bel Canto Design, Ltd. ("Bel Canto") is a manufacturer of high-end audio equipment. It sued-Defendants/Counterclaimants MSS HiFi Inc. ("MSS HiFi"), a former Bel Canto authorized dealer, and its principal, John Boey ("Boey," and with MSS HiFi, "Counterclaimants"), in the United States District **[*2]** Court for the District of Minnesota, for Lanham Act violations. The Minnesota District Court transferred the case to this Court on September 12, 2011, and Bel Canto moved for a preliminary injunction to halt several of Counterclaimants' business practices that Bel Canto claimed misled consumers and damaged Bel Canto's goodwill.

I held a preliminary injunction hearing on November 28 and 29, 2011. On December 16, 2011, I granted in part and denied in part Bel Canto's motion for a preliminary injunction. In particular, I enjoined MSS HiFi from (1) falsely claiming affiliation with or endorsement by Bel Canto, (2) advertising or selling Bel Canto products bearing altered serial numbers, or (3) advertising or selling Bel Canto products for which warranty protection is unavailable because of actions taken by MSS HiFi. *Bel Canto Design, Ltd. v. MSS Hifi, Inc., 837 F.Supp.2d 208, 2011 U.S. Dist. LEXIS 146701 , 2011 WL 6355215, at *1 (S.D.N.Y. 2011)*.

Prior to my decision, MSS HiFi and Boey answered Bel Canto's complaint and counterclaimed. (ECF No. 83.) On November 1, 2011 Bel Canto moved to dismiss the Counterclaim in its entirety. (ECF No. 85.) I did not decide this latter motion in my order granting a preliminary injunction, **[*3]** because it was not necessary to do so. It is necessary to do so now.

For the reasons discussed below, Bel Canto's motion to dismiss the Counterclaim is granted in part and denied in part.

BACKGROUND

A. Counterclaim allegations

The following allegations are drawn from the Counterclaim and the documents incorporated therein. *DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010)*.

Boey opened MSS HiFi in May 2007 in Rockland, New York. His business plan was to sell high-end home audio electronics at below wholesale prices. (Counterclaim ¶ 7.) One of the brands Boey wanted to stock at MSS HiFi was Bel Canto's. Bel Canto designs and manufactures "highly compact, high-powered digital amplifiers and low-noise, high dynamic range digital-to-analog converters." (Id. ¶ 8.) Counterclaimants allege that Bel Canto products have a "unique appeal" for a "select segment" of consumers, especially those in urban areas like New York City. (Id.)

Bel Canto does not market or sell its products directly to consumers, but distributes them through a network of authorized dealers. (Id. ¶ 9.) In early 2009, MSS HiFi became an authorized Bel Canto dealer by agreeing to Bel Canto's standard form Dealership **[*4]** Agreement, which is incorporated by reference into the Counterclaim. Several of its terms are relevant here.

First, the Dealership Agreement prevents authorized dealers from selling Bel Canto products to anyone — except other authorized dealers — for purposes of resale, and expressly allows Bel Canto to terminate the dealership of any authorized dealer who sells to unauthorized resalers. Second, the Dealership Agreement prohibits authorized dealers from selling to anyone outside of the United States. Third, the Dealership Agreement says this about Bel Canto's policy towards its manufacturer's suggested retail price ("MSRP"):

> It is Bel Canto's policy to supply Bel Canto products only to dealers that observe the MSRP . . . . Nothing in this Agreement, however, is intended to restrict the price at which the Dealer advertises or sells Bel Canto products supplied to the Dealer. Dealer agrees to sell Bel Canto products based on the value of the products and not price.

(See generally ECF No. 28, Ex. 2.)

Shortly after MMS Hifi's first order, Bel Canto's National Sales Manager, P.J. Zornosa, reprimanded MSS HiFi for attempting to make sales below the MSRP. (Counterclaim, ¶ 15.) Shortly thereafter, **[*5]** on February 15, 2009, Zornosa sent an email to Boey, which is quoted in the Counterclaim. It says:

> I also need my dealers to be a little less predatory when it comes to procuring customers. I think it works well when other dealers work with each other and not against each other. We have enough competition in our world in terms of what customers like to spend their money on than to make it distasteful when some are (or collectively) operating in bad taste.
>
> I am NOT stating that MSRP is always called for but when quoting Dealer Cost I don't think it's going to be sold profitably. I thought this was one of the reasons that MSS HiFi wanted to be our dealer? (To make $$!)

(ECF No. 22, Ex. A.)

At a February 20, 2009 meeting with MSS HiFi's principals, including Boey, Zornosa advised that Bel Canto was under "tremendous pressure" from its other authorized dealers, many of whom demanded that Bel Canto cease selling product to MSS HiFi. Those dealers, all competitors of MSS HiFi, included Stereo Exchange, a New York City outlet for high-end audio equipment, AudioFeil International, located in Upstate New York, and CSA Audio, located in Montclair, New Jersey. (Counterclaim, ¶ 17.) Stereo Exchange **[*6]** went so far as to threaten to stop buying from Bel Canto unless Bel Canto terminated MSS HiFi as an authorized dealer. (Id. ¶ 18.) Zornosa allegedly told MSS HiFi that as a result, it was forbidden to sell Bel Canto products outside of its then-principal place of business in Rockland, or to sell them for less than the price prescribed by Bel Canto. (Id. ¶ 19.)

MSS HiFi continued to sell Bel Canto products as an authorized dealer until November 2009, when Bel Canto terminated the parties' Dealership Agreement. (Id. ¶ 20.) Counterclaimants allege that, "Bel Canto terminated the Agreement in response to other dealer's demands and as a consequence of [MSS HiFi's] unwillingness to maintain artificially elevated prices and to restrict sales to a narrowly defined geographic area." (Id. ¶ 22.)

Nevertheless, MSS HiFi continued to sell Bel Canto products as an *un*authorized dealer; its practices in doing so are the subject of Bel Canto's underlying complaint as well as this Court's prior decision in this matter, which enjoined some of those practices. *Bel Canto, 2011 U.S. Dist. LEXIS 146701, 2011 WL 6355215, at *2-7*. Bel Canto's efforts to stop MSS HiFi, in turn, are the basis for several of the counts of the Counterclaim.

First, **[*7]** in early 2011, Mt. Washington Valley Audiophile ("Mt. Washington") — at the time an authorized Bel Canto dealer — agreed with MSS HiFi that it would obtain Bel Canto products on MSS HiFi's behalf, in exchange for a commission on MSS HiFi's sales. This agreement was in violation of Mt. Washington's Dealership Agreement with Bel Canto, which, as noted, forbids sales to unauthorized resalers. (See supra.) Bel Canto caught wind of the scheme after a couple of months. Suspecting that MSS HiFi's money, rather than Mt. Washington's, was being used to pay for product invoices, Bel Canto billed Mt. Washington $15K to fill an order. After Bel Canto received that amount (secretly from MSS HiFi), it refused to fill the order, presumably on the ground that Mt. Washington had breached its agreement and was not entitled to the product. (Counterclaim ¶¶ 24-26.)

Over the summer of 2011, Bel Canto contacted eBay, where MSS HiFi continued to sell Bel Canto products that it obtained from authorized dealers. Bel Canto persuaded eBay to remove MSS HiFi's listings on the ground that they violated Bel Canto's trademarks. Counterclaimants allege that this action was part of a conspiracy between Bel Canto and **[*8]** its authorized dealers to preclude MSS HiFi from selling Bel Canto products, and also tortiously interfered with its prospective economic relationships with eBay and eBay users. (Id. ¶¶ 27-33.)

Counterclaimants also allege that Bel Canto "retaliated" against those of its authorized dealers that sold Bel Canto products to MSS HiFi after MSS HiFi was terminated as an authorized dealer. In particular, after this Court ordered limited discovery on Bel Canto's trademark claims in September 2011, Bel Canto was able to identify two of its authorized dealers — Alpha Stereo ("Alpha") and Precision Audio and Video ("Precision") — that had sold to MSS HiFi. Bel Canto terminated those dealers for violating the terms of the Dealership Agreement. (Id. 40-45.) Counterclaimants suggest that either including a provision that prohibited selling to resalers in the Dealership Agreement, or enforcing that provision, is anti-competitive behavior in furtherance of an illegal conspiracy to prop up the price of Bel Canto products, and interferes with MSS HiFi's prospective economic relationship with those dealers.

Finally, Counterclaimants point to Bel Canto's policy of refusing to honor warranties on Bel Canto **[*9]** products purchased from an unauthorized dealer. They argue that this refusal is intended to, and succeeds in, forcing discounters like MSS HiFi out of the market (see id. ¶¶ 34-39); or, that if unauthorized dealers continue to sell Bel Canto products, Bel Canto's refusal to honor warranties results in a decrease in quality services to Bel Canto customers who buy from unauthorized dealers. (Id. ¶ 55.)

B. Procedural history

Bel Canto commenced this case by suing MSS HiFi and Boey in the District of Minnesota on July 28, 2011. It sought a temporary restraining order and preliminary injunction to stop MSS HiFi from selling Bel Canto products in violation of the Lanham Act. (ECF No. 1.) Judge Doty, granted a TRO on August 25, 2011. On September 12, 2011, Judge Doty extended the TRO and transferred the case this Court. Judge Doty's orders, which are mostly irrelevant to the instant motion, are discussed in greater detail in my prior opinion in this case. *Bel Canto, 2011 U.S. Dist. LEXIS 146701, 2011 WL 6355215, at *7-8*.

MSS HiFi and Boey answered Bel Canto's complaint and counterclaimed on October 7, 2011. The Counterclaim has nine counts. (ECF No. 83.) Count I seeks damages for violation of section 1 of the Sherman Act, **[*10]** *15 U.S.C. § 1*; Count II seeks damages under New York law for commercial disparagement; Count III seeks damages under New York law for tortious interference with prospective economic advantage; Count IV seeks damages for breach of the Dealership Agreement between Bel Canto and MSS HiFi; Count V seeks damages for false advertising under the Lanham Act; Count VI seeks damages under *section 349 of New York's General Business Law* ("GBL") for deceptive trade practices; Count VII seeks damages under *section 350 of the GBL* for false advertising; Count VIII seeks damages for a violation of New York's duty of good faith and fair dealing; and Count IX seeks damages for a violation of New York's Donnelly Act, *GBL § 340*, which parallels the Count I claim under the Sherman Act. Each Count is addressed separately below.

Rather than answer, Bel Canto moved to dismiss all of the counterclaims on November 1, 2011. That motion was not fully briefed when the preliminary injunction hearing was held on November 28, 2011. In ruling on the preliminary injunction motion, I made several preliminary findings of fact that, as discussed below, are relevant to some of the Counterclaims. See *Bel Canto, 2011 U.S. Dist. LEXIS 146701, 2011 WL 6355215, at *1-7*. **[*11]** Those findings do not bind me in my consideration of this motion.

DISCUSSION

A. Standard of review

A motion to dismiss counterclaims is governed by the familiar standards of *Rule 12(b)(6)*. "In deciding a motion to dismiss pursuant to *Rule 12(b)(6)*, the Court evaluates the sufficiency of the complaint under the 'two-pronged approach' suggested by the United States Supreme Court in *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L. Ed. 2d 868 (2009)*." *Bektic-Marrero v. Goldberg, 850 F. Supp. 2d 418, 2012 U.S. Dist. LEXIS 30764, 2012 WL 733875, at *5 (S.D.N.Y. Mar. 7, 2012)*. First, "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to the assumption of truth and are thus not sufficient to withstand a motion to dismiss. *Iqbal, 129 S.Ct. at 1949*; *Hayden v. Paterson, 594 F.3d 150, 161 (2d Cir. 2010)*.

Second, "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Iqbal, 129 S.Ct. at 1950*. A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct **[*12]** alleged." *Id. at 1949*. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

I analyze the Counterclaims as follows: Antitrust claims, Counts I and IX (Section B); Claims based on Bel Canto's allegedly false statements, Counts II, III, V, VI, VII (Section C); and Claims based on breach of contract, Counts IV and VIII (Section D).

B. Anti-trust claims, Counts I and IX

Counterclaimants first seek relief under section 1 of the Sherman Act, *15 U.S.C. § 1*, and the analogous provisions of New York's Donnelly Act, codified at *GBL § 340*. They allege that "Bel Canto forged a de facto conspiracy with its authorized distributors . . . by their refusal to do business with MSS [HiFi]," (id. ¶ 49); and that "This de facto conspiracy was among a manufacturer together with competitive distributors and had as its purposes fixing prices, . . . and it has greatly impeded MSS [HiFi]'s ability to sell Bel Canto products at discounted prices." (Id. ¶¶ 50-51.) Counterclaimants allege that this conspiracy, and Bel Canto's practices, "have had an adverse effect on prices, output, and the quality of services **[*13]** in the digital amplifier and digital-to-analog converter market — without any countervailing efficiencies o[r] benefit to consumers." (Id. ¶ 54.)

Section 1 of the Sherman Act says that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. Private causes of action for Sherman Act violations are permitted by Section 4 of the Clayton Act, *15 U.S.C. § 15*. *Floors-N-More, Inc. v. Freight Liquidators, 142 F.Supp.2d 496, 500 (S.D.N.Y. 2001)* (citation omitted). In order to state a claim for violation of this section, the party asserting it must allege three things: (1) an agreement (2) between two or more persons or entities (3) that "unreasonably" restrains trade.

1. *Illegal agreement vs. independent action*

Unilateral action by one market participant against another is not a basis for an anti-trust claim, even if the action has the effect of restraining trade, because unilateral action is inconsistent with an illegal "agreement" or conspiracy. "Unilateral conduct on the part of a single person or enterprise falls outside the purview of *[section 1 of the Sherman Act]*." **[*14]** *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc., 996 F.2d 537, 542 (2d Cir. 1993)*; see also *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 923 (2d Cir. 1985)*. Rather, "a manufacturer ... generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." Id. (internal citations omitted). This principle is often referred to as the "Colgate doctrine," after the United States Supreme Court's decision in *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*.

Cases that premise an anti-trust violation on an authorized dealer's termination by a manufacturer implicate the foregoing principle. It should come as no surprise that manufacturers, like Bel Canto, that chose to distribute through a network of authorized dealers will receive complaints about discounters from their authorized dealers — particularly if the authorized dealer agreement suggests an MSRP or geographic restrictions. The Supreme Court held, in *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*, that if the manufacturer responds to such complaints by terminating the price cutting dealer, this **[*15]** response alone does not suggest any anti-competitive conspiracy between the manufacturer and its complaining authorized dealers. Rather, such a response is consistent with a unilateral decision by the manufacturer not to authorize price-cutting dealers.

As my colleague Judge Skretny on United States District Court for New York's Western District has explained, discussing Monsanto:

> a manufacturer has the right: (1) to deal or refuse to deal with whomever it chooses; and (2) "to announce in advance the circumstances under which it will refuse to sell," so long as it does so independently. To protect against erosion of this principle, the [Supreme Court in Monsanto] explicitly held that evidence of complaints by distributors, standing alone, does not support an inference of antitrust conspiracy. The Court reasoned that complaints about price cutters "are natural — and from the manufacturer's perspective, unavoidable — reactions by distributors to the activities of their rivals," which "arise in the normal course of business and do

> not indicate illegal concerted action." Accordingly, it cautioned that barring a manufacturer from acting "solely because the information upon which it acts originated **[*16]** as a price complaint would create an irrational dislocation in the market."

Campbell v. Austin Air Systems, Ltd., 423 F. Supp. 2d 61, 68-69 (W.D.N.Y. 2005) (internal citations omitted); see also Burlington Coat Factory, 769 F.2d at 919. Applying Monsanto, the court in Campbell held that the plaintiff's "allegation that [his distributor] terminated his distributorship in response to the complaints of his competitors is legally insufficient to infer concerted action required under Section 1 of the Sherman Act." 423 F. Supp. 2d at 69.

Of course, the fact that dealers complained remains *relevant* to alleging (and ultimately proving) an illegal agreement, but "something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently;" or, a plaintiff must produce evidence that would allow a jury to conclude that "the alleged conspirators had a unity of purpose or a common design and understanding, or a meeting of the minds." Monsanto, 465 U.S. at 764. At the pleading stage, of course, the plaintiff must allege facts that if proved would entitle it to relief, and thus simply **[*17]** alleging competitor complaints and a manufacturer's response is not sufficient to satisfy the Rule 8 pleading requirement. "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); cf. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

The Counterclaim fails to allege an anti-trust conspiracy under the foregoing cases.

Counterclaimants allege, in wholly conclusory fashion, that Bel Canto "forged a de facto conspiracy with its authorized distributors," but it pleads no facts that would tend to establish any such conspiracy. To the extent Counterclaimants' usage of the phrase "de facto conspiracy" reflects the total absence of allegations tending to show the existence of an *actual* agreement, it is apt.

There is no allegation that Bel Canto met with some of its authorized dealers and forged an agreement to do anything. "In order to successfully allege conspiracy, Twombly requires that a plaintiff provide **[*18]** 'specific time(s), place(s), or person(s) involved in the alleged conspiracies.' It is well established that '[s]olely pleading opportunities to conspire is not sufficient to support a claim of actual conspiracy.'" American Medical Ass'n v. United Healthcare Corp., 588 F.Supp.2d 432, 446 (S.D.N. Y. 2008) (citations omitted). Counterclaimants do not plead specific times, places, or persons involved in the alleged de facto conspiracy.

Instead, they plead (1) price complaints by three local competitors, and (2) a series of actions by Bel Canto, including terminating MSS HiFi's dealership and seeking to prevent MSS HiFi from selling Bel Canto products as an unauthorized dealer. But Monsanto makes it clear that the allegation of competitor complaints followed by a response, such as termination of a dealership, is not sufficient to establish a conspiracy; pleading no more than those facts is likewise insufficient under Twombly. As for the steps Bel Canto has taken to prevent MSS HiFi from continuing as an unauthorized dealer, every one of them is consistent with Bel Canto's enforcing its rights under its other Dealership Agreements (such as terminating Mt. Washington for selling to MSS HiFi), **[*19]** or with its rights under the Lanham Act (such a contacting eBay to remove MSS HiFi listings of Bel Canto products). Because all of the actions pleaded are equally consistent with Bel Canto's business decision to enforce its rights, as with an actual agreement with its other authorized dealers, they do not give rise to a plausible inference of a conspiracy under Monsanto and Twombly.

2. *"Unreasonable " restraint of trade*

The failure to allege an agreement to restrain trade is sufficient by itself to doom the anti-trust counterclaims. But even if MSS had pleaded an agreement to restrain trade between Bel Canto and its authorized dealers, I would dismiss its antitrust counterclaims, because it has not alleged that this agreement constituted an unreasonable restraint of trade.

a. Controlling law

Pleading an agreement to restrain trade is not sufficient to state a claim under *section 1* of the Sherman Act. As the Supreme Court has explained, "the Sherman Act's prohibition of '[e]very' agreement in 'restraint of trade,' prohibits only agreements that *unreasonably* restrain trade." *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)* (emphasis in original); see also *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. **[*20]** Thus, the party challenging an agreement bears the burden of showing that the agreement is, in fact, unreasonably anticompetitive in the circumstances. "If a § 1 plaintiff establishes the existence of an illegal contract or combination, it must then proceed to demonstrate that the agreement constituted an unreasonable restraint of trade." *Capital Imaging, 996 F.2d at 542*; see also *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc., 530 F.3d 204, 218 (3d Cir. 2008)*.

An anti-trust claimant can show that an agreement unreasonably restrains trade in one of two ways.[1] See *Capital Imaging, 996 F.2d at 542*. First, certain kinds of agreements are, by their nature, presumed to constitute unreasonable restraints. "[C]ertain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances. An agreement of such a kind is unlawful per se." *NYNEX, 525 U.S. at 133*; see also *Major League Baseball Properties, Inc. v. Salvino. Inc., 542 F.3d 290, 315 (2d Cir. 2008)* ("MLB" herein).

However, the class of agreements considered unreasonable per se is limited. *Floors-N-More, 142 F. Supp. 2d at 500* (quoting *Capital Imaging, 996 F.2d at 542*). It includes agreements between competitors at the same level of distribution to fix prices, divide a market; or otherwise restrain competition — so-called "horizontal" agreements. See *MLB, 542 F.3d at 315*. The per se rule was long applied to agreements between market participants at different levels of the distribution chain ("vertical" agreements), but only if the agreement involved price restraints or price-fixing. However, since 2007, no vertical restraint is considered illegal per se under the Sherman Act. *Leegin, 551 U.S. at 877* (overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911))*. Thus, "agreements between persons at different levels of a market structure, for example between manufacturer and distributor or between franchisor **[*22]** and franchisee — referred to as 'vertical restraints' — are analyzed under the [so-called] rule of reason," and no longer treated as presumptively illegal. *Integrated Systems and Power, Inc. v. Honeywell Intern., Inc., 713 F. Supp. 2d 286, 291 (S.D.N.Y. 2010)* (citations omitted).

In limited circumstances, agreements to exclude a particular entity from participating in a market, for instance, by refusing to deal with that entity (so-called "group boycotts") have been deemed per se illegal. *U.S. v. General Motors Corp., 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*. However, a group boycott is not per se illegal unless it involves a horizontal agreement; as the Supreme Court explained in *NYNEX, 525 U.S. at 135*, "precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors." Thus, an agreement between a manufacturer and its distributor — parties in a vertical relationship — to exclude one of the distributor's competitors from the market is not per se illegal. *Leegin, 551 U.S. at 877*; see also *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir. 1978)*; *Floors-N-More, 142 F. Supp. 2d at 496*.

If an agreement is not an unreasonable restraint of trade per **[*23]** se, courts evaluate whether it in fact unreasonably restrains trade under the so-called "rule of reason." "The inapplicability of a per se analysis is not dispositive of Defendant's motion. The conduct alleged in the complaint would constitute a violation of *§ 1* . . . if Defendant's conduct is shown to be a violation under the rule of reason." *Integrated Systems, 713 F. Supp. 2d at 298* (citing *MLB, 542 F.3d at 316*).

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[1] The Court is aware of the "quick look," or abbreviated **[*21]** rule of reason analysis discussed in *Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 317-18 (2d Cir. 2008)*. However, neither party invokes that analysis, and rightly so, as it is not applicable to the facts of this case. I therefore discuss it no further.

An unreasonable restraint of trade under the rule of reason requires "an actual adverse effect on competition *as a whole* in the relevant market." *Commercial Data Servers, Inc. v. International Business Machines Corp., 262 F. Supp. 2d 50, 78 (S.D.N.Y. 2003)* (internal citation omitted) (emphasis added); see also *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 n.15, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)* (quoting *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918))*. As the Second Circuit has explained:

> Insisting on proof of harm to the whole market fulfills the broad purpose of the ***antitrust law*** that was enacted to ensure competition in general, not narrowly focused to protect individual competitors. Were the law construed otherwise, routine disputes between business competitors **[*24]** would be elevated to the status of an antitrust action, thereby trivializing the Act because of its too ready availability.

Capital Imaging, 996 F.2d at 543 (internal citations omitted).

b. The rule of reason applies here

The agreements alleged in this case are not per se unreasonable restraints of trade, because no horizontal agreement is alleged. Thus, the legality of the alleged agreement will be judged under the rule of reason.

Counterclaimants do not allege an agreement between its competitors — other Bel Canto dealers — and thus do not allege a horizontal conspiracy. Not a single allegation in the Counterclaim identifies the persons, places, or times involved in any horizontal conspiracy among Bel Canto dealers. None of the facts alleged — which detail Bel Canto's efforts to stop MSS HiFi from selling Bel Canto products — gives rise to any inference of a conspiracy or agreement among other Bel Canto dealers. Only three such dealers are identified — Stereo Exchange, AudioFeil International, and CSA Audio. The only allegation with respect to them is that they complained to Bel Canto about MSS HiFi and Boey; there is no allegation that they did so together, or only after conspiring **[*25]** to boycott MSS HiFi from the high end audio market. Indeed, these dealers are not alleged to have agreed amongst themselves to do anything at all.

As stated above, I do not believe Counterclaimants plausibly allege an agreement between Bel Canto and its authorized dealers, either. But even if they succeeded in doing so, such a "vertical" agreement is not per se illegal. *Leegin, 551 U.S. at 877*. Under controlling Supreme Court and Second Circuit precedent, and analogous cases from this District, such allegations do not state a per se illegal horizontal restraint of trade. See *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*; *Oreck, 579 F.2d at 126*; *Integrated Systems, 713 F. Supp. 2d at 286*; *Floors-N-More, 142 F. Supp. 2d at 496*. Thus, the rule of reason applies.

c. Counterclaimants fail to allege a violation under the rule of reason

Under the rule of reason analysis, Counterclaimants must allege that that Bel Canto's actions have had an actual adverse effect on competition as a whole in the relevant market. This requires pleading (1) a relevant market, (2) an anti-trust injury, i.e., an adverse effect on competition in the market, and (3) anti-competitive conduct **[*26]** by Bel Canto that causes the injury. *Commercial Data Servers, Inc. v. International Business Machines Corp., 2002 U.S. Dist. LEXIS 5600, 2002 WL 1205740, at *4-8 (S.D.N.Y. March 15, 2002)*.

i. *Relevant market*

"In order to plead an antitrust violation under the rule of reason, a plaintiff must allege a relevant market, including both a product market and a geographic market." *Integrated Systems, 713 F. Supp. 2d at 298*. As this Court explained in *Commercial Data, 262 F. Supp. 2d at 63-64*:

> The relevant product market is "the area of effective competition" within which a firm's products compete. The market must include all products "that have reasonable interchangeability for the purposes for which they are produced — price, use and qualities considered." Products are "reasonably interchangeable" where there is

> sufficient cross-elasticity of demand, i.e., where consumers would respond to an increase in the price of one product by purchasing another product. Products need not be identical, however, to be included in the same market, complete functional overlap is not required.

Market definition is frequently a fact-intensive inquiry and courts are hesitant to grant a motion to dismiss for failure to allege an appropriate **[*27]** market. Nevertheless:

> To survive a Rule 12(b)(6) motion to dismiss, an alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes — analysis of the interchangeability of use or the cross-elasticity of demand, and it must be plausible. Cases in which dismissal on the pleadings is appropriate frequently involve either (1) failed attempts to limit a product market to a single brand . . . that competes with potential substitutes or (2) failure even to attempt a plausible explanation as to why a market should be limited in a particular way.

Todd v. Exxon Corp., 275 F.3d 191, 200 (quoted in *Integrated Systems, 713 F. Supp. 2d at 298*).

Here, Counterclaimants fail to allege a proper market against which to measure their allegations of anti-competitive impact. Few allegations in the Counterclaim even suggest which market should be used to judge Bel Canto's behavior. First, Counterclaimants allege that Bel Canto is the "exclusive" manufacturer of "unique lines of audio equipment," including "highly compact, high-powered digital amplifiers and low-noise, high dynamic range digital-to-analog converters." (Counterclaim, ¶ 8.) **[*28]** These products are alleged to have "appeal for a select segment consumers, particularly in urban areas like New York City." Counterclaimants allege that "no other manufacturer produces equipment with like features on a competitive scale." (Id.) Next, Counterclaimants describe their competitors in the market as "three outlets for high end audio products in the New York Tri-State area." (Id. ¶ 17.) Finally, Counterclaimants suggest a deleterious impact on competition in the "niche market for compact high power digital amplifiers and digital to analog converters" (id. ¶ 1), or the "digital amplifier and digital-to-analog converter market," (id. ¶¶ 54, 123).

These allegations are not sufficient. Courts in the Second Circuit generally reject efforts define a market as consisting of a single brand, and will dismiss a complaint that alleges only such a market. "[A]ntitrust law protects competition, not competitors. Thus, courts generally conclude that single brands do not constitute separate markets." *Commercial Data, 262 F. Supp. 2d at 66* (collecting authority).

Counterclaimants quite clearly attempt to allege a single-brand market: the market for Bel Canto's "unique" and "niche" digital amplifiers **[*29]** and digital-to-analog converters. (Counterclaim ¶ 8.) Although some of the allegations suggest a market definition broader than just Bel Canto products — "high end audio products in the New York City area" (id. ¶ 17), or the "digital amplifier and digital-to-analog converter market," (id. ¶¶ 54, 123) — Counterclaimants expressly embrace a single-brand market definition in their opposition to the Bel Canto's motion to dismiss. (Opp'n at 12-13.) Finally, as discussed further below, Counterclaimants' allegations that Bel Canto's behavior has adversely affected competition "in the market" — for example, by increasing prices for Bel Canto products — is only "plausible" on the assumption that the relevant market is the single brand of Bel Canto products.

"High end audio equipment in the New York City area" might have been a serviceable market definition; so might have "highly compact, high-powered digital amplifiers and low-noise, high dynamic range digital-to-analog converters in the Tri-State area." But Counterclaimants do not plead any facts about the nature of this market; the existence of competitors, the interchangeability of offered products, or the impact on consumer choice that would **[*30]** result if Bel Canto were to raise prices. Thus, even had Counterclaimants tried to define a market larger than a single brand, they would have failed to attempt any "plausible explanation as to why [that] market should be a limited in [that] particular way," *Todd, 275 F.3d at 200*, and failed to plead any facts that would allow the Court to make a meaningful assessment of market power, the cross-elasticity of demand, or any of the other components of anti-trust analysis.

Because they have not alleged a plausible market, Counterclaimants have failed to state a claim for a violation of *section 1* of the Sherman Act under the rule of reason.

ii. *Adverse effect on competition*

At this point, I have identified two sufficient bases for dismissing the anti-trust counterclaims: Counterclaimants' failure to plead an agreement, and their failure to identify a plausible market. But there is yet another failing in the pleadings that requires dismissal: Counterclaimants have failed to allege an "adverse effect on competition" within an appropriate market.

"The traditional indicators of an adverse effect" on competition in a market are "reduced output, increased price, or decreased quality." *Commercial Data, 262 F. Supp. 2d at 78*. **[*31]** A party lacking such direct evidence of an adverse effect on competition may be able to prove it instead by showing that the defendant possessed "market power" and "that 'other grounds [exist] to believe that the defendant's behavior will harm competition market-wide such as the inherent anti-competitive nature of defendant's behavior or the structure of the interbrand market.'" *Id. at 78* (quoting *Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 59 (2d Cir. 1997))*.

"Market power is defined as the power to raise prices significantly above the competitive level without losing all of one's business." *American Medical Ass'n, 588 F. Supp. 2d at 447-48* (quoting *Kasada, Inc. v. Access Capital Inc., 2004 U.S. Dist. LEXIS 25257, 2004 WL 2903776, *8 (S.D.N.Y. Dec. 14, 2004))*. If a business has "market power," then there is a risk that its conduct can cause anti-competitive effects, and its practices will be scrutinized even if the plaintiff cannot demonstrate a causal link between those practices and reduced output, increased price, or decreased quality. In this way, proof of market power acts as a proxy for proof of adverse effects on competition.

On the other hand, when there is no evidence that competition has been **[*32]** harmed, and no evidence that the defendant possesses market power, the courts have little reason to be concerned about the anti-competitive effects of the behavior complained of. The Second Circuit explains that:

> firms lacking substantial market power act against their own self-interest when they raise prices, reduce output, or otherwise restrain trade. The marketplace itself will discipline such misguided efforts as buyers switch to substitutes or new sources of supply enter the market. When market power is lacking, antitrust litigation is not needed to police restraints and maintain competition.

Capital Imaging, 996 F.2d at 546 (internal citation, bracket and ellipses omitted).

Failure to allege adverse effects warrants dismissal of the complaint: "Like the relevant market definition, the adverse effect on competition is a requirement that must be alleged at the pleading stage and can be the basis for a motion to dismiss." *Integrated Systems, 713 F. Supp. 2d at 299* (citing *Electronics Communs. Corp. v. Toshiba Am. Consumer Prods., 129 F.3d 240, 244-46 (2d Cir. 1997))* (other citation omitted).

Counterclaimants have failed to plead any indicators of diminished competition in any relevant **[*33]** market — e.g., high end audio equipment, including amplifiers and digital-to-analog converters, in the New York City or Tri-State area. Of course, they have offered purely conclusory statements, like the one that Bel Canto misconduct "has had, and continues to have, a deleterious effect on the availability of goods in the applicable market" and "has caused additional consumer injury through a diminishment of services and their quality." But while this might conceivably be true with respect to the market for Bel Canto products, that is not an appropriate market definition, as discussed above. Bel Canto's distribution structure, and its willingness to terminate dealers who do not abide by the restrictions Bel Canto imposes, may very well reduce intrabrand competition, driving up the prices for Bel Canto products and decreasing the availability and quality of service for them. However, this restraint on competition is not considered necessarily "unreasonable" because any decrease in *intra*brand competition will likely have the effect of stimulating *inter*brand competition. Assuming there is a competitive market for high-end audio equipment, any increase in Bel Canto prices caused by eliminating **[*34]** discounters may have the effect of driving consumers to Bel Canto's competitors. Thus, while vertical restraints, such as a manufacturer terminating a distributor, have the potential to restrain intrabrand competition, they also have "real potential to stimulate interbrand competition," which the Supreme Court has identified as "the primary concern of ***antitrust law***." *Business Electronics, 485 U.S. at 724*.

Counterclaimants have not alleged any adverse effects on the interbrand market for high-end audio equipment of the kind that Bel Canto manufactures. Nor has it pleaded that Bel Canto has power in that market. Having failed in both, the anti-trust Counterclaims must be dismissed. *Integrated Systems, 713 F. Supp. 2d at 299-300*.

This Court will not allow a "routine dispute" between the parties to "be elevated to the status of an antitrust action," and "thereby trivialize[e] the Act because of its too ready availability." *Capital Imaging, 996 F.2d at 543*. Counterclaimants have failed conclusively to allege an anti-trust violation arising out of Bel Canto's actions in this case. Count I of the Counterclaim is dismissed.

3. *The Donnelly Act claim (Count IX) fails for the same reasons*

Section 340 of the New York General Business Law, **[*35]** known as the Donnelly Act, is modeled after the Sherman Act. *X.L.O. Concrete Corp. v. Rivergate Corp., 83 N.Y.2d 513, 634 N.E.2d 158, 611 N.Y.S.2d 786 (1994)*. Indeed, the New York Court of Appeals has stated that the Donnelly Act "should generally be construed in light of federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result." *Worldhomecenter.com, Inc. v. KWC America, Inc., 2011 U.S. Dist. LEXIS 104496, 2011 WL 4352390, at *2 (S.D.N.Y. Sept. 15, 2011)* (citing *Anheuser—Busch, Inc. v. Abrams, 71 N.Y.2d 327, 335, 520 N.E.2d 535, 525 N.Y.S.2d 816 (1988))*.

For the same reasons the Counterclaim fails to state a claim under the Sherman Act, it also fails to state a claim under the Donnelly Act. *Commercial Data, 262 F. Supp. 2d at 84* (citing *Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp., 814 F.2d 90, 98 n. 4 (2d Cir. 1987))*. Count IX of the Counterclaim is therefore dismissed.

C. Counterclaims based on Bel Canto's allegedly false statements

With the exception of two claims based on contract theories, Counterclaimants' remaining causes of action are based on Bel Canto statements that Counterclaimants allege are false. I address each claim separately below.

1. *Commercial* ***[*36]*** *disparagement/defamation (Count II)*

Counterclaimants seek damages for commercial disparagement under New York law. To state a claim for commercial disparagement, they must allege that Bel Canto directed defamatory statements at the quality of MSS HiFi's goods or services, and that the statements caused special damages. See *Ruder & Finn v Seaboard Sur. Co., 52 N.Y.2d 663, 670-71, 422 N.E.2d 518, 439 N.Y.S.2d 858 (1981)*.

Counterclaimants allege that Bel Canto disparaged them by making statements on eBay, and in letters to the authorized dealers that Bel Canto terminated for selling to MSS HiFi, to the effect that Counterclaimants engaged in "illegal" behavior, including infringement of Bel Canto's intellectual property rights. (Id. ¶¶ 58-66.) Counterclaimants allege (1) that these statements "intended to and did call into question the quality" of MSS HiFi's "goods or services in order to inflict economic harm" on MSS HiFi; and (2) that Bel Canto knew they were false when they made them. (Id. ¶ 63). Counterclaimants allege that these false statements have caused MSS HiFi to suffer damages in the form of diminished reputation and lost business opportunities.

These allegations state a claim for commercial disparagement. Bel **[*37]** Canto's statements can be taken to mean that MSS HiFi's purported "Bel Canto" products are not the "genuine article," and therefore inferior to Bel Canto products offered by Bel Canto through its authorized dealers. Bel Canto's statement of fact to the effect that Boey and MSS HiFi conduct their business illegally, together with an allegation of damages, also states a claim for defamation. Counterclaimants' allegations, if believed, give rise to plausible entitlement to relief, and therefore survive Bel Canto's motion to dismiss.

Of course, I have already found — after hearing evidence presented by both sides — that Bel Canto is likely to succeed in proving that Counterclaimants did, in fact, violate Bel Canto's intellectual property rights. *Bel Canto, 2011 U.S. Dist. LEXIS 146701, 2011 WL 6355215, at *10-12, 23*. If this conclusion is reached again after trial, it would provide Bel Canto with a complete defense to a commercial disparagement or defamation claim — truth. "It is axiomatic that a claim for commercial disparagement — which New York recognizes as the tort of either trade libel or disparagement of goods — rises and falls on the truth or falsity of a statement that is actually made." *Imig, Inc. v. Electrolux Home Care Products, Ltd., 2007 U.S. Dist. LEXIS 20530, 2007 WL 900310, at *19 (E.D.N.Y. Mar. 22, 2007)* **[*38]** (citing *Restatement of Torts (Second) §§ 626*, *629* (1977)). Although my finding was only preliminary, and is not binding on future proceedings (summary judgment or trial), Counterclaimants should think very carefully about whether they wish to continue pursuing this claim. If they do, and they lose, I will entertain a motion for Rule 11 sanctions.

Assuming Counterclaimants continue to press this claim, Bel Canto is free to renew its argument on a motion for summary judgment that these statements are protected by the absolute litigation privilege. See *Kilkenny v Law Off. of Cushner & Garvey, LLP, 76 A.D.3d 512, 905 N.Y.S.2d 661 (2d Dept 2010)*. To prove that its statements to eBay and to its former authorized dealers were "part of" the instant judicial proceeding, Bel Canto will need to introduce factual material into the record that is not properly considered on a motion to dismiss. See, e.g., *O'Brien v. Alexander, 898 F. Supp. 162, 171 (S.D.N.Y. 1995)* (collecting cases), affd in part *101 F.3d 1479 (2d Cir. 1996)*.

2. *Tortious interference with prospective economic advantage*

Counterclaimants next allege that Bel Canto tortiously interfered with its prospective economic advantage.

> Under New York law, to state **[*39]** a claim for tortious interference with prospective economic advantage, the plaintiff must allege that "(1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship."

Kirch v. Liberty Media Corp., 449 F.3d 388, 400 (2d Cir. 2006) (citation omitted).

Counterclaimants allege that Bel Canto knew that MSS HiFi had a business relationship with eBay and the customers it gained through eBay, and that it used "improper means" to interfere with those relationships, and thereby caused damage to MSS HiFi. The "improper means" alleged are Bel Canto's defamatory accusations that MSS HiFi and Boey violated Bel Canto's intellectual property rights. Independently tortious behavior that interferes with an economic relationship is, by itself, a wrongful means that may give rise to liability. Cf. *Carvel Corp. v Noonan, 3 N.Y.3d 182, 818 N.E.2d 1100, 785 N.Y.S.2d 359 (2004)*.

Of course, this cause of action also collapses if what Bel Canto said to eBay (and, through it, MSS HiFi's customers on eBay) was true. **[*40]** If Counterclaimants did, in fact, violate Bel Canto's intellectual property rights, then Bel Canto's saying so was not a "wrongful means" and Bel Canto will not be liable for tortious interference with MSS HiFi's prospective relationships. Thus, for the reasons discussed above, Counterclaimants should consider carefully whether they wish to pursue this claim any further in light of my early finding that Bel Canto is likely to succeed in proving that Counterclaimants did in fact violate the Lanham Act.

It appears that Counterclaimants would also premise tort liability on Bel Canto's termination of Mt. Washington, Alpha Stereo ("Alpha") and Precision Audio and Video ("Precision") as authorized Bel Canto dealers. As noted, Counterclaimants allege that Mt. Washington had a secret agreement to supply MSS HiFi with Bel Canto products in violation of Mt. Washington's Dealership Agreement, and that when Bel Canto found out, it terminated Mt. Washington. MSS HiFi had similar agreements with Alpha and Precision, but after Bel Canto obtained limited discovery, it discovered that MSS HiFi's inventory of Bel Canto products had been supplied by Alpha and Precision, and terminated them as authorized **[*41]** dealers. Counterclaimants suggest that Bel Canto may be liable for interfering with their ability to enter additional such agreements with Mt. Washington, Alpha and Precision in the future.

Unlike the allegation that Bel Canto published defamatory statements to eBay and its customers, these allegations do not state a claim for tortious interference. I have already determined, in the context of this motion, that Counterclaimants have not alleged any anti-trust violation as a matter of law. Insofar as terminating its authorized dealers for breaching their Dealership Agreements was not in any way illegal or tortious — it was not anticompetitive, and no other sort of illegality is suggested — it was not an "improper" or "wrongful" means, or intended solely to injure MSS HiFi. Rather, it was a perfectly legal and proper business decision to enforce the Dealership Agreement's proscription of sales to unauthorized resalers. As the New York Court of Appeals has explained, "Conduct that is not criminal or tortious will generally be 'lawful' and thus insufficiently 'culpable' to create liability for interference with prospective contracts or other nonbinding economic relations." *Carvel, 3 N.Y.3d at 190*. **[*42]** Since there are no allegations tending to show that the terms of the dealer agreements were either illegal or otherwise than as alleged, Counterclaimants have not stated a claim for tortious interference based on the termination of Mt. Washington, Alpha and Precision as authorized dealers.

3. *Misleading business practices under the Lanham Act and the New York GBL*

Counterclaimants next allege that Bel Canto engages in false advertising and misleading business practices, in violation of the Lanham Act and New York's GBL.

a. False advertising under the Lanham Act, GBL § 350 (Counts V and VII)

Section 43(a)(1)(B) of the Lanham Act prohibits any representation "in commercial advertising or promotion [that] misrepresents the nature, characteristics . . . or qualities . . . of goods, services, or commercial activities." To state a claim under this section, Counterclaimants must allege that Bel Canto made a misrepresentation in commerce that: (1) actually deceived or tended to deceive its customers; (2) was material, i.e., likely to influence purchasing decisions; and (3) injured or was likely to injure MSS HiFi. See *Gameologist Group, LLC v. Scientific Games Intern., Inc., 838 F.Supp.2d 141, 2011 U.S. Dist. LEXIS 123150 , 2011 WL 5075224, at *17 (S.D.N.Y. 2011)* **[*43]** (citing *Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144, 153 n.3 (2d Cir. 2007))*.

The scope of *GBL § 350* is similar, prohibiting the promulgation of "False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state." Advertising is "false" if it "is misleading in a material respect." *GBL § 350-a(1)*.

The following allegations are relevant to Counterclaimants' false advertising claims.

First, they allege that, at some point in the past, via some medium, Bel Canto conveyed to consumers that its products are sold with a ninety-day warranty. (Counterclaim ¶ 34.) This statement was misleading, Counterclaimants say, because Bel Canto will not honor the warranty on products sold by unauthorized dealers, like MSS HiFi. (Id. ¶ 35.) For example, Saim Bensaada bought a Bel Canto product from MSS HiFi after MSS HiFi was terminated as an authorized dealer. The product malfunctioned, and Bensaada sought warranty protection from Bel Canto, which initially refused to honor the warranty under its then-undisclosed policy, but eventually relented and honored the policy. (Id. ¶ 36-37.)

Counterclaimants admit that the policy of refusing to honor the **[*44]** warranty on products sold by unauthorized dealers is now disclosed on Bel Canto's website. The date of this disclosure is not revealed.

Even viewed generously, the Counterclaim does not adequately allege a misrepresentation. It may be misleading to say, without qualification, that Bel Canto products carry warranties if some do not. But this misrepresentation is not pleaded with any factual specificity, i.e., where, when and to whom it was made. Without any allegation of the words Bel Canto used, and where it used them, the Court cannot conclude that Counterclaimants have plausibly stated a claim for relief. For example, the Court cannot evaluate whether the statement of warranty coverage was unqualified, or whether the fact that the warranty was conditioned on purchasing products only through an authorized dealer was expressed in a way that would make the alleged omission not misleading. To evaluate context, the Court must also know where the representation was made — on the website, in the manual, on the warranty card — and what other information was readily available to one reading it. Finally, from everything else the Counterclaim alleges, it appears to have been well known that **[*45]** Bel Canto sells only through a network of authorized dealers. In the one instance of customer confusion alluded to, there is no allegation that Mr. Bensaada relied on any statement (or omission) made by Bel Canto about the availability of warranty coverage.

For this reason, the counterclaim has to be dismissed — albeit without prejudice, if they can supply the missing allegations.

Counterclaimants also argue that Bel Canto's disclosure of its policy is itself a misleading statement. This is so, they claim, because Bel Canto must honor all warranties, even those on products sold by non-authorized dealers, under *GBL § 369-b*. As explained in my prior decision, that statute forbids a manufacturer from refusing to honor warranties on the sole ground that the dealer that sold the product was not authorized to do so. *Bel Canto, 2011 U.S. Dist. LEXIS 146701, 2011 WL 6355215, at *16-18*. Counterclaimants suggest that it is misleading to say that Bel Canto's policy is to refuse to honor a warranty when the GBL says that Bel Canto must honor that warranty.

At this stage, I will allow this (apparently novel) theory to continue. In my earlier decision, I concluded that Defendants had not shown that Bel Canto did not have other reasons **[*46]** for refusing to honor any warranty — reasons that, if proven at trial, would render anyone's reliance on the GBL immaterial. *Bel Canto, 2011 U.S. Dist. LEXIS 146701, 2011 WL 6355215, at *16-22*. This is not an issue we can resolve on a motion to dismiss, however; if the trier of fact were to reach a different conclusion at trial, then the GBL issue would remain in the case.

Finally, Counterclaimants point to the statements that Bel Canto made to eBay and its terminated authorized dealers, to the effect that Counterclaimants were selling Bel Canto products in violation of the Lanham Act. But this "false advertising" theory is duplicative of the commercial disparagement claim, which I have already allowed to survive, subject to the warning that if what Bel Canto said was true, Counterclaimants have no case, and they know it. Although I have already found that Bel Canto is likely to succeed in proving that Counterclaimants violated the Lanham Act, that decision was non-final and non-binding. Even so, counsel for the Counterclaimants is advised to keep its Rule 11 obligations in mind as the case proceeds.

b. Deceptive trade practices under GBL § 349 (Count VI)

Under *section 349*, "deceptive acts or practices in the conduct **[*47]** of any business, trade, or commerce or in the furnishing of any service in this state are hereby declared unlawful." *GBL § 349*. Although violations of this statute are prosecuted by the New York Attorney General, see id. *§ 349(b)-(g)*, the statute was amended in 1980 to provide a private right of action for citizens who wish to recover damages or to enjoin an unlawful act or practice. Id. *§ 349(h)*.

To state a claim under *§ 349(h)*, a plaintiff must show that the defendant has engaged in: (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the deceptive act or practice. *City of New York v. Smokes-Spirits.com, Inc., 12 N.Y.3d 616, 621, 911 N.E.2d 834, 883 N.Y.S.2d 772 (2009)*. A plaintiff alleging an injury that is indirect or derivative, such that it arises solely as a result of injuries sustained by another party, lacks standing to pursue a *§ 349* claim. *Id. at 622* (citing *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA, Inc., 3 N.Y.3d 200, 207, 818 N.E.2d 1140, 785 N.Y.S.2d 399 (2004))*. However, entities other than consumers, such as business competitors, have been held to have standing to bring a claim "so long as harm to the public at large is at issue." *Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 264 (2d Cir. 1995)*; **[*48]** see generally *Worldhomecenter, 2011 U.S. Dist. LEXIS 104496, 2011 WL 4352390, at *7*.

Counterclaimants do not specify which of Bel Canto's business practices violate *§ 349*. It may be that this claim is intended to encompass the tortious interference, disparagement, and advertising claims discussed already. To the extent the first two of those claims survive, subject to this Court's repeated warnings about their viability, I will allow the GBL § 349 claim to survive as well, subject to the same warning.

D. Contract claims

Finally, Bel Canto brings two counterclaims that arise under the Dealership Agreement between Bel Canto and MSS HiFi. As noted, the parties entered this standard form agreement in early 2009, and Bel Canto terminated the agreement in November 2009.

1. *Minnesota Franchise Act (Count IV)*

First, Counterclaimants allege that MSS HiFi was terminated as an authorized dealer without cause and without 60 days notice, in violation of the *Minnesota Franchise Act*. That Act creates mandatory contract terms between franchisees and franchisors in Minnesota, including the term MSS HiFi relies on to establish a breach. Counterclaimants allege that the Dealership Agreement is governed, by its terms, by Minnesota law, **[*49]** including the *Franchise Act*.

In the Order that transferred this case to me, Judge Doty rejected Counterclaimants reliance on the *Franchise Act* because they failed to allege a franchisee-franchisor relationship to which the Act could apply. (ECF No. 65, at 7-8.) Counterclaimants have not corrected the deficiencies that Judge Doty identified, and I see no reason to revisit his reasoning. Thus, Count IV of the Counterclaim is dismissed.

2. *Breach of the duty of good faith and fair dealing (Count VIII)*

In the alternative to Count IV, Count VIII relies on the duty of good faith and fair dealing implicit in all contracts. This Count fails for several independently sufficient reasons. The most simple is that the only breach of the duty that Counterclaimants allege is that Bel Canto terminated MSS HiFi pursuant to an anti-trust conspiracy with its other authorized dealers. I have already concluded that no such conspiracy has been alleged as a matter of law. Thus, Count VIII of the Counterclaim is dismissed as well.

CONCLUSION

The motion is GRANTED with respect to Counts I, IV, VIII and IX, which are dismissed. The motion is DENIED with respect to Counts II, III, V, VI and VII, subject to the limitations **[*50]** discussed with each, and warning I have issued to counsel for the Counterclaimants above.

Counterclaimants have leave to amend Counts V and VII to supply the allegations necessary for their primary theory of false advertising.

Dated: June 20, 2011

/s/ Colleen McMahon

U.S.D.J.

End of Document

Wilson v. Hynek

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

June 20, 2012, Opinion Filed

D057620

Reporter

2012 Cal. App. Unpub. LEXIS 4580 *; 2012 WL 2337344

ROBERT W. WILSON et al., Plaintiffs and Appellants, v. BRIAN HYNEK et al., Defendants and Respondents.

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

Subsequent History: Ordered published by, Reported at *Wilson v. Hynek, 207 Cal. App. 4th 999, 144 Cal. Rptr. 3d 4, 2012 Cal. App. LEXIS 809 (Cal. App. 4th Dist., June 20, 2012)*

Prior History: **[*1]** APPEAL from a judgment of the Superior Court of San Diego County. Super. Ct. No. 37-2008-000104260-CU-BC-NC. Earl H. Maas III, Judge.

Disposition: Affirmed.

Core Terms

trust deed, vacant land, cause of action, foreclosure, allegations, unfair, foreclose, lender, intentional infliction of emotional distress, second amended complaint, sustain a demurrer, leave to amend, loan documents, unfair business practice, foreclosure sale, borrowed, demurrer, default, complaint alleges, condominium, outrageous, notice, pled

Judges: NARES, Acting P. J.; McDONALD, J., IRION, J. concurred.

Opinion by: NARES, Acting P. J.

Opinion

This action arises out of a loan to a real estate development property company, Pergola, a Nevada LLC controlled by plaintiff Robert W. Wilson. The loan was secured by a deed of trust on undeveloped land owned by Wilson's company and a deed of trust on a residence owned by Wilson and his wife, plaintiff Sharon Wilson (together, the Wilsons). Defendant Coast Capital Mortgage Company (Coast), a licensed real estate broker, and Coast Capital Income Fund, LLC (together, Coast defendants) arranged for a $1.6 million loan (the Pergola loan) from defendant Polo Investment Fund No. 1, LLC (Polo 1) and Polo Investment Funds, LLC (together, Polo Fund). Thereafter, Pergola borrowed an additional $1.25 million from Aztec Financial (the Aztec loan), also secured by a deed of trust on the undeveloped land. Subsequently, Pergola borrowed an additional $500,000 from Brian and Gayl Hynek (the Hyneks), secured by a third deed of trust on the undeveloped land.

When the loans matured and Pergola **[*2]** did not pay them off, nonjudicial foreclosure proceedings were instituted. Before the foreclosure process was complete, the Hyneks purchased the loans from Polo 1 and Aztec Financial.

The Wilsons filed the instant action against Coast, Polo Fund and the Hyneks, alleging that that they had resisted putting up their residence as additional security, but that they did so because a representative of Coast and Polo Fund, Joe Monte, orally represented to them that: (1) in the event of a foreclosure, the lender would first foreclose on the vacant land and, only if there were a deficiency, would the lender foreclose on their residence; (2) the residence would be released once they provided Polo Fund with an appraisal showing the vacant land to be worth at least $5 million; and (3) the loan documents would guarantee and provide that the residence would only be foreclosed upon if there were a deficiency after the foreclosure of the vacant land. The complaint alleges that they signed the loan documents based upon Monte's representations. The complaint further alleges that the Hyneks conspired with the other defendants to foreclose on the residence.

Defendants filed a series of demurrers, which, **[*3]** after the second demurrer, left only causes of action for unfair business practices under *Business and Professions Code section 17200* (all undesignated statutory references are to the Business and Professions Code) and intentional infliction of emotional distress in the Wilsons' second amended complaint. The court sustained the defendants' demurrers to these remaining causes of action without leave to amend.

On appeal, the Wilsons contend the court erred in sustaining the demurrers to their second amended complaint because (1) their unfair business practices claim was properly pled; and (2) their emotional distress cause of action was also properly pled. The Wilsons also contend they should be given leave to amend because the notice of default recorded during the foreclosure process was defective because it was recorded by the wrong entity. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Because we are reviewing a judgment of dismissal following the sustaining of a demurrer, we take much of the factual background from the applicable complaint in this action. The applicable complaint is the Wilson's second amended complaint.

A. *The Pergola Note and Related Deeds of Trust*

In early 2004 Wilson **[*4]** was manager of Pergola, which was in the process of purchasing 22 acres of land in Carlsbad for development or for resale (Carlsbad vacant land). In order to obtain funds necessary to acquire the Carlsbad vacant land, Pergola, through the Coast defendants, arranged for a $1.6 million loan (the Pergola loan) with Polo 1 as the lender.

The Pergola loan was evidenced by a note secured by deed of trust (Pergola note) dated January 12, 2004, and was executed by Mr. Wilson as manager of Pergola. The Pergola note was secured by a first deed of trust on the Carlsbad vacant land and was also executed by Mr. Wilson as manager of Pergola (Pergola deed of trust), by a second deed of trust executed by Wilson and his wife, Sharon L. Wilson (Wilson deed of trust) on their personal residence on Amberwood Court in Carlsbad (the Amberwood property), and by a deed of trust on a condominium owned by the Wilsons.

The Wilsons' complaint alleges that just prior to the close of the Pergola loan, Monte, an agent of the Coast defendants, told Mr. Wilson that, in addition to the Carlsbad vacant land, the lender required two additional properties as security for the Pergola loan; i.e., the Amberwood property and **[*5]** a condominium owned by the Wilsons. The Wilsons also asserted that they resisted putting up such additional security, but that they did so because Monte orally represented to them that: (1) in the event of a foreclosure, the lender would first foreclose on the Carlsbad vacant land and, only if there were a deficiency would the lender foreclose on the Amberwood property or the condominium; (2) the Amberwood property and the condominium would be released once they provided Polo Fund with an appraisal showing the Carlsbad vacant land to be worth at least $5 million; and (3) the loan documents would guarantee and provide that the Amberwood property would only be foreclosed upon if there were a deficiency after the foreclosure of the Carlsbad vacant land. The complaint alleges that they signed the loan documents based upon Monte's representations,.

The second amended complaint alleges that around October 2004 the Wilsons provided the Coast defendants with an appraisal for $6.6 million on the Carlsbad vacant land and information that Pergola had a pending resale of the property for $7 million. The complaint also alleges that, contrary to the representations by Monte, defendants agreed to **[*6]** release the condominium, but not the Amberwood property, even though the Wilsons complied with all of the conditions of the oral release agreement.

B. *Aztec Second Deed of Trust on Carlsbad Vacant Land*

In or about March 2004, Pergola borrowed an additional $1.25 million from Aztec Financial and secured it with a second deed of trust only on the Carlsbad vacant land.

C. *The Hyneks' Third Deed of Trust on Carlsbad Vacant Land*

On April 19, 2004, Pergola borrowed $500,000 from the Hyneks (Hynek loan), and secured it by a third deed of trust on the Carlsbad vacant land.

D. *The Hyneks Foreclose on the Carlsbad Vacant Land*

The Hynek loan matured on April 21, 2005. On May 6, 2008, the Hyneks foreclosed on their third deed of trust and became the owners of the Carlsbad vacant land, subject only to the Pergola deed of trust. Prior to the foreclosure, the Hyneks purchased the deed of trust securing the $1.25 million Aztec loan.

E. *Defaults on the Pergola Loan and Wilson Deed of Trust*

In or about April/May 2008, Polo 1 and the Coast defendants commenced separate foreclosures on the Pergola deed of trust and on the Wilson deed of trust, setting the sale of the Carlsbad vacant land for August 5, 2008, and **[*7]** the sale of the Amberwood property for August 15, 2008.

F. *The Wilsons' Alleged Attempt To Bid the Amount Due at Foreclosure Sale*

The complaint alleges that the Wilsons were "ready, willing and able" to bid at the trustee's sale the amount due at the foreclosure sale of the Pergola deed of trust set for August 5, 2008, or, alternatively, that they would be willing to purchase the Pergola note. In support of this allegation, the complaint quotes from a letter sent by the Wilsons' attorney to the attorney for the Coast defendants:

> "Mr. Wilson has arranged to facilitate a bid on the 22 acres, which will meet or exceed the $1,856,316.77 loan balance. Mr. Wilson plans to provide payment for the 22 acres in the form of a cashier's check. In lieu of a Trustee's Sale on the 22 acres, *Mr, Wilson has also offered to purchase the Deed of Trust for $1,856,316.77.* Mr. Wilson is willing and able to pay the debt which will release the Deed of Trust on the Amberwood residence. (Italics added.)

That letter also protested any postponement of the sale of the Carlsbad vacant land and informed the defendants that "if the Amberwood residence is sold prior to the [Carlsbad vacant land], your clients will be **[*8]** the Defendants in causes of action for wrongful foreclosure."

The complaint further alleges that defendants "conspired and agreed among themselves <u>not</u> to hold a foreclosure sale for the [Carlsbad vacant land], but instead to assign the note and first deed of trust for $1,660,000 to Defendants HYNEK, who would then offer the deed of trust and note as collateral to Defendants [Polo 1] and [Coast defendants]." The complaint alleges that defendants were "attempting to avoid foreclosing on the 22-acre parcel so that defendants HYNEK could hold title to that property and still be allowed to proceed with their foreclosure on [the Wilsons'] residence."

G. *Trustee's Sale of Amberwood Property*

On November 19, 2008, the trustee's sale under the Wilson deed of trust was concluded and the Amberwood property was sold to defendant U.S. Financial LLP.

PROCEDURAL BACKGROUND

A. *The Original Complaint*

In December 2008 the Wilsons filed a complaint alleging causes of action for declaratory relief, wrongful foreclosure, breach of contract, equitable relief from foreclosure sale, quiet title, cancellation of instrument, violation of *section 17200*, fraud and intentional infliction of emotional distress.

In addition **[*9]** to making substantially similar allegations as are recited, *ante,* the complaint attached as exhibits the loan documents and deeds of trust related to the transactions. The deeds of trust state that "[t]o the fullest extent allowed by law, *Borrower hereby expressly waives any right which it may have to direct the order in which any of the Property shall be sold* in the event of any sale or sales pursuant to this Deed of Trust." (Italics added.) The deeds of trust state that "Trustee and Lender, and each of [them] *shall be entitled to enforce this Deed of Trust and any other rights or security now or hereafter held by Lender or Trustee in such order and manner as they or either of them may in their absolute discretion determine.*" (Italics added.) The deeds of trust further state: "Lender, at any time and without the consent of Borrower, may grant participations in or sell, transfer, assign and convey all or any portion of its right, title and interest in and to the Loan, this Deed of Trust and other Loan Documents, guaranties given in connection with the Loan and any collateral given to secure the Loan."

The Coast defendants and Polo Fund demurred to the complaint, and the court sustained **[*10]** the demurrer without leave to amend as to the first two causes of action, finding that pursuant to the deeds of trust, the Wilsons waived their right to direct the priority and order of the foreclosure. The court also sustained without leave to amend the causes of action for equitable relief from foreclosure, quiet title and cancellation of instrument because those defendants did not claim an interest in the property. As to the remaining causes of action, the court sustained the demurrer with leave to amend.

The court sustained the Hyneks' demurrer without leave to amend as to all causes of action with the exception of the cause of action for unfair business practices and intentional infliction of emotional distress.

The Wilsons filed a verified first amended complaint that stated causes of action for breach of written contract, unfair business practices, fraud, intentional infliction of emotional distress and equitable relief. The complaint again attached the relevant loan documents and deeds of trust.

In response, the Hyneks, the Coast defendants and Polo Fund again demurred, and the court sustained the demurrers without leave to amend as to all but the causes of action for unfair business **[*11]** practices and intentional infliction of emotional distress. The court sustained the demurrers to the cause of action for breach of contract based upon the statute of frauds because it only referenced the alleged oral agreement with Monte. The court sustained the demurrers to the cause of action for fraud based upon the statute of limitations. There was no cause of action for equitable relief pleaded in the first amended complaint. The court also admonished the Wilsons "not to file an amended Complaint containing allegations inconsistent with the previously verified Complaints filed in this case."

The Wilsons filed a second amended complaint containing only causes of action for unfair business practices and intentional infliction of emotional distress, as detailed in the factual background, *ante.* However, the second amended complaint omitted as exhibits the loan documents attached to the first two complaints and omitted any references to those exhibits.

The defendants filed demurrers to the second amended complaint, which the court sustained without leave to amend. As to the first cause of action brought under *section 17200*, the court found that the Wilsons have "failed to plead facts **[*12]** indicating that the lawful acts taken by defendant Coast were unlawful, fraudulent or unfair." As to the cause of action for intentional infliction of emotion distress, the court found "the allegations as [pled] do not rise to the level of 'extreme and outrageous.'"

This timely appeal follows.[1]

DISCUSSION

I. *STANDARD OF REVIEW*

We review an order sustaining a demurrer without leave to amend de novo (*Blank v. Kirwan (1985) 39 Cal.3d 311, 318, 216 Cal. Rptr. 718, 703 P.2d 58)*, assuming the truth of all properly pleaded facts as well as facts inferred from the pleadings, and give the complaint a reasonable interpretation by reading it as a whole and its parts in context. (*Palacin v. Allstate Ins. Co. (2004) 119 Cal.App.4th 855, 861, 14 Cal. Rptr. 3d 731*.) However, we give no credit to allegations that merely set forth contentions or legal **[*13]** conclusions. (*Financial Corp. of America v. Wilburn (1987) 189 Cal.App.3d 764, 768-769, 234 Cal. Rptr. 653*.) A complaint will be construed "liberally . . . with a view to substantial justice between the parties." (*Code Civ. Proc., § 452*.) If the complaint states a cause of action on any possible legal theory, we must reverse the trial court's order sustaining the demurrer. (*Palestini v. General Dynamics Corp. (2002) 99 Cal.App.4th 80, 86, 120 Cal. Rptr. 2d 741*.) Whether a plaintiff will be able to prove its allegations is not relevant. (*Alcorn v. Anbro Engineering, Inc. (1970) 2 Cal.3d 493, 496, 86 Cal. Rptr. 88, 468 P.2d 216*.)

II. *ANALYSIS*

A. *The Wilsons' Unfair Competition Cause of Action*

Section 17200 defines "unfair competition" to "mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising" under *section 17500*. A claim made under *section 17200* "'is not confined to anticompetitive business practices, but is also directed toward the public's right to protection from fraud, deceit, and unlawful conduct. [Citation.] Thus, California courts have consistently interpreted the language of *section 17200* broadly.'" (*South Bay Chevrolet v. General Motors Acceptance Corp. (1999) 72 Cal.App.4th 861, 877, 85 Cal. Rptr. 2d 301*, **[*14]** quoting *Hewlett v. Squaw Valley Ski Corp. (1997) 54 Cal.App.4th 499, 519, 63 Cal. Rptr. 2d 118*.) "[S]ection 17200's definition is 'disjunctive,' the statute is violated where a defendant's act or practice is unlawful, unfair, fraudulent or in violation of *section 17500*." (*South Bay Chevrolet v. General Motors Acceptance Corp., supra, 72 Cal.App.4th at p. 878*; *State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal.App.4th 1093, 1102, 53 Cal. Rptr. 2d 229*.)

The Wilsons do not assert on appeal that any of the defendants' actions were "unlawful" or "fraudulent." Rather, the sole basis for their assertion they have adequately pled such a cause of action under *section 17200* is that the defendants' actions were "unfair." This contention is unavailing.

"Determination of whether a business practice or act is 'unfair' within the meaning of *[section 17200]* entails examination of the impact of the practice or act on its victim, '" . . . balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim . . . ." [Citation.]' [Citation.] In general the 'unfairness' prong 'has been used to enjoin **[*15]** deceptive or sharp practices. . . .'" (*Klein v. Earth Elements, Inc. (1997) 59 Cal.App.4th 965, 969-970, 69 Cal. Rptr. 2d 623*.)

There is a split of authority in California as to the proper definition of "unfair." The Wilsons assert the proper test for the unfairness prong is whether the practice "'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" (*State Farm Fire & Casualty Co. v. Superior Court, supra, 45 Cal.App.4th at p. 1104*.)

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[1] In their respondents' brief, the Hyneks assert that this appeal is premature because it is taken from the court's order sustaining defendants' demurrers, not the final judgment in this matter. However, as is pointed out by the Wilsons in their reply brief, the clerk of this court notified the parties by a letter dated June 29, 2010, that we would consider the appeal as being from the judgment or dismissal order.

However, this court has, on three occasions, rejected that test and has applied a much narrower test, the so-called "Cel-Tech test" for establishing unfairness. (See *Durell v. Sharp Healthcare (2010) 183 Cal.App.4th 1350, 1366, 108 Cal. Rptr. 3d 682*; *Scripps Clinic v. Superior Court (2003) 108 Cal.App.4th 917, 940, 134 Cal. Rptr. 2d 101*; *Byars v. SCME Mortgage Bankers, Inc. (2003) 109 Cal.App.4th 1134, 1147, 135 Cal. Rptr. 2d 796*.) Under that test, a plaintiff must prove that the defendant's "conduct is tethered to an[] underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***." (*Durell, at p. 1366*.)

In both their opening and reply **[*16]** briefs, the Wilsons ignore these cases. Moreover, they do not even attempt to show how their allegations in the second amended complaint can meet this test. Nor can they. As detailed, *ante,* their claims of alleged wrongdoing are directly contradicted by the terms of the deeds of trust, which they omitted as exhibits to their second amended complaint. Accordingly, the court did not err in sustaining the defendants' demurrer to the *section 17200* claim.[2]

B. *The Emotional Distress Claim*

"The elements of a prima facie case for the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. **[*17]** [Citations.] . . . Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Cervantez v. J. C. Penney Co. (1979) 24 Cal.3d 579, 593, 156 Cal. Rptr. 198, 595 P.2d 975*.)

The court properly sustained the demurrer to the cause of action for intentional infliction of emotional distress because the Wilsons have not pled any allegations of conduct by the defendants that could be considered "outrageous." At most, this was a creditor/debtor situation, whereby the defendants were exercising their rights under the loan agreements. There are no allegations that in conducting the foreclosure proceedings any of the defendants threatened, insulted, abused or humiliated the Wilsons. Thus, the Wilsons cannot state a claim for intentional infliction of emotional distress.

C. *The Wilsons' Request for Leave To Amend*

For **[*18]** the first time on appeal, the Wilsons assert they can amend the complaint to challenge the nonjudicial foreclosure sale of the Amberwood property because the notice of default was not recorded by E.C.I. Corporation, the original trustee named in the Wilson deed of trust, but rather by PLM Lender Service as agent for the beneficiary. This contention is unavailing.

Civil Code section 2924 et seq. provides a comprehensive scheme for regulation of nonjudicial foreclosure sales. (*Gomes v. Countrywide Home Loans, Inc. (2011) 192 Cal.App.4th 1149, 1154, 121 Cal. Rptr. 3d 819*.) *Civil Code section 2924, subdivision (a)(1)* states in part that "[t]he trustee, mortgagee, or beneficiary, *or any of their authorized agents* shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default." (Italics added.)

Thus, the recording of a notice of default by an authorized agent of the beneficiary is specifically authorized by that statute, and the Wilsons cannot state a claim for a defect in the recording of the notice of default.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

NARES, **[*19]** Acting P. J.

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[2] Polo Fund and the Coast Defendants also assert that the Wilsons' *section 17200* claim is barred by the statute of limitations. However, as we have concluded that the *section 17200* claim fails to state a cause of action as a matter of law, we need not address this alternative contention.

WE CONCUR:

McDONALD, J.

IRION, J.

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In re Rail Freight Fuel Surcharge Antitrust Litig.

United States District Court for the District of Columbia

June 21, 2012, Decided

MDL Docket No. 1869; Misc. No. 07-489 (PLF)

Reporter

287 F.R.D. 1 *; 2012 U.S. Dist. LEXIS 97178 **; 2012 WL 2879014

In re RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION. This document relates to: ALL DIRECT PURCHASER CASES

Subsequent History: Later proceeding at *In re Rail Freight Fuel Surcharge Antitrust Litig. - Mdl No. 1869, 2012 U.S. App. LEXIS 19848 (D.C. Cir., Aug. 31, 2012)*

Vacated by, Remanded by *In re Rail Freight Fuel Surcharge Antitrust Litig. - Mdl No. 1869, 2013 U.S. App. LEXIS 16500 (D.C. Cir., Aug. 9, 2013)*

Prior History: *In re Rail Freight Fuel Surcharge Antitrust Litig., 2012 U.S. Dist. LEXIS 86288 (D.D.C., June 21, 2012)*

Core Terms

fuel, surcharge, shippers, defendants', class certification, prices, regression, base rate, plaintiffs', alleged conspiracy, conspiracy, railroad, class member, class period, predominance, customers, freight, injury-in-fact, antitrust, preponderance of evidence, damages, factors, negotiations, discounting, rates, quotations, common factor, class-wide, traffic, programs

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Surface Transportation Board

HN1[] **Transportation, Railroads**

Under *49 U.S.C.S. 10709*, the Surface Transportation Board has no authority to regulate rail rates and services that are governed by a contract. Under *49 U.S.C.S. § 10709* traffic that moves under railroad-shipper contracts generally is not subject to challenge before the Surface Transportation Board.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN2[] Class Actions, Certification of Classes

To obtain class certification plaintiffs must satisfy the four threshold requirements of *Fed. R. Civ. P. 23(a)* — commonly referred to as numerosity, commonality, typicality, and adequacy — and the two additional requirements of *Rule 23(b)(3)* — predominance and superiority.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN3[] Prerequisites for Class Action, Predominance

Predominance concerns whether plaintiffs have met their burden to show that questions of law or fact common to class members predominate over any questions affecting only individual members. *Fed. R. Civ. P. 23(b)(3)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN4[] Class Actions, Prerequisites for Class Action

In addition to the four express requirements of *Fed. R. Civ. P. 23(a)*, there are two implied requirements: (1) the class must be sufficiently defined so as to be identifiable as a class; and (2) the named representatives must fall within the class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN5[] Class Actions, Certification of Classes

A party that moves for class certification bears the burden of showing that its proposed suit meets all of the requirements for certification. Those requirements fall into two categories. First, the moving party must show that its proposed suit satisfies the two implied and the four express requirements of *Fed. R. Civ. P. 23(a)*. As for the implied requirements, plaintiffs must show (1) that their proposed class is sufficiently defined so as to be identifiable as a class; and (2) that the named representatives fall within the class. As for the express requirements, the moving party must show that (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)*. Those four express requirements commonly are referred to as numerosity, commonality, typicality, and adequacy. Failure to adequately demonstrate any of the *Rule 23(a)* requirements is fatal to class certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN6[] Class Actions, Certification of Classes

A party that moves for class certification must show that its proposed suit falls within at least one of the three categories of cases set forth in Fed. R. Civ. P. 23(b). Rule 23(b)(3) is intended to encompass cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. In order to certify a class under Rule 23(b)(3), a court must find (1) that the questions of law or fact common to class members predominate over any questions affecting only individual members, and (2) that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). These two requirements commonly are referred to as predominance and superiority.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN7[] Prerequisites for Class Action, Predominance

As Rule 23(b)(3) states, in deciding whether a moving party has satisfied the predominance and superiority requirements, pertinent considerations for a court include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the ligation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN8[] Class Actions, Certification of Classes

The U.S. Supreme Court has emphasized that a class certification decision invites a close look at the case, and a class may be certified only if the trial court is satisfied, after rigorous analysis, that the applicable Fed. R. Civ. P. 23 requirements have been met. In examining the predominance requirement under Rule 23(b)(3), a court's rigorous analysis begins with the elements of the underlying cause of action. A court must examine the elements of a plaintiffs' claim through the prism of Rule 23 to determine whether the Rule 23 requirements have been met. Under Rule 23(b)(3), individual questions need not be absent. Indeed, the text of Rule 23(b)(3) itself contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole. If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Burdens of Proof > Allocation

HN9[] Sherman Act, Claims

To prevail on the merits of a claim of a violation of Section 1 of the Sherman Act, 15 U.S.C.S. § 1, at trial, plaintiffs have to prove three elements: (1) a violation of 15 U.S.C.S. § 1; (2) individual impact or injury resulting from that violation; and (3) measurable damages. In antitrust cases, injury includes both injury-in-fact and so-called antitrust injury.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN10[] Class Actions, Certification of Classes

At the class certification stage, plaintiffs need not prove their case. Instead, plaintiffs' burden at the class certification stage is to demonstrate that the elements of their claim are capable of proof at trial through evidence that is common to the class rather than individual to its members. Thus, the court's focus at the class certification stage is on how plaintiffs will attempt to prove the elements of their claim at trial.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Preponderance of Evidence

HN11[] Class Actions, Certification of Classes

In the context of determining whether to certify a class, the court can and must resolve any factual disputes relevant to the requirements for class certification — even if that requires considerations enmeshed in the factual and legal issues comprising plaintiffs' claim on the merits, and it should apply a preponderance of the evidence standard of proof in doing so.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN12[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule — that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc. A district court must be satisfied, after rigorous analysis, that the requirements of *Rule 23* have been met, and frequently that rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Nor is there anything unusual about that consequence.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN13[] Class Actions, Certification of Classes

The required rigorous factual review that a court must perform in examining whether the requirements of *Fed. R. Civ. P. 23(a)* and *(b)* have been met similarly applies to disputes among experts relevant to class certification. As the United States Court of Appeals for the Third Circuit stated: Expert opinion with respect to class certification, like any matter relevant to a *Rule 23* requirement, calls for rigorous analysis. Nothing in *Rule 23* distinguishes expert evidence from other types of evidence. Under *Rule 23* the district court must be satisfied, or persuaded, that each requirement is met before certifying a class. Like any evidence, admissible expert opinion may persuade its audience, or it may not. This point is especially important to bear in mind when a party opposing certification offers expert opinion. The district court may be persuaded by the testimony of either (or neither) party's expert with respect to whether a certification requirement is met. Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis *Rule 23* demands.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > ... > Expert Witnesses > Credibility of Witnesses > General Overview

Civil Procedure > Judicial Officers > Judges > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN14[] **Class Actions, Certification of Classes**

Resolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court — no matter whether a dispute might appear to implicate the credibility of one or more experts. Such disputes among experts in an antitrust case may include, among other things, different views on the appropriate characterization of the relevant market, different views on how defendants structured their prices, and any other considerations relevant to whether plaintiffs have satisfied the requirements of *Fed. R. Civ. P. 23*. Failure to weigh conflicting expert opinions amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > ... > Testimony > Expert Witnesses > General Overview

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

HN15[] **Class Actions, Certification of Classes**

There are, of course, limits to a court's inquiry into disputes among experts, just as there are limits to a court's inquiry into factual disputes generally: they should be resolved at the class certification stage only to the extent necessary to satisfy or persuade a court that each requirement of *Fed. R. Civ. P. 23* has or has not been met. Thus, for example, a court should only engage itself in statistical dueling of experts if such dueling presents a valid basis for granting or denying class certification. Similarly, for example, a court should resolve which expert is correct, when experts disagree on whether a single formula can be created, or whether there really are too many factors at work for a multiple regression model to be methodologically sound. In contrast, if the defendants' expert is merely disputing the results of the plaintiffs' experts' analysis rather than the feasibility of using a single formula methodology, that would be a merits issue, not a class certification issue. When both experts agree on a methodology for determining class-wide impact, but ultimately reach different conclusions whether putative class members were injured by an alleged conspiracy, a court need not resolve which expert is correct at the class certification stage; that dispute presents a merits question to be resolved by the finder of fact at trial.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Preponderance of Evidence

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN16[] **Class Actions, Certification of Classes**

Plaintiffs must establish the requirements of *Fed. R. Civ. P. 23* by a preponderance of the evidence, and this standard applies to any factual disputes, including those among experts, that bear on the decision whether to certify a class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Preponderance of Evidence

HN17[] **Class Actions, Certification of Classes**

Class certification requires a finding that each of the requirements of *Fed. R. Civ. P. 23* has been met by a preponderance of the evidence. *Fed. R. Civ. P. 23(b)(3)*. A court can only do so upon weighing all relevant evidence for and against class certification and then concluding by a preponderance of the evidence that the *Rule 23* requirements in fact have been met. Applying a lesser standard would permit class certification even if a court thought it less than likely that each *Rule 23* requirement had been met, violating the U.S. Supreme Court's instruction that actual, not presumed conformance with *Rule 23* is indispensable.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN18[] **Class Actions, Certification of Classes**

An expert opinion presenting economic regression analysis commonly is used as a basis for certifying a class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Preponderance of Evidence

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN19[] **Class Actions, Certification of Classes**

Where experts disagree on the ultimate question whether an economic regression model shows that impact is capable of proof at trial through evidence common to a class, that disagreement must be resolved by a court at the class certification stage: a court must determine which expert is correct about whether the injury-in-fact question is common to the class. To answer that question, the United States Court of Appeals for the Third Circuit instructed that a court must apply a two prong test, examining (1) whether the plaintiffs have established that their expert's theory of common impact is plausible; and, if so, (2) whether the plaintiffs have established by a preponderance of the evidence that the expert's plausible theory is susceptible to proof at trial through available evidence common to the class. An expert's theory that impact is capable of common proof at trial — by means of regression analysis or other common evidence — is not a question of fact necessarily capable of resolution by a preponderance of the evidence. The plausibility standard falls below a requirement of perfection, and above a "threshold," or a "not fatally flawed" standard. Plausibility depends on the ability to establish — whether through mathematical models or further data or other means — the key logical steps behind the theory.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Preponderance of Evidence

HN20[] Class Actions, Certification of Classes

In order to certify plaintiffs' putative class, the court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of *Fed. R. Civ. P. Rule 23*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

HN21[] Class Actions, Certification of Classes

A court's findings for the purpose of class certification are conclusive on that topic, but do not bind the fact-finder on the merits. The findings therefore 'may be revised (or wholly rejected) by the ultimate factfinder.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN22[] Class Actions, Prerequisites for Class Action

The first implied requirement of *Fed. R. Civ. P. 23(a)* is that the class must be sufficiently defined so as to be identifiable as a class. The requirement that a class be clearly defined is designed primarily to help the trial court manage the class. This requirement is not designed to be a particularly stringent test, but plaintiffs must at least be able to establish that the general outlines of the members of the class are determinable at the outset of the litigation. In other words, the class must be sufficiently definite that it is administratively feasible for the court to determine whether a particular individual is a member. A court therefore should deny class certification where the class definitions are overly broad, amorphous, and vague, or whether the number of individualized determinations required to determine class membership becomes too administratively difficult.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN23[] Class Actions, Prerequisites for Class Action

An implied requirement of *Fed. R. Civ. P. 23(a)* is that the named representative plaintiffs must fall within the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Evidence > Burdens of Proof > Allocation

HN24[] Prerequisites for Class Action, Numerosity

The first express requirement of *Fed. R. Civ. P. 23(a)* is numerosity: the putative class must be so numerous that joinder of all members is impracticable. *Fed. R. Civ. P. 23(a)(1)*. Typically, a class in excess of 40 members is sufficiently numerous to satisfy this requirement. Mere conjecture, without more, is insufficient to establish numerosity, but plaintiffs do not have to provide an exact number of putative class members in order to satisfy the numerosity requirement.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN25[] Prerequisites for Class Action, Numerosity

When a class is large, numbers alone are dispositive of the numerosity requirement.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN26[] Prerequisites for Class Action, Commonality

The second express requirement of *Fed. R. Civ. P. 23(a)* is commonality: there must be questions of law or fact common to the class. *Fed. R. Civ. P. 23(a)(2)*. Not every issue of law or fact need be the same for each member. Rather, the commonality test is met when there is at least one issue the resolution of which will affect all or a significant number of the putative class members. Because the commonality requirement is satisfied "by a single common issue," courts have noted that it often is easily met. But as the U.S. Supreme Court recently made clear, what matters for purposes of commonality is not the raising of common questions — even in droves — but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN27[] Regulated Practices, Private Actions

In antitrust class actions, allegations concerning the existence, scope, and efficacy of an alleged antitrust conspiracy present important common questions sufficient to satisfy the commonality requirement.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN28[] Regulated Practices, Private Actions

The third express requirement of *Fed. R. Civ. P. 23(a)* is typicality: the claims or defenses of the representative parties must be typical of the claims or defenses of the class. *Fed. R. Civ. P. 23(a)(3)*. Typicality is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of the absent class members so as to assure that the absentees' interests will be fairly represented. If the class representative's claims arise from the same events, practice, or conduct, and are based on the same legal theory as those of other class members, the typicality requirement is satisfied. The facts and claims of each class member do not have to be identical to support a finding of typicality, rather, the requirement goes to whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. The requirement has been liberally construed by courts and in the antitrust context, typicality will be established by plaintiffs and all class members alleging the same antitrust violations by defendants.

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

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

Civil Procedure > ... > Class Actions > Class Members > Named Members

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN29[] **Responses, Defenses, Demurrers & Objections**

The requirement that the proposed class representatives not be subject to unique defenses — which includes spoliation — can be seen as an offshoot of the requirement that the representative have circumstances that are sufficiently similar to those of the class. Because *Fed. R. Civ. P. 23* requires that both the claims and the defenses be typical, a proposed class representative will not satisfy *Rule 23(a)(3)* if the representative is subject to a unique defense that is likely to become a major focus of the litigation. Spoliation of evidence constitutes a unique defense, and courts have concluded that in some circumstances defending against a charge of spoliation of evidence can render a plaintiff an inadequate class representative. The presence of a unique defense, however, will not destroy typicality unless it will skew the focus of the litigation and create a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN30[] **Prerequisites for Class Action, Commonality**

Courts generally have considered the question of defenses in the context of examining the typicality and commonality requirements of *Fed. R. Civ. P. 23(a)*, as well as the predominance requirement of *Rule 23(b)(3)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN31[] Prerequisites for Class Action, Adequacy of Representation

The fourth and final express requirement of *Fed. R. Civ. P. 23(a)* is adequacy. It requires that the representative parties will fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)(4)*. Thus, this requirement necessitates an inquiry into the adequacy of representation, including the quality of class counsel, any disparity of interest between class representatives and members of the class, communication between class counsel and the class and the overall context of the litigation. A proposed representative is adequate if (1) his interests do not conflict with those of other class members, and (2) he will vigorously prosecute the interests of the class through qualified counsel.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN32[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23(b)(3) requires that the court find that the questions of law or fact common to class members predominate over any questions affecting only individual members. *Fed. R. Civ. P. 23(b)(3)*. A court's rigorous analysis begins with the elements of the underlying cause of action. The court must scrutinze plaintiffs' legal causes of action to determine whether they are suitable for resolution on a classwide basis. The court therefore examines the elements of plaintiffs' claim through the prism of *Rule 23* to determine whether plaintiffs have satisfied the predominance requirement. If proof of the essential elements of the claim requires individual treatment, then common questions do not predominate and class certification is unsuitable.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Evidence > Burdens of Proof > Preponderance of Evidence

HN33[] Sherman Act, Claims

When plaintiffs allege that defendants engaged in price fixing, in violation of *Section 1* of the Sherman Act, *15 U.S.C.S. § 1*, at trial, plaintiffs have to prove three elements: (1) a violation of the antitrust laws, specifically *15 U.S.C.S. § 1*; (2) individual impact resulting from that violation; and (3) measurable damages. At the class certification stage, plaintiffs' burden is different: plaintiffs must show by a preponderance of the evidence that the elements of their claim are capable of proof at trial through evidence that is common to the class rather than individual to its members.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

HN34[] Per Se Rule & Rule of Reason, Per Se Violations

A horizontal price fixing conspiracy is a per se violation of the Sherman Act.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Evidence > Burdens of Proof > Allocation

HN35[] Private Actions, Remedies

In examining whether impact is capable of common proof, it is important to note at the outset that this element involves two distinct components: injury-in-fact; and antitrust injury. These two components pose two distinct questions: injury-in-fact presents the familiar factual question whether the plaintiff has indeed suffered harm, whereas antitrust injury presents the legal question whether any such injury is the injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Antitrust injury is injury to competition, not just injury to an individual. And the reason an antitrust plaintiff is required to prove antitrust injury is to ensure that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.

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

HN36[] Private Actions, Remedies

Antitrust injury is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN37[] Class Actions, Certification of Classes

Class certification is not precluded simply because a class may include persons who have not been injured by the defendants' conduct.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

HN38[] Class Actions, Certification of Classes

The inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class. Only when it is apparent that a great many persons have not been impacted should a court deny class certification. There is no precise measure for "a great many." Such determinations are a matter of degree, and will turn on the facts as they appear from case to case.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Evidence > Inferences & Presumptions > Inferences

HN39[] Regulated Practices, Price Fixing & Restraints of Trade

Applying a presumption of impact based on an unadorned allegation of price fixing appears inconsistent with the rigorous analysis that must be performed in examining whether the requirements of *Fed. R. Civ. P. 23(b)(3)* have been met.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Evidence > Burdens of Proof > Allocation

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

HN40[] Regulated Practices, Private Actions

In order to establish antitrust injury, as the legal component of the impact element of a class action, at trial, plaintiffs must prove that the defendants engaged in an anti-competitive manipulation of the markets.

Antitrust & Trade Law > General Overview

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

HN41[] Antitrust & Trade Law

The antitrust laws were enacted for the protection of competition. Therefore, where there is no competition, there is no antitrust injury. In other words, without demonstrating that there was competition, a plaintiff cannot show that the defendants' actions have had or will have anticompetitive effects.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Evidence > Burdens of Proof > Allocation

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN42[] **Sherman Act, Claims**

It is a basic tenet of ***antitrust law*** that a cause of action will not lie if the plaintiff has not been harmed. Thus, in order to prevail at a trial on a Sherman Act claim plaintiffs must prove not only an antitrust violation but also a causal link between the violation and an injury to business or property. Plaintiffs need not exhaust all possible alternative sources of injury in fulfilling their burden of proving compensable injury under the antitrust laws, but they must show that the antitrust violation was a material cause of the injury. If plaintiffs would have suffered the same injury absent a conspiracy, then plaintiffs will fail on the merits of their claim. Put another way, if the same alleged injury would have been caused by independent, non-conspiratorial forces, then no causal link exists between the alleged antitrust violation and the injury. And if individualized inquiry is necessary to make such a determination on causation, then plaintiffs will have failed to show that common questions predominate as to injury-in-fact.

Antitrust & Trade Law > Sherman Act > Claims

HN43[] **Sherman Act, Claims**

In the context of a Sherman Act claim, the causation question — whether an antitrust violation was a material cause of an injury — commonly is assessed by reference to the but-for world. This hypothetical construct is a world that is free of the restraints and conduct alleged to be anticompetitive.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Evidence > Burdens of Proof > Preponderance of Evidence

HN44[] **Private Actions, Remedies**

One way of showing that common questions predominate on the issue of injury-in-fact is to show that there is a common method for proving that class plaintiffs paid higher actual prices than in the but-for world, such as using an economic regression model incorporating a variety of factors to demonstrate that a conspiracy variable was at work during the class period, raising prices above the but-for level for all plaintiffs. Comparing but-for prices with actual transaction prices by regression analysis, however, is not the only way for plaintiffs to succeed in a motion for class certification. Other accepted types of evidence for establishing class-wide injury-in-fact include: evidence of lock-step increases of national price lists, proof that defendants conspired to maintain an inflated base price from which all negotiations began, and evidence of structural factors that make an industry susceptible to successful collusion. Ultimately, the question is whether plaintiffs have shown by a preponderance of the evidence — through regressions, structural industry factors, or any other persuasive means — that methods of common proof exist to show class-wide impact.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Evidence > Burdens of Proof > Preponderance of Evidence

HN45[] **Private Actions, Sherman Act**

To prevail on the merits of their Sherman Act claim at trial, plaintiffs need not exhaust all possible alternative sources of injury in fulfilling their burden of proving compensable injury under the antitrust laws. Rather, they must show only that the antitrust violation was a material cause of the injury. And at the class certification stage, plaintiffs must show by a preponderance of the evidence that this is capable of common proof.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN46[] **Regulated Practices, Private Actions**

Class-wide injury-in-fact can be proven at trial by showing that allegedly conspiratorial fuel surcharges were the starting point from which negotiations for discounts began. The theory behind such cases is that the negotiated transaction prices would have been lower if the starting point for negotiations had been list prices set in a competitive market. Hence, if a plaintiff proves the alleged conspiracy resulted in artificially inflated list prices, a jury could reasonably conclude that each purchaser who negotiated an individual price suffered some injury. In sum, individualized negotiations and discounts are not an automatic bar to class action treatment.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Inferences & Presumptions > Inferences

HN47[] **Cartels & Horizontal Restraints, Price Fixing**

In an antitrust suit, plaintiffs will generally use multiple regression analysis to demonstrate that a conspiracy variable has influence over the dependent variable (price) — that is, class members paid a higher price than the basic economic principles of supply and demand would otherwise dictate, thus demonstrating collusive behavior was at work. A multiple regression model must, of course, be correctly set up for the results to be valid. The expert's choices are crucial for the success of the analysis and the ultimate fact-finder should consider the following when evaluating the efficacy of the expert's analysis: has the expert correctly identified the dependent variable; has he or she chosen the correct explanatory variable that is relevant to the question at issue; are the additional variables chosen all correct or are some missing and/or irrelevant; is the form of the analysis correct? Ultimately, even the best regression equation cannot prove causation. Rather, the most it can show is a correlation that can give rise to an inference that causation exists. Thus, one must infer that a causal relationship exists on the basis of an underlying causal theory that explains the relationship between the two variables.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Evidence > Burdens of Proof > Preponderance of Evidence

HN48[] **Regulated Practices, Private Actions**

The burden for plaintiffs at the class certification stage is to show by a preponderance of the evidence that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > Remedies > Damages > General Overview

Evidence > Burdens of Proof > Preponderance of Evidence

HN49[] **Class Actions, Certification of Classes**

The third element that plaintiffs seeking class certification have to prove at trial is measurable damages. The element of damages is distinct from impact: impact asks whether the plaintiffs were harmed, whereas damages quantify by how much. The inquiry for a district court at the class certification stage is whether the plaintiffs have demonstrated by a preponderance of the evidence that they will be able to measure damages on a class-wide basis using common proof. Some variation of damages among class members does not defeat class certification. Moreover, the presence of individualized questions regarding damages does not prevent certification under *Fed. R. Civ. P. 23(b)(3)*. To be sure, however, complex and individualized questions of damages weigh against finding predominance.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

HN50[] **Private Actions, Remedies**

At the class certification stage the court does not require that plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead requires that they assure the court that if they can prove impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN51[] **Prerequisites for Class Action, Superiority**

The second requirement of *Fed. R. Civ. P. 23(b)(3)* is superiority: a court must find that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *Fed. R. Civ. P. 23(b)(3)*. This requirement ensures that resolution by class action will achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable consequences.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN52[] **Prerequisites for Class Action, Predominance**

When common questions are found to predominate, then courts also generally have ruled that the second prerequisite of *Fed. R. Civ. P. 23(b)(3)* — that the class suit be superior to any other available means of settling the controversy — is satisfied in the context of an antitrust action. In contrast, when individual issues predominate, a class action will be deemed inferior.

Counsel: [1]** For RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION - MDL NO. 1869, In Re: Roger M. Adelman, LEAD ATTORNEY, LAW OFFICE OF ROGER M. ADELMAN, Washington, DC; Richard P. Rouco, PRO HAC VICE, WHATLEY DRAKE & KALLAS, LLC, Birmingham, AL.

For DAKOTA GRANITE COMPANY, on behalf of itself and all others similarly situated, Plaintiff: Arthur N. Bailey, Jr., LEAD ATTORNEY, Jon T. King, HAUSFELD LLP, San Francisco, CA; James Joseph Pizzirusso, Michael D. Hausfeld, LEAD ATTORNEYS, William P. Butterfield, HAUSFELD LLP, Washington, DC; James S. Reece, Richard M. Hagstrom, LEAD ATTORNEYS, ZELLE, HOFMANN, VOELBEL & MASON LLP, Minneapolis, MN; Scott W. Carlson, Vincent J. Esades, LEAD ATTORNEYS, HEINS, MILLS & OLSON, P.L.C., Minneapolis, MN; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA; Benjamin D. Brown, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, DC; Brent W. Landau, HAUSFELD LLP, Philadelphia, PA; Douglas A. Millen, PRO HAC VICE, FREED KANNER LONDON & MILLEN LLC, Bannockburn, IL; Steig D. Olson, QUINN EMANUEL URQUHART & SULLIVAN LLP, Los Angeles, CA; Steven A. Kanner, MUCH SHELIST FREED DENENBERG & AMENT, P.C., Chicago, IL.

For MCINTYRE GROUP, LTD., Plaintiff: Benjamin **[**2]** D. Brown, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, DC; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA; James Shedden, Lawrence W. Schad, Matthew S. Burns, Tony Kim, SCHAD DIAMOND & SHEDDEN P.C., Chicago, IL.

For GVL PIPE & DEMOLITION, INC., On behalf of itself and all others similarly situated, Plaintiff: Benjamin D. Brown, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, DC; Simon B. Paris, LEAD ATTORNEY, PRO HAC VICE, SALTZ, MONGELUZZI, BARRETT & BENDESKY, P.C., Philadelphia, PA; Allen D. Black, Donald L. Perelman, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA; Daniel E. Gunstafson, Jason S. Kilene, PRO HAC VICE, GUSTAFSON GLUEK PLLC, Minneapolis, MN; Patrick Howard, PRO HAC VICE, SALTZ, MONGELUZZI, BARRETT & BENDESKY, P.C., Philadelphia, PA; Thomas A. Muzilla, PRO HAC VICE, THE MUZILLA LAW FIRM, LLC, Cleveland, OH.

For FERRARO FOODS OF NORTH CAROLINA, LLC, On behlaf of itself and all others similarly situated, Plaintiff: Benjamin D. Brown, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, DC; Lynn Lincoln Sarko, LEAD ATTORNEY, Mark A. Griffin, KELLER ROHRBACK, LLP, Seattle, WA; Allen D. Black, PRO HAC VICE, **[**3]** FINE, KAPLAN & BLACK, Philadelphia, PA; Raymond J. Farrow, T. David Copley, PRO HAC VICE, KELLER ROHRBACK L.L.P., Seattle, WA.

For SUBLETTE COOPERATIVE, INC., On behalf of itself and all others similarly situated, Plaintiff: Benjamin D. Brown, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, DC; Allen D. Black, PRO

HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA; Krishna B. Narine, LAW OFFICE OF KRISHNA B. NARINE, P.C., Huntingdon Valley, PA.

For STRATES SHOWS, INC., Plaintiff: Arthur N. Bailey, Jr., LEAD ATTORNEY, Jon T. King, HAUSFELD LLP, San Francisco, CA; Benjamin D. Brown, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, DC; Brent W. Landau, LEAD ATTORNEY, HAUSFELD LLP, Philadelphia, PA; James Joseph Pizzirusso, LEAD ATTORNEY, William P. Butterfield, HAUSFELD LLP, Washington, DC; Joanne Zack, Joshua D. Snyder, Michael J. Boni, LEAD ATTORNEYS, BONI & ZACK LLC, Bala Cynwyd, PA; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA; Douglas A. Millen, PRO HAC VICE, FREED KANNER LONDON & MILLEN LLC, Bannockburn, IL; Steven A. Kanner, MUCH SHELIST FREED DENENBERG & AMENT, P.C., Chicago, IL.

For WEST ALABAMA SAND & GRAVEL, INC., Plaintiff: Joe **[**4]** R. Whatley, JR., LEAD ATTORNEY, WHATLEY DRAKE & KALLAS, LLC, New York, NY; Richard P. Rouco, LEAD ATTORNEY, PRO HAC VICE, WHATLEY DRAKE & KALLAS, LLC, Birmingham, AL; Roger M. Adelman, LEAD ATTORNEY, LAW OFFICE OF ROGER M. ADELMAN, Washington, DC; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA.

For CEDAR FARMS CO., INC., on behalf of itself and all others similarly situated, Plaintiff: Daniel Paul Dietrich, LEAD ATTORNEY, William J. Schifino, Jr., WILLIAMS SCHIFINO MANGIONE & STEADY, P.A., Tampa, FL; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA; Jeffrey B. Gittleman, BARRACK, RODOS & BACINE, Philadelphia, PA.

For DAD'S PRODUCTS CO., INC., Plaintiff: James Joseph Pizzirusso, Michael D. Hausfeld, LEAD ATTORNEYS, HAUSFELD LLP, Washington, DC; Steig D. Olson, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN LLP, Los Angeles, CA; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA.

For ZINIFEX TAYLOR CHEMICALS, INC., Plaintiff: Mary Jane Fait, LEAD ATTORNEY, WOLF HALDENSTEIN ADLER FREEMAN & HERZ, LLC, Chicago, IL; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA; Douglas A. Millen, PRO HAC VICE, FREED KANNER **[**5]** LONDON & MILLEN LLC, Bannockburn, IL; Steven A. Kanner, MUCH SHELIST FREED DENENBERG & AMENT, P.C., Chicago, IL.

For DUST PRO, INC., Plaintiff: Marc L. Greenwald, Stephen R. Neuwirth, LEAD ATTORNEYS, Daniel Brockett, QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP, New York, NY; Paul M. Donovan, LEAD ATTORNEY, LAROE WINN, MOERMAN & DONOVAN, Washington, DC; Steig D. Olson, LEAD ATTORNEY, Joseph D. Hammond, Kyle R. Taylor, Sami H. Rashid, QUINN EMANUEL URQUHART & SULLIVAN LLP, Los Angeles, CA; William P. Butterfield, LEAD ATTORNEY, Michael D. Hausfeld, HAUSFELD LLP, Washington, DC; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA; Douglas A. Millen, PRO HAC VICE, FREED KANNER LONDON & MILLEN LLC, Bannockburn, IL; Sathya S. Gosselin, PRO HAC VICE, HAUSFELD LLP, Washington, DC; Steven A. Kanner, MUCH SHELIST FREED DENENBERG & AMENT, P.C., Chicago, IL.

For QUALITY REFRACTORIES INSTALLATION, INC., Plaintiff: Eugene A. Spector, LEAD ATTORNEY, SPECTOR, ROSEMAN AND KODROFF PC, Philadelphia, PA; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA; Jay S. Cohen, William G. Caldes, SPECTOR, ROSEMAN & KODROFF & WILLIS, P.C., Philadlephia, PA.

For NIZHNEKAMSKNEFTEKHIM **[**6]** USA, INC., Plaintiff: Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA.

For DONNELLY COMMODITIES INCORPORATED, On behalf of itself and all others similarly situated, Plaintiff: Barry J. Nace, LEAD ATTORNEY, PAULSON & NACE, Washington, DC; Steig D. Olson, LEAD ATTORNEY, QUINN EMANUEL URQUHART & SULLIVAN LLP, Los Angeles, CA; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA; Douglas A. Millen, PRO HAC VICE, FREED KANNER LONDON & MILLEN LLC, Bannockburn, IL; Steven A. Kanner, MUCH SHELIST FREED DENENBERG & AMENT, P.C., Chicago, IL.

For US MAGNESIUM LLC, Plaintiff: Paul M. Donovan, LEAD ATTORNEY, LAROE WINN, MOERMAN & DONOVAN, Washington, DC; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA; Douglas A. Millen, PRO HAC VICE, FREED KANNER LONDON & MILLEN LLC, Bannockburn, IL; Steven A. Kanner, MUCH SHELIST FREED DENENBERG & AMENT, P.C., Chicago, IL.

For RB RUBBER PRODUCTS, INC., individually and on behalf of all those similarly situated, Plaintiff: Michelle A. Parfitt, LEAD ATTORNEY, ASHCRAFT & GEREL, Washington, DC; Richard P. Rouco, LEAD ATTORNEY, PRO HAC VICE, WHATLEY DRAKE & KALLAS, LLC, Birmingham, AL; Allen D. Black, PRO HAC **[**7]** VICE, FINE, KAPLAN & BLACK, Philadelphia, PA; Matthew H. Armstrong, Armstrong Law Firm LLC, St. Louis, MO; Susan Carole Minkin, ASHCRAFT & GEREL, Alexandria, VA.

For M.C. DIXON LUMBER COMPANY, INC., Plaintiff: Craig L. Briskin, Steven A. Skalet, LEAD ATTORNEYS, MEHRI & SKALET, PLLC, Washington, DC; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA.

For STERLING STEEL CO., LLC, Plaintiff: David M. Peterson, LEAD ATTORNEY, PETERSON & ASSOCIATES, PC, Kansas City, MO; Joseph A. Kronawitter, LEAD ATTORNEY, HORN, AYLWARD & BANDY, LLP, Kansas City, MO; R. Keith Johnston, LEAD ATTORNEY, WALTERS BENDER STROHBEHN & VAUGHAN, PC, Kansas City, MO; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA.

For CEDAR CREEK WHOLESALE, INC., Plaintiff: Joseph M. Barton, LEAD ATTORNEY, GOLD BENNETT CERA & SIDENER LLP, San Francisco, CA; Paul F. Bennett, LEAD ATTORNEY, PRO HAC VICE, GOLD BENNETT CERA & SIDENER LLP, San Francisco, CA; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA; Douglas A. Millen, PRO HAC VICE, FREED KANNER LONDON & MILLEN LLC, Bannockburn, IL; Gwendolyn R. Giblin, Steven O. Sidener, Thomas C. Bright, PRO HAC VICE, GOLD BENNETT CERA & **[**8]** SIDENER LLP, San Francisco, CA; Steven A. Kanner, MUCH SHELIST FREED DENENBERG & AMENT, P.C., Chicago, IL.

For ALL PLAINTIFFS, Plaintiff: Benjamin D. Brown, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, DC; James Joseph Pizzirusso, Michael D. Hausfeld, LEAD ATTORNEYS, HAUSFELD LLP, Washington, DC; Paul M. Weiss, LEAD ATTORNEY, FREED & WEISS LLC, Chicago, IL; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA; Daniel M. Cohen, CUNEO GILBERT & LADUCA, LLP, Alexandria, VA; Matthew H. Armstrong, Armstrong Law Firm LLC, St. Louis, MO; Steven A. Kanner, MUCH SHELIST FREED DENENBERG & AMENT, P.C., Chicago, IL.

For FAYUS ENTERPRISES, on behalf of itself and all others similarly situated, Consol Plaintiff: Christopher Lovell, Imtiaz A. Siddiqui, LEAD ATTORNEYS, LOVELL STEWART HALEBIAN LLP, New York, NY; Gary Edward Mason, LEAD ATTORNEY, WHITFIELD BRYSON & MASON LLP, Washington, DC; Reginald Terrell, LEAD ATTORNEY, PRO HAC VICE, THE TERRELL LAW GROUP, Richmond, CA; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA.

For AGWAY LIQUIDATING TRUST, on behalf of itself and all others similarly situated, MAROON INCORPORATED, on behalf of itself and **[**9]** all others similary situated, Consol Plaintiffs: Christopher Lovell, Imtiaz A. Siddiqui, LEAD ATTORNEYS, LOVELL STEWART HALEBIAN LLP, New York, NY; Gary Edward Mason, LEAD ATTORNEY, WHITFIELD BRYSON & MASON LLP, Washington, DC; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA.

For STATELINE BEAN PRODUCERS COOPERATIVE, Consol Plaintiff: Adam C. Belsky, Terry Gross, PRO HAC VICE, GROSS BELSKY ALONSO LLP, San Francisco, CA; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA; James Joseph Pizzirusso, HAUSFELD LLP, Washington, DC.

For LANCASTER FOUNDRY SUPPLY COMPANY, INC., BAR-ALE, INC., on behalf of itself and all others similarly situated, Consol Plaintiffs: Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA.

For SOMERSET INDUSTRIES, INC., Consol Plaintiff: Ronald J. Aranoff, LEAD ATTORNEY, BERNSTEIN LIEBHARD & LIFSHITZ, LLP, New York, NY; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA.

For COMPLETE TRANSPORATION SYSTEMS, INC., on behalf of itself and all others similary situated, Consol Plaintiff: Adel A. Nadji, William M. Audet, LEAD ATTORNEYS, AUDET & PARTNERS, LLP, San Francisco, CA; Allen D. Black, PRO HAC **[**10]** VICE, FINE, KAPLAN & BLACK, Philadelphia, PA.

For BLUE GRASS TOBACCO COMPANY, on behalf of itself and all others similarly situated, Consol Plaintiff: James E. Cecchi, Lindsey H. Taylor, LEAD ATTORNEYS, CARELLA, BYRNE, BAIN, GILFILLAN, CECCHI, STEWART & OLSTEIN, Roseland, NJ; Stephen A. Weiss, LEAD ATTORNEY, SEEGER WEISS LLP, New York, NY; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA.

For CARTER DISTRIBUTING COMPANY, on behalf of itself and all others similarly situated, Consol Plaintiff: Theodore J. Leopold, LEAD ATTORNEY, Leopold~Kuvin, P.A., West Palm Beach, FL; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA; Douglas A. Millen, PRO HAC VICE, FREED KANNER LONDON & MILLEN LLC, Bannockburn, IL; Steven A. Kanner, MUCH SHELIST FREED DENENBERG & AMENT, P.C., Chicago, IL.

For UNITED CO-OPERATIVE FARMERS, INC., on behalf of itself and all others similarly situated, Consol Plaintiff: H. Laddie Montague, LEAD ATTORNEY, Eric L. Cramer, BERGER & MONTAGUE, P.C., Philadelphia, PA; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA.

For ISSAC INDUSTRIES, INC., on behalf of itself and all others similarly situated, Consol Plaintiff: Robert **[**11]** N. Kaplan, LEAD ATTORNEY, KAPLAN FOX & KILSHEIMER LLP, New York, NY; Allen D. Black, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA.

For BNSF RAILWAY COMPANY, Defendant: David G. Meyer, LEAD ATTORNEY, PRO HAC VICE, JONES DAY, Los Angeles, CA; Gary A. Winters, Richard Joseph Favretto, LEAD ATTORNEYS, Michael E. Lackey, Jr., MAYER BROWN LLP, Washington, DC; Shari Ross Lahlou, LEAD ATTORNEY, CROWELL & MORING LLP, Washington, DC; Linda Sue Stein, Samuel M. Sipe, Jr., STEPTOE & JOHNSON, L.L.P., Washington, DC.

For CSX TRANSPORTATION, INC., Defendant: David Daniel Cross, Kent Alan Gardiner, LEAD ATTORNEYS, George D. Ruttinger, Kathryn D Kirmayer, Richard McMillan, Jr., Michael Wyld Lieberman, Shari Ross Lahlou, CROWELL & MORING, L.L.P., Washington, DC; David G. Meyer, LEAD ATTORNEY, PRO HAC VICE, JONES DAY, Los Angeles, CA; John Luke Cuddihy, CROWELL & MORING, Washington, DC.

For NORFOLK SOUTHERN RAILWAY COMPANY, Defendant: David G. Meyer, LEAD ATTORNEY, PRO HAC VICE, JONES DAY, Los Angeles, CA; Jennifer B. Patterson, LEAD ATTORNEY, Saul P. Morgenstern, KAYE SCHOLER, LLP, New York, NY; John Murray Nannes, Tara L. Reinhart, LEAD ATTORNEYS, Sean M. Tepe, SKADDEN, ARPS, SLATE, MEAGHER & **[**12]** FLOM, LLP, Washington, DC; Claudia R. Higgins, KAYE SCHOLER, LLP, Washington, DC.

For UNION PACIFIC RAILROAD COMPANY, Defendant: Alan Mitchell Wiseman, Thomas Adam Isaacson, LEAD ATTORNEYS, COVINGTON & BURLING LLP, Washington, DC; Tyrone R. Childress, LEAD ATTORNEY, PRO HAC VICE, JONES DAY, Los Angeles, CA; David G. Meyer, PRO HAC VICE, JONES DAY, Los Angeles, CA.

For SURFACE TRANSPORTATION BOARD, Interested Party: Virginia Strasser, LEAD ATTORNEY, SURFACE TRANSPORTATION BOARD, Washington, DC.

JONATHAN LEE RICHES, doing business as ROTHENBERG POLITICAL REPORT, Movant, Pro se, LEXINGTON, KY.

PETER H. DIAMANDIS, Movant, Pro se, Mclean, VA.

Judges: PAUL L. FRIEDMAN, United States District Judge.

Opinion by: PAUL L. FRIEDMAN

Opinion

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[*10] I. **[**13]** INTRODUCTION

This matter is before the Court on the motion of the direct purchaser plaintiffs for class certification under *Rule 23(b)(3) of the Federal Rules of Civil Procedure*. Also before the Court is the motion of the defendants to exclude what they refer to as "interline-related communications" from consideration for class certification or for any other purpose under *49 U.S.C. § 10706*. The Court heard oral argument on both motions on October 6 and 7, 2010, and took them under advisement. The Court delayed decision on the motions until after the Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*, and then invited the parties to file supplemental briefs discussing the impact of the Wal-Mart decision on the class certification question in this case. Those briefs have been filed, and the motions now are ripe.

Upon consideration of the parties' papers, the oral arguments presented by counsel, the relevant legal authorities, and the entire extensive record in this case, the Court finds by a preponderance of the evidence that the direct purchaser plaintiffs have satisfied all of the requirements of *Rule 23*. The Court therefore will grant the direct purchaser plaintiffs' **[**14]** motion for class certification; will certify this case as a class action under *Rule 23(b)(3)* for purposes of litigation and trial; will define the class as proposed by the direct purchaser plaintiffs in their motion for class certification; will certify for class treatment the direct purchaser plaintiffs' claim for price fixing in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*; will designate the eight named plaintiffs as the class representatives; and will appoint Quinn Emanuel Urquhart & Sullivan, LLP and Hausfled LLP as co-lead class counsel. The Court concludes that it need not rule at this time on the defendants' motion to exclude interline-related communications. [1]

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[1] The papers reviewed in connection with the pending motions include the following:

Class Certification. The second consolidated amended class action complaint ("2d Am. Compl.") [Dkt. No. 324]; the direct purchaser plaintiffs' motion for class certification ("Class Mot.") [Dkt. No. 337]; the direct purchaser plaintiffs' memorandum in support of motion for class certification ("Class Mem.") [Dkt. No. 337-9]; the corrected expert report of Gordon Rausser ("1st Rausser Report"); exhibits A through D submitted in **[**15]** support of the direct purchaser plaintiffs' motion for class certification; exhibits 1 through 224 submitted in support of the direct purchaser plaintiffs' motion for class certification (individually, "RD Ex."); the defendants' memorandum of law in opposition to plaintiffs' motion for class certification ("Class Opp.") [Dkt. No. 381]; the revised expert report of Robert D. Willig ("Willig Report"); the 21 declarations and their accompanying exhibits submitted in support of defendants' memorandum of law in opposition to plaintiffs' motion for class certification; exhibits 1 through 51 submitted in support of defendants' memorandum of law in opposition to plaintiffs' motion for class certification (individually, "PD Ex."); the plaintiffs' reply memorandum in support of their motion for class certification ("Class Reply") [Dkt. No. 406]; the corrected expert reply report of Gordon Rausser ("2d Rausser Report"); exhibits 1 through 150 submitted in support of plaintiffs' reply memorandum in support of their motion for class certification (individually, "HD Ex."); the plaintiffs' supplemental memorandum pursuant to the Court's September 17, 2010 Order ("Pls. Supp. Brief") [Dkt. No. 434]; **[**16]** the defendants' supplemental memorandum of law regarding class certification standards ("Defs. Supp. Brief") [Dkt. No. 439]; plaintiffs' and defendants' joint submission regarding class definition ("Joint Class Definition Submission") [Dkt. No. 456]; the plaintiffs' memorandum addressing Wal-Mart Stores, Inc. v. Dukes ("Pls. Wal-Mart Brief") [Dkt. No. 523]; the defendants' supplemental memorandum concerning Wal-Mart Stores, Inc. v. Dukes submitted pursuant to the Court's July 20, 2011 Order ("Defs. Wal-Mart Brief") [Dkt. No. 524]; the defendants' reply memorandum concerning Wal-Mart Stores, Inc. v. Dukes submitted pursuant to the Court's July 20, 2011 Order ("Defs. Wal-Mart Reply Brief") [Dkt. No. 526]; and the plaintiffs' reply memorandum addressing Wal-Mart Stores, Inc. v. Dukes ("Pls. Wal-Mart Reply Brief") [Dkt. No. 528]. Included as exhibits to the class certification papers are many deposition transcripts; the Court has reviewed all relevant parts of those transcripts, but lists here only those cited in this Opinion, grouped and alphabetized for ease of reference:

- *Experts* — Deposition of Gordon Rausser ("1st Rausser Dep."), June 3, 2010; Deposition of Gordon Rausser ("2d Rausser **[**17]** Dep."), Sept. 24, 2010; Deposition of Robert D. Willig ("Willig Dep."), Aug. 4, 2010.

- *Defendant BNSF Railway Company* — Deposition of Marc Allen ("HD Ex. 85, Allen Dep."), Aug. 12, 2010; Deposition of George Duggan ("HD Ex. 81, Duggan Dep."), Aug. 13, 2010; Deposition of David Garin ("HD Ex. 79, Garin Dep."), Aug. 16, 2010; Deposition of Thomas Jacobowski ("HD Ex. 76, Jacobowski Dep."), Aug. 12, 2010; Deposition of John Lanigan ("HD Ex. 68, Lanigan Dep."), June 22, 2010; Deposition of Matthew K. Rose ("HD Ex. 72, Rose Dep."), July 16, 2010.

[*11] II. BACKGROUND

The Court previously has described the background of this case. See , *In re Rail Freight Fuel Surcharge Antitrust Litig. ("Rail Freight I") 587 F. Supp. 2d 27, 29-31 (D.D.C. 2008)*; *In re Rail Freight Fuel Surcharge Antitrust Litig. ("Rail Freight II"), 593 F. Supp. 2d 29, 32, 34-35 (D.D.C. 2008)*, aff'd, *Fayus Enters. v. BNSF Ry. Co., 602 F.3d 444, 445-46, 454, 390 U.S. App. D.C. 213 (D.C. Cir. 2010)*. It therefore will limit its discussion accordingly.

This case involves the claim that defendants — BNSF Railway Company **[**21]** ("BNSF"); CSX Transportation, Inc. ("CSX"); Norfolk Southern Railway Company ("NS"); and Union Pacific Railroad Company ("UP") — engaged **[*12]** in a price fixing conspiracy to coordinate their fuel surcharge programs as a means to impose supra-competitive total price increases on their shipping customers. See 2d Am. Compl. ¶¶ 1-2; Class Mem. at 1. As plaintiffs describe it, a rail fuel surcharge "is a separately-identified fee that is charged by the railroads for . . . agreed-upon transportation [services], purportedly to compensate for increases in the cost of fuel." 2d Am. Compl. ¶ 2. Plaintiffs allege, however, that the four defendants, through their collective action, "conspired to impose Rail Fuel Surcharges that far exceeded any of the Defendants' fuel costs, and thereby collected billions of dollars of additional profits during the . . . conspiracy." Id.

• *Defendant CSX Transportation, Inc.* — Deposition of Donna Cerwonka ("HD Ex. 86, Cerwonka Dep."), Aug. 13, 2010; Deposition of Clarence Gooden ("HD Ex. 69, Gooden Dep."), July 16, 2010; Deposition of Tim McNulty ("HD Ex. 71, McNulty Dep."), Aug. 10, 2010; Deposition of Dean Piacente ("HD Ex. 87, Piacente Dep."), Aug. 13, 2010.

• *Defendant Norfolk Southern Railway Company* — Deposition of Patrick Glennon ("HD Ex. 65, Glennon Dep."), July 20, 2010; Deposition of John Kraemer ("HD Ex. 82, Kraemer Dep."), Aug. 11, 2010; Deposition of David Lawson ("HD Ex. 83, Lawson Dep."), Aug. 5, 2010; Deposition of Ronald Listwak ("HD Ex. 77, Listwak Dep."), Aug. 6, **[**18]** 2010; Deposition of Joseph Osborne ("HD Ex. 78, Osborne Dep."), Aug. 11, 2010; Deposition of Donald W. Seale ("RD Ex. 173, Seale Dep."), Feb. 26, 2010.

• *Defendant Union Pacific Railroad Company* — Deposition of Mark Draper ("HD Ex. 153, Draper Dep."), Mar. 3, 2010; Deposition of Thomas Gehl ("HD Ex. 88, Gehl Dep."), Aug. 10, 2010; Deposition of Robert Knight, Jr. ("HD Ex. 70, Knight Dep."), July 9, 2010; Deposition of Richard Pagan ("HD Ex. 89, Pagan Dep."), Aug. 9, 2010; Deposition of James Young ("HD Ex. 66, Young Dep.").

Interline-Related Communications. The defendants' motion to exclude interline-related communications from consideration for class certification or any other purpose prohibited by *49 U.S.C. § 10706* ("Interline Mot.") [Dkt. No. 417]; the defendants' memorandum in support of motion to exclude interline-related communications from consideration for class certification or any other purpose prohibited by *49 U.S.C. § 10706* ("Interline Mem.") [Dkt. No. 420]; the plaintiffs' memorandum and exhibits 1 through 18 in opposition to defendants' motion to exclude interline-related communications from consideration for class certification or any other purpose prohibited by *49 U.S.C. § 10706* **[**19]** ("Interline Opp.") [Dkt. No. 438]; the defendants' reply memorandum and exhibits 1 through 8 in support of their motion to exclude interline-related communications from consideration for class certification or any other purpose prohibited by *49 U.S.C. § 10706* ("Interline Reply") [Dkt. No. 444]; the defendants' objections under *49 U.S.C. § 10706* to plaintiffs' exhibits in support of plaintiffs' motion for class certification, and exhibits 1 through 11 and A through C to defendants' objections ("Defs. Interline Objections") [Dkt. No. 454]; the plaintiffs' response to defendants' objections under *49 U.S.C. § 10706* to plaintiffs' exhibits in support of plaintiffs' motion for class certification, and exhibits 1 through 15 to plaintiffs' response ("Pls. Interline Response") [Dkt. No. 457-19]; the plaintiffs' notice of additional evidence and exhibits relevant to the parties' briefing on *49 U.S.C. § 10706*, and exhibits 1 through 21 to plaintiffs' notice ("Pls. Interline Notice") [Dkt. No. 530-1]; the defendants' response to plaintiffs' notice of additional evidence relevant to the parties' briefing on *49 U.S.C. § 10706*, and exhibits A through E to defendants' response ("Defs. Response to **[**20]** Pls. Interline Notice") [Dkt. No. 532].

Motions Hearing and Related Submissions. The Court also reviewed the transcripts of the motions hearing of October 6 and 7, 2010 (respectively, "Oct. 6 Tr."; "Oct. 7 Tr."), and the binders of materials, consisting of demonstratives, exhibits, and deposition excerpts, submitted by the parties at the hearing: the plaintiffs' binder regarding *section 10706* ("Pls. *Section 10706* Binder"); the plaintiffs' hearing binder ("Pls. Hr'g Binder"); the defendants' hearing binder ("Defs. Hr'g Binder"); the defendants' proffer at hearing on class certification binder ("Defs. Proffer Binder"); and the plaintiffs' closing arguments binder ("Pls. Closing Binder").

Plaintiffs have been divided into two putative classes: (1) the direct purchasers — those who allegedly purchased rail freight transportation from defendants from July 1, 2003 until December 31, 2008 and who were assessed a rail fuel surcharge for the transportation; and (2) the indirect purchasers — those who allegedly purchased rail **[**22]** freight transportation services indirectly from defendants. See *Rail Freight I, 587 F. Supp. 2d at 29*. Plaintiffs in both putative classes allege that defendants violated *Section 1* of the Sherman Act, *15 U.S.C. § 1*, by conspiring to fix prices through use of their fuel surcharges, and seek recovery under *Section 4* of the Clayton Act, *15 U.S.C. § 15*. See *Rail Freight I, 587 F. Supp. 2d at 29*; 2d Am. Compl. ¶ 33.

In 2008, defendants moved to dismiss the claims of both putative classes. On November 7, 2008, the Court denied defendants' motion regarding the direct purchaser plaintiffs, concluding that the direct purchasers had sufficiently alleged an agreement in restraint of trade. See *Rail Freight I, 587 F. Supp. 2d at 32*. Shortly thereafter, on December 28, 2008, the Court denied in part and granted in part defendants' motion regarding the indirect purchaser plaintiffs, concluding that the indirect purchasers' state law claims were preempted and must be dismissed, but that the indirect purchasers' federal antitrust claim for injunctive relief could proceed. See *Rail Freight II, 593 F. Supp. 2d at 32, 43*. The United States Court of Appeals for the District of Columbia Circuit affirmed **[**23]** this Court's dismissal of the indirect purchasers' state law claims. See *Fayus Enters. v. BNSF Ry. Co., 602 F.3d at 454*. [2]

The direct purchaser plaintiffs (hereinafter, "plaintiffs" unless otherwise specified) now move for class certification. Specifically, plaintiffs move this Court under *Rule 23(b)(3) of the Federal Rules of Civil Procedure* for certification of a class of

> All entities or persons that at any time from July 1, 2003 until December 31, 2008 (the "Class Period") purchased rate-unregulated rail freight transportation services directly from one or more of the Defendants, as to which Defendants assessed a stand-alone rail freight fuel surcharge applied as a percentage of the base rate for the freight transport (or where some or all of the fuel surcharge was included in the base rate through a method referred to as "rebasing") ("Fuel Surcharge").
>
> Excluded from this Class definition are (a) Defendants, any subsidiaries or affiliates of Defendants, any of Defendants' co-conspirators, whether or not named as a Defendant in the Complaint, and all federal governmental entities, and (b) all entities or persons that paid a Fuel Surcharge directly to any of the Defendants solely pursuant to a railroad-shipper contract that was (i) **[*13]** entered **[**25]** into before July 1, 2003, and (ii) provided for a stand-alone Fuel Surcharge to be paid under a predetermined formula specifically set forth in the contract.

Class Mot. at 1.

Plaintiffs request that this case be certified as a class action for litigation and trial of plaintiffs' claim for price fixing under Section 1 of the Sherman Act, *15 U.S.C. § 1*, and that the eight named plaintiffs — Dust Pro, Inc.; Carter Distributing Company; Dakota Granite Company; Donnelly Commodities, Inc.; U.S. Magnesium LLC; Nyrstar Taylor Chemicals, Inc.; Olin Corporation; and Strates Shows, Inc. — be designated as class representatives. Class Mot. at 1. Plaintiffs further request that Quinn Emanuel Urquhart & Sullivan, LLP and Hausfeld LLP be designated as co-lead class counsel under *Rule 23(g) of the Federal Rules of Civil Procedure*. Defendants oppose plaintiffs' motion for class certification, arguing that plaintiffs have failed to satisfy the requirements of *Rule 23*.

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[2] On January 13, 2009, in view of the huge volume of documents to be produced in discovery and other discovery issues, many of which involved challenging e-discovery matters, the Court referred this case for the management of all pretrial matters, discovery, and scheduling jointly to Magistrate Judge John M. Facciola and Magistrate Judge Alan Kay. See Referral Order at 2, Jan. 13, 2009 [Dkt. No. 179]. Magistrate Judge Facciola and Magistrate Judge Kay have provided the Court and the parties with invaluable assistance, presiding over a lengthy discovery process, lasting over two years, in which the parties have raised complex legal issues and have exchanged millions of pages of documents. See *In re Rail Freight Fuel Surcharge Antitrust Litig., MDL No. 1869, 281 F.R.D. 1, 2011 U.S. Dist. LEXIS 132720, 2011 WL 5603995, at *1 (D.D.C. Nov. 17, 2011)* (Facciola, Mag. J.). Magistrate Judge Facciola's expertise in e-discovery matters and his weekly conference calls with counsel during the early stages of discovery made possible an efficient and largely non-contentious discovery process despite the complexity **[**24]** of the case and the challenging nature of some of the discovery issues.

A. The Alleged Conspiracy

Plaintiffs allege that in early 2003 defendants, the four largest Class I railroads in the continental United States, see 2d Am. Compl. ¶ 1, conspired to increase their total revenues through the use of standardized, **[**26]** uniform, and supra-competitive fuel surcharges. *Rail Freight I, 587 F. Supp. 2d at 29*. A Class I railroad is a large freight railway company that has "annual carrier operating revenues of at least $250 million." 1st Rausser Report at 20. Together, defendants comprise just one percent of all the freight railroads, see id., but control about 90 percent of rail freight traffic in the United States. 2d Am. Compl. ¶ 4; see Class Mem. at 7. BNSF and UP operate in the western United States; CSX and NS operate in the east. See 1st Rausser Report at 30-31; Willig Report ¶ 166. [3]

Before Congress passed the Staggers Rail Act in 1980, defendants would have had to apply to the Interstate Commerce Commission ("ICC") for approval of an across-the-board rate increase. *Rail Freight I, 587 F. Supp. 2d at 29-30*. Following the deregulation of the railroad industry, at least 80 percent of all rail shipments now move under private transportation contracts, which are not rate regulated, or are otherwise exempt from rate regulation. Id. Plaintiffs allege that defendants ultimately determined that the most efficient way to increase their profits was through the imposition of an across-the-board, artificially high, and uniform fuel surcharge, see *id. at 30*, instead of attempting to renegotiate all of their individual contracts, id., or attempting to fix each base rate separately, which plaintiffs say "would have been extremely complex, highly costly and effectively unmanageable." 1st Rausser Report at 52 n.118.

The total freight price for a shipping customer, that is, the all-in rate, consists of a base rate (also referred to as a line-haul rate) **[**28]** and any percentage fuel surcharge applied to the base rate. See Willig Report ¶ 18; Class Opp. at 3 (all-in price includes the base rate, fuel surcharge, and other charges and elements of value). The base rate

> includes fixed cost (or overhead) elements, such as the cost of organizing a particular shipment[,] . . . . the large fixed costs of building and maintaining track, bridges, and other structures to achieve long-run sustainability[,] . . . . [and] the railroad's markup of price over costs, i.e., the profitability element of pricing.

1st Rausser Report at 62. Plaintiffs allege that defendants imposed "an across-the-board artificially high and uniform fuel surcharge" as a percentage multiplier of the base rate, thereby permitting defendants "to raise total freight prices widely by a given percentage." *Rail Freight 1, 587 F. Supp. 2d* ***[*14]*** *at 30*; see also 1st Rausser Report at 50 ("[A]dding a percentage fuel surcharge on top of line-haul rates or base rates is by its very nature a general price increase."). In effect, according to plaintiffs, the allegedly conspiratorial fuel surcharges operated like a tax, increasing the total price of shipping by a set percentage. 1st Rausser Report at **[**29]** 80. Plaintiffs contend that this "approach yielded defendants billions of dollars of additional profits because the surcharge raised rates far beyond the real increased cost of fuel." *Rail Freight I, 587 F. Supp. 2d at 30*.

According to plaintiffs, it took defendants some trial and error to reach the point of conspiracy. Before the class period, plaintiffs say that defendants "operated as a price-discriminating, interdependent, but non-collusive oligopoly." Class Mem. at 8. And for many years before the class period, defendants "confronted a long-term, structural decline in rail freight rates." Id. "Between 2000 and early 2003, the three-year period preceding the Class Period," plaintiffs contend that defendants "unilaterally took various actions designed to increase rail freight prices and revenues." Id. at 9. As plaintiffs describe it, "[t]hese uncoordinated actions included, among other things, unilateral attempts to apply stand-alone fuel surcharges, which were designed 'to take advantage of future rising

[3] To preview, see infra at 61 n.11 & 64 n.12, Gordon Rausser is plaintiffs' retained expert, and Robert D. Willig is defendants' retained expert. Dr. Rausser is the Robert Gordon Sproul Distinguished Professor at the University of California at Berkeley. He has held positions teaching economics and statistics at numerous universities and has published widely in these fields. See 1st Rausser Report at 1. Dr. Willig is a Professor of Economics and Public Affairs at Princeton University, where he holds a joint appointment in the Economics Department and at the Woodrow Wilson School of Public and International Affairs. His **[**27]** focus is microeconomics, specializing in industrial organization. He has published widely in these fields. See Willig Report at 1.

fuel prices' and intended as 'revenue enhancement steps.'" Id. (quoting RD Ex. 9, E-mail from C. Adams, at UPFSC 0147060, Dec. 5, 2002; RD Ex. 163, NS 2000 Annual Report, at 3). **[**30]** But plaintiffs contend that defendants "acting on their own had limited success when trying to boost revenues through fuel surcharges." Id. Plaintiffs contend that these pre-class period "fuel surcharges were applied only sporadically to a limited number of shippers," because defendants were concerned about competition — "losing business to other [railroads] that did not apply fuel surcharges[.]" Id. at 9-10.

Another barrier to broad application of fuel surcharges during the pre-class period, according to plaintiffs, was wide use of "the so-called Rail Cost Adjustment Factor, or 'RCAF.'" Class Mem. at 11. The RCAF "is a weighted index that accounts for all significant input costs, including fuel." Id.; see also Willig Rep. ¶ 63 ("RCAF measures changes in the prices of major components of the railroad industry's operating expenses, including labor, fuel, materials, equipment rents, depreciation, interest and other expenses."). According to plaintiffs, wide use of the RCAF impeded broad application of fuel surcharges because defendants "recognized that imposing a stand-alone fuel surcharge where fuel price increases were already covered by the RCAF would be perceived by shippers as double **[**31]** dipping." Class Mem. at 11 (quotations omitted).

Thus, plaintiffs contend that before the class period

> the number of shippers covered by stand-alone, rate-based fuel surcharges was relatively low . . . , and fuel surcharges did not contribute significantly to Defendants' revenues or bottom lines. Defendants were unable to meet their respective revenue enhancement goals through the use of uncoordinated fuel surcharges.

Class Mem. at 12.

But all of this allegedly changed in 2003. Plaintiffs contend that beginning in the spring of 2003 "[t]he four Defendants agreed to create and apply a common Fuel Surcharge" — linked to the price of oil on one of two oil indexes, the On-Highway Diesel Fuel ("HDF") index or the West Texas Intermediate ("WTI") index — "based on a percentage of base rates on an across-the-board basis to all members of" plaintiffs' putative class. Class Mem. at 19. Under CSX's new, allegedly conspiratorial fuel surcharge program, the railroad would assess a 0.4 percent surcharge when the price of oil on the WTI index exceeded $23 per barrel, and an additional 0.4 percent for every dollar above $23. Id. at 19. Plaintiffs say that "[u]nlike its predecessor program, which required **[**32]** the price of oil to exceed the threshold price ($28 per barrel under the old program) for 30 consecutive days, CSX's new program would be based on the average price of oil from the preceding month." Id. at 19-20. And plaintiffs allege that BNSF, UP, and NS adopted "essentially uniform" programs, and all four **[*15]** defendants "remained in synch through the class period." Id. at 24.

As plaintiffs describe it,

> "[t]he only differences in the Defendants' programs concerned the indices used and the thresholds chosen. The two indices chosen were closely related. The western railroads (BNSF and the UP) linked their fuel surcharge to the on-highway diesel fuel (HDF) index, whereas the eastern railroads (CSX and NS) linked their fuel surcharge to the [WTI] index."

Class Mem. at 24 n.76 (quoting 1st Rausser Report at 54-55). Although UP and BNSF used slightly different thresholds in their fuel surcharge programs, plaintiffs allege that this difference "had no practical effect":

> "The UP applied a fuel surcharge when the HDF was above the threshold of $1.35 per gallon and the BNSF applied a Fuel Surcharge when the HDF index was above $1.25 per gallon. CSX and NS both applied fuel surcharges when the WTI **[**33]** index was above $23 per barrel. The different thresholds used by UP and BNSF were not relevant to fuel surcharge amounts during the class period, because the indices were all above the threshold values for the entire Class Period. Consequently, the UP and BNSF Fuel Surcharge programs provided for identical fuel surcharge percentages once the $1.35 threshold was reached."

Id. (quoting 1st Rausser Report at 55).

The next step in the alleged conspiracy, according to plaintiffs, was defendants' agreement and collective action to cause the American Association of Railroads ("AAR") to create a new cost escalation index, the All Inclusive Index Less Fuel ("AIILF"), that removed fuel costs from the prior cost escalation index, the All Inclusive Index ("AII"), on which the RCAF was based. See *Rail Freight I, 587 F. Supp. 2d at 30*; see Class Mem. at 27. Plaintiffs say that defendants reached this agreement during the October and December 2003 meetings of the AAR; the AIILF index was published in December 2003. *Rail Freight I, 587 F. Supp. 2d at 30*; see Class Mem. at 29. As plaintiffs describe it, "[t]he magnitude of this accomplishment from Defendants' perspective cannot be understated." Class **[**34]** Mem. at 29. Plaintiffs point to a letter written by BNSF's chief economist, Sam Kyei, in which he stated:

> "In December 2003 [Matt Rose, BNSF's chief executive officer], single-handedly got the A.A.R. to establish a non-fuel RCAF index, now called the All-Inclusive Index Less Fuel . . . . In my 18-year railroad career, no one had ever succeeded in steering the A.A.R. to do this. . . . [T]he combination of sound price escalation using this index and a fuel surcharge should tremendously help our bottom-line for years to come. In fact, . . . the entire rail industry should benefit from the escalation options the index provides."

Class Mem. at 29-30 (quoting RD Ex. 122, Letter from S. Kyei, at BNSF-0070502, Mar. 15, 2005).

At this point, plaintiffs allege that defendants, having coordinated their fuel surcharges and created and published the AIILF, "worked tirelessly to achieve 100% Fuel Surcharge coverage across their customers." Class Mem. at 31. Plaintiffs say that following defendants' agreement to coordinate their fuel surcharges, defendants' fuel surcharge revenue "skyrocketed": as an example, plaintiffs state that NS saw fuel surcharge revenue for certain businesses grow exponentially **[**35]** from about $11.6 million in 2002 to about $61.7 million, $208 million, $650 million, and $974 million in 2003, 2004, 2005, and 2006, respectively. Id. at 42-43. Plaintiffs say that because of the conspiracy, defendants "were able to reverse the long-term downward trend in rail freight rates and move rates sharply upward[,]" id. at 43, at the expense of putative class members. Id. at 45.

B. Surface Transportation Board Proceedings and 18 Class Action Lawsuits

Eventually, shippers of both rate-regulated and rate-unregulated freight traffic complained about defendants' use of fuel surcharges, arguing that the surcharges recovered far more than the incremental cost of fuel, and that the surcharges had become non-negotiable. Shippers of rate-regulated traffic expressed their complaints to the Surface **[*16]** Transportation Board ("STB"), see 2d Am. Compl. ¶ 96; Class Mem. at 47, an agency that regulates certain aspects of the railroad industry. See *Manufacturers Ry. Co. v. Surface Transp. Bd., 676 F.3d 1094, 1095, 400 U.S. App. D.C. 157 (D.C. Cir. 2012)*. In response, the STB "instituted [a] proceeding to inquire into rail carrier practices related to fuel surcharges." *Rail Fuel Surcharges, Ex Parte No. 661, 2007 STB LEXIS 39, 2007 WL 201205, at *1 (S.T.B. Jan. 26, 2007)*.

As **[**36]** the STB made clear, ***HN1***[] its proceedings on fuel surcharges and its ultimate decision on the matter related only to rate-*regulated* freight traffic. See *Rail Fuel Surcharges, 2007 STB LEXIS 39, 2007 WL 201205, at *10* ("Under *49 U.S.C. 10709*, we have no authority to regulate rail rates and services that are governed by a contract. Therefore, our findings and actions here apply only to regulated common carrier traffic."); see also *Fayus Enters. v. BNSF Ry. Co., 602 F.3d at 445* (noting that under *49 U.S.C. § 10709* traffic that moves under railroad-shipper contracts generally is not subject to challenge before the STB). And plaintiffs' putative class in the instant case includes only those shippers who purchased rate-*unregulated* transportation services. See Class Mot. at 1. But plaintiffs say that the fuel surcharges applied to rate-regulated freight traffic are the same fuel surcharges applied during the class period to putative class members, see Class Mem. at 49; 2d Am. Compl. ¶ 98, and both sides reference the STB decision and rely on it for various propositions in their class certification briefing. See Class Mem. at 49; Class Opp. at 16-17; Class Reply at 22-25. The Court therefore will describe below the **[**37]** STB proceedings and the STB's 2007 decision.

The STB held hearings on the use of fuel surcharges on rate-regulated traffic in May and August 2006. *Rail Fuel Surcharges, 2007 STB LEXIS 39, 2007 WL 201205, at *1*. On January 26, 2007, the STB issued its decision on the matter, concluding:

> [I]t is an unreasonable practice to compute fuel surcharges as a percentage of the base rates. Because railroads rely on differential pricing, under which rates are dependent on factors other than costs, a surcharge that is tied to the level of the base rate, rather than to fuel consumption for the movement to which the surcharge is applied, cannot fairly be described as merely a cost recovery mechanism. Rather, a fuel

> surcharge program that increases all rates by a set percentage stands virtually no prospect of reflecting the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied. Two shippers may have traffic with identical fuel costs, but if one starts out with a higher base rate (because, for example, it has fewer transportation alternatives), it will pay dramatically more in fuel surcharges.

*2007 STB LEXIS 39, [WL] at *4*. Thus, the STB directed defendants to change their practice of "computing **[**38]** rail fuel surcharges as a percentage of a base rate" on regulated traffic. *2007 STB LEXIS 39, [WL] at *1*.

The STB emphasized, however, that its ruling did not ban all fuel surcharges for regulated traffic. See *Rail Fuel Surcharges, 2007 STB LEXIS 39, 2007 WL 201205, at *6* ("[W]e are not precluding railroads from incorporating as many factors that affect fuel consumption as they wish in calculating fuel surcharges. Nor are we requiring them to incorporate every conceivable such factor, as we agree that would be impracticable."). Under the STB's decision, a railroad could still choose to implement a fuel surcharge for rate-regulated traffic, but that surcharge "must be based upon attributes of a movement that directly affect the amount of fuel consumed." Id. Essentially, the STB imposed the requirement that any fuel surcharge applied by a railroad must have "a reasonable nexus to fuel consumption." Id. The STB concluded that a fuel surcharge applied as a percentage of a base rate fails that test because it "increases all rates by a set percentage" and therefore "stands virtually no prospect of reflecting the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied." *2007 STB LEXIS 39, [WL] at *4*.

As discussed, **[**39]** the STB decision did not apply to rate-unregulated freight traffic. Nor did the STB decision in any way preclude railroads from using fuel surcharges tied to base rates in private contracts. As the STB noted in its decision:

> Several carriers introduced evidence that many of their customers favor the continued **[*17]** use of a fuel surcharge program that is tied to the base rate. Given that such a program shifts greater responsibility for fuel recovery to shippers with higher rates, it is not surprising that a subset of customers (presumably those with lower base rates) favor retaining a percentage-of-the-base-rate approach. We note that such shippers are free to enter into contractual arrangements with carriers that incorporate into those contracts any escalation provision for fuel cost recovery that the parties wish.

*Rail Fuel Surcharges, 2007 STB LEXIS 39, 2007 WL 201205, at *6 n.34*.

Although some customers of rate-unregulated freight traffic may have favored the use of fuel surcharges tied to base rates, many others did not, and that latter group of shippers had similar complaints to those expressed before the STB. See Class Mem. at 45-47. Those complaints eventually gave rise to 18 separate class action lawsuits, **[**40]** pending in six districts, involving common antitrust allegations relating to the use of fuel surcharges on rate-unregulated freight traffic. See *Rail Freight I, 587 F. Supp. 2d at 29*; *In re Rail Freight Fuel Surcharge Antitrust Litig., 528 F. Supp. 2d 1358, 1358-59 (J.P.M.L. 2007)*. On November 26, 2007, the Multidistrict Litigation Panel consolidated those 18 separate class actions and transferred them to this Court, see *In re Rail Freight Fuel Surcharge Antitrust Litig., 528 F. Supp. 2d at 1358-59*, and now eight named plaintiffs request that this Court certify this case as a class action under *Rule 23(b)(3)*. See Class Mot. at 1-2.

C. Class Certification Papers and Supplemental Briefing Before and After the Motions Hearing

As will be discussed in detail below, ***HN2***[] to obtain class certification plaintiffs must satisfy the four threshold requirements of *Rule 23(a)* — commonly referred to as numerosity, commonality, typicality, and adequacy — and the two additional requirements of *Rule 23(b)(3)* — predominance and superiority. [4] Although there is some dispute

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[4] ***HN4***[] In addition to the four express requirements of *Rule 23(a)*, there are two implied requirements: (1) the class must be "sufficiently defined so as to be identifiable as a class"; and (2) the named representatives must "fall within the class." *Vigus v. Southern Ill. Riverboat/Casino Cruises, Inc., 274 F.R.D. 229, 235 (S.D. Ill. 2011)* (citing *Oshana v. Coca-Cola Co., 472 F.3d 506, 513 (7th Cir. 2006)*; *Alliance to End Repression v. Rochford, 565 F.2d 975, 977 (7th Cir. 1977))*.

over whether plaintiffs have satisfied some of the requirements of *Rule 23(a)*, see Class Opp. at 75-82, the parties agree that the central **[**41]** question before the Court relates to ***HN3***[] predominance, that is, whether plaintiffs have met their burden to show that "questions of law or fact common to class members predominate over any questions affecting only individual members[.]" *Fed. R. Civ. P. 23(b)(3)*; see Defs. Wal-Mart Reply Brief at 1; Oct. 6 Tr. at 88; Oct. 7 Tr. at 167. That question, in turn, focuses on whether plaintiffs have shown that the harm — that is, the impact — from the alleged conspiracy is capable of proof at trial through evidence that is common to the class rather than individual to its members. See, e.g., Defs. Wal-Mart Reply Brief at 1.

Plaintiffs maintain that they will be able to demonstrate the alleged conspiracy's impact at trial with **[**42]** common evidence. See Class Mem. at 67-75. And in support of their motion for class certification, plaintiffs have submitted for consideration by the Court the expert report of Dr. Gordon Rausser, the Robert Gordon Sproul Distinguished Professor at the University of California at Berkeley. See 1st Rausser Report at 1. Plaintiffs asked Dr. Rausser to determine, among other things, whether "[t]here was a common impact of Defendants' alleged conspiracy on the Plaintiffs and the Class which can be demonstrated through evidence and economic analysis common to the Class[.]" Id. at 4. Dr. Rausser analyzed the rail freight industry and defendants' transaction data and concluded that there was such a common impact. See id. at 5-8. As Dr. Rausser explains, he developed economic regressions that he applied to defendants' transaction data; in view of the results of his regressions, he concludes, among other things, that common evidence and economic analysis can be used to determine the impact of defendants' alleged conspiracy on a class-wide basis. See id. at 7-8, 80-81.

[*18] Defendants oppose plaintiffs' motion for class certification, arguing primarily that individual issues predominate in determining **[**43]** the impact of the alleged conspiracy. See Class Opp. at 28-72. In support of their position that class certification is inappropriate, defendants have submitted for consideration by the Court the expert report of Dr. Robert Willig, a Professor of Economics and Public Affairs at Princeton University. See Willig Report ¶ 1. Among other things, defendants asked Dr. Willig to determine "whether it is feasible for plaintiffs to demonstrate through common proof that members of the proposed class suffered economic injury[.]" Id. ¶ 11. Dr. Willig concludes that it is not feasible; as he sees it, individual issues predominate over common issues for purposes of determining the impact from the alleged conspiracy. Id. ¶ 25. According to Dr. Willig, "[e]valuation of plaintiffs' claims in this matter would require undertaking analysis that is specific to individual plaintiffs." Id. Furthermore, Dr. Willig contends that Dr. Rausser's regressions are flawed, and he disagrees with Dr. Rausser's conclusion that common evidence and analysis can be used to determine the impact of the alleged conspiracy. Id.

The parties and their experts therefore have presented this Court with what other courts have referred **[**44]** to as a "battle of the experts" on predominance and, in turn, impact. *Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011)*; *In re Puerto Rican Cabotage Antitrust Litig., 269 F.R.D. 125, 132 (D.P.R. 2010)*. Compare 1st Rausser Report at 7, with Willig Report ¶ 25. As plaintiffs see it, they should win this battle: whereas Dr. Rausser used economic analysis to show persuasively that workable formulas, common to the class, are available to prove impact, Class Reply at 1, Dr. Willig's analysis should not be credited because his methodology is "overtly flawed." Id. at 5. Defendants say the opposite, arguing that the Court should not credit Dr. Rausser's analysis because it is "fatally flawed." Class Opp. at 50.

In preparation for the hearing on plaintiffs' motion for class certification and in view of the disputes between Dr. Rausser and Dr. Willig on the central issue of predominance, the Court concluded that supplemental briefing was necessary. The Court therefore ordered supplemental briefing on two issues, to be completed before the class certification motions hearing: (1) What standard of proof should the Court apply when examining the requirements of *Rule 23 of the Federal Rules of Civil Procedure*?; **[**45]** and (2) Can the Court resolve factual disputes relevant to *Rule 23* requirements — with particular emphasis on conflicting expert reports — if those factual disputes overlap with the merits of this case? See Order at 1-2, Sept. 17, 2010 [Dkt. No. 423]. The Court then heard oral argument on plaintiffs' motion for class certification, including argument on these two supplemental issues, on October 6 and 7, 2010. See generally Oct. 6 Tr.; Oct. 7 Tr.; see also Order at 1-2, Oct. 5, 2010 [Dkt. No. 445] (listing topics and schedule of argument).

After the class certification motions hearing, the Court, on its own review of the Supreme Court's oral argument transcript in Wal-Mart Stores, Inc. v. Dukes, provided the parties with the opportunity for further supplemental briefing. As the Court explained, although plaintiffs' class certification motion involves *Rule 23(b)(3)*, and the certification question in Wal-Mart Stores, Inc. v. Dukes involved *Rule 23(b)(2)*, "a review of the oral argument transcript in Wal-Mart . . . suggest[ed] that the Supreme Court's decision in that case may have a bearing on this case." Order at 1, Apr. 7, 2011 [Dkt. No. 504]. Thus, the Court ordered the parties to meet **[**46]** and confer and file a joint report with the Court 30 days after the Supreme Court issued its decision in Wal-Mart, stating whether either side believed that supplemental briefing was necessary and, if so, listing the proposed topics and proposing a briefing schedule. Id. at 1-2.

On June 20, 2011, the Supreme Court issued its decision in Wal-Mart Stores, Inc. v. Dukes, and one month later the parties agreed that supplemental briefing was necessary and submitted a joint report listing three proposed topics. See Joint Report Pursuant to April 7, 2011 Order at 1-2, July 20, 2011 [Dkt. No. 519]. The Court approved the parties' joint proposal and ordered supplemental **[*19]** briefing on the following three questions:

> (1) Whether Wal-Mart provides guidance with respect to the standards to be applied in determining whether to certify a class here.
>
> (2) Whether Wal-Mart has any implications for the plaintiffs' ability to satisfy the requirements of *Rule 23(b)(3)*, in light of the facts of this case, plaintiffs' claims and defendants' asserted defenses.
>
> (3) Whether Wal-Mart has any implication for this Court's evaluation of the parties' expert evidence submitted in connection with the pending class certification **[**47]** motion.

Order at 1, July 20, 2011 [Dkt. No. 520]. That supplemental briefing now is complete.

D. "Interline-Related" Communications

One final matter requires preliminary discussion. In the course of briefing on plaintiffs' motion for class certification, defendants filed a motion to exclude what they refer to as "interline-related" communications from consideration for class certification or for any other purpose under *49 U.S.C. § 10706*. Interline Mot. at 1. According to defendants, plaintiffs devote substantial class certification briefing "to the merits of this case" and "repeatedly cite to evidence of communications between Defendants related to interline traffic," defined by defendants as "traffic that originates on the line of one rail carrier but must be handed off to one or more other rail carriers to reach a destination point." Interline Mem. at 1. Defendants argue that "Congress, by statute, has banned such evidence in antitrust cases because it regards such communications as necessary and perfectly lawful, and wanted to protect rail carriers from false allegations of antitrust violations." Id.

The relevant statute is *49 U.S.C. § 10706*, and defendants say that Congress enacted **[**48]** it specifically

> to prevent plaintiffs from inferring an unlawful agreement "from evidence that two or more rail carriers acted together with respect to an interline rate or related matter and that a party to such action took similar action with respect to a rate or related matter on another route or traffic," and
>
> to provide that "evidence of a discussion or agreement between or among such rail carrier and one or more other rail carriers, or of any rate or other action resulting from such discussion or agreement, shall not be admissible if the discussion or agreement . . . concerned an interline movement of the rail carrier, and the discussion or agreement would not, considered by itself, violate the [antitrust] laws."

Interline Mem. at 1 (quoting *49 U.S.C. § 10706(a)(3)(B)(ii)*) (alteration in original).

Plaintiffs oppose defendants' motion on procedural and substantive grounds. See Interline Opp. at 1-2. As for the latter, plaintiffs argue that

> to the extent it applies at all, the limited scope of *§ 10706(a)(3)(B)(ii)*'s evidentiary protection is clear. That subsection does not — as Defendants assert — immunize any discussion or agreement relating in any way to anything having to do with **[**49]** interline traffic. Rather, it narrowly protects only a discussion or agreement that concerned a specific "interline movement of the rail carrier."

Id. at 4 (quoting *49 U.S.C. § 10706(a)(3)(B)(ii)(II)*). Plaintiffs therefore contend that *49 U.S.C. § 10706* does not preclude the admissibility of the evidence that defendants purport to challenge. See id. at 10.

The parties agree that the question whether there was a conspiracy can be established by common proof, so it is not an issue in dispute for purposes of class certification. See infra at 58-59. Thus, defendants note that they "expect that at this stage of the case the Court will not find it necessary to consider any of the [interline-related communications] evidence that Plaintiffs have cited to support their claim that Defendants engaged in an unlawful conspiracy." Interline Mem. at 27; see id. (describing as "legally immaterial" plaintiffs' argument in their certification briefs referencing purported interline communications); see also Oct. 6 Tr. at 44. Consequently, the parties also agree that the Court need only rule on defendants' **[*20]** motion before relying on any such disputed evidence. See Oct. 6 Tr. at 44.

At the Court's direction, **[**50]** after the class certification hearing defendants provided the Court with the list of specific objections to documents and deposition testimony that plaintiffs submitted in support of their motion for class certification, as well as annotated copies of relevant excerpts from Dr. Rausser's two reports that purportedly rely on interline-related communications. See Defs. Interline Objections at 1; see also id., Exs. 1-11, A-C. Because the Court has not relied on any of the disputed evidence in reaching its decision on plaintiffs' motion for class certification, the Court concludes that it need not rule at this time on defendants' motion to exclude interline-related communications.

III. LEGAL STANDARD FOR CLASS CERTIFICATION UNDER *RULE 23(b)(3) OF THE FEDERAL RULES OF CIVIL PROCEDURE*

A. Requirements of Rule 23(a) and (b)(3)

HN5[] A party that moves for class certification bears the burden of showing that its proposed suit meets all of the requirements for certification. See *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316 n.14 (3d Cir. 2008)*; *Lindsay v. Government Emples. Ins. Co., 251 F.R.D. 51, 54 (D.D.C. 2008)*. Those requirements fall into two categories.

First, the moving party must **[**51]** show that its proposed suit satisfies the two implied and the four express requirements of *Rule 23(a)*. See *Vigus v. Southern Ill. Riverboat/Casino Cruises, Inc., 274 F.R.D. at 235*; *Lindsay v. Government Emples. Ins. Co., 251 F.R.D. at 54*. As for the implied requirements, plaintiffs must show (1) that their proposed class is "sufficiently defined so as to be identifiable as a class"; and (2) that the named representatives "fall within the class." *Vigus v. Southern Ill. Riverboat/Casino Cruises, Inc., 274 F.R.D. at 235*. As for the express requirements, the moving party must show that

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Those four express requirements commonly are referred to as numerosity, commonality, typicality, and adequacy. Failure to adequately demonstrate any of the *Rule 23(a)* requirements is fatal to class certification. See *Garcia v. Johanns, 444 F.3d 625, 631, 370 U.S. App. D.C. 280 (D.C. Cir. 2006)*.

HN6[] Second, **[**52]** the moving party must show that its proposed suit falls within at least one of the three categories of cases set forth in *Rule 23(b)*. *Lindsay v. Government Emples, Ins. Co., 251 F.R.D. at 54*. In this case, plaintiffs move for class certification under *Rule 23(b)(3)*. That part of *Rule 23* is intended to encompass cases in which "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Id. at 56* (quoting *Fed. R. Civ. P. 23(b)* ADVISORY COMMITTEE NOTE TO 1966 AMENDMENTS). In order to certify a class under *Rule 23(b)(3)*, a court must find "[1] that the questions of law or fact common to class members predominate over any questions affecting only individual members, and [2] that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. These two requirements commonly are referred to as predominance and superiority. ***HN7***[] As *Rule 23(b)(3)* states, in deciding whether a moving party has satisfied the predominance and superiority requirements, pertinent considerations **[**53]** for a court include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the ligation of the claims in the particular forum; and

[*21] (D) the likely difficulties in managing a class action.

Id.

HN8[] The Supreme Court has emphasized that a class certification decision invites a "close look at the case," *Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 615, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (quotations omitted), and a class may be certified only "if the trial court is satisfied, after rigorous analysis," that the applicable Rule 23 requirements have been met. *General Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*. In examining the predominance requirement under *Rule 23(b)(3)*, a court's rigorous analysis "'begins . . . with the elements of the underlying cause of action.'" *Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 815 (7th Cir. 2012)* (quoting *Erica P. John Fund, Inc. v. Halliburton, Co., 131 S. Ct. 2179, 2184, 180 L. Ed. 2d 24 (2011)*); see *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311*; see also **[**54]** *Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. 293, 299 (D.D.C. 2007)*. A court must "examine the elements of plaintiffs' claim through the prism of *Rule 23* to determine whether" the Rule 23 requirements have been met. *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311* (quotations omitted).

Under *Rule 23(b)(3)*, "[i]ndividual questions need not be absent." *Messner v. Northshore Univ. HealthSystem, 669 F.3d at 815*. Indeed, "[t]he text of *Rule 23(b)(3)* itself contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole." Id. "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311* (quotations omitted).

In this case, plaintiffs allege that defendants engaged in price fixing, in violation of *Section 1* of the Sherman Act. ***HN9***[] To prevail on the merits of their claim at trial, plaintiffs will have to prove three elements: (1) a violation of the antitrust laws — here, *Section 1* of the Sherman Act; (2) individual impact or injury resulting **[**55]** from that violation; and (3) measurable damages. See *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311*; *Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. at 307*. In antitrust cases, injury includes both injury-in-fact and so-called antitrust injury. See *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 106 (2d Cir. 2007)*; see also *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311*.

HN10[] At the class certification stage, however, plaintiffs need not prove their case. See *Behrend v. Comcast Corp., 655 F.3d 182, 199 (3d Cir. 2011)*, petition for cert. filed (U.S. Jan. 11, 2012) (No. 11-864) [cert. denied, *133 S. Ct. 24, 183 L. Ed. 2d 673, 2012 U.S. LEXIS 4754*]; *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311*; see also *Walsh v. Ford Motor Co., 807 F.2d 1000, 1017-18, 257 U.S. App. D.C. 85 (D.C. Cir. 1986)* ("Class action proponents may not be called upon to prove their case in order to obtain certification."). Instead, plaintiffs' burden at the class certification stage is to demonstrate that the elements of their claim are "*capable of proof* at trial through evidence that is common to the class rather than individual to its members." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311-12* (emphasis added); see *Messner v. Northshore Univ. HealthSystem, 669 F.3d at 818*; **[**56]** *Behrend v. Comcast Corp., 655 F.3d at 192-93*. Thus, the Court's focus at the class certification stage is on *how* plaintiffs will attempt to prove the elements of their claim at trial. See *Behrend v. Comcast Corp., 655 F.3d at 199*; *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311*.

B. Resolution of Factual Disputes and Standard of Proof

It has long been established that the moving party cannot be called upon to prove its case at the class certification stage. See, e.g., Walsh v. Ford Motor Co., 807 F.2d at 1017-18. Until recently, however, it was unclear whether and, if so, how, a court should assess factual disputes, especially those related to the merits of plaintiffs' cause of action, in ruling on a motion for class certification. Compare In re Vitamins Antitrust Litig., 209 F.R.D. 251, 257 n.9 (D.D.C. 2002), with In re Hydrogen Peroxide Antitrust Litig., **[*22]** 552 F.3d at 316-20. Moreover, there was "little guidance . . . available on the subject of the proper standard of 'proof' for class certification." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 316; see 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 3:12 (8th ed. 2011) ("Until recently . . . there had been surprisingly **[**57]** little case law addressing the evidentiary standard the proponent of certification must meet in demonstrating that Rule 23's requirements are satisfied."); Teamsters Local 445 Freight Div. Pension v. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008) ("readily acknowledg[ing]" that prior case law had "been less than clear," and directly "address[ing] a question that weaves through the[] various requirements of Rule 23: the standard of proof applicable to evidence proffered to meet them"); see also Shariff v. Goord, 235 F.R.D. 563, 568 n.3 (W.D.N.Y. 2006) ("Neither Rule 23, nor the vast majority of cases interpreting it identifies a particular burden of proof on the plaintiff.").

Although the D.C. Circuit has not yet had occasion to provide much guidance on these questions, see Kottaras v. Whole Foods Mkt., Inc., Civil Action No. 08-1832, 281 F.R.D. 16, 2012 U.S. Dist. LEXIS 10885, 2012 WL 259862, at *5 (D.D.C. Jan. 30, 2012), the Supreme Court's recent decision in Wal-Mart as well as persuasive decisions from the Third Circuit and others have clarified the standards that a district court must apply in determining whether to certify a class. Upon review of those decisions, the Court concludes (1) **HN11**[] that it can and **[**58]** must resolve any factual disputes relevant to the requirements for class certification — even if that requires considerations enmeshed in the factual and legal issues comprising plaintiffs' claim on the merits, see Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. at 2551-52; see also In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 320; and (2) that it should apply a preponderance of the evidence standard of proof in doing so. See, e.g., In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 320.

1. Factual Disputes and Dueling Experts

As the Supreme Court stated in Wal-Mart Stores, Inc. v. Dukes: **HN12**[] "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule — that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. at 2551 (emphasis in original). A district court must be satisfied, after "rigorous analysis," that the requirements of Rule 23 have been met, and

> [f]requently that rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be **[**59]** helped. [T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. . . . Nor is there anything unusual about that consequence[.]

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. at 2551-52 (quotations and citations omitted).

The Supreme Court in Wal-Mart definitively resolved the question whether its decision in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), precludes inquiry into the merits at the class certification stage. Before the Supreme Court issued its decision in Wal-Mart, much of the law on that question arose from an "oft-quoted statement" in Eisen, see In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 33 (2d Cir. 2006), that "nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." Eisen v. Carlisle & Jacquelin, 417 U.S. at 177. In the past, that statement in Eisen

> has led some courts to think that in determining whether any Rule 23 requirement is met, a judge may not consider any aspect of the merits, and has led other **[**60]** courts to think that a judge may not do so at least with respect to a prerequisite of Rule 23 that overlaps with an aspect of the merits of the case.

In re Initial Pub. Offerings Sec. Litig., 471 F.3d at 33.

The Supreme Court in Wal-Mart made clear that that reading of its decision in **[*23]** Eisen is wrong. As the Supreme Court stated:

> [I]n [Eisen], the judge had conducted a preliminary inquiry into the merits of a suit, *not in order to determine the propriety of certification under Rules 23(a) and (b) (he had already done that . . .)*, but in order to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants.

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. at 2552 n.6 (emphasis added) (citation omitted). To the extent that language in Eisen suggests the impermissibility of a merits inquiry *related to the Rule 23(a) and (b) analysis*, the Supreme Court made clear that such language "is the purest dictum and is contradicted by . . . other [Supreme Court] cases." *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. at 2552 n.6*. Thus, "it is appropriate — and indeed necessary — in some circumstances to 'consider[] a merits question at the Rule 23 stage.'" *Kottaras v. Whole Foods Mkt., Inc., 2012 U.S. Dist. LEXIS 10885, 2012 WL 259862, at *6* **[**61]** (quoting *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. at 2552 n.6*); see *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 316-20*; *Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372, 381 (5th Cir. 2007)*; *In re Initial Public Offerings Sec. Litig., 471 F.3d at 41*; *Gariety v. Grant Thornton, LLP, 368 F.3d 356, 366 (4th Cir. 2004)*; *Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 677 (7th Cir. 2001)*; see also 1 McLaughlin on Class Actions § 3:12 ("The Supreme Court recently cemented consensus that recently emerged among the United States Courts of Appeal. Virtually every circuit had expressly adopted standards that require a district court considering class certification to consider evidence" and "resolve factual disputes that are relevant to Rule 23's criteria[.]").

HN13[] The required rigorous factual review that a court must perform in examining whether the requirements of *Rule 23(a)* and *(b)* have been met similarly applies to disputes among experts relevant to class certification. As the Third Circuit stated in In re Hydrogen Peroxide Antitrust Litig.: "Expert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, **[**62]** calls for rigorous analysis." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 323*. Nothing in Rule 23 distinguishes expert evidence from other types of evidence.

> Under *Rule 23* the district court must be "satisfied," . . . or "persuaded," . . . that each requirement is met before certifying a class. Like any evidence, admissible expert opinion may persuade its audience, or it may not. This point is especially important to bear in mind when a party opposing certification offers expert opinion. The district court may be persuaded by the testimony of either (or neither) party's expert with respect to whether a certification requirement is met. Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.

In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 323 (quoting *General Tel. Co. of the Sw. v. Falcon, 457 U.S. at 161*; *In re Initial Pub. Offerings Sec. Litig., 471 F.3d at 41*); see also *id. at 315 n.13* (stating that the "ultimate question" at the class certification stage is "whether the district court is satisfied, by all the evidence and arguments including all relevant expert opinion, that **[**63]** the requirements of *Rule 23* have been met").

HN14[] "Resolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court — no matter whether a dispute might appear to implicate the 'credibility' of one or more experts[.]" *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 324*; see *In re Initial Pub. Offerings Sec. Litig., 471 F.3d at 40* (concluding that courts must "resolve[] factual disputes relevant to each Rule 23 requirement," including weighing conflicting opinion evidence); *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d at 107*; *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 96-97 (D. Conn. 2009)*. Such disputes among experts in an antitrust case may include, among other things, different views on the appropriate characterization of the relevant market, different views on how defendants structured their prices, and any other considerations relevant to whether **[*24]** plaintiffs have satisfied the requirements of *Rule 23*. See *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 325*; *In re EPDM Antitrust Litig., 256 F.R.D. at 96-97*; *Hnot v. Willis Grp. Holdings Ltd., 241 F.R.D. 204, 209-10 (S.D.N.Y. 2007)*. **[**64]** Failure to weigh conflicting expert opinions "'amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert.'" *Kottaras v. Whole Foods Mkt., Inc., 2012 U.S. Dist. LEXIS 10885, 2012 WL 259862, at *11* (quoting *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 323*).

HN15[] There are, of course, limits to a court's inquiry into disputes among experts, just as there are limits to a court's inquiry into factual disputes generally: they should be resolved at the class certification stage only to the extent necessary to "satisf[y]" or "persuade[]" a court that each requirement of Rule 23 has or has not been met. In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 323 (quotations and citations omitted); see also In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 611 (8th Cir. 2011). Thus, for example, a court should only engage itself in "'statistical dueling'" of experts if "such dueling presents 'a valid basis for [granting or] denying class certification.'" Hnot v. Willis Grp. Holdings Ltd., 241 F.R.D. at 210 (quoting In re Initial Pub. Offerings Sec. Litig.,471 F.3d at 35). Similarly, for example, a court should resolve "which expert is correct," **[**65]** Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d at 107, when experts disagree on "*whether* a single formula can be created, or *whether* there really [are] too many factors at work for a multiple regression model to be methodologically sound." In re EPDM Antitrust Litig., 256 F.R.D. at 96-97 (citing Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d at 107) (emphasis added).

In contrast, if the defendants' expert is "merely disputing the *results* of the plaintiffs' experts' analysis rather than the feasibility of using a single formula methodology, that would be a merits issue, not a class certification issue." In re EPDM Antitrust Litig., 256 F.R.D. at 96 (emphasis added); see id. at 100-01 (concluding that defendants' challenge to plaintiffs' expert at the class certification stage was a matter to be resolved at trial because, although each sides' expert "arrived at a polar opposing finding concerning common impact[,] . . . significantly both employ single formulas"). When both experts agree on a methodology for determining class-wide impact, but ultimately reach different conclusions whether putative class members were injured by an alleged conspiracy, **[**66]** a court need not resolve which expert is correct at the class certification stage; that dispute presents a merits question to be resolved by the finder of fact at trial. In re Currency Conversion Fee Antitrust Litig., 264 F.R.D. 100, 115 (S.D.N.Y. 2010); see In re EPDM Antitrust Litig., 256 F.R.D. at 90; Hnot v. Willis Grp. Holdings Ltd., 241 F.R.D. at 209-10.

2. Standard of Proof

a. Facts Bearing on Rule 23

The Court concludes that HN16[] plaintiffs must establish the requirements of Rule 23 by a preponderance of the evidence, and that this standard applies to any factual disputes, including those among experts, that bear on the decision whether to certify a class. As both sides acknowledge, in the past some judges in this district at the class certification stage have required plaintiffs to make only a "threshold showing" or to set forth a "colorable method" by which they intend to satisfy the requirements of Rule 23. In re Vitamins Antitrust Litig., 209 F.R.D. at 264; see Pls. Supp. Brief at 1-2; Defs. Supp. Brief at 14-15. Recent decisions by the Second, Third, and Fifth Circuits, however, all expressly hold that Rule 23 requirements must be established by a higher standard: a preponderance **[**67]** of the evidence. See Brown v. Kelly, 609 F.3d 467, 476 (2d Cir. 2010) ("The Rule 23 requirements must be established by at least a preponderance of the evidence.") (citing Teamsters Local 445 Freight Div. Pension v. Bombardier Inc., 546 F.3d at 202 ("Today, we dispel any remaining confusion and hold that the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements.")); In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 257-58 (3d Cir. 2009) ("The '[f]actual determinations **[*25]** necessary to make Rule 23 findings must be made by a preponderance of the evidence.'") (quoting In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 320); In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 307 (expressly rejecting a "threshold showing" standard and requiring proof by a preponderance of the evidence); Alaska Elec. Pension Fund v. Flowserve Corp., 572 F.3d 221, 228 (5th Cir. 2009) ("'[T]he preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements.'") (quoting Teamsters Local 445 Freight Div. Pension v. Bombardier Inc., 546 F.3d at 202) (alteration in original). [5]

As the Third Circuit stated in In re Hydrogen Peroxide:

[5] In their supplemental briefing, plaintiffs **[**68]** state that they do not object to the Court applying the preponderance of the evidence standard because they believe they can readily satisfy it; nevertheless, plaintiffs note that they "are not agreeing that a preponderance standard should apply." Pls. Supp. Brief at 3 n.5.

> [I]nvoking the phrase "threshold showing" risks misapplying *Rule 23*. A "threshold showing" could signify, incorrectly, that the burden on the party seeking certification is a lenient one (such as a prima facie showing or a burden of production) or that the party seeking certification receives deference or a presumption in its favor. So defined, "threshold showing" is an inadequate and improper standard. [T]he requirements of *Rule 23* must be met, not just supported by some evidence.

In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 321 (quotations omitted).

HN17[] "Class certification requires a finding that each of the requirements of *Rule 23* has been met" by a preponderance of the evidence. *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 320*; see *Fed. R. Civ. P. 23(b)(3)* (the court must "find[] that the questions of law or fact common to class members predominate"). **[**69]** A court can only do so upon weighing all relevant evidence for and against class certification and then concluding by a preponderance of the evidence that the *Rule 23* requirements in fact have been met. See *id. at 320-22*; see also *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. at 2551* (party seeking certification "must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.") (emphasis in original). Applying a lesser standard would permit class certification even if a court thought it less than likely that each *Rule 23* requirement had been met, violating the Supreme Court's instruction that "actual, not presumed conformance" with *Rule 23* is "indispensable." *General Tel. Co. of the Sw. v. Falcon, 457 U.S. at 160*; see also *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. at 2551*.

b. Expert Opinions and Regression Analyses

HN18[] An expert opinion presenting economic regression analysis commonly is used as a basis for certifying a class. See, e.g., *In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 291, 313 (N.D. Cal. 2010)* (citing cases accepting multiple regression analysis as a means of proving antitrust injury and damages on a class-wide **[**70]** basis); *In re EPDM Antitrust Litig., 256 F.R.D. at 95*; see also DANIEL L. RUBINFELD, REFERENCE GUIDE ON MULTIPLE REGRESSION 305-08 (FED. JUDICIAL CENTER, 3d ed. 2011). In this case, plaintiffs' expert, Dr. Gordon Rausser, has developed two multiple regression models, a common factor model and a damage model, that, in his opinion, together reveal that impact can be established at trial with evidence common to the class. See 2d Rausser Report at 91-92, 99-100; see also Oct. 6 Tr. at 137. Defendants' expert, Dr. Robert Willig, disagrees with Dr. Rausser's analysis and concludes that Dr. Rausser's regressions suffer from fatal flaws. See generally Willig Report.

HN19[] Where, as here, experts disagree on the ultimate question whether an economic regression model shows that impact is capable of proof at trial through evidence common to the class, that disagreement must be resolved by a court at the class certification stage: a court must determine "which expert is correct" about whether "the injury-in-fact question is common to the class." *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d at 107*; see *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at* ***[*26]*** *324*. To answer that question, **[**71]** the Third Circuit instructed in In re Hydrogen Peroxide Antitrust Litig. that a court must apply a two prong test, examining (1) whether the plaintiffs have established that their expert's theory of common impact is "plausible"; and, if so, (2) whether the plaintiffs have established by a preponderance of the evidence that the expert's plausible theory is "susceptible to proof at trial through available evidence common to the class." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 325*; see *Behrend v. Comcast Corp., 655 F.3d at 192-93*.

The Third Circuit recognized in In re Hydrogen Peroxide Antitrust Litig., and then reaffirmed in Behrend v. Comcast Corp., that an expert's theory that impact is capable of common proof at trial — by means of regression analysis or other common evidence — is not a question of fact necessarily capable of resolution by a preponderance of the evidence. The plausibility standard falls below a requirement of perfection, see *Behrend v. Comcast Corp., 655 F.3d at 204 n.13* (a court need not determine that a regression model "is perfect at the certification stage"), and above a "threshold," *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 321* (quotations **[**72]** omitted), or a "not fatally flawed" standard. *In re Initial Pub. Offerings Sec. Litig., 471 F.3d at 42*. Plausibility depends on the "ability to establish — whether through mathematical models or further data or other means — the key logical steps behind [the] theory." In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 25-26 (1st Cir. 2008).

By way of illustration, Dr. Willig criticizes Dr. Rausser's common factor regression model for looking at only a snapshot in time and therefore purportedly failing to examine changes in freight rates over time. See Willig Report ¶ 213. Whether this purported error discredits Dr. Rausser's common factor model is not a question that readily lends itself to resolution by a preponderance of the evidence; indeed, such a standard has not been adopted by any court and lacks intuitive force. See Oct. 6 Tr. at 20 (plaintiffs' counsel noting that "there has been no direction by any circuit, let alone this district or the Supreme Court that applies an evidentiary type standard to the assessment by the court as a whole of an expert report directed at proof of impact or fact of damage and amount of damage"). Instead, applying the first prong **[**73]** of the test set forth in In re Hydrogen Peroxide Antitrust Litig., the Court will evaluate whether this purported error precludes a determination that Dr. Rausser's theory of proof is "plausible," Behrend v. Comcast Corp., 655 F.3d at 204 n.13; In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 325, or "viable," In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d at 25 (1st Cir. 2008); and that his regression analysis is "feasible," In re EPDM Antitrust Litig., 256 F.R.D. at 96, or "workable." In re Amaranth Natural Gas Commodities Litig., 269 F.R.D. 366, 383 & n.118 (S.D.N.Y. 2010); see In re Ready-Mixed Concrete Antitrust Litig., 261 F.R.D. 154, 171 (S.D. Ind. 2009). [6]

If a court determines that the plaintiffs have established that their expert's theory of proof is plausible and that their expert's regression analysis, if any, is workable, then the next question for the court to resolve is whether the plaintiffs have established by a preponderance of the evidence that the plausible theory and workable regression are "susceptible to proof at trial through available evidence common to the class." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 325; see Behrend v. Comcast Corp., 655 F.3d at 192-93. In assessing that question in this case, the Court will resolve all factual disputes bearing on Dr. Rausser's and Dr. Willig's analyses — including what the parties refer to as subsidiary factual disputes underlying the experts' opinions — by a preponderance of the evidence. See In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at **[*27]** 320-25; see Oct. 6 Tr. at 30-31. And ultimately, the Court will determine which expert is correct, Dr. Rausser or Dr. Willig, on the question whether a workable regression model can be used to establish by a preponderance of the evidence that impact can be proven at trial with common evidence. See, e.g., Behrend v. Comcast Corp., 655 F.3d at 192-93; **[**75]** In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 325; Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d at 107.

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To summarize, the Court will resolve factual disputes relevant to Rule 23 requirements, and the Court will apply a preponderance of the evidence standard in examining whether plaintiffs have satisfied each of the requirements of Rule 23. Accordingly, **HN20**[] in order to certify plaintiffs' putative class, the Court "must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 320; see also Behrend v. Comcast Corp., 655 F.3d at 185 (plaintiffs must establish by a preponderance of the evidence that they would be able to prove through common evidence impact and a common methodology to quantify damages). As for the predominance requirement of Rule 23(b)(3), in examining Dr. Rausser's conclusion that impact can be established at trial with common evidence, the Court will determine whether Dr. Rausser's theory of proof is plausible and whether his regression models are workable; and, if so, whether plaintiffs have established by preponderance of **[**76]** the evidence that his theory and models are "susceptible to proof at trial through available evidence common to the class." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 325; see Behrend v. Comcast Corp., 655 F.3d at 192-93.

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[6] Defendants use the terms "feasible" and "viable" in evaluating the issue of common impact. See Willig Report ¶ 11 (stating that defendants asked Dr. Willig to determine "whether it is *feasible* for plaintiffs to demonstrate through common proof that members of the proposed class suffered economic injury") (emphasis added); Defs. Wal-Mart Reply Brief at 1 (stating that the central question before the Court is whether plaintiffs have proffered "a *viable* classwide method for proving injury at trial") (emphasis **[**74]** added).

Defendants contend that there are numerous factual disputes between the parties and their experts that are relevant to whether plaintiffs have satisfied the predominance requirement of *Rule 23(b)(3)*, and defendants further contend that Dr. Rausser's analysis is fatally flawed. Defendants identify four principal factual disputes and assert that each one bears on whether impact can be proven at trial with common evidence: (1) whether rate-based fuel surcharges frequently were used before the class period, see Defs. Wal-Mart Brief at 5; (2) whether "legacy shippers" — that is, shippers who paid a rate-based fuel surcharge during the class period under a contract that was entered into before July 1, 2003 — would have continued paying fuel surcharges, even absent the alleged conspiracy, see id.; see also Defs. Supp. Brief at 17; (3) whether captive shippers — that is, those shippers served by only one railroad or those shippers with no viable transport alternatives **[**77]** to the railroad that serves it — would have paid fuel surcharges, even absent the alleged conspiracy, see Defs. Wal-Mart Brief at 6; Defs. Supp. Brief at 18 & n.10; and (4) whether some class members received concessions from a defendant on certain aspects of their rail transportation agreement in exchange for acceptance of the defendant's fuel surcharge. See Defs. Wal-Mart Brief at 6; Defs. Supp. Brief at 19. As defendants describe it, the Court's resolution of each of these factual disputes in plaintiffs' favor is a necessary condition for class certification; defendants contend that these disputes "must be resolved" in examining whether to certify plaintiffs' putative class. Defs. Wal-Mart Brief at 6; see Defs. Supp. Brief at 19-20.

The Court agrees with defendants that these factual disputes are relevant to *Rule 23(b)(3)*'s predominance requirement — primarily, whether plaintiffs can show that impact is capable of proof at trial through evidence that is common to the class. Regarding, for example, the issue of concessions, if shippers received concessions in the form of base rate discounts in exchange for the application of a fuel surcharge, then, as plaintiffs' expert himself acknowledges, **[**78]** the impact for those shippers "wouldn't have been common to others" who did not receive such discounts. 1st Rausser Dep. at 272; see also id. at 270 (Dr. Rausser, acknowledging that "any coordinated program that focuses just on a part of the pricing can be unwound or made far less effective if there is a change in the base pricing"). Going further, if the fuel surcharge applied to a shipper "was **[*28]** exactly offset by the base rate," then, as plaintiffs' expert states, "there would be no injury." 2d Rausser Dep. at 208. [7]

Defendants and their expert contend that some shippers included within plaintiffs' class were not harmed by the alleged conspiracy because they received contract concessions in the form of base rate discounts. And defendants say that determining which shippers received such discounts requires individualized evidence and analysis that precludes a finding that impact can be proven on a class-wide basis with common evidence. Plaintiffs and their expert disagree, arguing that there is no evidence of widespread discounting and any examples of discounting are anomalies that do not preclude a finding that impact can be proven on a class-wide basis with common evidence. Because this dispute is relevant to whether common evidence can be used to establish impact at trial, the Court must resolve it by a preponderance of the evidence — even though it plainly is an issue **[**80]** enmeshed in the factual and legal issues comprising the merits of plaintiffs' claim.

Although the Court agrees with defendants that it must resolve this (and other) factual disputes, the Court disagrees with defendants that the facts fall in their favor at this stage. As discussed below, the Court finds by a preponderance of the evidence that the fuel surcharge programs applied by defendants before the class period were nothing like the widespread application of defendants' more aggressive, standardized fuel surcharge programs during the class period; that these standardized fuel surcharges were applied uniformly, to all or virtually all class members; and that there is no evidence of widespread discounting of base rates in exchange for application of fuel surcharges, and that any such discounting in the record is an anomaly that does not preclude a

[7] To be clear on terms, as discussed below, such an exact offset between a fuel surcharge and a base rate would mean that an individual plaintiff has no claim for damages, but not necessarily that that plaintiff was not injured by the defendants' alleged conspiracy. See, e.g., *In re EPDM Antitrust Litig., 256 F.R.D. at 88* ("[I]t is possible for a plaintiff to suffer antitrust injury-in-fact and yet have no damages because it has taken steps to mitigate the actual price paid through rebates, discounts, and other non-price factors . . . . By expending resources to negotiate down from the supracomeptitive prices established by the cartel, plaintiffs who have suffered no damages **[**79]** may still have suffered an injury-in-fact from the antitrust conspiracy. The fact that a plaintiff may have successfully employed bargaining power to fend off the *effect* of the conspiratorial practices does not mean that it has not been put in a worse position but-for the conspiracy.") (emphasis in original); see infra at 115-16.

finding of predominance. Furthermore, the Court credits Dr. Rausser's conclusion that impact and damages are capable of proof at trial with common evidence. The Court finds that Dr. Rausser's economic regression analysis is workable, and that he presents a theory of proof that is plausible and susceptible to proof at trial through available **[**81]** evidence common to the class. [8]

IV. *RULE 23(a)* FINDINGS AND CONCLUSIONS

A. Two Implied Requirements

1. Class Definition

HN22[] The first implied requirement of *Rule 23(a)* is that the class must be "sufficiently defined so as to be identifiable as a class." *Vigus v. Southern Ill. Riverboat/Casino Cruises, Inc., 274 F.R.D. at 235*; see also *Johnson v. District of Columbia, 248 F.R.D. 46, 52 (D.D.C. 2008)*; *Pigford v. Glickman, 182 F.R.D. 341, 346 (D.D.C. 1998)*. "The requirement that a class be clearly defined is **[**82]** designed primarily to help the trial court manage the class." *Pigford v. Glickman, 182 F.R.D. at 346*. This requirement "is not designed to be a particularly stringent test, but plaintiffs must at least be able to establish that 'the general outlines of the members of the class are determinable at the outset of the litigation.'" Id. (quoting 7A **[*29]** CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1790, at 118). "In other words, the class must be sufficiently definite 'that it is administratively feasible for the court to determine whether a particular individual is a member.'" Id. (quoting 7A FEDERAL PRACTICE & PROCEDURE, supra, § 1760, at 121). A court therefore should deny class certification "where the class definitions are overly broad, amorphous, and vague, or whether the number of individualized determinations required to determine class membership becomes too administratively difficult." *Perez v. Metabolife Int'l, Inc., 218 F.R.D. 262, 269 (S.D. Fla. 2003)*; see also *Johnson v. District of Columbia, 248 F.R.D. at 52*.

In this case, plaintiffs seek certification of the following class:

> All entities or persons that at any time from July 1, 2003 until **[**83]** December 31, 2008 (the "Class Period") purchased rate-unregulated rail freight transportation services directly from one or more of the Defendants, as to which Defendants assessed a stand-alone rail freight fuel surcharge applied as a percentage of the base rate for the freight transport (or where some or all of the fuel surcharge was included in the base rate through a method referred to as "rebasing") ("Fuel Surcharge").
> Excluded from this Class definition are (a) Defendants, any subsidiaries or affiliates of Defendants, any of Defendants' co-conspirators, whether or not named as a Defendant in the Complaint, and all federal governmental entities, and (b) all entities or persons that paid a Fuel Surcharge directly to any of the Defendants solely pursuant to a railroad-shipper contract that was (i) entered into before July 1, 2003, and (ii) provided for a stand-alone Fuel Surcharge to be paid under a predetermined formula specifically set forth in the contract.

Class Mot. at 1. [9]

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[8] The findings set forth in this Opinion are made "only for purposes of class certification and [are] not binding on the trier of facts" on the merits at trial. *In re Initial Pub. Offerings Sec. Litig., 471 F.3d at 41*; see *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 318* (***HN21***[] a court's findings "for the purpose of class certification are conclusive on that topic," but "do not bind the fact-finder on the merits"); see also *Behrend v. Comcast Corp., 655 F.3d at 190*. These findings therefore "'may be revised (or wholly rejected) by the ultimate factfinder[.]'" *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 318 n.19* (quoting *Unger v. Amedisys Inc., 401 F.3d 316, 323 (5th Cir. 2005))*.

[9] During the class certification motions hearing, the Court noted that the class definition proposed by plaintiffs in their motion papers is different from the class definition proposed by plaintiffs in their **[**84]** second consolidated amended complaint. See Oct. 7 Tr. at 331. Compare Class Mot. at 1, with 2d Am. Compl. ¶ 38. In view of some case law suggesting that a district court may be bound by the class definition set forth in a complaint, see *Berlowitz v. Nob Hill Masonic Mgmt., Inc., Civil Action No. 96-1241, 1996 U.S. Dist. LEXIS 22599, 1996 WL 724776, at *2 (N.D. Cal. Dec. 6, 1996)*; see also *Brewer v. Salyer, Civil Action No.*

Defendants contend that plaintiffs' class definition "renders determining which shippers would actually be in the proposed class extremely difficult, if not impossible." Class Opp. at 75. According to defendants, there are two problems with plaintiffs' proposed class: (1) there is no "[e]asy [w]ay" to determine whether freight traffic qualifies as rate-unregulated, id.; and (2) plaintiffs propose no method to identify shippers with "rebased" rates. Id. at 76.

As discussed, plaintiffs' proposed class is specifically limited to "rate-unregulated" traffic. Class Mot. at 1. Plaintiffs have defined the term "unregulated" as referring to "rail freight transportation services where the rates are set by private contracts or through other means exempt from rate regulation under federal law." 2d Am. Compl. ¶ 1. Defendants contend that it is difficult to discern whether freight traffic moves under a regulated common carrier authority or, instead, under an unregulated contract. Class Opp. at 75. According to defendants, **[**86]** determining whether freight traffic is rate-regulated or rate-unregulated requires individualized inquiries viewed in light of the parties' intent. Id. Consequently, defendants contend that "[d]etermining **[*30]** class membership would require individualized inquiries, making class certification inappropriate." Id. at 76.

The Court disagrees with defendants. As plaintiffs point out, the STB ruling in 2007 distinguished between rate-regulated and rate-unregulated traffic, expressly stating that its ruling applied only to the former. See Class Reply at 39. Neither the STB nor defendants asserted that it was too difficult to determine which traffic the ruling covered. Id. Furthermore, in this case defendants have produced during discovery transaction data for rate-unregulated traffic without arguing that it was too difficult to determine which transaction data related to that type of traffic. Id. And finally, defendants' expert, Dr. Willig, has not claimed any difficulty in distinguishing between rate-regulated and rate-unregulated traffic. To the contrary, Dr. Willig was able to quantify both the amount of rate-unregulated traffic during the class period and the revenue it produced for defendants. **[**87]** See Willig Report ¶ 24 ("[S]hippers of unregulated traffic with revenue-based FSCs[, that is, fuel surcharges,]generated roughly 72 million carloads of rail traffic during the class period and $110 billion in revenue for defendants. This reflects roughly 56 percent of defendants' total non-regulated traffic over this period. For the class period as a whole, there were nearly 30,000 shippers of unregulated traffic with revenue-based FSCs[.]"); see also 1st Rausser Report at 89 (noting that "the data supplied by BNSF . . . records whether the shipment was regulated or not"). Dr. Willig's report therefore belies defendants' claim that it is too difficult to determine whether rail traffic qualifies as rate-unregulated.

Defendants' second argument focuses on plaintiffs' proposed inclusion of shippers who paid "rebased" rates. As plaintiffs describe it, at some point during the alleged conspiracy NS "engaged in something that has come to be known in this case as rebasing; namely folding at least part of the fuel surcharge into the base rate." Oct. 6 Tr. at 133. Defendants contend that plaintiffs "do not identify . . . shippers" who paid a rebased rate "or propose any methodology for doing **[**88]** so." Class Opp. at 76. And in the absence of any viable methodology, defendants contend that it is impossible to determine what shippers are in the class due to rebasing. Id.

The Court disagrees with defendants. Plaintiffs assert that shippers who paid a rebased rate simply paid a new base rate with a portion of the previous supra-competitive fuel surcharge "bake[d]" in. Class Reply at 40 (citing HD Ex. 83, Lawson Dep. at 72); see Class Mot. at 48. As Dr. Rausser explains it, NS' rebasing strategy "effectively made permanent a surcharge based on a WTI of $64 by folding that amount into base rates, and supplemented that with a new stand-alone fuel surcharge anytime the WTI exceeded $64." 1st Rausser Report at 117 n.250. And Dr. Rausser has accounted for NS' alleged rebasing in his analysis. See id. ("As my analysis considers the gross price

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06-1324, 2009 U.S. Dist. LEXIS 61285, 2009 WL 2019923, at *3 (E.D. Cal. July 8, 2009), the Court directed two questions to the parties at the motions hearing: (1) How do the plaintiffs want the class defined?; and (2) Is there some obligation on the plaintiffs to move to amend their amended complaint to match the definition set forth in the class certification motion? See Oct. 7 Tr. at 331.

In response to the Court's two questions, the parties filed a joint submission regarding the class definition in which they agreed that a formal amendment to plaintiffs' complaint was "not necessary" and that the Court "may decide plaintiffs' motion for class certification based on the proposed class definition in the motion, and on the record before it." Joint Class Definition Submission at 1. In accordance with the parties' joint submission, **[**85]** the Court has decided plaintiffs' motion for class certification based on the proposed class definition in their motion, not the definition in their second consolidated amended complaint.

it will not be affected by NS' change to their fuel surcharge program" by means of rebased rates.); see also id. at 47 n.105 ("[M]ost shipments still received a fuel surcharge on top of that new base rate[.]").

The Court therefore finds by a preponderance of the evidence that plaintiffs' proposed class is defined so as "to establish that 'the general **[**89]** outlines of the membership of the class are determinable at the outset of the litigation.'" *Pigford v. Glickman, 182 F.R.D. at 346* (quoting 7A FEDERAL PRACTICE & PROCEDURE, supra, § 1790, at 118). Plaintiffs have satisfied their burden of showing that "'it is administratively feasible for the court to determine whether a particular individual is a member.'" Id. (quoting 7A FEDERAL PRACTICE & PROCEDURE, supra, § 1760, at 121).

2. Named Representatives Within the Putative Class

HN23[] The second implied requirement of *Rule 23(a)* is that the named representative plaintiffs must "fall within the class." *Vigus v. Southern Ill. Riverboat/Casino Cruises, Inc., 274 F.R.D. at 235*. Defendants appear to argue that some (or perhaps all) of the proposed representatives are not part of the putative class. See Class Opp. at 80 (stating that "[a] class cannot be certified where the proposed representatives would not be members **[*31]** of the class."). The basis for that argument, however, is unclear, and the Court is not persuaded. Plaintiffs assert, and defendants do not dispute, that during the class period each of the eight named representatives directly purchased from one or more of the defendants rail freight **[**90]** services as to which a fuel surcharge was applied. See Class Mem. at 1; id. at 58-60. Consequently, the Court finds by a preponderance of the evidence that the second implied requirement of *Rule 23(a)* is met: each of the named representative plaintiffs falls within the putative class.

B. Four Express Requirements

1. Numerosity

HN24[] The first express requirement of *Rule 23(a)* is numerosity: the putative class must be "so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*. "Typically, a class in excess of 40 members is sufficiently numerous to satisfy this requirement." *Lindsay v. Government Emples. Ins. Co., 251 F.R.D. at 55*. "Mere conjecture, without more, is insufficient to establish numerosity, but plaintiffs do not have to provide an exact number of putative class members in order to satisfy the numerosity requirement." *Pigford v. Glickman, 182 F.R.D. at 347*.

Plaintiffs assert that defendants' transaction data show that "tens of thousands of shippers" are included in the putative class. Class Mem. at 56. Defendants do not contest the numerosity requirement and themselves acknowledge that plaintiffs' putative class includes approximately 30,000 shippers. See, e.g., **[**91]** Oct. 7 Tr. at 258; see also Willig Report ¶ 24 ("For the class period as a whole, there were nearly 30,000 shippers of unregulated traffic with revenue-based FSCs[.]"). ***HN25***[] "When the class is large" — here, in the tens of thousands — "numbers alone are dispositive[.]" *Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. at 306*. The Court therefore finds that plaintiffs have satisfied their burden of showing by a preponderance of the evidence that the putative class "is so numerous that joinder of all members is impracticable[.]" *Fed. R. Civ. P. 23(a)(1)*.

2. Commonality

HN26[] The second express requirement of *Rule 23(a)* is commonality: there must be "questions of law or fact common to the class[.]" *Fed. R. Civ. P. 23(a)(2)*. "Not every issue of law or fact [need] be the same for each member." *Lindsay v. Government Emples. Ins. Co., 251 F.R.D. at 55* (quotations omitted) (alteration in original). "Rather, the commonality test is met when there is at least one issue . . . the resolution of which will affect all or a significant number of the putative class members." Id. (quotations omitted) (alteration in original).

Because the commonality requirement is satisfied "by a single common issue," courts **[**92]** have noted that it often is easily met. *Taylor v. District of Columbia Water & Sewer Auth., 241 F.R.D. 33, 37 (D.D.C. 2007)*. But as the Supreme Court recently made clear, what matters for purposes of commonality "is not the raising of common questions — even in droves — but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. at 2551* (quotations omitted).

HN27[] In antitrust class actions, "numerous courts have held that allegations concerning the existence, scope, and efficacy of an alleged antitrust conspiracy present important common questions sufficient to satisfy the commonality requirement[.]" *Meijer Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. at 300* (quotations omitted). As plaintiffs assert, and as defendants do not dispute, the question whether defendants engaged in a conspiracy — the first element of plaintiffs' claim — is an issue that is common to all class members because the answer to that question will focus exclusively on defendants' conduct. See Class Mem. at 57; see also Oct. 7 Tr. at 161 (defendants' counsel, acknowledging that "whether there was or was **[**93]** not a conspiracy is in fact capable of common proof"). The Court therefore finds by a preponderance of the evidence that "there are questions of law or fact common to the class[.]" *Fed. R. Civ. P. 23(a)(2)*.

[*32] 3. Typicality

HN28[] The third express requirement of *Rule 23(a)* is typicality: "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class[.]" *Fed. R. Civ. P. 23(a)(3)*. Typicality is "intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of the absent class members so as to assure that the absentees' interests will be fairly represented." *Pigford v. Glickman, 182 F.R.D. at 349* (quotations omitted). "[I]f the class representative's claims arise from the same events, practice, or conduct, and are based on the same legal theory as those of other class members, the typicality requirement is satisfied." *Lindsay v. Government Emples. Ins. Co., 251 F.R.D. at 55* (quotations omitted); see *Pigford v. Glickman, 182 F.R.D. at 349*.

"The facts and claims of each class member do not have to be identical to support a finding of typicality . . . , rather, the requirement **[**94]** goes to whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. at 301* (citation and quotations omitted)); see also *Johnson v. District of Columbia, 248 F.R.D. at 53*. "The requirement has been liberally construed by courts . . . [and] in the antitrust context, typicality will be established by plaintiffs and all class members alleging the same antitrust violations by defendants." *Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. at 301* (alternations in original) (quotations omitted).

Plaintiffs contend that the typicality requirement easily is satisfied in this case because "all named Plaintiffs and all Class members seek overcharge damages pursuant to an identical price-fixing claim under *Section 1* of the Sherman Act." Class Mem. at 58. As plaintiffs describe it, "[t]he **[**95]** claims of the named Plaintiffs and the absent Class members alike arose out of the same course of events: Defendants' conspiracy to impose stand-alone, rate-based Fuel Surcharges in order to raise shipping prices across the board." Id.

Defendants disagree. They argue that none of the eight proposed class representatives is typical. See Class Opp. at 79. First, defendants argue that shippers that paid a fuel surcharge before July 1, 2003 are not properly members of the class, and shippers that are served by only one defendant can have no claim because there was no competition among defendants for their business that could have been affected by the alleged conspiracy. See id. According to defendants, this disqualifies all of the eight proposed class representatives. Id.

The Court finds defendants' arguments inapposite because the typicality requirement focuses on the "*claims* of the representative, not the individual characteristics of the [named] plaintiff[s]." *Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. at 301* (quotations omitted) (emphasis added). The claims of the eight named plaintiffs and those of the absentee class members arose from the same course of events: defendants' **[**96]** alleged conspiracy to impose supra-competitive fuel surcharges across-the-board on all shippers. And the eight named plaintiffs and the absentee class members seek the same relief: overcharge damages under *Section 1* of the Sherman Act.

Next, defendants target two of the named representatives, Dust Pro and Nystar, arguing that each one faces a disqualifying problem. As for Dust Pro, defendants argue that the shipper "generally did not pay for its shipments — it liquidated the business while owing a substantial debt to UP — and has no evidence that the dollar total of fuel surcharges it actually paid even approached the amount of its unpaid debt[.]" Class Opp. at 79 n.89. Defendants, however, cite no authority for their claim that Dust Pro's alleged "non-payment" should disqualify it as a class representative. Nor can the Court surmise any reason why Dust Pro should be disqualified.

Regarding Nystar, defendants argue that this named plaintiff should be disqualified because, according to defendants, it spoliated evidence. Class Opp. at 80-81. ***HN29***[] "The requirement that the proposed representatives **[*33]** not be subject to *unique defenses*" — which includes spoliation — "can be seen as an offshoot of **[**97]** the requirement that the representative have circumstances that are sufficiently similar to those of the class." *In re Schering Plough Corp. ERISA Litig., 589 F.3d 585, 598 (3d Cir. 2009)* (emphasis in original). Because *Rule 23* requires that both the claims and the defenses be typical, a proposed class representative will not satisfy *Rule 23(a)(3)* "if the representative is subject to a unique defense that is likely to become a major focus of the litigation." Id. (quotations omitted); see also *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 180 (2d Cir. 1990)* ("[T]here is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.").

Spoliation of evidence constitutes a unique defense, and courts have concluded that in some circumstances defending against a charge of spoliation of evidence can render a plaintiff an inadequate class representative. See, e.g., *Falcon v. Philips Elecs. N. Am. Corp., 304 Fed. App'x 896, 897 (2d Cir. 2008)* (district court did not abuse its discretion in concluding that defending against a charge of spoliation rendered a plaintiff an inadequate class representative). **[**98]** The presence of a unique defense, however, "will not . . . destroy typicality [unless it] will skew the focus of the litigation and create a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." *Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. at 302* (quotations omitted) (alteration in original). In this case, the Court agrees with plaintiffs that at this stage the spoliation issue is hypothetical and speculative, see Class Reply at 39, and the Court is satisfied that this alleged unique defense presents a question of law and fact "that can readily be resolved by the Court without skewing the focus of the litigation or creating a significant danger of distracting [plaintiffs'] ability to pursue the interests of the absent class members." *Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. at 302* (quotations omitted).

Finally, defendants argue that a "significant number" of putative class members' contracts include broad arbitration clauses. See Class Opp. at 78. Defendants state that they "intend, as they have a right to do, to rely on [those putative class members'] agreements to arbitrate," which would **[**99]** include, according to defendants, the Sherman Act claim alleged in this case. Id. at 78-79. Thus, defendants argue that shippers whose contracts include arbitration provisions cannot pursue their claims in this Court and, as a result, cannot be part of the class that plaintiffs seek to certify here. Id. at 79. And defendants assert that the Court should consider these agreements to arbitrate — constituting, as defendants see it, affirmative defenses — in making its class certification decision. Id. (citing *Rodney v. Northwest Airlines, Inc., 146 Fed. App'x 783, 786 (6th Cir. 2005)*. Defendants do not assert, however, that any of the eight named plaintiffs have contracts containing arbitration clauses; nor do defendants assert that they have initiated any arbitrations. See Class Reply at 40.

While defendants do not suggest under what part of *Rule 23* the Court should consider their argument regarding arbitration, ***HN30***[] courts generally have considered the question of defenses in the context of examining the typicality and commonality requirements of *Rule 23(a)*, as well as the predominance requirement of *Rule 23(b)(3)*. See, e.g., *In re Schering Plough Corp. ERISA Litig., 589 F.3d at 598* (question **[**100]** of unique defenses is an offshoot of typicality requirement); *Gene & Gene LLC v. BioPay LLC, 541 F.3d 318, 327 (5th Cir. 2008)* ("[T]he predominance of individual issues necessary to decide an affirmative defense may preclude class certification.") (quotations omitted); *Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 438 (4th Cir. 2003)* ("[A]ffirmative defenses must be factored into the calculus of whether common issues predominate."). Regardless of which part of *Rule 23* applies, however, the Court concludes that "the *possible* arbitration of some class members" does not, "by itself, defeat class certification." *Lerner v. Haimsohn, 126 F.R.D. 64, 66 (D. Colo. 1989)* (emphasis added). Neither plaintiffs nor defendants have initiated arbitration, and the Court concludes that defendants' assertion regarding their "inten[t]" to **[*34]** initiate arbitration, Class Opp. at 78, is too speculative to defeat predominance, much less commonality or typicality.

The Court finds that the claims of the eight named class representatives arise from the "same events, practice, or conduct, and are based on the same legal theory as those of other class members." *Lindsay v. Government Emples. Ins. Co., 251 F.R.D. at 55* **[**101]** (quotations omitted). Consequently, plaintiffs have satisfied their burden of showing by a preponderance of the evidence that "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" *Fed. R. Civ. P. 23(a)(3)*.

4. Adequacy of Representation

HN31[] The fourth and final express requirement of *Rule 23(a)* is adequacy. It requires that "the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. Thus, this requirement "necessitates an inquiry into the adequacy of representation, including the quality of class counsel, any disparity of interest between class representatives and members of the class, communication between class counsel and the class and the overall context of the litigation." *Pigford v. Glickman, 182 F.R.D. at 350*. "A proposed representative is 'adequate' if (1) his interests do not conflict with those of other class members, and (2) he will vigorously prosecute the interests of the class through qualified counsel." *Lindsay v. Government Emples. Ins. Co., 251 F.R.D. at 55*.

Plaintiffs assert that the eight named representative plaintiffs have shown a willingness to step forward, **[**102]** incur substantial discovery burdens, and prosecute this case in the best interests of the members of the putative class. Class Mem. at 61. Furthermore, plaintiffs assert that there are no conflicts with the unnamed members of the class that would warrant denial of class certification. Id. Finally, plaintiffs contend that they have protected the interests of absent class members through the selection of qualified class counsel. As plaintiffs describe it, interim co-lead class counsel Quinn Emanuel and Hausfeld

> — firms that have extensive experience in both antitrust litigation in particular and class action litigation generally — have vigorously prosecuted this action, expending substantial time and resources in investigating the claims, overseeing the production and review of documents, taking and defending of depositions, working with experts, and briefing and arguing motions.

Id. at 62. Defendants present mostly the same arguments regarding adequacy as they did for typicality. See Class Opp. at 79-80. For the reasons just discussed, see *supra at 49-54*, the Court rejects them.

In addition, defendants argue that Donnelly Commodities, Inc. should be disqualified because it filed for bankruptcy **[**103]** and is currently under the control of an appointed trustee. Class Opp. at 81-82. According to defendants, when a class representative has filed for bankruptcy under Chapter 7 and has had a trustee appointed, an "'inherent' conflict of interest exists." Id. at 82 (quoting *Dechert v. Cadle Co., 333 F.3d 801, 803 (7th Cir. 2003))*. As defendants see it, this is because of the trustee's "'dual role as class representative and creditors' representative.'" Id. (quoting *Dechert v. Cadle Co., 333 F.3d at 803*). But the authority upon which defendants rely for that proposition, Dechert v. Cadle Co., rejected a "flat rule that a trustee in a bankruptcy . . . can never be a class representative." *Dechert v. Cadle Co., 333 F.3d at 803*. And other courts have allowed such representation where, as here, "an additional representative [is designated] to appear as plaintiff along with the Trustee[.]" *Ernst & Ernst v. U.S. Dist. Court for the S. Dist. of Tex., 457 F.2d 1399, 1400 (5th Cir. 1972)*. In this case, of course, there are eight representative plaintiffs only one of which, Donnelly Commodities, Inc., is under the control of a trustee in bankruptcy. The Court therefore sees no basis at this stage **[**104]** to disqualify Donnelly Commodities, Inc. as a named representative.

Finally, as for the quality of class counsel, the Court agrees with plaintiffs' undisputed assertion that they have protected the interests of absent class members through the selection of class counsel. See Class Mem. at 62-63. As the Court previously has stated, the firms Quinn Emanuel and Hausfeld both **[*35]** have sufficient resources and expertise to prosecute this matter in the putative class' best interests. See Memorandum Op. & Order at 3, Mar. 13, 2009 [Dkt. No. 232]. As plaintiffs state:

> Quinn Emanuel and Hausfeld LLP have already demonstrated their ability to work well together, coordinate the efforts of the various other firms also representing plaintiffs in this multidistrict litigation, and generate work

> product at the highest professional levels. Together, these firms are extraordinarily well situated to assess how Plaintiffs' case will be presented at trial, and will be prepared to try this case should that be necessary.

Class Mem. at 63. Defendants do not disagree, and neither does this Court. [10]

The Court finds that plaintiffs have met their burden of showing by a preponderance of the evidence that "the representative parties will fairly and adequately protect the interests of the class," *Fed. R. Civ. P. 23(a)(4)*, because the interests of the eight named representatives do not conflict with those of other class members, and because they will vigorously prosecute the interests of the class through qualified counsel. *Lindsay v. Government Emples. Ins. Co., 251 F.R.D. at 55*.

V. *RULE 23(b)(3)* FINDINGS AND CONCLUSIONS

Because plaintiffs have satisfied all of the threshold *Rule 23(a)* requirements by a preponderance of the evidence, the Court now must conduct a "rigorous analysis" of the requirements of *Rule 23(b)(3)*. See *In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d at 611*; *Madison v. Chalmette Refining, L.L.C., 637 F.3d 551, 554 (5th Cir. 2011)*; see also *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. at 2551*. In examining whether plaintiffs have satisfied their burden **[**106]** under *Rule 23(b)(3)*, the Court has resolved the factual disputes between the parties and their experts that are relevant to the requirements for class certification — even when such resolution requires considerations enmeshed in the factual and legal issues comprising the plaintiffs' claim on the merits — and the Court has applied a preponderance of the evidence standard of proof in doing so.

A. Predominance

HN32[] *Rule 23(b)(3)* requires that the Court "find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members[.]" *Fed. R. Civ. P. 23(b)(3)*. As discussed, see supra at 25, in examining the predominance requirement under *Rule 23(b)(3)*, a court's rigorous analysis "'begins . . . with the elements of the underlying cause of action.'" *Messner v. Northshore Univ. HealthSystem, 669 F.3d at 815* (quoting *Erica P. John Fund, Inc. v. Halliburton, Co., 131 S. Ct. at 2184*). The Court must "scrutinz[e] plaintiffs' legal causes of action to determine whether they are suitable for resolution on a classwide basis." *McCarthy v. Kleindienst, 741 F.2d 1406, 1412 n.6, 239 U.S. App. D.C. 247 (D.C. Cir. 1984)*. The Court therefore examines "the elements of plaintiffs' claim **[**107]** through the prism of *Rule 23* to determine" whether plaintiffs have satisfied the predominance requirement. *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311* (quotations omitted). If proof of the essential elements of the claim requires individual treatment, then common questions do not predominate and class certification is "unsuitable." Id. (quotations omitted).

In this case, ***HN33***[] plaintiffs allege that defendants engaged in price fixing, in violation of *Section 1* of the Sherman Act. Thus, to prevail on the merits of their claim at trial, plaintiffs will have to prove three elements: (1) a violation of the antitrust laws — here, *Section 1* of the Sherman Act; (2) individual impact resulting from that violation; and (3) measurable damages. See *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311*. At the class certification stage, plaintiffs' burden is different: plaintiffs must show by a preponderance of the evidence that the elements of their claim are "*capable of proof* at **[*36]** trial through evidence that is common to the class rather than individual to its members." *Id. at 311-12* (emphasis added).

1. Violation of ***Antitrust Law***

Plaintiffs have alleged that defendants engaged in a horizontal **[**108]** price fixing conspiracy to coordinate their fuel surcharge programs in order to effect an overall supra-competitive total price increase on their customers, in violation of *Section 1* of the Sherman Act. See Am. Compl. ¶¶ 1-2. ***HN34***[] A horizontal price fixing conspiracy, as

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[10] Under *Rule 23(c)(1)(B)* and *(g)*, plaintiffs seek formal designation of Quinn Emanuel and Hausfeld as co-lead class **[**105]** counsel. See Class Mot. at 2; Class Mem. at 62 n.219. Upon consideration of the matters set forth in *Rule 23(g)*, the Court will grant plaintiffs' request and will designate these two firms as co-lead class counsel.

alleged here, is a *per se* violation of the Sherman Act. See, e.g., *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*; *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133-34, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*; *Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1334 (11th Cir. 2010)*. And the parties agree that this element of plaintiffs' claim is capable of proof at trial through evidence that is common to the class. See Class Mem. at 65-66; see Oct. 7 Tr. at 161 (defendants' counsel, acknowledging that "whether there was or was not a conspiracy is in fact capable of common proof, so that's really not at issue in the predominance analysis"). That is because plaintiffs' allegations of price fixing indisputably "will focus on the actions of the defendants, and, as such, proof for these issues will not vary among class members." *In re Vitamins Antitrust Litig., 209 F.R.D. at 264*; see *Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. at 308* (because alleged **[**109]** violation of the antitrust laws "relates solely to Defendants' conduct . . . proof for [this] issue will not vary among class members") (quotations omitted) (alteration in original). The Court therefore finds by a preponderance of the evidence that the first element of plaintiffs' claim is capable of proof at trial through evidence that is common to the class rather than individual to its members.

2. Impact

In this case, as in many antitrust cases, the second element of plaintiffs' claim —individual impact resulting from the alleged conspiratorial conduct (also referred to by the parties as "injury") — is the central issue. See Oct. 6 Tr. at 9; Defs. Wal-Mart Reply Brief at 1 ("The parties . . . agree that the central question here is whether Plaintiffs have met their burden . . . to show that common questions predominate over individual ones, which in turn requires that they proffer a viable classwide method for proving injury at trial."); see also *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311*.

HN35[] In examining whether impact is capable of common proof, it is important to note at the outset that this element involves two distinct components: injury-in-fact; and antitrust injury. **[**110]** See *Bassett v. National Collegiate Athletic Ass'n, 528 F.3d 426, 434 (6th Cir. 2008)* ("[A] private antitrust plaintiff, in addition to having to show injury-in-fact and proximate cause, must allege, and eventually prove, antitrust injury.") (quotations omitted); *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d at 106*; see also *In re Currency Conversion Fee Antitrust Litig., 264 F.R.D. at 114*; *Mazanderan v. Independent Taxi Owners' Ass'n, Inc., 700 F. Supp. 588, 590 (D.D.C. 1988)* (discussing the "two-fold requirement of individual economic injury to [a] plaintiff that is grounded in the antitrust laws"). These two components pose "two distinct questions": injury-in-fact presents the "familiar factual question whether the plaintiff has indeed suffered harm," whereas antitrust injury presents "the legal question whether any such injury is the 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d at 106* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*). Antitrust injury is injury to competition, **[**111]** not just injury to an individual. *Andrx Pharms., Inc. v. Biovail Corp. Int'l, 256 F.3d 799, 812, 347 U.S. App. D.C. 178 (D.C. Cir. 2001)*. And the reason an antitrust plaintiff is required to prove antitrust injury is to ensure that a plaintiff can recover "only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (emphasis in original).

[*37] *1. Injury-in-fact.* The primary dispute in this case relates to the injury-in-fact component of the impact element. The parties vigorously dispute whether injury-in-fact can be established at trial with common evidence, and they have submitted expert reports by distinguished economists that reach diametrically opposed conclusions. Plaintiffs contend that they will prove injury-in-fact on a class-wide basis at trial "by showing that Defendants' conspiracy caused the Class members to pay supra-competitive prices during the Class Period." Class Mem. at 67. According to plaintiffs, the effect of defendants' alleged conspiracy was to impose "on all Class members coordinated Fuel Surcharges that rose in lockstep and resulted in across-the-board prices increases." Id. at 68.

Plaintiffs **[**112]** assert that they will show injury-in-fact "with public information, Defendants' documents, and witness testimony" — all of which, they contend, will be evidence that is common to the class. Class Mem. at 70. Specifically, plaintiffs assert that common evidence will show at trial that

- Defendants intended to use their coordinated Fuel Surcharge programs not as a means solely to recover fuel costs, but as a means to raise revenues and profits.

- Defendants[] intended their coordinated fuel surcharge programs to be applied across-the-board.
- Defendants each, and in coordination with each other, undertook during the Class Period to monitor success in achieving broad application o[f] the Fuel Surcharges.
- Defendants during the Class Period adopted policies precluding discounting to offset the Fuel Surcharges.
- Defendants recognized in internal documents that during the Class Period, the Fuel Surcharges generated revenues by raising prices paid by the Class far beyond Defendants' actual fuel costs.
- During the Class Period, the Fuel Surcharges were responsible in large part for very large increases in Defendants' revenues and profits.

Id. (citations omitted).

Plaintiffs further contend that **[**113]** the analysis of their expert, Dr. Gordon Rausser, confirms that injury-in-fact can be established at trial with common evidence and economic analysis. See Class Mem. at 71. [11] Dr. Rausser explains that he has examined the rail freight industry and concludes that certain structural factors make it so that "had a conspiracy occurred it would have succeeded in subjecting the Class to a common" injury-in-fact. 2d Rausser Report at 80; see 1st Rausser Report at 7-8. Furthermore, Dr. Rausser has developed two economic regression models and has analyzed 100 percent of defendants' transaction data during the alleged conspiracy. 2d Rausser Report at 91-92, 96. Dr. Rausser's regression analyses purportedly substantiate his theory of common proof, showing that

- [Defendants] did implement a common rate increase across the Class through their use of the fuel surcharge applied as a percentage of base rates.

- Common factors such as shipment weight, distance, route and commodity type, among others, predominate over individual factors in the determination of freight rates. These common factors can be measured using the Defendants' transaction data and used in a common analysis to identify and quantity **[**114]** the harm experienced by the Class.

- Defendants' transaction data reveals that there was no material discounting of base rates to offset the fuel surcharges that were applied to shipments made by **[*38]** the Class. As a result, Class members commonly experienced price increases from the Defendants' actions irrespective of the commodity they were shipping. . . .
- Class members paid significantly higher prices to Defendants for rail freight transportation during the Class Period than before and that these higher prices are not explainable by price determinants other than the conspiracy.

1st Rausser Report at 7-8. Thus, according to Dr. Rausser, "[t]here was a common impact of Defendants' alleged conspiracy on the Plaintiffs and the Class which can be demonstrated through evidence and economic analysis common to the Class[.]" 1st Rausser Report at 4.

Defendants disagree that injury-in-fact can be proven at trial with common evidence. As defendants frame the issues, in order to demonstrate that plaintiffs' claims are suited for class treatment

> Plaintiffs must prove . . . that they have a method of providing a common answer to each of the core questions each class member would have to answer had it brought its own claim: (i) *Did I pay a fuel surcharge (or higher fuel surcharge) because of the alleged conspiracy?* and (ii) *Did payment of a fuel surcharge cause me to pay more for shipping than it would have otherwise paid?*

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[11] Dr. Rausser provides a detailed discussion of his qualifications and background in his expert report. See 1st Rausser Report at 1-2. In summary, Dr. Rausser is the Robert Gordon Sproul Distinguished Professor at the University of California at Berkeley and the former Dean of that University's College of Natural Resources. Class Mem. at 4 n.3. Dr. **[**115]** Rausser's work focuses on the subjects of economics, applied economics, econometrics, and statistics. See id. He has published more than 250 articles, books, and book chapters, and has written more than 100 commissioned papers, governmental reports, and work papers. Id. Dr. Rausser served as the Chief Economist to the Agency for International Development in Washington, D.C. from 1988 to 1990, and as a Senior Economist at the President's Council of Economic Advisors from 1986 to 1987. Id.

Defs. Wal-Mart Brief at 2 (emphasis in original). Defendants contend that the facts in this case make clear that rate-based fuel surcharges **[**116]** were widely used before the start of the alleged conspiracy; that the use of fuel surcharges was growing; and that even Dr. Rausser concedes that some class members would have paid rate-based fuel surcharges absent the alleged conspiracy. See id. Given these proffered facts, among others, defendants conclude that neither plaintiffs nor their expert "has offered any way to use common evidence to show that, absent the alleged conspiracy, every shipper would have paid a lower fuel surcharge or none at all." Id. According to defendants, plaintiffs therefore have failed to show that they have a common answer to the first question quoted above. Id.

As for the second question quoted above, defendants contend that it, too, cannot be answered with common evidence. According to defendants, the facts show that "many shippers received contract concessions, including lower base rates than the railroads initially offered, in exchange for accepting a fuel surcharge[.]" Defs. Wal-Mart Brief at 6. Because the alleged conspiracy was only directed at a portion of the total price of shipping, defendants say that any class member who obtained anything of value in exchange for accepting a fuel surcharge **[**117]** may not have suffered injury-in-fact. See Class Opp. at 41. And in view of the purported evidence that "some (but not all) shippers made trade-offs for fuel surcharges," id., defendants contend that individualized issues predominate because "it is necessary to examine the circumstances and negotiating history of each shipper to prove that it did not negotiate offsetting savings and therefore pay a higher all-in price for shipping as a result of its having agreed to a fuel surcharge." Defs. Wal-Mart Brief at 2.

In support of their position that class certification is inappropriate in this case, defendants have submitted the expert report of Dr. Robert Willig. [12] As Dr. Willig explains, he was asked by defendants to address from an economic perspective "whether it is feasible for plaintiffs to demonstrate through common proof that members of the proposed class suffered economic injury"; "whether it is feasible to estimate each class member's **[*39]** damages on a class-wide basis"; and "to evaluate the damage methodology proposed by Professor Rausser as well as the analyses that support his conclusions." Willig Report ¶ 11.

As for the issue of injury-in-fact, Dr. Willig's overall conclusion is that assessing injury-in-fact "requires an in-depth individualized inquiry into the circumstances of the particular shipper." Willig Report ¶ 15. In arriving at this conclusion, Dr. Willig makes six principal points:

• First, "[t]he fact that shippers paid FSCs [fuel surcharges] is not common evidence of class-wide **[**119]** impact or damages assessment." Willig Report at 13.

• Second, "[t]he levels of the FSCs paid by shippers provide no common evidence of class-wide impact or damages assessment." Id. at 14.

• Third, "[t]he processes by which FSCs were applied to shipper rates preclude common evidence of class-wide impact or damages assessment." Id. at 16.

• Fourth, "[a]ll-in rates varied widely and contradict the possibility of common evidence showing class-wide impact." Id. at 18.

• Fifth, "Professor Rausser's attempts to show that common evidence can establish class-wide impact and assessment of damages fail to support his conclusion." Id. at 22.

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[12] Dr. Willig provides a detailed description of his qualifications and **[**118]** background in his expert report. See Willig Report ¶¶ 1-6. In summary, Dr. Willig has been a Professor of Economics and Public Affairs at Princeton University for over 30 years. Class Opp. at 6 n.2. He has written 75 articles on economics and a book on competition and the theory of industrial market structure. Id. His focus is on microeconomics, with particular specialization in industrial organization, and he teaches courses on microeconomics, regulation, antitrust, and competition policy. Id. Dr. Willig served as the Chief Economist in the Antitrust Division of the United States Department of Justice from 1989 to 1991. Id. He also has done research and economic analysis of the railroad industry, including testifying before the STB, and its predecessor, the ICC, about issues affecting the industry. Id.

• Sixth, "[m]embers of the proposed class have conflicting economic interests." Id. at 28.

2. Antitrust injury. Although it was not initially apparent from defendants' papers that they also dispute whether antitrust injury can be established at trial with common evidence, see Class Opp. at 50-56 (seemingly equating antitrust injury with injury-in-fact arguments); see also Oct. 7 Tr. at 172, defendants' counsel stated at oral argument that defendants do argue that some class members — specifically, captive shippers — cannot suffer antitrust injury. See Oct. 7 Tr. **[**120]** at 171-73. As discussed, ***HN36***[] antitrust injury is "'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d at 106* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 489*). As defendants see it, certain shippers in plaintiffs' putative class are "captive shippers," also referred to synonymously as "sole served" shippers. Oct. 6 Tr. at 30. Because of various factors, including geographic location, these shippers have "no option but to use a single railroad when it ships out of its place[.]" Oct. 7 Tr. at 172. Defendants contend that these captive shippers cannot as a matter of law suffer antitrust injury because they have "no reduction in competition" — having had no competition in the first place — "as a result of the alleged wrong." Id. And defendants argue that identifying such captive shippers requires individualized inquiry.

Plaintiffs disagree. Plaintiffs contend that defendants themselves, as well as defendants' expert, Dr. Willig, admit that captives shippers are subject to competitive pressures, see Oct. 7 Tr. at 304, and that **[**121]** Dr. Rausser's analysis confirms what defendants themselves have admitted. Id. at 304-05.

The Court first addressees two preliminary legal issues regarding the impact element: the number of uninjured class members sufficient to preclude a finding of predominance, and the "presumption" of common impact. The Court then examines the parties' and the experts' arguments regarding whether antitrust injury and injury-in-fact are capable of proof at trial through evidence that is common to the class.

a. Uninjured Class Members

The first preliminary legal issue regarding impact involves a dispute between the parties over the number of uninjured class members sufficient to preclude a finding of predominance. Defendants contend that plaintiffs "must proffer a valid method for proving . . . injury to all or virtually all class members on a simultaneous, class-wide basis[.]" Class Opp. at 26-27 (quotations omitted). Defendants acknowledge that "[s]ome cases have suggested a more relaxed requirement in which inability to show injury as to a few does not defeat class certification where the **[*40]** plaintiffs can show widespread injury to the class." Id. at 27 n.39 (quotations omitted); see Oct. 7 Tr. at 258 **[**122]** (defendants' counsel, acknowledging that "the case law . . . is mixed on the issue of whether every single class member must be injured or whether there's some negligible number"); see also *Kottaras v. Whole Foods Mkt., Inc., 2012 U.S. Dist. LEXIS 10885, 2012 WL 259862, at *7-8* (discussing cases addressing number of uninjured class members sufficient to preclude a finding of predominance). Defendants assert, however, that this "relaxed requirement" has not been adopted by the D.C. Circuit, and argue that, in any event, plaintiffs have failed to meet either standard in this case. See Class Opp. at 27; Oct. 7 Tr. at 258

The Court concludes that defendants are incorrect about the legal standard for impact. ***HN37***[] "Class certification is not precluded simply because a class may include persons who have not been injured by the defendants' conduct." *Mims v. Stewart Title Guar. Co., 590 F.3d 298, 308 (5th Cir. 2009)* (citing *Kohen v. Pacific Inv. Mgmt. Co., 571 F.3d 672, 677 (7th Cir. 2009)*. As the Seventh Circuit stated in Kohen v. Pacific Investment Management Co.:

> [A] class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many **[**123]** of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification[.]

Kohen v. Pacific Inv. Mgmt. Co., 571 F.3d at 677; see *Messner v. Northshore Univ. HealthSystem, 669 F.3d at 823* (citing and quoting *Kohen v. Pacific Inv. Mgmt. Co., 571 F.3d at 677*). Thus, ***HN38***[] the "inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class." *Meijer, Inc.*

v. Warner Chilcott Holdings Co. III, 246 F.R.D. at 310 (quotations omitted). Only when it is apparent that "a great many persons" have not been impacted should a court deny class certification. Kohen v. Pacific Inv. Mgmt. Co., 571 F.3d at 677. "There is no precise measure for 'a great many.' Such determinations are a matter of degree, and will turn on the facts as they appear from case to case." Messner v. Northshore Univ. HealthSystem, 669 F.3d at 825 (quoting Kohen v. Pacific Inv. Mgmt. Co., 571 F.3d at 677).

b. "Presumption" of Common Impact

The second preliminary legal issue involves what the partes refer to as a "presumption" of common impact. **[**124]** Class Mem. at 69; Class Opp. at 27 n.40. "Some courts have found a presumption of common impact in cases involving allegations of horizontal price-fixing." In re Vitamins Antitrust Litig., 209 F.R.D. at 266 (citing e.g., In re Master Key Antitrust Litig., 528 F.2d 5, 12, n.11 (2d Cir. 1975); In re Auction Houses Antitrust Litig., 193 F.R.D. 162, 166 (S.D.N.Y. 2000)). As the Third Circuit stated in Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., "[i]n antitrust class actions, injury may be presumed when it is clear the violation results in harm to the entire class." Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 179 n.21 (3d Cir. 2001).

Plaintiffs contend that applying a presumption of common impact in this case would be warranted, because if "Plaintiffs prove that Defendants coordinated their Fuel Surcharge programs in an anticompetitive manner, then it would make basic economic sense to recognize that all Class members, all of whom paid Fuel Surcharges that were either imposed for the first time, or increased by the conspiracy, were impacted by the conspiracy." Class Mem. at 69-70. Plaintiffs, however, make clear that they "do **[**125]** not rest on such a presumption," asserting that they need not do so in view of the evidence in the record in support of their claim of common impact. Id.

Although several judges in this district have mentioned this presumption in passing, none actually has applied it. See, e.g., Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. at 308 n.16 (concluding that "[n]o . . . presumption is required . . . because [p]laintiffs have established that common proof will predominate over individual issues"). And as the Third Circuit more recently stated in In re Hydrogen Peroxide **[*41]** Antitrust Litig.: "Applying a presumption of impact based solely on an unadorned allegation of price-fixing would appear to conflict with the 2003 amendments to Rule 23, which emphasize the need for a careful, fact-based approach, informed, if necessary, by discovery." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 326. To the extent that any such presumption of common impact remains valid law, see id. at 327 (stating that district court, on remand, could consider whether presumption of common impact "is compatible with the record of th[e] case"), it appears to be some sort of presumption-plus, requiring **[**126]** "some additional amount of empirical evidence." American Seed Co., Inc. v. Monsanto Co., 271 Fed. App'x 138, 141 (3d Cir. 2008).

The Court agrees with the reasoning set forth by the Third Circuit in In re Hydrogen Peroxide Antitrust Litig. and concludes that ***HN39***[] applying a presumption of impact based on an unadorned allegation of price fixing appears inconsistent with the rigorous analysis that must be performed in examining whether the requirements of Rule 23(b)(3) have been met. And whatever remains of any such presumption or presumption-plus under the law, the Court concludes that no presumption is required in this case, as plaintiffs themselves make clear that they do not rely on it. Nor do they need to.

c. Antitrust Injury

HN40[] In order to establish antitrust injury, the legal component of the impact element, at trial, plaintiffs "must prove that the defendants engaged in an anti-competitive manipulation of the markets." In re EPDM Antitrust Litig., 256 F.R.D. at 87. In examining this legal component at the class certification stage, the Second Circuit held in Cordes & Co. Financial Services, Inc. v. A. G. Edwards & Sons, Inc. that the plaintiffs successfully established that antitrust injury **[**127]** was common to the class and predominated over individual questions because the plaintiffs alleged only one type of injury in the complaint: "overcharges paid to a horizontal price-fixing conspiracy." Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d at 107. As the Second Circuit stated in Cordes:

"Because each class member allegedly suffered the same type of injury, the legal question of whether such an injury is 'of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful,' . . . is a common one." Id. (quoting *Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 489*). As in Cordes, the Court concludes that plaintiffs have satisfied the first part of the impact element by showing that the legal question of antitrust injury is common to the class and predominates over individual issues.

Plaintiffs have alleged only one type of injury in their second amended consolidated complaint: that defendants' price fixing conspiracy imposed supra-competitive total price increases on the putative class, in violation of *Section 1* of the Sherman Act. See 2d Am. Compl. ¶¶ 1-2; Class Mem. at 1. Plaintiffs contend that the type **[**128]** of supra-competitive overcharges allegedly imposed in this case "clearly constitute antitrust injury." Class Mem. at 65 n.221. Defendants disagree as to a subset of putative class members, arguing that so-called captive shippers cannot suffer antitrust injury.

As defendants' counsel described it at oral argument, antitrust injury is the injury that flows from the harm that the antitrust laws are intended to prevent, and the antitrust laws are intended to prevent only a reduction in competition. See Oct. 7 Tr. at 172-73. Consequently, if there is "no competition in the first instance for a customer's business, that customer cannot suffer antitrust injury." Id. at 173. Defendants and Dr. Willig contend that shippers served by only one railroad do not benefit from rail-to-rail competition, and, as a result,

> the railroad serving such a shipper would be expected to attempt to extract the maximum possible rate given the shipper's non-rail alternatives and the value the shipper derives from rail service. A conspiracy among railroads does not enable the serving railroad to extract more than the maximum rates from such a shipper. For shippers served by only one railroad, any attempt by the serving **[**129]** railroad to impose an FSC that is not desired by that shipper would be expected to require that **[*42]** the railroad make a concession with respect to base rate or another dimension of contract.

Willig Report ¶ 132. Dr. Willig contends that any claim that captive shippers enjoy competition "is contradicted by the well-recognized fact that 'captive' shippers experience higher prices than shippers that face head-to-head rail competition." Id. ¶ 135.

HN41[] The antitrust laws were enacted for "'the protection of *competition*[.]'" *Andrx Pharms., Inc. v. Biovail Corp. Int'l, 256 F.3d at 812* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 488*) (emphasis in original). Defendants therefore are correct that "where there [is] no competition, there [is] no antitrust injury." *City of Pittsburgh v. West Penn Power Comp., 147 F.3d 256, 266-67 (3d Cir. 1998)*. In other words, "[w]ithout demonstrating that there was competition, a plaintiff cannot show that the defendants' actions have had or will have anticompetitive effects." Id. (citing *Continental Cablevision of Ohio, Inc. v. American Elec. Power Co., 715 F.2d 1115, 1119-20 (6th Cir. 1983)*; see also *In re Tobacco/Governmental Health Care Costs Litig., 83 F. Supp. 2d 125, 134-35 (D.D.C. 1999)* **[**130]** ("The antitrust laws were not intended to prevent losses that result from increased competition but those resulting from activity that may tend to lessen competition. . . . The reason an antitrust plaintiff is required to plead antitrust injury is to assure that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior.") (quotations omitted) (alteration and emphasis in original).

The Court, however, disagrees with defendants and Dr. Willig that captive shippers are not subject to competitive forces — a claim that is contradicted by the statements of defendants' own executives. NS' chief executive officer, Charles W. Moorman, testified before Congress in 2007 that even captive shippers are subject to "competitive constraints [that] are real," and he expressly acknowledged that "even where there is only one railroad serving a facility, there are market factors at play." Corrected HD Ex. 36, Written Statement of Charles W. Moorman, at 16, Sept. 20, 2007. Similarly, UP's chief executive officer, James Young, agreed that railroads place "competitive constraints" on each other, even in the case of captive shippers. HD Ex. 66, **[**131]** Young Dep. at 201. And CSX has acknowledged in internal documents that "[s]tudies have shown that, in aggregate, captive shippers don't pay higher prices than non-captive shippers," and that "CSX[] sets prices based on all competitive factors." HD Ex. 37, CSX Talking Points Response to Escalation Resource - Fuel Surcharge Alert, at CSXFSC000153187.

That captive shippers enjoy competition is further reflected by the experience of one of the named plaintiffs in this case before and during the class period. U.S. Magnesium has an operating facility outside of Salt Lake City, Utah. As plaintiffs' counsel stated at oral argument, that plant is truly captive — "[t]here is . . . a single rail line coming up to the plant, which is owned by [UP]." Oct. 6 Tr. at 92-93. In December 2002, before the class period, U.S. Magnesium *negotiated out* of the application of a fuel surcharge. See RD Ex. 10, at USM005647 (UP proposing to U.S. Magnesium a 4 percent increase on all rates and application of a fuel surcharge, but ultimately agreeing to a 4 percent across the board increase without a fuel surcharge). But one year later, during the period when plaintiffs say that defendants were conspiring to impose **[**132]** fuel surcharges uniformly as to all shippers, the application of a fuel surcharge was "mandate[d] by UP management[.]" RD Ex. 72, at USM005663.

Moreover, defendants' executives expressly have denied in their depositions taken in this case that they would have tried to impose more aggressive programs on captive shippers than they were able to impose on non-captive shippers. BNSF's chief executive officer, Matthew K. Rose, stated that BNSF had never considered having a higher or more onerous fuel surcharge for captive shippers, and that such an approach would "violate [BNSF] principle." HD Ex. 72, Rose Dep. at 232. UP's chief financial officer, Robert Knight, Jr., acknowledged that he was unaware of any discussions on the topic of having separate fuel surcharge programs for captive shippers. HD Ex. 70, **[*43]** Knight Dep. at 64. These statements are consistent with Dr. Rausser's analysis and conclusion, which the Court finds persuasive, that defendants' transaction data show that "so-called captive shippers paid the same Fuel Surcharge as others" during the class period. 2d Rausser Report at 23.

The Court therefore finds by a preponderance of the evidence that railroads are affected by competitive **[**133]** constraints that apply to both captive and non-captive shippers, and that plaintiffs have satisfied the first part of the impact element for all putative class members, including captive shippers, by showing that the legal question of antitrust injury is common to the class and predominates over individual issues. See *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d at 107*. [13]

d. Injury-In-Fact

The Court now addresses whether injury-in-fact is capable of proof at trial with evidence common to the class rather than individual to its members. See *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311-12*. The Court finds by a preponderance of the evidence that it is.

HN42[] "It is a basic tenet of ***antitrust law*** that a cause of action will not lie if the plaintiff has not been harmed." *Warren Gen. Hosp. v. Amgen Inc., 643 F.3d 77, 92 (3d Cir. 2011)*. Thus, in order to prevail at trial on their Sherman Act claim plaintiffs must prove not only an antitrust violation — here, that defendants' conspired on their fuel surcharge **[**135]** programs — but also a "causal link between the violation and an injury to . . . business or property." *Federal Prescription Serv., Inc. v. American Pharm. Ass'n, 663 F.2d 253, 268, 214 U.S. App. D.C. 76 (D.C. Cir. 1981)*; see *Taylor Publ'g Co. v. Jostens, Inc., 216 F.3d 465, 485 (5th Cir. 2000)* ("[T]he fact of damages . . . means that the antitrust violation must cause injury to the antitrust plaintiff.") (quotations omitted); see also *Hecht v. Pro-Football, Inc., 570 F.2d 982, 987, 187 U.S. App. D.C. 73 (D.C. Cir. 1977)* ("[T]he plaintiff must show both an

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[13] The Seventh Circuit's decision in Messner v. Northshore University HealthSystem suggests that defendants' argument regarding captive shippers and antitrust injury is more appropriately categorized as an argument that "the class for which certification is requested is fatally overbroad because it contains members who could not have been harmed[.]" *Messner v. Northshore Univ. HealthSystem, 669 F.3d at 824*. As the court in Messner explained: "[I]f a proposed class consists largely (or entirely, for that matter) of members *who are ultimately shown to have suffered no harm*, that may not mean that the class was improperly certified but only that the class failed to meet its burden of proof on the merits. . . . If, however, a class is defined so broadly as to include a great number of members *who* ***[**134]*** *for some reason could not have been harmed* by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification." Id. (emphasis added). As the Court has found, however, plaintiffs have shown by a preponderance of the evidence that railroads are affected by competitive constraints applying to both captive and non-captive shippers. Thus, the Court concludes that the class is not defined so broadly as to include a great number of members who "could not have been harmed" by defendants' allegedly unlawful conduct. Id.

injury-in-fact to his business or property and a *causal connection* between that injury and the defendant's allegedly illegal acts.") (emphasis in original) (quotations omitted). Plaintiffs "need not exhaust all possible alternative sources of injury in fulfilling [their] burden of proving compensable injury under" the antitrust laws, but they must show that the antitrust violation was a "material cause of the injury[.]" *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*.

If plaintiffs would have suffered the same injury absent a conspiracy, then plaintiffs will fail on the merits of their claim. See *Federal Prescription Serv., Inc. v. American Pharm. Ass'n, 663 F.2d at 268*. **[**136]** Put another way, if the same alleged injury would have been caused by independent, non-conspiratorial forces, then no causal link exists between the alleged antitrust violation and the injury. And if individualized inquiry is necessary to make such a determination on causation, then plaintiffs will have failed to show that common questions predominate as to injury-in-fact. See *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d at 25* ("Plaintiffs cannot make their case without common proof of causation[.]"); see also *Kottaras v. Whole Foods Mkt., Inc., 2012 U.S. Dist. LEXIS 10885, 2012 WL 259862, at *7*.

[*44] ***HN43***[] This causation question — whether an antitrust violation was a material cause of an injury — commonly is assessed by reference to what the parties and their experts refer to as the but-for world. See *In re EPDM Antitrust Litig., 256 F.R.D. at 88* ("[G]enerally speaking, antitrust injury-in-fact and damages are often determined by comparing the 'but-for' price — the price a customer would have paid in the absence of the conspiracy — and the actual price paid."). This hypothetical construct is a world that is "free of the restraints and conduct alleged to be anticompetitive." *Blades v. Monsanto Co., 400 F.3d 562, 569 (8th Cir. 2005)*; **[**137]** see *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d at 107*; *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1055 (8th Cir. 2000)*. ***HN44***[] One way of showing that common questions predominate on the issue of injury-in-fact

> is to show that there is a common method for proving that the class plaintiffs paid higher actual prices than in the but-for world, such as using an economic regression model incorporating a variety of factors to demonstrate that a conspiracy variable was at work during the class period, raising prices above the but-for level for all plaintiffs.

In re EPDM Antitrust Litig., 256 F.R.D. at 88. And this precisely is what plaintiffs have attempted to do through their expert, Dr. Rausser.

Comparing but-for prices with actual transaction prices by regression analysis, however, is "not the *only* way for plaintiffs to succeed in a motion for class certification." *In re EPDM Antitrust Litig., 256 F.R.D. at 88* (emphasis in original). Other accepted types of evidence for establishing class-wide injury-in-fact include: evidence of lock-step increases of national price lists, see id.; proof that defendants conspired to maintain an inflated base price from which **[**138]** all negotiations began, see *id. at 89*; and evidence of structural factors that make an industry susceptible to successful collusion. See *id. at 91-93*; see also *Behrend v. Comcast Corp., 655 F.3d at 199*. Ultimately, the question is whether plaintiffs have shown by a preponderance of the evidence — through regressions, structural industry factors, or any other persuasive means — that "methods of common proof exist to show class-wide impact[.]" *In re EPDM Antitrust Litig., 256 F.R.D. at 88*; see *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d at 25-26*.

The alleged antitrust violation in this case is a conspiratorial agreement to impose supra-competitive fuel surcharges — a component of the total price of a freight shipment — as a percentage multiplier of the base rate of transportation as a means to impose supra-competitive price increases on the putative class. See Class Mem. at 1; Am. Compl. ¶¶ 1-2. Plaintiffs do not allege that defendants conspired to fix each base rate separately, see 1st Rausser Dep. at 98 ("*Q.* . . . There is no agreement to raise the base; right? *A.* Yes. *Q.* So all of the injury comes from the fuel surcharge; right? *A.* Ultimately, yes."), which, Dr. **[**139]** Rausser explains, "would have been extremely complex, highly costly and effectively unmanageable." 1st Rausser Rep. at 52 n.118.

Because the alleged antitrust violation involves only a component of the total price, at trial plaintiffs will be required to prove in fact (1) that they paid a fuel surcharge because of the alleged conspiracy and (2) that, as a result, they paid more for shipping than they otherwise would have paid. And in order to prevail at the class certification stage, plaintiffs now must show by a preponderance of the evidence that common proof can be used to answer the questions (1) whether class members paid a fuel surcharge because of the alleged conspiracy; and, if so, (2) whether payment of that fuel surcharge caused class members to pay more for shipping than they otherwise would have paid.

Plaintiffs contend that they have met their burden. They assert that they will prove injury-in-fact at trial with public information, defendants' own documents, and witness testimony, all of which will be common to the class. See Class Mem. at 70-71. Plaintiffs further assert that Dr. Rausser's expert report confirms through economic regression analysis that injury-in-fact is **[**140]** capable of common proof at trial. See id. at 71-75.

Defendants and Dr. Willig disagree that common evidence can be used to establish **[*45]** injury-in-fact at trial. See Class Opp. at 28-56. As for Dr. Rausser's economic regressions, defendants and Dr. Willig argue that Dr. Rausser's analysis is "fatally flawed." Id. at 50. Defendants do not "quibble with the notion . . . that regression analysis can in many cases provide a basis for certifying a class." Oct. 7 Tr. at 263. But defendants maintain that Dr. Rausser's regressions and analysis suffer from methodological failures that render his conclusions unreliable, see Class Opp. at 62-72, ultimately invalidating his report altogether. Id. at 72.

The Court concludes that plaintiffs have satisfied their burden at this stage. It finds by a preponderance of the evidence that injury-in-fact is capable of proof at trial through evidence that is common to the class rather than individual to its members.

i. Payment of an allegedly conspiratorial fuel surcharge

Defendants argue that individualized analysis is required to determine whether class members would have paid a fuel surcharge but for the conspiracy. See Class Opp. at 28. As defendants see it, **[**141]** plaintiffs have failed to offer any methodology by which they can show with common proof that class members would not have paid a fuel surcharge in the but-for world —that is, the non-conspiratorial world. See id.

First, defendants assert that they had considerable ability and incentive to adopt fuel surcharges entirely independent of any conspiracy. See Class Opp. at 30. In support of this claim, defendants point to the purported trend toward increased use of fuel surcharges before the alleged conspiracy, and then contend that it is implausible that this trend would have stopped in the but-for world. See id. at 30-31. Specifically, defendants assert that fuel surcharges were "widely used" before the start of the conspiracy, with nearly 60 percent of shippers paying a rate-based fuel surcharge as of June 2003, id. at 31 (citing Willig Report ¶ 77); that there was "a strong trend toward increasing use of fuel surcharges before the start of the alleged conspiracy," id. at 32, and that it is "implausible to suggest that this trend would have come to a screeching halt in mid-2003," id. at 33; and that the use of fuel surcharges did not accelerate after the start of the alleged conspiracy **[**142]** — "on the contrary . . . , the growth rate actually *slowed* after July 2003 for every defendant." Id. at 34 (emphasis in original).

Dr. Willig points out that there are legitimate economic rationales for the use of fuel surcharges because they can enhance economic efficiency. See Willig Report ¶¶ 65-68. As Dr. Willig explains:

> The use of FSCs in many industries expanded in the early 2000s in response to increases in both the levels and the volatility of fuel prices. Over the alleged conspiracy period, fuel costs became an increasingly large component of rail costs. . . .
> FSCs were adopted in the rail industry due in part to dissatisfaction with the RCAF index, which lags behind changes in fuel prices, resulting in delays in cost recovery when fuel prices are rising.

Willig Report ¶¶ 65-66. Thus, in view of the purported evidence showing a trend toward the increasing use of fuel surcharges and the legitimate rationales for their use, defendants conclude that there is no basis upon which the Court can conclude "that all or most of the members of the purported class would not have paid fuel surcharges absent the alleged conspiracy." Id. at 35.

Second, defendants argue that plaintiffs face an **[**143]** even higher hurdle for a large group of shippers in plaintiffs' putative class, 55 to 68 percent of the class, that were already paying fuel surcharges before July 2003 —

a group referred to by the parties as legacy shippers. See Class Opp. at 35. As defendants note, plaintiffs have excluded some legacy shippers from the class definition. See id. Specifically, plaintiffs have excluded from their putative class those shippers that paid a fuel surcharge during the conspiracy period "solely pursuant to a railroad-shipper contract that was (i) entered into before July 1, 2003, and (ii) provided for a stand-alone Fuel Surcharge to be paid under a predetermined formula specifically set forth in the contract." Class Mot. at 1. If, however, a legacy shipper entered into a new contract during the class period that included a fuel **[*46]** surcharge, that shipper then is included in plaintiffs' class because it would not have paid a fuel surcharge "*solely* pursuant to a railroad-shipper contract that was . . . entered into before July 1, 2003[.]" Class Mot. at 1 (emphasis added); see Class Opp. at 35-36. And defendants contend that this "narrow legacy exclusion," Class Opp. at 35, presents a significant **[**144]** causation problem illustrated by the following example:

> Consider a shipper that entered into a contract running from January 2002 through December 2003 that contained a fuel surcharge. If such a shipper entered into a new contract in January 2004 that also contained a fuel surcharge, it would fall within Plaintiffs' class definition because the fuel surcharge was not "solely" in the pre-conspiracy contract. But, proof of causation for such a shipper is problematic at best. The fact that the shipper had a fuel surcharge when Defendants were concededly acting independently makes it extremely likely that a fuel surcharge would have been included in its January 2004 contract, regardless of any alleged conspiracy to expand fuel surcharge coverage. Certainly one cannot presume that all such shippers would have avoided fuel surcharges thereafter.

Id. at 36.

Third, defendants argue that any attempt to distinguish class members that had a fuel surcharge only because of the alleged conspiracy from those that would have been subject to one anyway necessarily would require individualized analysis. See Class Opp. at 36-39. According to defendants, many factors influence not only whether a customer **[**145]** would pay a fuel surcharge in the but-for world but also the level of that surcharge. Id. at 37. Defendants contend that these factors include: customers served by only one railroad (captive shippers); customer history of purchasing rail freight; existence of capacity constraints; customers whose primary freight alternative was truck; and customer receptivity to fuel surcharges. See id. at 37-39. Defendants contend that these factors show that individualized analysis is required to determine injury-in-fact at trial. See id. at 36-37.

Plaintiffs disagree with defendants and make three principal points in response. First, plaintiffs argue that defendants have incorrectly lumped fuel surcharges before the conspiracy with the uniform, standardized, and supra-competitive fuel surcharges imposed during the conspiracy. According to plaintiffs, the fuel surcharges imposed during the conspiracy period were "different both in design and application from those that came before." Class Reply at 7. Second, plaintiffs argue that evidence common to the class contradicts defendants' claim that the same fuel surcharges imposed during the conspiracy would have been imposed in the but-for world. And third, **[**146]** relying on the economic regression analysis conducted by Dr. Rausser, plaintiffs contend that evidence common to the class refutes defendants' claim that any individualized factors predominate. See Class Reply at 6-16.

As for plaintiffs' first point, they contend that "[m]ost of defendants' arguments and Dr. Willig's analysis are built on a faulty assumption: that the FSCs used by Defendants before and during the conspiracy were the same." Class Reply at 7. Plaintiffs assert, however, that the allegedly conspiratorial fuel surcharges put in place in the spring of 2003 were

> different both in design and application from those that came before. . . . [T]hese new FSCs (i) got Defendants in lockstep in calculating the percentage based on fuel indexes; (ii) used a trigger equal to about $23 per barrel, rather than the higher $28 per barrel (or higher) that several Defendants had previously used; and (iii) adjusted the FSC based on the 30-day average fuel price, rather than, as in several Defendants' earlier programs, only when the trigger was exceeded for 30 (or more) consecutive days.

Class Reply at 7. For this argument, plaintiffs rely on the testimony of defendants' own employees who repeatedly **[**147]** have admitted in depositions that the new fuel surcharges imposed during the class period were "not the same as, were more aggressive than, and definitely yielded more revenue" than fuel surcharge programs applied before the alleged conspiracy. Id. at 7 & n.16 (quotations **[*47]** omitted). Moreover, plaintiffs say that these new, standardized, more aggressive fuel surcharges were uniformly applied, with the express goal of 100 percent coverage. Id. at 1; see id. at 9-10. In contrast, fuel surcharge programs applied before the conspiracy in some contracts were only "theoretically billable, in that they often were not triggered or applied, and when they were, they were small." Id. at 8 (quotations omitted).

Regarding their second point, plaintiffs dispute defendants' view of the but-for world, arguing that it fails to acknowledge actual facts, established with evidence common to the class, that defendants needed to conspire to surmount obstacles to widespread application of uncoordinated fuel surcharges. As plaintiffs see it, before the conspiracy, defendants were frustrated by the structural decline in rail freight rates and their inability to raise prices due to "destructive pricing for rail **[**148]** share." Class Reply at 10 (quotations omitted). According to plaintiffs, defendants were unable to use fuel surcharges as an effective revenue generator because of competition among the defendants, customer resistance, and the frequent use of the RCAF index. Id. Consequently, plaintiffs argue that defendants' experience with "theoretical and insignificant FSCs before the Class Period cannot be extrapolated to the Class Period because, among other reasons, increased customer resistance would be expected as the FSCs were triggered with rising fuel prices, and as Defendants sought to lower the trigger thresholds and implement more aggressive FSC programs." Class Reply at 11-12 (quotations omitted).

Regarding their third point, plaintiffs contend that Dr. Rausser's regressions —now based on an analysis of 100 percent of defendants' transaction data, see 2d Rausser Report at 12; Class Reply at 38 — refute defendants' and Dr. Willig's assertion that individualized factors predominate. See Class Reply at 12. According to plaintiffs, Dr. Rausser has used economic analysis to show that workable formulas, common to the putative class, are available to "prove the conspiracy's impact on the class **[**149]** — a 'structural break in the relationship between fuel prices and freight rates,' a surge in rates attributable to the conspiracy, and significant overcharges in comparison to prices that would have prevailed absent the conspiracy[.]" Id. at 1 (quoting 1st Rausser Report at 120, 122-23).

As plaintiffs describe it, Dr. Rausser's analysis confirms that overall freight prices are based on seven factors that are common to all shipments, including, among other factors, shipment weight, distance, route, and commodity type; and that these seven factors can be measured using defendants' transaction data and can be used in a common analysis to identify and quantify the injury experienced by the class. 1st Rausser Report at 7. Dr. Rausser's regression analysis takes into account the factors that influenced defendants' prices during the class period compared with benchmark prices during the three preceding years — a time period in which Dr. Rausser concludes that defendants "acted as an interdependent oligopoly unaffected by the type of collusion that determined prices during the Class Period." 1st Rausser Report at 113. Upon an analysis of defendants' transaction data, Dr. Rausser identified **[**150]** a "structural break in the relationship between freight rates and fuel prices around 2003, which is consistent with a conspiracy using Fuel Surcharges to raise freight rates." 2d Rausser Report at 92. In other words, Dr. Rausser's analysis shows that, before the alleged conspiracy, "there was a relationship between fuel costs and overall prices that was dramatically changed once the [alleged] conspiracy went into effect." Oct. 6 Tr. at 139; see id. (stating that, before the alleged conspiracy, "if fuel prices went up by a certain amount, it would have a certain effect . . . on rail freight prices overall; and after the [alleged] conspiracy, if fuel prices went up, it had a much bigger effect on the overall price"). Plaintiffs therefore contend that Dr. Rausser's analysis shows that members of the class paid artificially higher prices as a result of the conspiracy and were injured-in-fact by the antitrust violation. See Class Mem. at 47.

The Court agrees with plaintiffs and finds that they have shown by a preponderance of the evidence that common evidence can be **[*48]** used at trial to answer the question whether class members paid the allegedly conspiratorial fuel surcharges because of the **[**151]** alleged conspiracy:

1. Fuel surcharges during the class period — aggressive, standardized, and uniform. The Court is unpersuaded by defendants' and Dr. Willig's attempt to link fuel surcharges that were in place before the alleged conspiracy to those applied during the alleged conspiracy. Defendants place significant weight on their conclusion that their transaction data show that "almost 60% of Defendants' customers, including all eight of the named Plaintiffs, paid rate-based fuel surcharges *before* the conspiracy began." Class Opp. at 2 (emphasis in original). And, according to defendants, Dr. Rausser's admission during his deposition that he would have expected each defendant to impose fuel surcharges as broadly as possible even absent the conspiracy is particularly damning. See id. (citing 1st Rausser

Dep. at 281). But as plaintiffs and their expert make clear, their antitrust claim in this case is not a conspiracy to impose just *any* fuel surcharge; rather, plaintiffs claim that defendants agreed to increase total prices "by widespread application and enforcement of coordinated, and aggressive, fuel surcharges." Pls. Wal-Mart Reply Brief at 7 n. 11; see also 1st Rausser Dep. at **[**152]** 94; 2d Rausser Dep. at 119-21.

The Court finds by a preponderance of the evidence that the fuel surcharge programs applied before the class period were nothing like the widespread and uniform application of standardized fuel surcharges during the class period. Before the alleged conspiracy, defendants' differentiated fuel surcharges were subject to competition and negotiation with shippers, were less aggressive, and were applied only sporadically. Furthermore, these pre-class period fuel surcharges were only "theoretically billable." HD Ex. 65, Glennon Dep. at 26 (manager of NS pricing systems (now retired) acknowledging that before the class period "the fuel surcharge was theoretically billable, so I would say that . . . customers might not resist it as much"). That is, these pre-class period fuel surcharges often were not triggered or applied, and when they were they were small. See HD Ex. 66, Young Dep. at 24-25 (UP chief executive officer stating that before the class period "[w]e had fuel surge (sic) programs in many contracts, but because fuel had not run up, they were never implemented"); id. at 28 (agreeing that fuel surcharges triggered "during the 2000 through 2002 time period **[**153]** never reached significant percentage levels"); HD Ex. 70, Knight Dep. at 24 (UP chief financial officer stating that during the 2000 through 2002 time period UP did not have a company-wide policy on fuel surcharges: "[t]here were some isolated situations where there were surcharges, but . . . no policy position"); HD Ex. 68, Lanigan Dep. at 27 (BNSF executive vice president and chief marketing officer stating that BNSF's fuel surcharge participation rates in January 2003 were "low," in the "25 to 30 percent rage"); HD Ex. 69, Gooden Dep. at 101 (CSX executive vice president of sales and marketing agreeing that the "fuel surcharge revenue [CSX] was generating prior to adoption of this new program in March of 2003" was "[l]ow — relatively low to where it needed to be"); HD Ex. 71, McNulty Dep. at 118-19 (CSX director of marketing, agricultural products discussing "fairly minimal" fuel surchargers in 2001 and 2002).

The fuel surcharges that defendants put in place in the spring of 2003 were of a different breed. See Class Reply at 7 (fuel surcharges were different "both in design and application from those that came before"). The evidence shows that defendants employed these fuel surcharges **[**154]** in lockstep, lowered the trigger price for the imposition of the fuel surcharge, and adjusted the fuel surcharge based on the 30-day average fuel price rather than only when the trigger was exceeded for 30 (or more) consecutive days. See 1st Rausser Report at 54-60. Defendants' own executives admitted that the new fuel surcharge programs applied by the defendants during the class period were different — that is, they were more aggressive and yielded more revenue than earlier programs. For example, UP's chief executive officer, James Young, testified that compared to the pre-2003 time period,

> the impact of fuel surcharges on customers . . . was greater in '03, it was greater in **[*49]** '04, it was greater in '05 because, again, the percent of recovery. And in negotiating contracts, [UP was] able to get a fuel surcharge included in those contracts so you were having a — having a greater recovery each year.

HD Ex. 66, Young Dep. at 57. Patrick Glennon, a manager of pricing systems for NS (now retired), testified that the new fuel surcharge program was "not the same" as before, HD Ex. 65, Glennon Dep. at 67, admitting that it "definitely was more aggressive," and "definitely yielded more revenue." **[**155]** Id. at 42; see id. at 67. Indeed, as Mr. Glennon described the new program in an internal NS e-mail: "By dropping the base to $23 per barrel, raising the percentage yield and taking it sooner, the change is in fact a blatant general rate increase[.]" HD Ex. 30, E-mail from P. Glennon, at NS_010004522, Apr. 29, 2003. Internal CSX e-mails similarly stated that although the new fuel surcharge program may "seem[] somewhat benevolent, it is actually a large increase in fuel surcharge billings — maybe as much as 100%." RD Ex. 23, E-mail from J. Couch, at CSX000326, Mar. 19, 2003.

Not only were defendants' class period fuel surcharges more aggressive than before, but they also were standardized and uniformly applied across all or virtually all shippers — regardless of whether such shippers were legacy or captive shippers. BNSF's chief financial officer testified before the STB in 2006 that "[o]ur surcharge program is the same for all customers[.]" HD Ex. 9, Testimony of Tom Hunt, at 272, May 11, 2006. UP told a major customer, [TEXT REDACTED BY THE COURT], in 2005 that it was "uniformly requiring" its "standard fuel surcharge program . . . of all of [its] customers." HD Ex. 149, Letter from **[**156]** J. Koraleski, at UPFSC 0342883, Apr. 22, 2005.

Defendants and Dr. Willig, relying heavily on 21 declarations submitted by railroad executives, contend that the evidence of aggressive, uniform, and standardized fuel surcharges is not reflective of reality. See Class Opp. at 21-22, 56-58; Willig Report at 54-55. [14] According to defendants, their fuel surcharge programs during the class period "varied widely from railroad to railroad as well as by shipper and commodity." Class Opp. at 21, 56-58. Defendants say that

> [i]t is an indisputable fact that the Defendants used dozens of fuel surcharges during the Class Period. NS alone applied fifty distinct fuel surcharge formulas during the Class Period, Lawson Decl. ¶ 14, UP had 90 different fuel surcharges between 2000 and 2008, Adams Decl. ¶ 3, and BNSF had a total of 152 in effect at some point between 2000 and 2007. Jacobowski Decl. ¶ 6.

Class Opp. at 56. Defendants also argue that they had different fuel surcharges for intermodal traffic, id. at 21 — that is, traffic that involves "goods shipped in containers or trailers on rail flat cars as part of a continuous movement with another mode of transport, such as truck or steamship." Class Opp. at 14 n.18. **[**157]** [15] In view of these proffered **[*50]** facts, defendants argue that there is no uniform or standard class-wide fuel surcharge that could be used to demonstrate a common impact. See id. at 56.

The Court finds the railroad executives' declarations unpersuasive. Indeed, the most damning portions of almost every single declaration on which defendants **[**159]** rely are contradicted by the declarant's subsequent deposition testimony. By way of example, relying on the declaration of Thomas J. Jacobowski, the general director of price management in BNSF's industrial products marketing department, defendants say that BNSF "had a total of 152 [fuel surcharge formulas] in effect at some point between 2000 and 2007." Class Opp. at 56 (citing Jacobowski Decl. ¶ 6). But when this assertion was tested during his deposition, Mr. Jacobowski testified that these non-standard fuel surcharges were associated with only 24 shippers, HD Ex. 76, Jacobowski Dep. at 28-30, out of approximately 10,000 shippers, id. at 35-36, and that it is "very possible" that all of those 24 shippers also paid BNSF's standard fuel surcharge on at least some routes. Id. at 31-32; see also id. at 38.

Relying on the declaration of David T. Lawson, the vice president of industrial products for NS, defendants say that "NS alone applied fifty distinct fuel surcharge formulas during the class period[.]" Class Opp. at 56 (citing Lawson Decl. ¶ 14). But at his deposition Mr. Lawson admitted that during the alleged conspiracy period NS had "a policy to apply the standard fuel surcharge **[**160]** to as many customers as possible," HD Ex. 83, Lawson Dep. at 38; that "for any authority that would have either a nonstandard fuel surcharge or no fuel surcharge, it required group vice-president approval," id.; that he himself had to authorize "any [fuel surcharge] authority [that] was going to contain any nonstandard fuel surcharge," id.; that the 50 distinct non-standard fuel surcharges could include "duplicates," id. at 16; and that his declaration provided no information as to the percentage of NS customers that were using the

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[14] The 21 declarations submitted by defendants are listed below in alphabetical order: Declaration of Charles M. Adams, UP ("Adams Decl."), June 18, 2010; Declaration of Marc Allen, BNSF ("Allen Decl."), June 24, 2010; Declaration of Jim Bolander, NS ("Bolander Decl."), June 28, 2010; Declaration of Donna Cerwonka, CSX ("Cerwonka Decl."), June 22, 2010; Declaration of George T. Duggan, BNSF ("Duggan Decl."), June 29, 2010; Declaration of David Garin, BNSF ("Garin Decl."), June 24, 2010; Declaration of Thomas R. Gehl, UP ("Gehl Decl."), June 17, 2010; Declaration of Thomas J. Jacobowski, BNSF ("Jacobowski Decl."), June 23, 2010; Declaration of Christopher Jenkins, CSX ("Jenkins Decl."), June 28, 2010; Declaration of Richard Kiley, NS ("Kiley Decl."), June 28, 2010; Declaration of John Kraemer, NS ("Kraemer Decl."), June 23, 2010; Declaration of Julie A. Krehbiel, UP ("Krehbiel Decl."), June 15, 2010; Declaration of David T. Lawson, NS ("Lawson Decl."), June 25, 2010; Declaration of Ronald Listwak, NS ("Listwak **[**158]** Decl."), June 28, 2010; Declaration of Scott D. McGregor, NS ("McGregor Decl."), June 23, 2010; Declaration of Tim McNulty, CSX ("McNulty Decl."), June 28, 2010; Declaration of Joseph Osborne, NS ("Osborne Decl."), June 28, 2010; Declaration of Dean Piacente, CSX ("Piacente Decl."), June 22, 2010; Declaration of Richard A. Pagan, UP ("Pagan Decl."), June 16, 2010; Declaration of James R. Schaaf, NS ("Schaaf Decl."), June 23, 2010; Declaration of Andrew Strok, CSX ("Strok Decl."), June 21, 2010.

[15] There are two basic types of rail traffic: intermodal traffic; and carload traffic. See Class Opp. at 14 n.18; Oct. 7 Tr. at 207. As defendants define it, intermodal traffic "proceeds both by rail and by some other mode." Oct. 7 Tr. at 207; see Class Opp. at 14 n.18. "All other rail traffic is known as 'carload' traffic," Class Opp. at 14 n.18, which consists of, for example, "a container that has chemicals in it or that has coal, or it's a designated kind of rail vessel designed to hold the specific kind of traffic." Oct. 7 Tr. at 207-08.

standard fuel surcharge at any time during the class period. Id. at 36; see id. at 37 (agreeing that his declaration did not address "whether a majority or a minority of NS customers were paying the standard fuel surcharge").

Moreover, contrary to what defendants suggest in their opposition papers, the evidence in the record makes plain, and the railroad executives themselves admitted, that during the class period defendants uniformly began their negotiations with their standard fuel surcharge program and their objective was to apply their standard fuel surcharge as widely as possible. See HD Ex. 85, Allen Dep. at 25-27 ("*Q.* . . . [Y]ou started the negotiation **[**161]** with a given [BNSF] customer with the $1.25 HDF standard fuel surcharge program as the starting point? *A.* That's correct."); HD Ex. 76, Jacobowski Dep. at 23 ("*Q.* Now I'm correct . . . that [BNSF's] goal was to apply the standard fuel surcharges to as much of its traffic as possible? *A.* Correct. *Q.* In fact, the goal was to apply the standard fuel surcharge to 100 percent of your shippers. Is that correct, sir? *A.* Correct. *Q.* And any exceptions had to be approved by senior management? *A.* Correct."); HD Ex. 83, Lawson Dep. at 37-38 ("*Q.* Now, NS had a policy to try to apply the standard fuel surcharge to as many customers as possible, correct? *A.* Yes. . . . *Q.* And, in fact, for any authority that would have either a nonstandard fuel surcharge or no fuel surcharge, it required group vice-president approval correct? *A.* Yes. And I think ultimately my approval as well."); see also HD Ex. 78, Osborne Dep. at 38-41, 48-49; HD Ex. 77, Listwak Dep. at 29-31; HD Ex. 86, Cerwonka Dep. at 7-8; HD Ex. 87, Piacente Dep. at 7-10. And any deviations from defendants' standard fuel surcharge programs were rare. See, e.g., HD Ex. 82, Kraemer Dep. at 30; HD Ex. 86, Cerwonka Dep. at 19-20; HD Ex. 79, Garin **[**162]** Dep. at 67-68; see supra at 89-90. Furthermore, each defendant enforced strict policies ensuring across-the-board application of these standardized fuel surcharge programs on all of their shippers, see supra at 88, including legacy shippers renewing a contract during **[*51]** the class period. See HD Ex. 50, Union Pacific 2005 Analyst Fact Book, at 11 ("In 2006, approximately 13 percent of the remaining 45 percent of long-term contracts will be available for repricing. As Union Pacific renegotiates this business to market rates, it will also include Union Pacific's standard fuel surcharge."); Pls. Hr'g Binder Tabs 39, 118-19.

Defendants contend that the question "*[w]hy* a shipper paid a particular fuel surcharge is an inherently individualized question, given all the reasons why shippers paid fuel surcharges both before and during the alleged conspiracy." Defs. Wal-Mart Reply Brief at 7 (emphasis in original). But the evidence in the record at this stage reveals that the answer to that question is rather simple and applies class-wide: shippers paid the standard fuel surcharges during the alleged conspiracy because the surcharges were non-negotiable. As of January 2004, BNSF pricing guidelines **[**163]** stated: "*Every contract* should include a fuel surcharge clause. All new and all renewing contract negotiations should have a fuel surcharge as the goal." RD Ex. 223, BNSF Price and Fuel Escalation General Guidelines, at BNSF-0404221, Jan. 2004 (emphasis added). And as BNSF internal e-mails emphasized, contracts requiring the chief executive officer's signature "but excluding full fuel surcharge provisions *will not be signed.*" RD Ex. 224, E-mail from S. Kyei, at BNSF-FSC 000488, Mar. 11, 2004 (emphasis added). Similarly, as UP explained it to a customer: "As a company policy, all contracts without fuel language will have fuel language upon renewal. This is a mandate by UP management." RD Ex. 72, E-mail from B. Denkers, at USM005663, Dec. 22, 2003. And internal CSX e-mails said the same thing:

> We have very clear instructions with our team to pursue FSC. . . . Here are some specific directions we've given the team that will help CSX's overall success:
> 1) all renewals include fuel — very very few exceptions as we discussed last month.
> 2) any multiyear deals must include FSC in the out years[.]
>
> 3) any new prices for customers with master contracts that don't renew in the near term should be **[**164]** added to a different price vehicle for that customer. The new price vehicle should incorporate our FSC program. Even though these master contracts likely have an RCAF component.

RD Ex. 141, E-mail from D. Piacente, at CSXFSC000086200, June 5, 2006. As for NS, its vice president of industrial products agreed that "there was a policy to apply the standard fuel surcharge to as many customers as possible." HD Ex. 83, Lawson Dep. at 38.

Notwithstanding the documentary evidence and the railroad executives' admissions during their depositions, Dr. Willig examines defendants' transaction data and concludes that it tells a different story. Dr. Willig says that there was "widespread use of FSCs prior to the alleged conspiracy," and asserts that "all eight named plaintiffs paid

FSCs prior to July 2003." Willig Report ¶ 73. As he describes it, the transaction data show that "FSC use was growing rapidly prior to the start of the alleged conspiracy." Id. ¶ 78. And Dr. Willig ultimately concludes that "[t]he growth in FSCs before the alleged conspiracy precludes the possibility of showing that all class members paid an FSC because of the conspiracy." Id. at 36.

Dr. Rausser disagrees. As he sees it, **[**165]** Dr. Willig's analysis is flawed because, among other reasons, it relies on a "revenue weighting error [that] concealed both how much more extensive Fuel Surcharge coverage became during the Class Period and that the sharp increase in coverage began in mid-2003, consistent with the facts of the alleged conspiracy." 2d Rausser Report at 34. Dr. Rausser also contends that Dr. Willig uses an insufficient set of data points to establish the purported trend toward increasing use of fuel surcharges. See id. at 7, 32-34. Dr. Rausser, analyzing the same data as Dr. Willig and correcting the problems he identified in Dr. Willig's analysis, concludes that "the pattern in Fuel Surcharge coverage is consistent with the implementation of the conspiracy as alleged." Id. at 35.

The Court is not persuaded by Dr. Willig. In his analysis, Dr. Willig treated *any* fuel surcharge applied to a single shipment by a class member as equal to a fuel surcharge **[*52]** applied to *all* of that class member's shipments during the class period. See Willig Dep. at 47, 52-53; see also Class Reply at 3 n.8. The Court finds that analysis inadequate: under Dr. Willig's metric, if the effect of the alleged conspiracy was to cause **[**166]** a class member paying a two percent fuel surcharge on a single route before the class period to pay the allegedly conspiratorial fuel surcharge at, for example, up to 20 percent on 50 routes during the class period, then Dr. Willig's trend analysis would not recognize this clearly significant change, since his fuel surcharge incidence inputs would treat both circumstances as the same. See Class Reply at 3 n.8. Ultimately, Dr. Willig's analysis suffers from the same problem as defendants' primary argument: both defendants and Dr. Willig incorrectly lump fuel surcharges before the alleged conspiracy with fuel surcharges applied during the alleged conspiracy. As plaintiffs point out, Dr. Willig made no effort to assess whether, in cases where fuel surcharges were applied before the start of the class period, those fuel surcharges were the same as the standardized fuel surcharges applied during the alleged conspiracy. See Willig Dep. at 253-57.

The Court finds Dr. Rausser's analysis persuasive and credits his conclusion that defendants' transaction data show that each defendant applied a standard fuel surcharge program during the class period, across railroads and shipment types, see 2d **[**167]** Rausser Report at 15-16; and that any deviations from the standard fuel surcharge program were rare and without consequence for purposes of determining injury-in-fact at trial with common evidence. Id. at 22-23, 53-54. As Dr. Rausser concludes: "[F]or each railroad 83% to 92% of its non-intermodal revenue and 92% to 100% of its intermodal revenue can be accounted for by a handful or programs and a few identifiable exceptional programs." Id. at 54. The Court also credits Dr. Rausser's conclusion that standard fuel surcharge coverage became more extensive during the class period and that the sharp increase in coverage began in mid-2003, consistent with the start of the alleged conspiracy. See id. at 34-37. [16]

2. Additional ***[**168]*** *factors identified by defendants.* The Court concludes that none of the additional factors identified by defendants — economic efficiency; captive shippers; customer history of purchasing rail freight; existence of capacity constraints; customers whose primary freight alternative was truck; and customer receptivity to fuel surcharges, see Class Opp. at 37-39 — precludes a finding that evidence common to the class can be used to prove that class members paid a fuel surcharge because of the alleged conspiracy.

Economic Efficiency. As discussed, defendants argue that fuel surcharges can enhance economic efficiency. See Willig Report at 31. As Dr. Willig describes it, fuel surcharges allocate risk and were adopted by many industries in the early 2000s in response to increases in both the levels and volatility of fuel prices. See id. ¶ 64. He further explains:

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[16] During the class certification hearing, defendants' counsel argued, seemingly for the first time, that "[t]here was no change in the intermodal standard fuel surcharges of any consequence during the class period." Oct. 7 Tr. at 208. After the hearing, defendants argued this point again in their supplemental briefing. See Defs. Wal-Mart Brief at 11. The Court is not persuaded by that argument. See 2d Rausser Report at 22-23; Pls. Wal-Mart Reply Brief at 14-15 & nn.33-34.

> Price adjustment mechanisms have been widely adopted and have long been used in the railroad industry. Historically, many rail contracts have included price adjustment clauses tied to the . . . RCAF[]. . . . RCAF measures changes in the prices of major components of the railroad industry's operating expenses, including labor, fuel, materials, **[**169]** equipment rents, depreciation interest and other expenses. . . . The widespread use of price-adjustment provisions such as RCAF indicates that these mechanisms can enhance economic efficiency. FSCs serve the same function but are based on a single input instead of a basket of inputs. Such fuel-only formulas were in use prior to the alleged conspiracy both in the rail and other industries. . . . The use of FSCs in many industries expanded in the early 2000s in response to increases in both the levels and volatility of fuel prices. . . . FSCs were adopted in the **[*53]** rail industry due in large part to dissatisfaction with the FCAF index, which lags behind changes in fuel prices, resulting in delays in cost recovery when fuel prices are rising.

Id. ¶¶ 63-66. Thus, in view of the legitimate economic rationales identified by Dr. Willig for adopting fuel surcharges, he argues that growth in fuel surcharge use "would be expected even absent the alleged conspiracy." Id. at 31.

This case, however, is not about fuel surcharges generally, but rather about aggressive and standardized fuel surcharges tied to base rates. The Court disagrees with Dr. Willig's conclusion that fuel surcharges tied to base **[**170]** rates are a more accurate and efficient method for recovery of fuel costs than other alternatives, such as the RCAF, and thus would have increased even absent a conspiracy. As Dr. Rausser persuasively explains:

> Dr. Willig describes the increased use of Fuel Surcharges as a "normal business adaptation to the increasing importance of volatile costs of fuel" and argues that they were superior to RCAF, because "the weights used in the RCAF formula are *only updated annually.*" The RCAF used these weights to translate movements in underlying costs indexes, one for labor, one for fuel and so on, into percentage increases to be applied to freight rates. The Fuel Surcharge program also translated fuel price movements into percentage increase in freight rates, but the translation formula (the "slope") was *never* updated. As a result, the Fuel Surcharge program was clearly not superior to the RCAF in this respect. Furthermore, one variant of the RCAF, the RCAF-A, adjusted for productivity improvements over time, thus reflecting changes in fuel efficiency rates. The Fuel Surcharge program incorporated no such adjustments and was therefore less likely to properly reflect changes over time than was **[**171]** the RCAF.

2d Rausser Report at 30-31 (footnotes omitted) (emphasis in original). [17] Moreover, as the STB noted during its proceedings addressing rate-unregulated traffic, railroads largely "concede[d] that their fuel surcharges [were] not tied to the fuel consumption associated with the individual movements to which they [were] applied." *Rail Fuel Surcharges, 2007 STB LEXIS 39, 2007 WL 201205, at *1*.

Dr. Willig also maintains that the standardization and mechanical application of fuel surcharges to base rates makes them an efficient tool for increasing freight rates across shippers without having to renegotiate individual contracts. See Willig Report at 35-36. Dr. Rausser agrees, but persuasively argues that "it is precisely this fact that makes the Fuel Surcharges an efficient mechanism for price-fixing, raising total freight rates and thus the Defendants' profits." 2d Rausser Report at 30. Indeed, as the STB noted: "A fuel surcharge program keyed to the base rate has one primary **[**172]** benefit — ease of application." *Rail Fuel Surcharges, 2007 STB LEXIS 39, 2007 WL 201205, at *6*. But such a program — that is, one "that increases all rates by a set percentage" — "stands virtually no prospect of reflecting the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied." *2007 STB LEXIS 39, [WL] at *4*; see also 1st Rausser Report at 50 ("[A]dding a percentage fuel surcharge on top of line-haul rates or base rates is by its very nature a general price increase.").

Captive shippers. Defendants' and Dr. Willig's argument regarding captive shippers and injury-in-fact is essentially identical to the one made during oral argument regarding antitrust injury. See supra at 65-66, 71-72. Defendants say that customers served by only one railroad — referred to by the parties as either "captive" or "sole served"

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[17] As for use of the RCAF-A mechanism of recovery, BNSF price and fuel escalation guidelines stated: "RCAF-A is absolutely unacceptable." RD Ex. 223, BNSF Price and Fuel Escalation General Guidelines, at BNSF-0404221, Jan. 2004.

shippers — "might have difficulty avoiding a fuel surcharge, even absent a conspiracy." Class Opp. at 37. [18] Moreover, as **[*54]** defendants contend, such shippers "do not benefit from rail competition in the first place" and therefore "cannot be injured by an alleged conspiracy among railroads." Defs. Supp. Brief at 18 n.10. Thus, defendants argue that the alleged conspiracy on **[**173]** fuel surcharges would not be expected to injure such captive shippers, Class Opp. at 37, and that such shippers — of which they are "many . . . , although the number cannot be determined with precision," Willig Report at 75 — can be identified only with individualized inquiry. See Willig Report ¶¶ 139-43. And so defendants argue that the existence of such shippers in plaintiffs' putative class precludes a finding of predominance.

The Court disagrees with defendants. As the Court already has concluded, plaintiffs have shown that captive shippers are subject to competitive forces; that defendants' executives expressly have denied that they would have tried to impose more aggressive programs on captive shippers than they were able to impose on non-captive shippers; and that defendants **[**174]** uniformly imposed their standard fuel surcharges during the class period without regard for whether the shipper was captive or had access to alternative modes of transportation. See supra at 72-74; see, e.g., HD Ex. 79, Garin Dep. at 111-14, 117-18, 120-21, 126-29; HD Ex. 77, Listwak Dep. at 74-76, 93-101; see also HD Ex. 153, Draper Dep. at 322 (agreeing that UP "adopted a standard surcharge program that it intended to be common across its customers," and explaining that "the difficulty of doing it on a customer-by-customer basis is one of the reasons it was done on a global basis"). Plaintiffs have shown by a preponderance of the evidence that defendants applied the allegedly conspiratorial fuel surcharges without discrimination. Thus, the captive-shipper factor does not preclude a finding that injury-in-fact is capable of common proof at trial.

Customer history of purchasing rail freight; existence of capacity constraints; customers whose primary freight alternative was truck. Defendants argue that roughly one-third of the shippers in the putative class first purchased rail freight after July 2003, and these shippers therefore "have no pre-conspiracy history on which to assess their **[**175]** likelihood of paying fuel surcharges absent collusion." Class Opp. at 38. Other shippers "have a long-standing history of rail freight purchases from Defendants, which could inform what the negotiation would have looked like, and whether it would have resulted in an assessment of a fuel surcharge, absent the conspiracy." Id. Defendants contend that these varying histories require individualized analysis that preclude a finding of predominance.

Next, defendants argue that certain shippers faced capacity constraints, and such shippers would be more likely to pay a fuel surcharge in the but-for world, even with rail-to-rail competition. See Class Opp. at 38. And defendants then point to customers whose primary freight alternative was truck. See id. According to defendants, these customers "would be likely to accept a rail fuel surcharge because trucking companies charged a fuel surcharges." Id. As defendants see it, "[c]ustomers already paying fuel surcharges to competing transportation alternatives would be unlikely to reject the idea of fuel surcharges by railroads." Id.

The Court disagrees with defendants that any of these factors preclude a finding that injury-in-fact can be established **[**176]** at trial with common evidence. Evidence common to the class shows that defendants intended to apply the new standard fuel surcharges to all of their freight shipments — regardless of prior freight purchasing history or any other factor. ***HN45***[] To prevail on the merits of their claim at trial, plaintiffs "need not exhaust all possible alternative sources of injury in fulfilling [their] burden of proving compensable injury under" the antitrust laws. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. at 114 n.9*. Rather, they must show only that the antitrust violation was a "material cause of the injury[.]" Id. And at the class certification stage, plaintiffs must show by a preponderance of the evidence **[*55]** that this is capable of common proof. They have satisfied their burden at this stage: plaintiffs have established by a preponderance of the evidence that each defendant enforced policies ensuring across-the-board, uniform application of their new fuel surcharge program.

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[18] As defendants explain, the term "captive" is used in two different ways: "In some cases, it is applied to a shipper that is served by only one railroad although that shipper has viable transportation options available through trucks and/or barges. Other times, it is applied to a shipper that claims that it has no viable transport alternatives to the railroad that serves it." Defs. Supp. Brief at 18 n.10.

Customer receptivity to fuel surcharges. Defendants argue that some shippers were "more amenable to fuel surcharges, and thus would have been more likely to agree to a fuel surcharge even with competition among railroads." **[**177]** Class Opp. at 39. Defendants point out that several sophisticated clients — [TEXT REDACTED BY THE COURT] — themselves proposed to pay a rate-based fuel surcharge. See id. According to defendants, [TEXT REDACTED BY THE COURT], for example, "proposed a rate-based fuel surcharge when its UP contract first came up for renewal after July 2003." Id. [TEXT REDACTED BY THE COURT] "volunteered to pay BNSF and NS a fuel surcharge even though its contracts with those carriers did not require it." Id. [TEXT REDACTED BY THE COURT] "acknowledged the need for a fuel surcharge in its contracts with CSX[] because of the volatility of fuel prices." Id. [TEXT REDACTED BY THE COURT], both BNSF customers, "were willing to pay a fuel surcharge so long as their own formulas were used." Id. According to defendants, these examples provide further support for their claim that individualized analysis is necessary in order to determine what caused shippers to pay a fuel surcharge and whether they would have paid a fuel surcharge in the but-for world. See id.

The Court disagrees with defendants. That some shippers may have been willing to pay *a* fuel surcharge is not surprising. Indeed, the STB noted in its 2007 **[**178]** decision that several railroads had introduced evidence that "many of their customers favor the continued use of a fuel surcharge program that is tied to the base rate." *Rail Fuel Surcharges, 2007 STB LEXIS 39, 2007 WL 201205, at *6 n.34*. As the STB stated: "Given that such a program shifts greater responsibility for fuel recovery to shippers with higher rates, it is not surprising that a subset of customers (presumably those with lower base rates) favor retaining a percentage-of-the-base-rate approach." Id. But the claim in this case is not a conspiracy to impose just *any* fuel surcharge; rather, plaintiffs claim that defendant conspired to increase total prices "by widespread application and enforcement of *coordinated, and aggressive, fuel surcharges.*" Pls. Wal-Mart Reply Brief at 7 n.11 (emphasis added); see also 1st Rausser Dep. at 94-95. Thus, defendants' assertion that, for example, [TEXT REDACTED BY THE COURT] were "willing to pay *a* fuel surcharge *so long as their own formulas were used*," Class Opp. at 39 (emphasis added), does not discredit plaintiffs' conclusion that injury-in-fact from widespread, aggressive, standardized, and uniform fuel surcharges is capable of common proof at trial.

ii. Component **[**179]** of the total price of shipping

A fuel surcharge is an add-on to the base rate for freight transportation. The total rail freight price for a shipping customer — the all-in rate — consists of the base rate and any percentage fuel surcharge applied to the base rate. Willig Report ¶ 18; see Class Opp. at 3; 1st Rausser Report at 62. The base rate

> includes fixed cost (or overhead) elements, such as the cost of organizing a particular shipment[,] . . . . the large fixed costs of building and maintaining track, bridges, and other structures to achieve long-run sustainability[,] . . . . [and] the railroad's markup of price over costs, i.e., the profitability element of pricing.

1st Rausser Report at 62. As discussed, plaintiffs do not allege that defendants conspired to fix each base rate separately. See 1st Rausser Dep. at 98; see also 1st Rausser Report at 52 n.118. Rather, plaintiffs allege that defendants imposed "an across-the-board artificially high and uniform fuel surcharge" as a percentage multiplier of the base rate, thereby permitting defendants "to raise total freight prices widely by a given percentage." *Rail Freight I, 587 F. Supp. 2d at 30*; see also 1st Rausser Report at 50 ("[A]dding **[**180]** a percentage fuel surcharge on top of line-haul rates or base rates is by its very nature a general price increase."); 2d Am. Compl. ¶ 13.

Defendants argue that since plaintiffs' conspiracy claim is based on a component of the overall price of shipping, "[p]ayment of a **[*56]** collusively-imposed fuel surcharge . . . can injure a shipper only if it caused the overall rate to be inflated above the competitive level." Class Opp. at 41. And "[g]iven that the alleged conspiracy was directed only at a portion of the total price," defendants argue that "any class member that obtained anything of value in exchange for accepting a fuel surcharge may not have suffered impact from the alleged conspiracy." Id. As defendants describe it,

> [i]n view of evidence that some (but not all) shippers made trade-offs for fuel surcharges, the task of determining which class members were injured (because their fuel surcharge was added to the rate with no corresponding reduction in price of other railroad concession) and which were not injured (because they were

> able to negotiate a price reduction or other service component that the shipper valued, requires an individualized analysis of hundreds or even thousands of **[**181]** railroad-shipper contract negotiations.

Id. at 41-42.

Defendants maintain that cases in which a conspiracy claim is based only on a component of the overall price "face a serious problem on class certification" because "[i]t is nearly impossible to determine, using common class-wide proof, whether the alleged conspirators never reduced (or failed to raise) other elements of the price and thereby competed on an overall price basis." Class Opp. at 43 (citing *Exhaust Unlimited, Inc. v. Cintas Corp., 223 F.R.D. 506, 513 (S.D. Ill. 2004)*; *Schoenbaum v. E.I. DuPont de Nemours & Co., Civil Action No. 05-1108, 2009 U.S. Dist. LEXIS 114080, at *35 (E.D. Mo. Dec. 8, 2009)*; *American Seed Co. v. Monsanto Co., 238 F.R.D. 394, 401 (D. Del. 2006)*, aff'd, *271 Fed. Appx. 138, 2008 U.S. App. LEXIS 6963 (3d Cir. Apr. 1, 2008))*. And defendants contend that this case is similar to *Robinson v. Texas Auto Dealers Ass'n, 387 F.3d 416 (5th Cir. 2004)*, in which the Fifth Circuit reversed certification of a class of automobile purchasers who challenged an agreement among auto dealers on how they would list an automobile tax, referred to as a Vehicle Inventory Tax ("VIT"). See Class Opp. at 44.

The Fifth Circuit in Robinson rejected **[**182]** the plaintiffs' assumption that the tax was simply added to the purchase price "for every consumer in the class," concluding:

> Such an assumption defies the realities of the haggling that ensues in the American market when one buys a vehicle. Although some purchasers certainly negotiate a price that excludes taxes, titles, and fees, others negotiate with an eye toward the "bottom line." Bottom-line purchasers base their negotiations on the *final* purchase price, including every tax, fee, and surcharge.

Robinson v. Texas Auto Dealers Ass'n, 387 F.3d at 423 (emphasis in original). Thus, the Fifth Circuit concluded that

> [t]o determine whether a purchaser negotiated in a top-line or bottom-line fashion, a court would have to hear evidence regarding *each purported class member and his transaction.* Such an individual examination would destroy any alleged predominance present in the proposed class. The offered evidence plainly shows that the class members' individual negotiation styles prevent the plaintiffs from arguing that all members of the class suffered an antitrust injury just by paying a VIT.

Id. at 424 (emphasis in original). Defendants contend that, if anything, this case is even less **[**183]** suited for class certification than Robinson because the automobile tax there never varied, whereas, here "the actual fuel surcharge assessed can and does vary from shipper to shipper — adding another variable to the negotiation over total prices." Class Opp. at 44.

Defendants also assert that the evidence in the record, similar to the circumstances in Robinson, shows that many of defendants' customers negotiate toward the bottom line and frequently trade fuel surcharges for rate reductions or other benefits. See Class Opp. at 45. As defendants describe it, "[t]here is overwhelming evidence that many of the sophisticated shippers constituting a substantial portion of Defendants' customer base focus on the overall price/service package and frequently negotiate trade-offs between base rates, fuel surcharges and many other terms of service." Id. And relying on the **[*57]** declarations of various railroad executives, defendants say that they have provided "numerous examples of major customers that negotiated items of value to them as part of their contracts that also included their agreement to pay fuel surcharges[.]" Id. Thus, given the highly individualized nature of rail freight pricing, defendants **[**184]** contend that plaintiffs cannot establish with common evidence that class members paid more for shipping as a result of paying the allegedly conspiratorial fuel surcharge.

On this point, Dr. Willig has the same view. As he explains, rail contracts are multidimensional, involving a wide variety of complex contractual provisions, and a shipper's evaluation of a contract "depends on the full package of contract terms[.]" Willig Report ¶ 116. Dr. Willig examines defendants' transaction data and relies on defendants' declarations to conclude that the introduction of fuel surcharges into rail contacts during the class period "often" resulted in concessions on other contract terms. Id. ¶ 122; see id. ¶ 123.

Plaintiffs do not appear to disagree with the general proposition that evidence of discounting — for example, reductions in a base rate — is relevant in assessing whether class certification is appropriate. Dr. Rausser himself has acknowledged that if shippers received concessions in the form of base rate discounts in exchange for the application of a fuel surcharge, then the impact for those shippers "wouldn't have been common to those" who did not receive such discounts. 1st Rausser Dep. **[**185]** at 272; see also id at 270. Plaintiffs argue, however, that the depositions of defendants' declarants, on whom defendants primarily rely for their purported evidence of discounting, have exposed that the declarations are both unreliable and inconsistent with later deposition testimony. See Class Reply at 17. According to plaintiffs, although defendants claim that customers traded fuel surcharges for trade reductions, the depositions establish that most reductions were in fact reduced *increases*, and even those such situations were rare. See id. at 20.

As for Dr. Rausser, he acknowledges that defendants' transaction data show that a nominal amount of discounting occurred, see 2d Rausser Dep. at 211 (describing "very little deviations or anomalies"), but contends that there is no evidence of systematic discounting of base rates to offset increases. See 2d Rausser Report at 91 ("There is no evidence of a systematic pattern of discounting base rates or providing other concessions in order to offset Fuel Surcharges[.]"); Class Reply at 14. As Dr. Rausser sees it, "there is no real-world evidence of widespread discounting of base rates, nor is there any established causal link between the **[**186]** isolated instances of declining base rates and the imposition of Fuel Surcharges." 2d Rausser Report at 66.

The Court agrees with plaintiffs that defendants' executives' declarations are unpersuasive and inconsistent with their later deposition testimony. Furthermore, the Court finds by a preponderance of the evidence that any examples of discounting are, at best, anomalies that do not preclude a finding of predominance. Finally, the Court concludes that the Fifth Circuit's decision in *Robinson* is inapposite to this case.

1. Defendants' declarations. Defendants and Dr. Willig rely heavily on the 21 declarations submitted by defendants' executives purporting to show that many of defendants' customers traded fuel surcharges for rate reductions. Defendants point to eight such examples in their opposition papers, see Class Opp. at 45-46, and then state that they "are not trivial exceptions to a rule," but rather "represent large revenues" and "reflect the diversity of outcomes among negotiated contracts." Id. If defendants' declarations provide examples of anything, it is the paucity of any evidence of discounting.

Relying on the declaration of George T. Duggan, a vice president at BNSF, **[**187]** defendants state: [TEXT REDACTED BY THE COURT] Class Opp. at 45 (citing Duggan Decl. ¶ 16). But during his deposition, Mr. Duggan testified that [TEXT REDACTED BY THE COURT] HD Ex. 81, Duggan Dep. at 26-27 (emphasis added). [TEXT REDACTED BY THE COURT] This, then, is an example of a reduced increase, not a discounting of the base rate in exchange for application of a standardized fuel surcharge.

[*58] Relying on the declarations of Marc Allen and David Garin, both vice presidents at BNSF, defendants state:

> [TEXT REDACTED BY THE COURT] In other instances, shippers agreed to pay the standard BNSF fuel surcharge in exchange for receiving other economic concessions from BNSF. Garin Decl. ¶ 12.

Class Opp. at 45-46. Mr. Allen, however, testified that BNSF's "standard fuel surcharge provision" was "the starting point in contract negotiations with respect to the fuel surcharge provision to be included in the contract." HD Ex. 85, Allen Dep. at 27; see id. at 25 ("[O]ur initial opening offer is almost always one that includes a standard fuel surcharge program."). As for Mr. Garin, he admitted that [TEXT REDACTED BY THE COURT] Id. at 198-99.

Relying on the declaration of Dean Piacente, a CSX vice president, **[**188]** defendants state: [TEXT REDACTED BY THE COURT] Class Opp. at 46 (citing Piacente Decl. ¶ 6). But Mr. Piacente subsequently testified that [TEXT REDACTED BY THE COURT] HD Ex. 87, Piacente Dep. at 102.

Relying on the declaration of Tim McNulty, CSX's director of marketing, agricultural products, defendants state: [TEXT REDACTED BY THE COURT] Class Opp. at 46 (citing McNulty Decl. ¶ 10). But as Mr. McNulty later testified at his deposition, [TEXT REDACTED BY THE COURT] HD Ex. 71, McNulty Dep. at 148.

Relying on the declarations of Ronald Listwak and James R. Schaaf, both vice presidents at NS, defendants state: "In 2006, the South Mississippi Electric Power Association agreed to pay the fuel surcharge if NS reduced the base rate by $0.35/ton. NS agreed." Class Opp. at 46 (citing Listwak Decl. ¶ 15; Schaaf Decl. ¶ 18). But as Mr. Listwak subsequently testified during his deposition, NS "was able to achieve *both the standard fuel surcharge and significant base rate increases*" on its contract with the South Mississippi Electric Power Association. HD Ex. 77, Listwak Dep. at 111. Thus, Mr. Listwak's declaration describes another example of a reduced increase of the base rate, not a discounting **[**189]** of the original base rate in exchange for application of the standard fuel surcharge.[19]

Relying again on the declaration of Mr. Listwak, defendants state:

> [TEXT REDACTED BY THE COURT]

Class Opp. at 46 (citing Listwak Decl. ¶¶ 19-23). As Mr. Listwak admitted during his deposition, however, NS [TEXT REDACTED BY THE COURT] HD Ex. 77, Listwak Dep. at 117; NS [TEXT REDACTED BY THE COURT] id.; and NS [TEXT REDACTED BY THE COURT] Id. at 119 (emphasis added).

2. Mandates not to discount base rates. Based in large part on the deposition testimony of defendants' own executives, the Court finds that plaintiffs have established by a preponderance of the evidence that any discounting of the base rate by defendants was rare — which is consistent with clear mandates from defendants not to modify their standard fuel surcharge program. As an illustrative **[**190]** example, Donald Seale, at the time NS' senior vice president of marketing services, stated in an internal NS e-mail: "I expect market based price increases to be applied independent of the FSC, and we should *absolutely not* be deferring any rate increases because we are applying the FSC." RD Ex. 84, E-mail from D. Seale, at NS_010034244, Apr. 14, 2004 (emphasis added). Subsequently, Mr. Seale, now the chief marketing officer of NS, testified:

> *A.* . . . . Do not trade off one to gain the other. That was the directive.
>
> *Q.* And don't give up the fuel surcharge for base rate, don't give up base rate for the fuel surcharge, goes to both sides of the equation, correct?
>
> *A.* Well, it would . . . have relationship to both sides of the equation because they are all components of the overall price.
>
> *Q.* And your directive was, If you want to defer rate increases because you are applying a fuel surcharge, you come to me and get my approval, correct?
>
> *A.* That is correct.
>
> *Q.* Okay. And so you would be the sign-off authority for any situation in which, **[*59]** where people were following your directives, at least, someone sought to defer a rate increase because the fuel surcharge was being applied, correct?
>
> *A.* If the fuel **[**191]** surcharge was being modified/customized through negotiation, the directive was that they would secure authority to make that modification.
>
> *Q.* Okay. I understand that that was the directive. But it was also the directive, was it not, that you are not to defer rate increases because you are applying the fuel surcharge, that was a separate directive?
>
> *A.* That was — that was a part of the directive. The two are inseparable.

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[19] Mr. Schaff, in his declaration, referenced the shipping customer [TEXT REDACTED BY THE COURT] See Schaff Decl. ¶ 18. But Mr. Lawson, another NS vice president, admitted during his deposition that the Schaff declaration described only three contracts without providing any information on whether [TEXT REDACTED BY THE COURT] HD Ex. 83, Lawson Dep. at 126.

> *Q.* And you were the person that had final sign-off authority both with respect to any modification of the fuel surcharge and with respect to any deferring of rate increases because of the application of the fuel surcharge, correct?
>
> *A.* That would be correct.
>
> *Q.* And so my question is: Did you keep some record of the situations in which you specifically approved a modification of the fuel surcharge, that is Question Number 1?
>
> *A.* No.
>
> *Q.* Did you keep any record of any situations or of the situations in which you specifically approved the deferring of any rate increase because of the application of the fuel surcharge?
>
> *A.* No. I did not.

RD Ex. 173, Seale Dep. at 299-301. Mr. Seale admitted — despite being the individual with final sign-off authority for any modifications to NS' clear **[**192]** directives on its fuel surcharge program — that he had "no direct knowledge" of situations in which rate increases were deferred because NS was applying its fuel surcharge. Id. at 297; see id. at 299-301. [20]

3. Expert opinions on discounting. As for the parties' experts, Dr. Rausser and Dr. Willig disagree on the extent of any discounting in exchange for application of the standard fuel surcharge program. Compare 1st Rausser Report at 94-101, and 2d Rausser Report at 57-66, with Willig Report at 66-70. The Court finds persuasive Dr. Rausser's analysis, which is consistent with the evidence in the record. Dr. Willig, relying on the declarations provided by defendants, states that these declarations show that the application of fuel surcharges "often resulted in concessions with respect to other contract **[**193]** terms," including discounts on base rates. Willig Report ¶ 122. Dr. Rausser disagrees. See 2d Rausser Dep. at 205. He explains that he went through "each and every instance that's specified in the declarations and discussed in depositions" and concludes that the declarations provide "weak evidence . . . [b]ecause they don't offset the actual over-recovery of fuel surcharges resulting from" the coordinated fuel surcharge programs. Id. The Court agrees with Dr. Rausser. As discussed above, the Court finds the defendants' declarations unpersuasive and often inconsistent with later deposition testimony of the same people; the declarations primarily reveal reduced increases in base rates with application of the standard fuel surcharge program.

Both experts also reviewed defendants' transaction data and reached different conclusions as to discounting. Dr. Willig concludes that defendants' transaction data reveal "a variety of examples of pairs of shippers of the same commodity that faced similar changes during the class period in 'all-in' rates," and that "[t]hese examples demonstrate large differences across shippers in the extent to which all-in rate increases were attributable to changes **[**194]** in base rates as opposed to changes in FSCs." Willig Report ¶ 123. In contrast, Dr. Rausser analyzed defendants' transaction data and concluded that there was no systematic discounting of base rates to offset the application of the standard fuel surcharge. See 1st Rausser Report at 94-101. As Dr. Rausser describes it: "An analysis **[*60]** of the transaction data reveals that there is no evidence of widespread discounting of base rates. Instead, base rates across the main commodities shipped by defendants remained largely constant in real terms from the years before the Class Period to the years during the Class Period." 1st Rausser Report at 95; see also 2d Rausser Report at 66.

In resolving this dispute between the experts, the Court notes, as an initial matter, that Dr. Willig has relied on the defendants' transactional data to reach his conclusions about purported examples of discounting. See Willig Report

[20] For another example of a company directive not to discount base rates in exchange for application of a fuel surcharge, see RD Ex. 91, BNSF Memorandum from S. Kyei, at BNSF-0325453, Mar. 28, 2008 ("CEO's Mandate for Marketing's Fuel Surcharge Programs": "Every price authority should have a fuel surcharge applied"; "Marketing Team should not discount a fuel surcharge to raise price").

at 67 ("Defendants' transaction data reveal large differences across comparable shippers in the contribution of base rates and FSCs to all-in rates."). Thus, Dr. Willig is relying on evidence common to the class to dispute the results of Dr. Rausser's analysis regarding discounting and, **[**195]** ultimately, whether class members experienced injury-in-fact. This, then, appears to raise a merits issue, not a class certification issue. The question before the Court is whether plaintiffs, through Dr. Rausser, have "'established a workable multiple regression equation, *not whether plaintiffs' model actually works*[.]'" *In re Amaranth Natural Gas Commodities Litig., 269 F.R.D. at 383* (quoting *In re EPDM Antitrust Litig., 256 F.R.D. at 100*) (emphasis in original); see *In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 583, 604 (N.D. Cal. 2010)*. Defendants should be "focused on disputing the use of the methodology itself, not the results of the methodology." *In re EPDM Antitrust Litig., 256 F.R.D. at 96*. In any event, the Court finds Dr. Rausser's analysis persuasive, see 2d Rausser Report at 57-66, and credits his determination from his review of the data that there was no evidence of systematic discounting. The Court concludes that any examples of such discounting are outliers, insufficient to defeat a finding of predominance. See *Kohen v. Pacific Inv. Mgmt. Co., 571 F.3d at 677*.

4. Starting point for negotiations. Finally, the Court concludes that the Fifth Circuit's decision **[**196]** in Robinson v. Texas Auto Dealers Ass'n, a case upon which defendants' heavily rely, is inapposite to this case. The Fifth Circuit in Robinson framed the question presented as "whether the mere payment of a VIT — unaccompanied by any other evidence — provides enough information such that a party may sustain a price-fixing suit on behalf of the entire class." *Robinson v. Texas Auto Dealers Ass'n, 387 F.3d at 423*. In concluding that class certification was inappropriate, the Fifth Circuit criticized the plaintiffs for *assuming* that the automobile tax at issue "represents an additional charge that artificially increases the final purchase price for every consumer in the class." Id. As the Fifth Circuit stated:

> Such an assumption defies the realities of haggling that ensues in the American market when one buys a vehicle. Although some purchasers certainly negotiate a price that excludes taxes, titles, and fees, others negotiate with an eye to the "bottom line." Bottom-line purchasers base their negotiations on the *final* purchase price, including every tax, fee, and surcharge.

Id. (internal footnote omitted) (emphasis in original). Thus, in order to determine whether a customer is a bottom-line **[**197]** or top-line negotiator, the Fifth Circuit concluded that "a court would have to hear evidence regarding *each purported class member and his transaction*," and that was fatal to a finding of predominance. *Id. at 424* (emphasis in original).

Here, however, plaintiffs have presented persuasive documentary and expert opinion evidence that is common to the class that shows that the standard fuel surcharges were intended to raise overall prices as a percentage multiplier of the base rate. Because each defendant's standardized fuel surcharge program was applied as a percentage multiplier of a shipper's base rate, application of that surcharge without discounting directly had the effect of "increas[ing] all rates by a set percentage[.]" *Rail Fuel Surcharges, 2007 STB LEXIS 39, 2007 WL 201205, at *4*. And the standardized fuel surcharges applied during the class period were uniform, were not subject to negotiation, and were not discounted except in the case of anomalies. Finally even when, in the rare case, base rates were discounted, railroad executives admitted that **[*61]** the standard fuel surcharge program "even if not accepted . . . was an effort to at least influence the discussion on . . . fuel surcharge." HD Ex. **[**198]** 88, Gehl Dep. at 55. In other words, the allegedly conspiratorial fuel surcharges were the starting point for negotiations — a situation commonly observed in price fixing conspiracies where classes have been certified. See, e.g., *In re Universal Serv. Fund Tel. Billing Practices Litig., 219 F.R.D. 661, 675 (D. Kan. 2004)* (describing class actions where "'the negotiated transaction prices would have been lower if the stating point for negotiations had been list prices set in a competitive market'") (quoting *In re Industrial Diamonds Antitrust Litig., 167 F.R.D. 374, 383 (S.D.N.Y. 1996))*.

This case therefore is nothing like Robinson. Compare *Robinson v. Texas Auto Dealers Ass'n, 387 F.3d at 423* (deciding "whether the mere payment of a V1T — *unaccompanied by any other evidence* — provides enough information such that a party may sustain a price-fixing suit on behalf of the entire class") (emphasis added). Instead, this case falls within the line of cases holding that ***HN46***[] class-wide injury-in-fact can be proven at trial by showing that the allegedly conspiratorial fuel surcharges were the starting point '"from which negotiations for discounts began.'" *In re Universal Serv. Fund Tel. Billing Practices Litig., 219 F.R.D. at 675* **[**199]** (quoting *In re Industrial Diamonds Antitrust Litig., 167 F.R.D. at 383*); see *In re Ready-Mixed Concrete Antitrust Litig., 261 F.R.D. at 171-72*. The theory behind this line of cases — which applies with equal force here —

> "is . . . that the negotiated transaction prices would have been lower if the starting point for negotiations had been list prices set in a competitive market. Hence, if a plaintiff proves the alleged conspiracy resulted in artificially inflated list prices, a jury could reasonably conclude that each purchaser who negotiated an individual price suffered some injury."

In re Universal Serv. Fund Tel. Billing Practices Litig., 219 F.R.D. at 675 (quoting *In re Industrial Diamonds Antitrust Litig., 167 F.R.D. at 383*). In sum, individualized negotiations and discounts are not an automatic bar to class action treatment. See *In re EPDM Antitrust Litig., 256 F.R.D. at 89*; *In re Urethane Antitrust Litig., 251 F.R.D. 629, 637-38 (D. Kan. 2008)*; *In re Industrial Diamonds Antitrust Litig., 167 F.R.D. at 383*.

Under this line of cases, then, the question is whether common proof can be used to show that the alleged conspiracy on fuel surcharges, at the very least, affected the starting **[**200]** point for negotiations. See *In re EPDM Antitrust Litig., 256 F.R.D. at 88-89*; *In re Urethane Antitrust Litig., 251 F.R.D. at 637-38*. The answer is yes. Not only have defendants' own executives admitted that negotiations started with the standard fuel surcharge program, see HD Ex. 88, Gehl Dep. at 55; HD Ex. 85, Allen Dep. at 24-27; HD Ex. 83, Lawson Dep. at 38-41; HD Ex. 77, Listwak Dep. at 23, 129; HD Ex. 89, Pagan Dep. at 55-56; HD Ex. 66, Young Dep. at 71-75, but plaintiffs have shown — in reliance on defendants' own documents and economic analysis of defendants' transaction data — that defendants' standardized fuel surcharge programs overwhelmingly were applied without discounting the base rate. See supra at 106-13.

iii. Expert opinions on injury-in-fact

Plaintiffs do not rely only on the extensive documentary evidence in the record to show that injury-in-fact is capable of proof at trial with evidence common to the class. Plaintiffs also submit that they anticipate presenting at trial the testimony of Dr. Rausser, who, as they describe, confirms with economic principles common to the class and a regression analysis that injury-in-fact is capable of common proof. See Class Mem. at **[**201]** 71-75; see also Class Mot., Ex. B, Trial Plan at 8-9.

In his report, Dr. Rausser first discusses the rail freight industry and concludes that five structural factors strongly suggest that a conspiracy to impose supra-competitive fuel surcharges on shippers would have succeeded in subjecting the class to a common injury-in-fact. See 1st Rausser Report at 10-52; 2d Rausser Report at 80-81. Then, Dr. Rausser performs economic regression analyses on defendants' transaction data that he says reveal that class members suffered a **[*62]** common injury-in-fact from the alleged conspiracy. See 1st Rausser Report at 80-101, 120; 2d Rausser Report at 91-92. Dr. Rausser has developed two economic regression models: a "common factor model and a damage model." Oct. 6 Tr. at 137. According to plaintiffs and Dr. Rausser, "[t]hese models together show that there are identifiable common factors that explain pricing in the rail freight industry; and . . . that the conspiracy caused significant overcharges across the class." Id.; see 2d Rausser Report at 91-92. Thus, plaintiffs say that Dr. Rausser has established that economic analyses relying on evidence common to the class — defendants' transaction data and **[**202]** economic principles common to the class — "can be used to show that Defendants' conspiracy led to artificially high prices during the Class Period for Class members." 1st Rausser Report at 80-81. [21]

Dr. Willig disagrees with some of Dr. Rausser's views about the rail freight market. See Willig Report at 64-100. More importantly, Dr. Willig finds flaws in Dr. Rausser's regression analyses, see id. at 107-59, and concludes that individualized inquiry is required to determine whether a particular shipper was injured-in-fact as a result of the alleged conspiracy. See id. ¶ 285.

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[21] As discussed below, see infra at 138-39, Dr. Rausser also concludes that a common damage methodology works in this case.

As the Third Circuit instructed in In re Hydrogen Peroxide Antitrust Litig., the Court has weighed the expert reports of Dr. Rausser and Dr. Willig as a part of the rigorous analysis Rule 23 demands. See *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 323-24*. The Court finds persuasive Dr. Rausser's analysis, which supports plaintiffs' argument that injury-in-fact is capable of proof at trial through evidence common to the class. The Court finds that Dr. Rausser's theory is "plausible," *Behrend v. Comcast Corp., 655 F.3d at 204 n.13*; **[**203]** *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 325*, and "susceptible to proof at trial through available evidence common to the class." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 325*. Dr. Rausser persuasively has established "the key logical steps behind [his] theory," *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d at 26*, that injury-in-fact is capable of proof at trial with workable economic models and analysis — that is, common evidence.

1. Rail freight industry. Dr. Rausser contends that the rail freight industry is conducive to price fixing. See 1st Rausser Report at 5. He first identifies the geographic and product scope relevant to the rail freight industry. See id. at 10. As for the geographic scope, defendants sell rail services throughout the continental United States. Id. Together, defendants possess a 90 percent market share based on track miles and a 94 percent market share based on freight revenue. Id. at 21. Together, they provide rail services throughout the continental United States "to nearly every industrial, wholesale, retail, and resource-based sector of the economy." Id. In short, Dr. Rausser concludes that defendants have "an **[**204]** enormous market share in the rail freight market," and that this "structure . . . created an environment conducive to collusion[.]" Id. at 20.

The product at issue is freight service. See 1st Rausser Report at 16. As Dr. Rausser describes it, freight services are "homogenous and interchangeable across Defendants." Id. at 27. He further explains:

> The service that the Class I railroads offer shippers is interchangeable and therefore, when shippers make a choice between railroads, they do so based on price. The service that is offered to the market is simply the movement of goods between origin and destination. Shippers can even use their own cars and often do. Any differences that may exist between shippers concerning reliability and speed are very likely to be eliminated over time as railroads compete with each other and invest to eliminate any service deficiencies they may have.

Id. In view of this characterization of the product, Dr. Rausser concludes that "[b]ecause customers choose between railroads based on price, there are strong incentives **[*63]** for railroads to restrict the resulting price competition by collusion." Id.

Having examined the geographic market and the product at issue, Dr. **[**205]** Rausser contends that the rail freight industry has five characteristics that make it conducive to price fixing: (1) the industry is heavily concentrated; (2) there are significant barriers to entry; (3) rail freight services are interchangeable across defendants, and shippers choose their railroad based on price; (4) the demand for rail freight services generally is inelastic; and (5) pricing is transparent. See 2d Rausser Report at 79. And according to Dr. Rausser, these five characteristics strongly suggest that "had a conspiracy occurred it would have succeeded in subjecting the Class to a common" injury-in-fact. 2d Rausser Report at 80. Dr. Rausser concludes:

> *Characteristic 1* — as the industry is concentrated in the hands of the Defendants, the alleged cartel would have been able to sustain high prices across the Class and non-Defendant railroads would have lacked the capacity to lure Class members away with lower prices;
>
> *Characteristic 2* — the Defendants' high prices would not have been undercut by the creation of new railroads (*de novo* entry), or the expansion of existing railroads;
>
> *Characteristic 3* — because Class members considered the railroads' services as interchangeable and **[**206]** chose their railroad based on price, they would have been harmed by the restriction of that choice and the routinely imposed higher prices;
>
> *Characteristic 4* — although some shippers may have been able to find viable transport alternatives to rail (all price-fixing cartels lose some customers), the vast majority would have been unable to do so and, thus, Defendants could profitably elevate their prices in a coordinated manner without risk of losing substantial business;

> *Characteristic 5* — costs of implementing and maintaining the conspiracy would have been extremely low due to thoroughly standardized service descriptions, established mechanisms for communicating and tracking prices, and ease of using generally available indexes to increase prices.

2d Rausser Report at 80-81 (footnotes omitted). [22]

Not surprisingly, Dr. Willig disagrees with Dr. Rausser: he contends that the industry characteristics discussed by Dr. Rausser "do not suggest, and provide no valid basis for concluding, that the alleged conspiracy would have had a systematic effect on rail rates paid by members of the purported class." Willig Report ¶ 43. As Dr. Willig sees it, the economics of the rail industry imply that there can no common evidence of class-wide injury-in-fact. Willig Report at 64.

Dr. Willig's disagreement with Dr. Rausser appears to focus on two questions about the structure of the rail freight industry: whether freight prices are truly interchangeable; and whether pricing is transparent. As for the first issue, Dr. Willig contends that rail contracts involve a wide variety of complex contractual agreements and are multidimensional in nature. Willig Report ¶ 115. Dr. Willig concludes:

> Testimony from defendants' marketing personnel as well as defendants' transaction data demonstrate that FSCs cannot be viewed **[**208]** in insolation from the other dimensions of agreements between railroads and shippers. Rather, only an individualized inquiry can determine whether shippers benefitted from modification of other parts of the agreement as part of their agreement to pay an FSC. The existence and magnitude of such modifications cannot be measured on a class-wide basis since they depend upon the terms of both rate and non-rate provisions of the agreements.

Willig Report ¶ 115. According to defendants, they "do not provide a product, much **[*64]** less a fungible commodity"; rather, they "provide the majority of their services pursuant to contracts that reflect the diversity of rail customers and are highly differentiated, varying by customer, lane, equipment, product being shipped, and numerous other factors." Class Opp. at 58; see Willig Report ¶ 116.

Regarding the second issue, Dr. Willig contends that Dr. Rausser's claim that pricing is transparent is incorrect. Willig Report ¶ 43. According to Dr. Willig, "rates typically paid by members of the proposed class are confidential and are not transparent to other members of the alleged conspiracy." Id. This industry characteristic, Dr. Willig says, "creates practical **[**209]** incentives for members of the alleged cartel to 'cheat' or 'deviate' by offering concessions to shippers on base rates, fuel escalation provisions, or other elements of rail contracts." Id.

The Court finds persuasive Dr. Rausser's characterization of the rail freight industry. There is no question that the rail freight industry is concentrated in the hands of the four defendants — they possess 90 percent market share based on track miles and control 94 percent of the market based on freight revenue — and Dr. Willig does not claim otherwise. Nor does Dr. Willig dispute Dr. Rausser's contention that there are significant barriers to entry.

As for the nature of the product, the Court disagrees with defendants that "there are a lot of individualized factors that drive shippers to choose between different rail freight service providers." Oct. 6 Tr. at 32. Dr. Rausser persuasively has explained that customers routinely switch between railroads for shipments along the same routes, "confirming that they see the railroads' services as interchangeable." 1st Rausser Report at 27; see id. at 27-29. The Court also credits Dr. Rausser's conclusion that demand for freight services generally is inelastic. **[**210]** See 1st Rausser Report at 29-36. As he explains, "an analysis of the industry demonstrates that Defendants' businesses are concentrated in commodities and distances over which rail is the most cost efficient transport option and therefore the demand that they faced was in general inelastic." Id. at 31-32.

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[22] Defendants contend that one part of "Characteristic 5" references objectionable interline-related communications. See Defs. Interline Objections, Ex. C, at 80-81. Specifically, defendants say that Dr. Rausser improperly has relied on interline-related communications when he states that costs of implementing and maintaining the conspiracy would have been extremely low due to "*established mechanisms* ***[**207]*** *for communicating and tracking prices*[.]" Id. (emphasis added). The Court has not relied on this part of Characteristic 5 in reaching in decision on plaintiffs' motion for class certification.

Finally, regarding the issue of transparency, Dr. Rausser acknowledges, as he must, the existence of private contracts, but explains that rail freight pricing nevertheless is established, well defined, and easily understood. See 1st Rausser Report at 37. [23] As Dr. Rausser states: "[F]reight railroad companies use common types of *price authority* documents, which provide a detailed account of all the base freight charges, surcharges, accessorial, and fuel surcharges associated with a specified rail movement." Id. at 37 (emphasis in original). Although rail freight is, of course, a service, rather than a good, "that service is well defined and highly standardized using commodity classifications for the material shipped, tonnage as a measure of quantity, and miles representing the distance traveled." 2d Rausser Report at 29. Thus, "[i]ntelligence on price quotes for this service can be **[**211]** exchanged and both parties in the exchange know exactly what they are talking about," which "eases the costs of monitoring for a cartel." Id. Moreover, the allegedly conspiratorial mechanism applied by defendants — standardized fuel surcharges — does not require constant communications once the details of the surcharge have been agreed upon. See 1st Rausser Report at 50. And although Dr. Willig contends that the existence of private price quotes creates practical incentives to "cheat" or "deviate" by offering concessions, see Willig Report ¶ 43, as the Court previously has found by a preponderance of the evidence, see supra at 106, the examples of discounting are, at best, anomalies.

The Court **[**212]** therefore is not persuaded by Dr. Willig's characterization of the rail freight industry, see Willig Report ¶¶ 43, 115-16, or by defendants' attempts to discredit **[*65]** Dr. Rausser's analysis. See Defs. Hr'g Binder, Part III at 45; Oct. 7 Tr. at 222-35. Rather, the Court finds that the five structural characteristics of the rail freight industry identified by Dr. Rausser, and the evidence he marshals regarding those characteristics, provide strong support for plaintiffs' contention that injury-in-fact is capable of proof at trial with evidence common to the class. See *In re Puerto Rican Cabotage Antitrust Litig., 269 F.R.D. at 139* (considering, among other things, highly concentrated industry, high entry barriers, static elasticity, and price competition in finding by a preponderance of the evidence that predominance requirement was satisfied); *In re EPDM Antitrust Litig., 256 F.R.D. at 92* (according to expert analysis credited by the court, certain market factors "lay the groundwork for plaintiffs' argument that, if collusive behavior did occur, it would have been effective in raising prices across the class, thus demonstrating class-wide injury-in-fact").

2. Background on multiple regression ***[**213]*** *analysis.* The centerpiece of Dr. Rausser's report focuses on two economic models that examine defendants' transaction data through multiple regression analysis. See 2d Rausser Report at 91-92; see also id. at 11. Before addressing the specific analyses done in this case, the Court provides below some background on multiple regressions in general, as set forth in a reference guide published by the Federal Judicial Center:

> Multiple regression analysis is a statistical tool for understanding the relationship between or among two or more variables. Multiple regression involves a variable to be explained — called the dependent variable — and additional explanatory variables that are thought to produce or be associated with changes in the dependent variable. For example, a multiple regression analysis might estimate the effect of the number of years of work on salary. Salary would be the dependent variable to be explained; years of experience would be the explanatory variable.
>
> Multiple regression analysis is sometimes well suited to the analysis of data about competing theories for which there are several possible explanations for the relationships among a number of explanatory variables. **[**214]** Multiple regression typically uses a single dependent variable and several explanatory variables to assess the statistical data pertinent to these theories. . . . [For example, [in an antitrust cartel damages case, the plaintiff's expert might utilize multiple regression to evaluate the extent to which the price of a product increased during the period in which the cartel was effective, after accounting for costs and other variables unrelated to the cartel. The defendant's expert might use multiple regression to suggest that the plaintiff's expert had omitted a number of price-determining variables.

[23] Moreover, as Dr. Rausser points out, the existence of private price agreements in the rail freight industry does not distinguish the industry "from many other industries, including some that have experienced price fixing despite the supposedly confidential nature of customer contracts." 2d Rausser Report at 10 & n. 16 (citing peer-reviewed study concluding that "cartels in industries with fuller reporting on prices are not statistically significantly higher than for cartels in other industries").

> More generally, multiple regression may be useful (1) in determining whether a particular effect is present; (2) in measuring the magnitude of a particular effect; and (3) in forecasting what a particular effect would be, but for an intervening event. . . .
>
> Multiple regression analysis can be a source of valuable scientific testimony in litigation. However, when inappropriately used, regression analysis can confuse important issues while having little, if any, probative value.

RUBINFELD, supra, at 305-08.

HN47[] "In an antitrust suit, plaintiffs will generally use multiple regression analysis to demonstrate **[**215]** that a 'conspiracy' variable has influence over the dependent variable (price) — that is, class members paid a higher price than the basic economic principles of supply and demand would otherwise dictate, thus demonstrating collusive behavior was at work." *In re EPDM Antitrust Litig., 256 F.R.D. at 95*; see *Schumacher v. Tyson Fresh Meats, Inc., Civil Action No. 02-1027, 2006 U.S. Dist. LEXIS 1943, 2006 WL 47504, at *1 n.1 (D.S.D. Jan. 5, 2006)* ("A multiple regression analysis is a statistical tool that attempts to reveal relationships between explanatory variables and a dependent variable."). A multiple regression model must, of course,

> be correctly set up for the results to be valid. The expert's choices are crucial for the success of the analysis and the ultimate fact-finder should consider the following **[*66]** when evaluating the efficacy of the expert's analysis: has the expert correctly identified the dependent variable; has he or she chosen the correct explanatory variable that is relevant to the question at issue; are the additional variables chosen all correct or are some missing and/or irrelevant; is the form of the analysis correct?

In re EPDM Antitrust Litig., 256 F.R.D. at 95; see RUBINFELD, supra, at 310-17.

Ultimately, **[**216]** "[e]ven the best regression equation cannot prove causation." *Schumacher v. Tyson Fresh Meats, Inc., 2006 U.S. Dist. LEXIS 1943, 2006 WL 47504, at *7*; see RUBINFELD, supra, at 310. Rather, "[t]he most it can show is a correlation that can give rise to an inference that causation exists." *Schumacher v. Tyson Fresh Meats, Inc., 2006 U.S. Dist. LEXIS 1943, 2006 WL 47504, at *7*; see *Morgan v. United Parcel Serv. of Am., Inc., 380 F.3d 459, 466 (8th Cir. 2004)* (a valid regression equation gives rise to an inference of causation, but does not itself prove causation); see also *In re Oil Spill by the Amoco Cadiz Off the Coast of Fr. on Mar. 16, 1978, 954 F.2d 1279, 1320 (7th Cir. 1992)* ("If done right, regression analysis permits an inference of causation, and of the size of the effect."). Thus, "one must infer that a causal relationship exists on the basis of an underlying causal theory that explains the relationship between the two variables." RUBINFELD, supra, at 310.

3. Dr. Rausser's regressions are workable and susceptible to proof at trial through common evidence. As discussed, Dr. Rausser explains that he developed two multiple regression models, a common factor model and a damage model, that together reveal that injury-in-fact can be established **[**217]** at trial with evidence common to the class. See, e.g., 2d Rausser Report at 91-92, 99-100; see also Oct. 6 Tr. at 137. As Dr. Rausser describes it, his common factor model performs "an investigation of whether . . . common transaction characteristics predominate over individual factors in determining the variation in freight rates." 2d Rausser Report at 84. Dr. Rausser analyzed defendants' transaction data and concluded that there are seven common factors that predominately explain rail price variations, and that these factors can be controlled for in a regression. See 1st Rausser Report at 92. In other words, according to Dr. Rausser, his common factor model explains pricing in the rail freight industry and shows, relying only on defendants' transaction data, that rail freight pricing is "highly standardized." Id. at 84.

According to Dr. Rausser, the seven factors that predominately explain rail price variations are: (1) weight of the shipment; (2) distance; (3) whether the shipment is interline; (4) the origin and destination; (5) the commodity being transported; (6) the rail car type; and (7) the quarter of departure. See 1st Rausser Report at 92. Dr. Rausser concludes that these **[**218]** seven factors are highly predictive of freight rates: he says that these factors explain "over 75% of the variation in actual per car revenues for individual shipments." 2d Rausser Report at 66-67. Because, according to Dr. Rausser, the seven common factors predominate over individual factors in determining rail freight price, the seven common factors can be used in a common analysis of impact. See 2d Rausser Report at

67; see also 1st Rausser Report at 7 (stating that "common factors can be measured using the Defendants' transaction data and used in a common analysis to identify and quantify the harm experienced by the Class").

Dr. Rausser's damage model builds on the common factor model to show, again relying on defendants' transaction data, that the alleged conspiracy injured class members by inflating freight prices and to quantify the amount of damages. See 2d Rausser Report at 91-92. Dr. Rausser says that the damage model works by taking into account the factors that influenced defendants' prices during the class period as compared to "benchmark" prices during the three preceding years. 1st Rausser Report at 113. Dr. Rausser says that his regression analyses — applied now to 100 **[**219]** percent of defendants' transaction data, see 2d Rausser Report at 12 — find "that all-in freight rates were higher during the Class Period than could be explained by economic forces other than the alleged price-fixing conspiracy" and reveal "a structural break in the relationship between fuel prices and freight rates starting in 2003, consistent with the **[*67]** advent of a price-fixing conspiracy using Fuel Surcharges as its facilitating mechanism." Id. at 82-83; see 1st Rausser Report at 120. Dr. Rausser's damage model calculates a class-wide overcharge of 13.4 percent. See 2d Rausser Report at 83; 1st Rausser Report at 119-20.

Defendants and Dr. Willig argue that Dr. Rausser's economic regressions suffer from fatal flaws, and that neither his common factor model nor his damage model satisfies plaintiffs' burden of showing that injury-in-fact is capable of proof at trial with common evidence. See Class Opp. at 63. As for the common factor model, defendants contend that it has four flaws. See id. at 63-65. First, defendants contend that Dr. Rausser "only studied traffic destined for three geographic areas out of the thousands served by Defendants and only for a single year — 2006." Id. at 63. **[**220]** The three destinations that he chose, according to defendants, are not representative samples. Id. Second, defendants argue that although Dr. Rausser's model shows that certain characteristics "play an important role in overall rail rates," it "says nothing about whether the conspiracy caused all class members to pay a fuel surcharge they otherwise would not have paid or how that fuel surcharge compared to whatever cost recovery mechanism would have been used instead." Id. at 64. Third, defendants argue that Dr. Rausser's model "purports to explain 76-89% of the variation in overall rates," but provides "no scientific basis to dismiss the 11-24% in unexplained price variation as unimportant." Id. Fourth, defendants argue that Dr. Rausser's model "looks only at a snapshot in time — 2006 — and thus cannot examine changes in rates over time." Id. at 65. Thus, as defendants see it, Dr. Rausser's common factor model "tells the [C]ourt nothing about what factors would have an effect on rates over time[.]" Id.

Next, addressing Dr. Rausser's damage model, defendants argue that it is "not a model of injury causation," and that Dr. Rausser purportedly has not claimed otherwise. Class Opp. at 65 **[**221]** (citing 1st Rausser Dep. at 142-43). And even if it were a model of injury causation, defendants argue that it suffers the same underlying flaw as his common factor model. As defendants see it, his damage model "cannot show whether a shipper paid a fuel surcharge *because* of the conspiracy or would have paid one anyway. The model simply assumes causation and then attempts to quantify the damages." Id.

Finally, defendants argue that Dr. Rausser's analysis fails to specify a but-for world. See Class Opp. at 67. According to defendants, absent a clearly identified but-for world, "there is no basis to say whether prices would have been lower across-the-board." Id. Defendants contend:

> Given the unprecedented increase in fuel costs, which even Dr. Rausser concedes would have led to increased prices, the logical question is what price strategy supposedly would have been used in lieu of the rate-based fuel surcharges. In contrast to a simple reduction in price in the typical price-fixing case, alternative fuel pricing strategies affect class members in very different ways and the Court simply cannot assume — as Plaintiffs would like it to — that a mechanism that might have been chosen but for **[**222]** the conspiracy would always yield a lower fuel surcharge. Rather, Plaintiffs must posit an alternative and demonstrate that it would yield a lower charge for all (or nearly all) members of the class.

Class Opp. at 67-68. Defendants say that plaintiffs have not identified a but-for fuel pricing strategy, and Dr. Rausser's regressions fail to measure any specific but-fur fuel cost recovery mechanism. Id.

The Court disagrees with defendants and concludes that Dr. Rausser has presented a theory of proof that is plausible and economic regression analyses that are workable. The Court finds by a preponderance of the evidence that Dr. Rausser's theory and regression analyses are susceptible to proof at trial through evidence common to the class. See *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 325*; see also *In re EPDM Antitrust Litig., 256 F.R.D. at 96*. The Court addresses each of defendants' arguments in turn:

First, the Court is not persuaded by defendants' argument that Dr. Rausser's common factor model relies on unrepresentative destinations. **[*68]** The point of the common factor regression is to demonstrate that certain factors predominately explain rail price variations. See 1st Rausser **[**223]** Report at 92; 2d Rausser Report at 85. As defendants acknowledge, Dr. Rausser's model "[o]f course" shows that "a shipment's physical characteristics, such as its weight, car type and commodity, play an important role in overall rail rates." Class Opp. at 64. Defendants do not assert that, had Dr. Rausser chosen other destinations, he would have reached a different conclusion that seven common factors predominately explain freight rates. The Court concludes that defendants have failed to undermine plaintiffs' showing that the seven factors identified and controlled for in Dr. Rausser's analysis are the determinative factors of rail freight pricing.

Second, defendants criticize Dr. Rausser's common factor model for purportedly failing to say anything about whether the conspiracy caused all class members to pay a fuel surcharge they otherwise would not have paid or how that fuel surcharge compared to whatever cost recovery mechanism would have been used instead. Class Opp. at 64. The Court finds that criticism misplaced. Dr. Rausser's common factor and damage models together set forth persuasive, workable multivariate regressions that give rise to an inference of causation (the most any **[**224]** regression analysis can be expected to do) — that is, that putative class members paid more for rail freight transportation services than they would have absent the conspiracy on fuel surcharges. Dr. Rausser has examined the entire universe of defendants' transaction data from 2000 to 2008. As plaintiffs point out, that data consist of "more than 200 million unregulated shipments nationwide over an eight-year period." Pls. Wal-Mart Brief at 15. Dr. Rausser's regression analyses revealed that seven common factors predominate over individual factors in determining rail freight prices, and that these common factors permit a common analysis of defendants' transaction data that can measure injury-in-fact suffered by the class.

Third, defendants criticize Dr. Rausser's common factor model for failing to "explain all of the variation in rail rates." Oct. 7 Tr. at 265; see also Class Opp. at 64. As defendants' counsel stated at oral argument, "there's quite a bit of variation that's unexplained by [Dr. Rausser's] common factors model." Oct. 7 Tr. at 265. But Dr. Rausser's model explains "over 75% of the variation in actual per car revenues for individual shipments." 2d Rausser Report at 66. **[**225]** His damage model, which builds on the common factor model, explains "84% of the variation in all-in rates." Id. at 67. The Court agrees with plaintiffs that both of Dr. Rausser's regression models provide high levels of explanatory power, and that there is no basis for demanding, as defendants appear to do, 100 percent explanatory power. See Pls. Wal-Mart Reply Brief at 10; 2d Rausser Report at 67 ("In no industry is it possible to explain 100% of the variation in prices."); see also *In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. at 601* (concluding that plaintiffs put forth feasible regression methodology that, among other things, found that 77 percent of price variation was determined by five variables); see *id. at 604* (plaintiffs "need not demonstrate that their multiple regression analysis captures all the proper variables and thus reaches the 'right' answer, as the defendants would require"). Furthermore, Dr. Rausser persuasively explains that the important question for the Court is

> whether the remaining unexplained variation is both systematic and related to the conspiracy. Unless this is true, the residual (random) unexplained price component is irrelevant for class certification **[**226]** purposes, given that it would have been present even in the but-for world. In evaluating this question, economic logic plays an important role, identifying factors that would be likely to influence price and therefore should be included in the model.

2d Rausser Report at 68. The Court agrees that Dr. Rausser's common factor and damage models together plausibly include the logical determinants of freight rates, and neither defendants nor Dr. Willig credibly have identified any missing variables.

Fourth, regarding defendants' claim that Dr. Rausser's common factor model is merely a snapshot in time that does not explain rail rates over time, the Court disagrees that **[*69]** this is a valid basis on which to discredit Dr.

Rausser's model. Dr. Rausser examined rail rates over a 12-month period, and defendants have not asserted that this time period was not representative of the years of the alleged conspiracy period, was somehow aberrational or unreliable, or that Dr. Rausser would have reached any other conclusion had he chosen different years within the period or examined all years.

Fifth, defendants criticize Dr. Rausser's damage model, arguing that it is not a model of injury causation, as Dr. **[**227]** Rausser purportedly admitted during his deposition. Class Opp. at 65 (citing 1st Rausser Dep. at 142-43). But what Dr. Rausser explained in his deposition was that his common factor model was a "maintained hypothesis," 2d Rausser Dep. at 143, in his damage model — which he then uses to explore what effect, if any, can be attributed to the alleged conspiracy, and what portion of the prices paid by shippers can be attributed to the conspiracy. See id. As Dr. Rausser explains in his reply report, neither his common factor model nor his damage model in isolation attempts to prove common injury-in-fact. Rather, the result of the damage model "must be viewed as the final step in the body of evidence . . . presented" to show that injury-in-fact is capable of common proof. 2d Rausser Report at 92.

Sixth, defendants argue that Dr. Rausser's damage model cannot show whether a shipper paid a fuel surcharge because of the conspiracy — it simply assumes causation. The Court disagrees. As discussed, see supra at 127-28, Dr. Rausser's common factor model and damage model work in conjunction. Together, these two models set forth a persuasive inference of causation: certain common factors predominate **[**228]** in the determination of freight rates; controlling for those common factors, analysis of defendants' transaction data reveals that there was a structural break in the relationship between freight rates and fuel prices around 2003, "which is consistent with a conspiracy using Fuel Surcharges to raise freight rates[.]" 2d Rausser Report at 92.

Finally, defendants argue that Dr. Rausser has not clearly identified a but-for world or a but-for fuel pricing strategy, and he therefore has no basis to say whether prices would have been lower across-the-board. Class Opp. at 68. Defendants contend that there is some suggestion in plaintiffs' complaint that, at one point, plaintiffs may have thought that defendants should have used a mileage-based fuel surcharge, but that plaintiffs have not pursued that theory. See id. Defendants contend that the reason for that is simple: "Dr. Willig examined whether shippers would have been better off with mileage-based fuel surcharges and found that a substantial percentage of shippers would have paid *more* under a mileage-based surcharge." Id. (emphasis in original) (citing Willig Report ¶ 282). According to defendants, "[a]bsent a clearly identified but-for **[**229]** world, there is no basis to say whether prices would have been lower across-the-board." Class Opp. at 67.

Plaintiffs, however, do not need to prove at the class certification stage that prices would have been lower across-the-board. Plaintiffs' burden, rather, is to demonstrate that injury-in-fact is capable of common proof at trial. See *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311-12*. And as to Dr. Rausser's regression analyses,

> "[t]he real question . . . is whether the plaintiffs have established a workable multiple regression equation, *not whether plaintiffs' model actually works*, because the issue at class certification is not which expert is the most credible, or the most accurate modeler, but rather [whether] the plaintiffs [have] demonstrated that there is a way to prove a class-wide [injury-in-fact] through generalized proof."

In re Amaranth Natural Gas Commodities Litig., 269 F.R.D. at 383 (quoting *In re EPDM Antitrust Litig., 256 F.R.D. at 100*) (emphasis in original); see *In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. at 604*; *In re Ready-Mixed Concrete Antitrust Litig., 261 F.R.D. at 170-71*. The Court concludes that Dr. Rausser's regression analyses are **[**230]** workable. Dr. Rausser has presented a plausible theory of injury-in-fact that is susceptible to proof at trial through available evidence common to the class. See *Behrend v. Comcast Corp., 655 F.3d at 198*; *In re **[*70]** Hydrogen Peroxide Antitrust Litig., 552 F.3d at 325*.

As Dr. Rausser describes it:

> [A]bsent the conspiracy, fuel cost recovery would have been but one component of a total price kept lower by price competition between the railroads . . . . The "but-for" world analyzed in my Initial Report is simply characterized by railroads competing with each other over *total price* (base rates plus Fuel Surcharges) as they

> did in the pre-Class period. A combination of different fuel recovery programs might be used, or none at all. This is what the world looked like prior to mid-2003 . . . , and this period serves as a reliable benchmark with which to quantify damages.

2d Rausser Report at 47 (emphasis in original). As for Dr. Willig's analysis that shippers would have been better off with mileage-based fuel surcharges, he essentially is submitting a *competing* view of the but-for world based on an analysis of defendants' transaction data, which is not an appropriate inquiry for the Court at the **[**231]** class certification stage. See, e.g., *In re Currency Conversion Fee Antitrust Litig., 264 F.R.D. at 115* ("[W]hen both experts rely on evidence common to the class, this Court should not resolve which 'but for' price is correct."); *In re EPDM Antitrust Litig., 256 F.R.D. at 90*; *Hnot v. Willis Group Holdings Ltd., 241 F.R.D. at 209-10*; see also *In re TFT-LCD (Flat Panel) Antitrust Litig., MDL No. 1827, 2012 U.S. Dist. LEXIS 9449, 2012 WL 253298, at *4 (N.D. Cal. Jan. 26, 2012)* ("Defendants have not challenged the reasonableness of plaintiffs' methodology for proving classwide impact. Instead, their arguments concern the application of that methodology. Such analysis, however, goes beyond the inquiry at the class certification stage.") (citing *In re Graphics Processing Units Antitrust Litig., 253 F.R.D. 478, 490 (N.D. Cal. 2008))*. [24]

Ultimately, in evaluating Dr. Rausser's regressions and Dr. Willig's criticisms, the Court must determine whether Dr. Rausser's theory of proof is plausible and whether his regression models are workable. The Court concludes that they are: Dr. Rausser has established "the key logical steps behind [his] **[**233]** theory" that injury-in-fact is capable of proof at trial with common evidence. *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d at 26*. Relying on principles common to the class and an analysis of 100 percent of defendants' transaction data, Dr. Rausser has presented a workable regression analysis that is susceptible to proof at trial through available evidence common to the class. See *Behrend v. Comcast Corp., 655 F.3d at 198*; *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 325*.

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HN48[↑] The burden for plaintiffs at the class certification stage is to show by a preponderance of the evidence "that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311-12*. Plaintiffs have satisfied that burden. The Court has examined all the relevant evidence and arguments including all relevant expert opinion, see *id. at 315 n. 13*, and finds by a preponderance of the evidence that plaintiffs have shown that impact is capable of proof at trial through common evidence.

[*71] 3. Damages

HN49[↑] The third element that plaintiffs will have to prove at trial **[**234]** is "measurable damages." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311*; *Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. at 307*. The element of damages is distinct from impact: impact asks "*whether* the plaintiffs were harmed," whereas damages "quantify *by how much.*" *In re EPDM Antitrust Litig., 256 F.R.D. at 88* (emphasis in original). "The inquiry

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[24] Both sides and their experts reference and rely on a 2009 study that was conducted by Laurits R. Christensen Associates, Inc. and commissioned by the STB to analyze competition, capacity, and service quality in the rail freight industry. See, e.g., Oct. 6 Tr. at 140-41; Oct. 7 Tr. at 272-73; see generally HD Ex. 12, LAURITS R. CHRISTENSEN ASSOCIATES, INC., VOLUME 2, ANALYSIS OF COMPETITION, **[**232]** CAPACITY, AND SERVICE QUALITY (Nov. 2009) (hereinafter, "Christensen Report"). Plaintiffs say that the Christensen Report supports Dr. Rausser's conclusion that there was a structural break in the relationship between fuel costs and rail freight prices that was consistent with the start of the alleged conspiracy. See Oct. 6 Tr. at 140-41; see also Christensen Report at 9-16-9-17. Defendants say, among other things, that the Christensen Report "does quite the opposite." Oct. 7 Tr. at 272. Defendants do not dispute, however, that the Christensen Report relies on evidence common to the class and itself constitutes such common evidence. Thus, if anything, the Christensen Report supports plaintiffs view that injury-in-fact is *capable* of common proof at trial. The question of which party's characterization of that report is correct is a matter to be resolved by the finder of fact at trial.

for a district court at the class certification stage is whether the plaintiffs have demonstrated by a preponderance of the evidence that they will be able to measure damages on a class-wide basis using common proof." *Behrend v. Comcast Corp., 655 F.3d at 204*.

"Some variation of damages among class members does not defeat class certification." *Behrend v. Comcast Corp., 655 F.3d at 204*; see 7AA FEDERAL PRACTICE & PROCEDURE, supra, § 1781 ("[I]t uniformly has been held that differences among the members as to the amount of damages incurred does not mean that a class action would be inappropriate."). Moreover, as the Seventh Circuit recently stated: "It is well established that the presence of individualized questions regarding damages does not prevent certification under *Rule 23(b)(3)*." *Messner v. Northshore Univ. HealthSystem, 669 F.3d at 815*; **[**235]** see *Arreola v. Godinez, 546 F.3d 788, 801 (7th Cir. 2008)* ("Although the extent of each class member's personal damages might vary, district judges can devise solutions to address that problem if there are substantial common issues that outweigh the single variable of damages amounts. . . . [T]he need for individual damages determinations does not, in and of itself, require denial of [a] motion for certification.") (internal citations omitted); *Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248, 1261 (11th Cir. 2003)* ("[N]umerous courts have recognized that the presence of individualized damages issues does not prevent a finding that common issues in the case predominate."); *Hardy v. City Optical Inc., 39 F.3d 765, 771 (7th Cir. 1994)* (recognizing that "[t]here have been many antitrust class actions in which the relief sought was damages, and the fact that the damages would generally be different for each member of the class was not deemed an insurperable obstacle"); see also *Kottaras v. Whole Foods Mkt., Inc., 2012 U.S. Dist. LEXIS 10885, 2012 WL 259862, at *7*. To be sure, however, "[c]omplex and individualized questions of damages . . . weigh against finding predominance." *Behrend v. Comcast Corp., 655 F.3d at 204*.

Plaintiffs **[**236]** rely on Dr. Rausser to show that analysis common to the class can be used to calculate and apportion class-wide damages among class members. See Class Mem. at 75. As plaintiffs describe it, Dr. Rausser has observed that "it is entirely feasible to perform the estimation of the percentage overcharge across the entire class for each regression specification described in his report, yielding a calculation of overcharge for the entire class." Id.

According to Dr. Rausser, his analysis reveals that "a professionally accepted regression based methodology using the Defendants' transaction data . . . does in fact work" in assessing class-wide damages. 1st Rausser Report at 113. As Dr. Rausser explains, he "developed such a regression model" — that is, his damage model — "to test whether the prices during the Class Period are significantly different than prices generated from an appropriate 'benchmark' period, after adjusting for differences in all relevant economic forces." Id.

Dr. Rausser has calculated class-wide damages using his damage model employing the conspiracy and pre-conspiracy transaction data:

> The percentage overcharge due to the alleged conspiracy can be calculated using the regression **[**237]** model to compare freight rates in the Class Period to those in the pre-Class Period, while using the Defendants' transaction data and publicly available data to account for the other predominating common economic forces that determine prices. The transaction data can be used to account for the effect of shipment specific characteristics, such as weight, distance, route, car type, commodity type, and so on. . . . The regression model can be used to "back out" the effect **[*72]** of these factors to isolate the effect of the alleged conspiracy on freight rates.

1st Rausser Report at 114. He further adds that "to calculate each individual customer's damages[,] the relationship between price drivers and freight rates calculated by the model run on the full range of data can be used to estimate the but-for price for each customer transaction." Id. at 122. Thus, the "difference between this but-for price and the actual price paid is the overcharge to that customer for that transaction." Id. at 122-23.

Defendants argue that "the complications of the individualized proof of damages here preclude class certification." Class Opp. at 72. As defendants describe it, in most price fixing cases, plaintiffs **[**238]** will propose to calculate a standard overcharge percentage, which then is applied to all class member purchases. See id. at 73. In that situation, defendants contend that an assessment of damages is not particularly complicated: "the only individualized task is to tally up a class member's purchases, which are then multiplied by the common overcharge percentage." Id.

Here, however, defendants argue that determining individualized damages requires evidence of, among other things:

> (1) the [individual] class member's actual fuel surcharge payments, (2) the but-for fuel cost recovery that would have applied to that class member in light of its specific competitive situation, including both the timing of when that fuel surcharge would have been added and its terms, and (3) other adjustments to the base rate or non-rate elements of the contract that were made as part of the negotiations to add the fuel surcharge.

Class Opp. at 73. According to defendants, "[t]hese are all individualized determinations," and Dr. Rausser's damage model "does not account for any of these elements and therefore cannot be used to estimate an individual class member's damages." Id. Thus, defendants contend that class **[**239]** certification must be denied. See id. at 73-74 (citing *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp., 215 F.R.D. 523, 530-31 (E.D. Tex. 2003))*; see also Willig Report at 137-51.

The Court disagrees with defendants and finds that plaintiffs have satisfied their burden of showing by a preponderance of the evidence that "they will be able to measure damages on a class-wide basis using common proof." *Behrend v. Comcast Corp., 655 F.3d at 204*. Dr. Rausser has developed a workable regression model that uses defendants' transaction data to calculate damages to the class and to each class member. In his original report, Dr. Rausser applied his regression methodology on a dataset that included about 25 percent of each defendants' total unregulated freight traffic over the period 2000 to 2008. See Class Reply at 37. As Dr. Rausser explains in his reply report, he now has run his regression model on the complete set of defendants' transaction data. See 2d Rausser Report at 96; see also Class Reply at 37. And, according to Dr. Rausser, "[t]he results on 100% of the relevant transactions confirm that a structural break in the relationship between fuel prices and freight rates occurred **[**240]** in 2003, and that this break increased freight rates above what they would have been absent the conspiracy. The estimated class-wide overcharge is 13.4%." 2d Rausser Report at 83. Furthermore, as Dr. Rausser explains, his damage model "does not assume that all shippers paid the same overcharge." 2d Rausser Report at 92. Rather, he explains that his damage model "can be used to calculate individual damages[.]" Id.

The Court rejects defendants' argument that Dr. Rausser's damage model cannot be applied on a class-wide basis to calculate damages because such damages vary on particular shipments. See Class Opp. at 65; Willig Report ¶ 273. Even if that were true, it would not preclude a finding of predominance. See *Messner v. Northshore Univ. HealthSystem, 669 F.3d at 815*; see *supra at 137-38*. And in any event, the Court agrees with Dr. Rausser that the reported variation among shipments is to be expected and does not prevent a common damage methodology from applying in this case. See 2d Rausser Report at 98 n.225.

[*73] The Court also rejects defendants' argument that Dr. Rausser's damage model "yields nonsensical results." Class Opp. at 66. As defendants describe it: "Dr. Rausser says injury **[**241]** to class members results from the payment of fuel surcharges, but the damages he calculates, which are expressed as percentage reductions in all-in-rates, vastly exceed the fuel surcharges actually assessed." Id.; see Willig Report ¶¶ 258-60. The Court agrees with plaintiffs that this criticism is misplaced. As Dr. Rausser persuasively explains:

> My damage methodology pertains to all-in rates, rather than merely the increase in Fuel Surcharge percentages, and estimates how much those all-in rates increased as a result of Defendants' conspiratorial conduct. As documented throughout the discovery record, the Fuel Surcharge is the facilitating mechanism used by Defendants to increase these all-in rates. The computed all-in overcharge which 1 have arrived at using 100% of the transaction data is 13.4%, a figure well below the *average* percentage Fuel Surcharge imposed during the Class Period.

2d Rausser Report at 96 (emphasis in original). To the extent that there are instances where calculated overcharges do exceed the fuel surcharges assessed, the Court credits Dr. Rausser's explanation that this reflects various factors, including, for example, instances of "double-dipping" — that is, when **[**242]** fuel surcharges were applied on top of base rates that themselves already have built-in fuel cost recovery mechanisms — and instances of rebasing. See id at 96.

As the Third Circuit recently stated: **HN50**[] "At the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead [require] that they assure us that if they can prove impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations." *Behrend v. Comcast Corp., 655 F.3d at 206*. The Court is persuaded that Dr. Rausser's damage model satisfies this burden, and the Court finds by a preponderance of the evidence that plaintiffs "will be able to measure damages on a class-wide basis using common proof." *Id. at 204*.

B. Superiority

HN51[] The second requirement of *Rule 23(b)(3)* is superiority: a court must find "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*; see *Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. at 313*. This requirement "ensures that resolution by class action will 'achieve economies of time, effort, **[**243]** and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable consequences." *Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. at 313* (quoting *Amchem Prods Inc. v. Windsor, 521 U.S. at 615*) (alteration in original).

HN52[] "When common questions are found to predominate, then courts also generally have ruled that the second prerequisite of *Rule 23(b)(3)* — that the class suit be superior to any other available means of settling the controversy — is satisfied in the context of an antitrust action." *In re Ready-Mixed Concrete Antitrust Litig., 261 F.R.D. at 173* (quotations omitted). In contrast, when individual issues predominate, a class action will be deemed inferior. See *McCarthy v. Kleindienst, 741 F.2d at 1415*; see also *Williams v. Glickman, Civil Action No. 95-1149, 1997 U.S. Dist. LEXIS 1683, 1997 WL 33772612, at *11 (D.D.C. Feb. 14, 1997)* ("The greater the number of individual issues, the less likely superiority can be established.").

Defendants contest the superiority requirement on the same grounds as they contest predominance: they say that a class action is inferior because individual issues predominate **[**244]** regarding injury and damages. See Class Opp. at 74-75. But as the Court has concluded, individual issues do not predominate, and so the Court finds that plaintiffs have satisfied the superiority requirement.

This case involves approximately 30,000 shippers, and plaintiffs have shown by a preponderance of the evidence that the elements of plaintiffs' Sherman Act claim are **[*74]** capable of proof at trial through evidence that is common to the class. Given the size, complexity, and expense of this case, the Court finds that class action treatment is superior to any other available methods for fairly and efficiently adjudicating plaintiffs' claim. See *Fed. R. Civ. P. 23(b)(3)*. The Court has considered plaintiffs' proposed trial plan, see Class Mot., Ex. B, Trial Plan at 1-10, as well as any possible difficulties in a trial on plaintiffs' Sherman Act claim. See Class Opp. at 77-78. The Court concludes that the resolution of this case by class action will "'achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing fairness or bringing about other undesirable consequences." *Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. at 313* **[**245]** (quoting *Amchem Prods Inc. v. Windsor, 521 U.S. at 615*).

VI. CONCLUSION

For the foregoing reasons, the Court finds by a preponderance of the evidence (1) that plaintiffs have established each fact necessary to meet the requirements of *Rule 23 of the Federal Rules of Civil Procedure*; and (2) that plaintiffs have established that the elements of their Sherman Act claim are capable of proof at trial through evidence that is common to the class rather than individual to its members.

Therefore, the Court will grant the motion of the direct purchaser plaintiffs' for class certification [Dkt. No. 337]; will certify this case as a class action under *Rule 23(b)(3)* for purposes of litigation and trial; will define the class as proposed by the direct purchaser plaintiffs' in their motion for class certification; will certify for class treatment the direct purchaser plaintiffs' claim for price fixing in violation of Section 1 of the Sherman Act, *15 U.S.C. § 1*; will designate the eight named plaintiffs as the class representatives; and will appoint Quinn Emanuel Urquhart & Sullivan, LLP and Hausfled LLP as co-lead class counsel for the class. The Court will not rule at this time on the motion of the **[**246]** defendants to exclude interline-related communications from consideration for class certification or for any other purpose [Dkt. No. 417].

This Opinion temporarily has been issued under seal in its entirety in view of the possibility that the Court has referenced "Confidential" or "Highly Confidential — Attorneys' Eyes Only" material, as described in the Protective Order issued in this case. See Protective Order ¶¶ 1.3, 1.4, Jan. 29, 2009 (Facciola, Mag. J.) [Dkt. No. 195]. This Opinion, however, will not remain under seal. The Court will order the parties to meet and confer and file a joint report by July 10, 2012 showing cause why this Opinion should not be published in full without redactions on the public docket of this Court.

If either party believes that some passage(s) of the Court's Opinion should be redacted, they must specify in the joint report which passage(s) and must specifically state the cause for each redaction. In making any such request, the parties are reminded that the courts are not intended to be, nor should they be, secretive places for the resolution of secret disputes. See, e.g., *Nixon v. Warner Communs, Inc., 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978)* ("It is clear that the **[**247]** courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.") (footnotes omitted); *Johnson v. Greater Se. Cmty. Hosp. Corp., 951 F.2d 1268, 1277, 293 U.S. App. D.C. 1 (D.C. Cir. 1991)* (noting that there is a "strong presumption in favor of public access to judicial proceedings"); *United States v. Hubbard, 650 F.2d 293, 317 n.89, 208 U.S. App. D.C. 399 (D.C. Cir. 1980)* (holding that the trial court's discretion to restrict access to court records should "clearly be informed by this country's strong tradition of access to judicial proceedings"). Accordingly, any redactions shall be made solely to the extent necessary to preserve the confidentiality of the relevant information in accordance with the terms of the Protective Order issued in this case. See Protective Order ¶¶ 1.3, 1.4.

An Order consistent with this Opinion shall issue this same day.

SO ORDERED.

/s/ PAUL L. FRIEDMAN

United States District Judge

DATE: June 21, 2012

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Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC

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

June 26, 2012, Decided; June 26, 2012, Filed

Case No. 8:10-cv-2008-T-33TGW

Reporter
2012 U.S. Dist. LEXIS 88053 *; 2012-1 Trade Cas. (CCH) P77,966; 2012 WL 2402825

LAKELAND REGIONAL MEDICAL CENTER, INC., Plaintiff, v. ASTELLAS US LLC, and ASTELLAS PHARMA US, INC., Defendants.

Subsequent History: Class certification denied by *Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC, 2012 U.S. Dist. LEXIS 136990 (M.D. Fla., Sept. 24, 2012)*

Prior History: *Lakeland Reg'l Med. Ctr., Inc. v. Astellas US LLC, 2011 U.S. Dist. LEXIS 80723 (M.D. Fla., July 25, 2011)*

Core Terms

class certification, case management, amended complaint, discovery, deadline

Counsel: **[*1]** For Lakeland Regional Medical Center, Inc., on behalf of itself and all others similarly situated, Plaintiff: Archie I. Grubb, W. Daniel Miles, III, LEAD ATTORNEYS, Beasley, Allen, Crow, Methvin, Portis & Miles, PC*, Montgomery, AL; Jack P. Smith, III, LEAD ATTORNEY, Fish & Richardson, PC, Atlanta, GA; Stephen R. Senn, LEAD ATTORNEY, Peterson & Myers, PA*, Lakeland, FL; William B. Raich, LEAD ATTORNEY, PRO HAC VICE, Finnegan, Henderson, Farabow, Garett & Dunner, LLP, Washington, DC.

For Astellas US, LLC, Astellas Pharma US, Inc., Defendants: Amanda Arnold Sansone, Chris S. Coutroulis, LEAD ATTORNEYS, Carlton Fields, PA, Tampa, FL; David P. Frazier, LEAD ATTORNEY, Susan Haberman Griffen, William B. Raich, LEAD ATTORNEYS, PRO HAC VICE, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Washington, DC; Jana D. Jobes, Zachary A. Madonia, LEAD ATTORNEYS, PRO HAC VICE, John Treece, LEAD ATTORNEY, Sidley Austin LLP*, Chicago, IL.

Judges: VIRGINIA M. HERNANDEZ COVINGTON, UNITED STATES DISTRICT JUDGE.

Opinion by: VIRGINIA M. HERNANDEZ COVINGTON

Opinion

ORDER

This matter comes before the Court pursuant to Astellas's Motion to Strike Class Action Allegations from the First Amended Complaint, or Alternatively, for a Case Management **[*2]** Conference to Set a Schedule for Class Certification Briefing (Doc. # 90), which was filed on May 4, 2012. Lakeland Regional Medical Center filed a Response to the Motion to Strike (Doc. # 94) on May 21, 2012. Also before the Court is Lakeland Regional's Motion to Extend Time for Filing Class Certification Brief (Doc. # 95), filed on May 22, 2012. Astellas filed a Response to the Extension Motion on June 6, 2012, (Doc. # 98), and Lakeland Regional Filed a Reply Memorandum (Doc. # 109) on June 21, 2012, with leave of Court. For the reasons that follow, the Court grants the Extension Motion and denies the Motion to Strike as moot.

I. Factual and Procedural Background

Lakeland Regional, a "full-service hospital," is a not-for-profit Florida corporation with its headquarters in Lakeland, Florida. (Doc. # 11 at ¶ 7). Defendants Astellas US, LLC and Astellas Pharma US, Inc. (collectively, "Astellas") are Delaware corporations with headquarters in Deerfield, Illinois. Id. at ¶ 8. Astellas is the exclusive licensee of two patents involving the administration of adenosine to patients undergoing cardiac stress tests. Lakeland Regional alleges that Astellas has engaged in unlawful, anticompetitive, **[*3]** monopolistic, and exclusionary activity with respect to adenosine in violation of the Sherman Antitrust Act, *15 U.S.C. §§ 1* and *2*, the Clayton Antitrust Act, *15 U.S.C. § 14*, Florida ***antitrust law***, and Florida common law.

Lakeland Regional initiated this action against Astellas on September 13, 2010, and filed an amended, putative class action complaint on October 19, 2010. (Doc. ## 1, 11). Lakeland Regional's amended complaint arrays the following counts against Astellas: unlawful tying (count one), exclusive dealing (count two), attempted monopolize (count three), unreasonable restraint of trade (count four), attempted monopolization (count five), and tortious interference with a prospective economic advantage (count six). Astellas filed a Motion to Dismiss the Amended Complaint (Doc. # 16), which this Court denied. (Doc. # 66). The parties filed the Case Management Report (Doc. # 27) on December 17, 2010, and as this is a Track Three Case, the Court set a preliminary pretrial conference before the assigned Magistrate Judge. (Doc. # 31). Astellas filed a Motion for Phased Discovery (class discovery to be conducted before merits discovery)(Doc. # 28), which this Court denied, finding, **[*4]** "phased discovery will unnecessarily prolong this litigation and increase the expense involved for both sides [and] will lead to duplicative and delayed discovery." (Doc. # 40 at 5).

On February 24, 2011, the Magistrate Judge issued a Report and Recommendation (Doc. # 47) concerning the case management deadlines. On March 14, 2011, the Court issued its Case Management and Scheduling Order. (Doc. # 58). Neither the Report and Recommendation nor the Court's Case Management and Scheduling Order addressed the deadline for Plaintiff to file a motion for class certification. At this juncture, Astellas seeks an order striking from the amended complaint all class allegations, as Lakeland Regional failed to timely move for class certification under the Court's Local Rules. Lakeland Regional seeks an extension of time in which to move for class certification.

II. Analysis

Local Rule 4.04(b), M.D. Fla., provides that motions for class certification shall be filed within ninety days following the filing of the initial complaint, unless the time is extended by the Court for cause shown. Here, Lakeland Regional filed its initial complaint on September 13, 2010. Accordingly, under the Local Rules, Lakeland **[*5]** Regional's motion for class certification should have been filed by December 13, 2010.

However, it should be noted that both parties contemplated that Lakeland Regional's motion for class certification would be filed at a later time. For instance, the parties initially agreed in the Case Management Report that Lakeland Regional would file its motion for class certification by September 11, 2011. (Doc. # 27 at 11). Astellas also represents that it previously agreed to Lakeland Regional filing its motion for class certification by January 25, 2012, or May 10, 2012, and that Lakeland Regional "reneged" on those two proposed deadlines. (Doc. # 90 at 2).

Lakeland Regional requests the opportunity to file its motion for class certification by August 6, 2012. The Court determines that it is appropriate to grant a limited extension of time for Lakeland Regional to file the motion for class certification, but declines to allow Lakeland Regional until August 6, 2012. [1]

Lakeland Regional has demonstrated excusable neglect for missing the deadline set forth in the Local Rules. **[*6]** Although it would have been a far better choice for Lakeland Regional to seek an extension of time prior to the expiration of the deadline, the Court agrees with Lakeland Regional that, due to the complex nature of this case, a worthwhile motion for class certification could not have been filed within that initial ninety day period after Lakeland Regional filed its complaint. The Court also agrees with Lakeland Regional that the requirements of *Rule 23* cannot be satisfied with skeletal, perfunctory motions for class certification. As explained by Justice Scalia in *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551-52, 180 L. Ed. 2d 374 (2011)*:

> *Rule 23* does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law and fact, etc.... [C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of *Rule 23(a)* have been satisfied. . . . Frequently, that rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim.

Id. (internal citations **[*7]** and quotation marks omitted).

Balancing the equities and in consideration of the foregoing, the Court determines that it is appropriate to allow Lakeland Regional to file its motion for class certification by July 13, 2012. Astellas has until July 26, 2012, to respond to the motion for class certification. Lakeland Regional may file a reply, limited to ten pages, by August 3, 2012.

Accordingly, it is

ORDERED, ADJUDGED, and **DECREED**:

(1) Lakeland Regional's Motion to Extend Time for Filing Class Certification Brief (Doc. # 95) is **GRANTED** consistent with the foregoing.

(2) Astellas's Motion to Strike Class Action Allegations from the First Amended Complaint, or Alternatively, for a Case Management Conference to Set a Schedule for Class Certification Briefing (Doc. # 90) is **DENIED AS MOOT.**

DONE and **ORDERED** in Chambers in Tampa, Florida, this 26th day of June, 2012.

/s/ Virginia M. Hernandez Covington

VIRGINIA M. HERNANDEZ COVINGTON

UNITED STATES DISTRICT JUDGE

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[1] The Court also declines to postpone the Case Management and Scheduling Order deadlines as proposed by Lakeland Regional.

In re Elec. Books Antitrust Litig.

United States District Court for the Southern District of New York

June 27, 2012, Decided; June 27, 2012, Filed

11 MD 2293 (DLC)

Reporter

2012 U.S. Dist. LEXIS 90190 *; 2012-1 Trade Cas. (CCH) P77,960; 2012 WL 2478462

IN RE: ELECTRONIC BOOKS ANTITRUST LITIGATION;This Opinion and Order applies to the following actions: 11 Civ. 5576 (DLC), 11 Civ. 5609 (DLC), 11 Civ. 5621 (DLC), 11 Civ. 5707 (DLC), 11 Civ. 5750 (DLC), 11 Civ. 5896 (DLC), 11 Civ. 5898 (DLC), 11 Civ. 5976 (DLC), 11 Civ. 6019 (DLC), 11 Civ. 6079 (DLC), 11 Civ. 7507 (DLC), 11 Civ. 7534 (DLC), 11 Civ. 7323 (DLC), 11 Civ. 8329 (DLC), 11 Civ. 8608 (DLC), 11 Civ. 9016 (DLC), 11 Civ. 9014 (DLC), 11 Civ. 9559 (DLC), 11 Civ. 9560 (DLC), 11 Civ. 9561 (DLC), 11 Civ. 9562 (DLC), 11 Civ. 9563 (DLC), 11 Civ. 9564 (DLC), 11 Civ. 9565 (DLC), 11 Civ. 9566 (DLC), 11 Civ. 9567 (DLC), 12 Civ. 0476 (DLC).

Prior History: *In re Elec. Books Antitrust Litig., 846 F. Supp. 2d 1378, 2011 U.S. Dist. LEXIS 141890 (J.P.M.L., Dec. 9, 2011)*

Core Terms

arbitration, eBooks, compel arbitration, proceedings, plaintiffs', arbitration agreement, class action, antitrust, costs

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

HN1[] **Contract Conditions & Provisions, Arbitration Clauses**

The Federal Arbitration Act, *9 U.S.C.S. § 1 et seq.*, is an expression of a strong federal policy favoring arbitration as an alternative means of dispute resolution. Whether parties have agreed to submit a particular dispute to arbitration is typically an issue for judicial determination. When deciding whether the parties agreed to arbitrate a certain matter courts generally should apply ordinary principles that govern the formation of contracts.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

HN2[] **Alternative Dispute Resolution, Arbitration**

Arbitration has been recognized as an effective vehicle for vindicating statutory rights, but only so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.

Antitrust & Trade Law > General Overview

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

Contracts Law > Defenses > Public Policy Violations

HN3[] **Antitrust & Trade Law**

An agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Civil Procedure > Special Proceedings > Class Actions > General Overview

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

Evidence > Burdens of Proof > Allocation

Contracts Law > Defenses > Public Policy Violations

HN4[] **Contract Conditions & Provisions, Arbitration Clauses**

In cases in which a large number of individuals have suffered an alleged wrong but the individual prospective damages awards are small, class action lawsuits may be the only economically rational alternative. Accordingly, plaintiffs may successfully invalidate an arbitration agreement that contains a class action waiver on the grounds that the agreement would prevent them from effectively vindicating their federal statutory rights. The party seeking to invalidate the agreement bears the burden of showing the likelihood of incurring prohibitive costs. Furthermore, each waiver must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the Federal Arbitration Act, *9 U.S.C.S. § 1 et seq.*, is a congressional declaration of a liberal federal policy favoring arbitration agreements.

Counsel: **[*1]** For Plaintiffs: Kit A. Pierson, Emmy L. Levens, Jeffrey B. Dubner, Cohen Milstein Sellers & Toll PLLC (DC), Washington, DC; John Douglas Richards, Cohen Milstein Sellers & Toll PLLC, New York, NY; George W. Sampson, Hagens Berman Sobol Shapiro LLP (Seattle), Seattle, WA; Jeff D. Friedman, Shana Scarlett, Hagens Berman Sobol Shapiro LLP (CA), Berkely, CA; Jason Allen Zweig, Hagens Berman Sobol Shapiro LLP (NYC), New York, NY.

For Defendant Penguin Group (USA), Inc.: Daniel Ferrel McInnis, David A. Donohoe, Allison Sheedy, Akin Gump Strauss Hauer & Feld LLP, Washington, D.C.

Judges: DENISE COTE, United States District Judge.

Opinion by: DENISE COTE

Opinion

OPINION & ORDER

DENISE COTE, District Judge:

Plaintiffs in this class action bring claims for violation of Section 1 of the Sherman Antitrust Act, *15 U.S.C. § 1* (the "Sherman Act"); violation of California's Cartwright Act, *California Business and Professions Code §§ 16720, et seq*.; violation of state antitrust and restraint of trade laws and consumer protection statutes; and unjust enrichment. The defendant Penguin Group (USA), Inc. ("Penguin") has moved to stay the proceedings and compel arbitration. For the following reasons, the motion to stay the proceedings and **[*2]** compel arbitration of the Sherman Act claim is denied.

BACKGROUND

A comprehensive description of the facts in this matter are recounted in the Court's Opinion and Order of May 15, 2012, *In re Elec. Books Antitrust Litig., 11 MD 2293 (DLC), 859 F. Supp. 2d 671, 2012 U.S. Dist. LEXIS 68058, 2012 WL 1946759 (S.D.N.Y. May 15, 2012)*, familiarity with which is presumed. Only those facts relevant to the disposition of this motion are recounted below. These facts are undisputed unless otherwise noted.

The plaintiffs are purchasers of electronic books or "eBooks." They bring this action on behalf of themselves and others who claim that they paid higher prices for their eBooks as a direct and foreseeable result of defendants' allegedly unlawful conduct. Penguin is one of the six largest publishing companies in the United States. The plaintiffs allege that Penguin and its co-defendants conspired from the Fall of 2009 until April 2010 to fix and raise eBooks prices through, inter alia, adopting the "agency" sales model for eBooks, and that this conspiracy in fact resulted in higher eBooks prices.

Penguin seeks to stay the proceedings and compel arbitration as to a subset of the putative class -- specifically, those plaintiffs who purchased their **[*3]** eBooks through the vendors Amazon.com ("Amazon") and Barnes & Noble. Penguin claims that the plaintiffs who purchased their eBooks through these vendors expressly agreed to arbitrate any disputes related to their purchases of eBooks, and are equitably stopped from denying that their claims against Penguin are subject to arbitration. Penguin does not seek to compel arbitration as to those plaintiffs who purchased their eBooks through other vendors besides Amazon and Barnes & Noble, such as defendant Apple, Inc. ("Apple").

The Terms of Use for the Amazon Kindle and for Barnes & Noble include mandatory arbitration clauses. The Amazon Kindle Terms of Use read in pertinent part:

> Disputes. Any dispute or claim relating in any way to your use of the Kindle, Reading Applications or Kindle Store, or the goods or services sold or distributed by Amazon or through the Kindle, Reading Applications or Kindle Store, will be resolved by binding arbitration, rather than in court, except that you may assert claims in small claims court if your claims qualify. The Federal Arbitration Act and federal arbitration law apply to this agreement.
>
> ***
>
> The arbitration will be conducted by the American Arbitration **[*4]** Association (AAA) under its rules, including the AAA's Supplementary Procedures for Consumer-Related Disputes. *** Payment of all filing, administration and arbitrator fees will be governed by the AAA's rules. We will reimburse those fees for claims totaling less than $10,000 unless the arbitrator determines the claims are frivolous.
>
> ***
>
> You and Amazon each agree that any dispute resolution proceedings will be conducted only on an individual basis and not in a class, consolidated or representative action. If for any reason a claim proceeds in court rather than in arbitration you and Amazon each waive any right to a jury trial.

(Emphasis supplied.) The Barnes & Noble Terms of Use provide:

> XVIII. DISPUTE RESOLUTION
>
> Any claim or controversy at law or equity that arises out of the Terms of Use, the Barnes & Noble.com Site or any Barnes & Noble.com Service (each a "Claim"), shall be resolved through binding arbitration conducted by telephone, online or based solely upon written submissions where no in-person appearance is required. In

> such cases, the arbitration shall be administered by the American Arbitration Association under its Commercial Arbitration Rules (including without limitation **[*5]** the Supplementary Procedures for Consumer-Related Disputes, if applicable), and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.
> Alternatively, at Barnes & Noble.com's sole option, a Claim (including Claims for injunctive or other equitable relief) may be adjudicated by a court of competent jurisdiction located in New York County, New York.
>
> Any Claim shall be arbitrated or litigated, as the case may be, on an individual basis and shall not be consolidated with any Claim of any other party whether through class action proceedings, class arbitration proceedings or otherwise.

(Emphasis supplied.) The Amazon and Barnes & Noble Terms of Use in effect in early 2010, when Penguin adopted the agency model, included similar arbitration clauses. Both sets of arbitration agreements contain waivers of plaintiffs' right to pursue their claims through a class action.

Penguin filed its motion to stay proceedings and compel arbitration on March 2, 2012. The motion became fully submitted on April 13.

DISCUSSION

HN1[] The Federal Arbitration Act, *9 U.S.C. § 1 et seq.* ("FAA"), is "an expression of a strong federal policy favoring arbitration as an alternative **[*6]** means of dispute resolution." *Ragone v. Atl. Video at Manhattan Ctr., 595 F.3d 115, 121 (2d Cir. 2010)* (citation omitted). "[W]hether parties have agreed to submit a particular dispute to arbitration is typically an issue for judicial determination." *Granite Rock Co. v. Int'l B'hood of Teamsters, 561 U.S. 287, 130 S.Ct. 2847, 2855, 177 L. Ed. 2d 567 (2010)* (citation omitted). "When deciding whether the parties agreed to arbitrate a certain matter courts generally should apply ordinary principles that govern the formation of contracts." *Id. at 2856* (citation omitted).

HN2[] Arbitration has been recognized as an effective vehicle for vindicating statutory rights, but only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum. . . ." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)*. ***HN3***[] "[A]n agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy." *In re American Exp. Merchants' Litig., 667 F.3d 204, 214 (2d Cir. 2012)* ("Amex III") (citation omitted).

HN4[] In cases in which a large number of individuals have suffered an alleged wrong but the individual prospective **[*7]** damages awards are small, class action lawsuits may be the "the only economically rational alternative." Id. Accordingly, plaintiffs may successfully invalidate an arbitration agreement that contains a class action waiver on the grounds that the agreement would prevent them from "effectively vindicating" their federal statutory rights. *Id. at 216* (citation omitted). The party seeking to invalidate the agreement "bears the burden of showing the likelihood of incurring [prohibitive] costs." *Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 92, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)*. Furthermore, "each waiver must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the FAA is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Amex III, 667 F.3d at 219* (citation omitted).

Here, even if the Amazon and Barnes & Noble arbitration agreements are otherwise enforceable in this action, they are invalid as to plaintiffs' Sherman Act claims because the plaintiffs have established that the agreements would prevent them from effectively vindicating their rights under the Sherman Act. This case falls squarely within the ambit of **[*8]** the Second Circuit's recent opinion in *Amex III*. In Amex III, the Second Circuit invalidated an arbitration agreement that contained a class action waiver on the grounds that the costs of pursuing the action through an individual arbitration, when compared with the size of the damages at issue, rendered arbitration prohibitively expensive. The plaintiffs in Amex III submitted detailed affidavits demonstrating that they faced costs "in the middle of the range" of $300,000 to $2 million, and a median recovery of only $5,252 in trebled damages. *In re Am. Express Merchants' Litig., 554 F.3d 300, 316 (2d Cir. 2009)* ("Amex I").

In this case, the plaintiffs have presented similarly detailed affidavits demonstrating that, given the complexities of proving this particular antitrust violation, plaintiffs can expect at most a median recovery of $540 in treble damages, and face several hundred thousand dollars to millions of dollars in expert expenses alone. Plaintiffs have also demonstrated that they are likely to incur significant expenses in securing, organizing, and maintaining documents, deposing witnesses, and in attorneys' fees, and that they face no guarantee of recovering any or all of **[*9]** these expenses. Plaintiffs have already expended $45,000 in expert expenses evaluating the claims and drafting the complaint. Plaintiffs' affidavits demonstrate that it would be economically irrational for any plaintiff to pursue his or her claims through an individual arbitration. Penguin has presented no serious argument to the contrary.

Penguin argues that the plaintiffs might pool resources and share the cost of expert fees. In Amex I, the Second Circuit described a similar proposition as "intriguing," but rejected it on the grounds that the plaintiffs in that action were not permitted to share information presented in any individual arbitration pursuant to a confidentiality provision in the relevant arbitration agreement. See *id. at 318*. Penguin notes that the Amazon and Barnes & Noble arbitration agreements contain no such confidentiality provisions.

This argument blinkers reality. The size of the prospective class in this case is enormous. Even if plaintiffs could share experts, these experts would still need to testify at each of potentially thousands or more individual arbitrations and be paid accordingly. Moreover, even if Penguin's suggestion were practically feasible -- which **[*10]** it is not -- the Second Circuit noted in Amex I that "plaintiffs must include the risk of losing, and thereby not recovering any fees" when evaluating prospective costs. Id. Penguin has not demonstrated how plaintiffs could rationally account for this risk of losing and still go forward with individual arbitrations that will net them, at most, an average of $540.

Penguin questions plaintiffs' suggestion that some of their costs might be unrecoverable because Penguin would oppose reimbursement. Penguin notes that federal ***antitrust law*** mandates recovery of "the cost of suit" by prevailing claimants, *15 U.S.C. § 15(a)*, and there is "no reason to assume at the outset that arbitrators will not follow the law." *Shearson/am. Express Inc. v. McMahon, 482 U.S. 220, 232, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)*. Declining to assume that arbitrators will fail to follow the law is not the same as engaging in a pragmatic accounting of the likely costs and benefits of bringing an individual arbitration and the incumbent risks. Amex III recognizes that plaintiffs in the real world will do the latter, and decline to arbitrate their claims if the economics are sufficiently stacked against them. See *Amex III, 667 F.3d at 218*. As discussed **[*11]** above, the plaintiffs in this case have demonstrated, convincingly, that it would be economically irrational for them to pursue their claims through individual arbitrations.

Penguin notes that because Penguin has not sought to compel arbitration as to all the plaintiffs, class counsel will be going forward with their case regardless of the outcome of this motion. Penguin argues that the plaintiffs who are compelled to arbitrate may therefore obtain representation through class counsel. This argument is absurd. Penguin has not set forward any realistic argument as to how such an arrangement would possibly benefit class counsel when each individual plaintiff can anticipate such a small recovery through arbitration.

Penguin further argues that Amex III is wrongly decided. *Amex III* is Second Circuit precedent, and as Penguin acknowledges, this Court is obliged to give it controlling weight.

Penguin also seeks to compel arbitration as to plaintiffs' state law claims. The Court reserves judgment on this issue. In any event, even if Penguin could successfully compel this partial class of plaintiffs to arbitrate their state law claims, litigation of plaintiffs' federal claims would not be stayed. **[*12]** Penguin has not put forward any argument as to why a stay would be appropriate in these circumstances, and there is no reason to believe a stay would help avoid "piecemeal litigation" or avoid "duplication of discovery or issue resolution." *Admin. Comm. of The Time Warner, Inc. Benefit Plans v. Biscardi, 99 Civ. 12270 (DLC) , 2000 U.S. Dist. LEXIS 6238, 2000 WL 565210, at *2 (S.D.N.Y. May 8, 2000)*. For many of the reasons discus above, it is highly unlikely that any such arbitrations would actually occur in practice.

CONCLUSION

Penguin's March 5, 2012 motion to stay the proceedings and compel arbitration is denied as to plaintiffs' federal claims.

SO ORDERED:

Dated: New York, New York

June 27, 2012

/s/ Denise Cote

DENISE COTE

United States District Judge

Minn-Chem, Inc. v. Agrium Inc.

United States Court of Appeals for the Seventh Circuit

February 8, 2012, Argued; June 27, 2012, Decided

No. 10-1712

Reporter

683 F.3d 845 *; 2012 U.S. App. LEXIS 13131 **; 2012-1 Trade Cas. (CCH) P77,943; 2012 WL 2403531

MINN-CHEM, INC., et al., Plaintiffs-Appellees, v. AGRIUM INC., et al., Defendants-Appellants.

Subsequent History: US Supreme Court certiorari dismissed by *Agrium Inc. v. Minn-Chem, Inc., 570 U.S. 935, 134 S. Ct. 23, 186 L. Ed. 2d 936, 2013 U.S. LEXIS 5013 (July 22, 2013)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 08 C 6910, MDL No. 1996—Ruben Castillo, Judge.

Minn-Chem, Inc. v. Agrium Inc., 657 F.3d 650, 2011 U.S. App. LEXIS 19433 (7th Cir. Ill., Sept. 23, 2011)
In re Potash Antitrust Litig., 667 F. Supp. 2d 907, 2009 U.S. Dist. LEXIS 102623 (N.D. Ill., Nov. 3, 2009)

Core Terms

commerce, potash, import, cartel, prices, Sherman Act, effects, domestic, anti trust law, tons, alleges, foreseeable, purchasers, antitrust, global, foreign nation, markets, export, sales, reasonably foreseeable, transactions, fertilizer, subject-matter, customers, producers, output, district court, world market, consumers, entities

LexisNexis® Headnotes

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

HN1[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The criteria of the Foreign Trade Antitrust Improvements Act of 1982, *15 U.S.C.S. § 6a*, relate to the merits of a claim, and not to the subject-matter jurisdiction of the court. The United States Court of Appeals for the Seventh Circuit therefore overrules its earlier en banc decision in *United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942 (7th Cir. 2003)*.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN2[] **Jurisdiction, Subject Matter Jurisdiction**

The United States Supreme Court has emphasized the need to draw a careful line between true jurisdictional limitations and other types of rules.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN3[] **Jurisdiction, Subject Matter Jurisdiction**

Subject-matter jurisdiction refers to a tribunal's power to hear a case.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

HN4[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The Foreign Trade Antitrust Improvements Act of 1982, *15 U.S.C.S. § 6a*, sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts.

International Law > Authority to Regulate > General Overview

HN5[] **International Law, Authority to Regulate**

Limitations on the extraterritorial reach of a statute describe what conduct the law purports to regulate and what lies outside its reach.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

HN6[] **International Aspects, Foreign Trade Antitrust Improvements Act**

When Congress decides to strip the courts of subject-matter jurisdiction in a particular area, it speaks clearly. The Foreign Trade Antitrust Improvements Act of 1982, *15 U.S.C.S. § 6a*, however, never comes close to using the word "jurisdiction" or any commonly accepted synonym. Instead, it speaks of the "conduct" to which the Sherman Act (or the Federal Trade Commission Act) applies. This is the language of elements, not jurisdiction.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

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

Evidence > Burdens of Proof > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

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

HN7[] **International Aspects, Foreign Trade Antitrust Improvements Act**

From a procedural standpoint, a party who wishes to contest the propriety of an antitrust claim implicating foreign activities must, at the outset, use *Fed. R. Civ. P. 12(b)(6)*, not *Rule 12(b)(1)*. This is not a picky point that is of interest only to procedure buffs. Rather, this distinction affects how disputed facts are handled, and it determines when a party may raise the point. While it is the burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution, a court accepts as true all of the allegations contained in a complaint, subject, of course, to the limitations articulated in the relevant cases. Likewise, subject-matter jurisdiction must be secure at all times, regardless of whether the parties raise the issue, and no matter how much has been invested in a case. By contrast, a motion to dismiss for failure to state a claim may only be brought as late as trial. *Fed. R. Civ. P. 12(h)(2)*.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

HN8[] **International Aspects, Foreign Trade Antitrust Improvements Act**

See *15 U.S.C.S. § 6a*.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

HN9[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The opening phrase of *15 U.S.C.S. § 6a* (sometimes referred to as a chapeau in international circles) reflects Congress's effort to indicate that the Sherman Act does not apply to every arrangement that literally can be said to involve trade or commerce with foreign nations. The public recognition of this limitation was inspired largely by international comity. But, by inserting the parenthetical "other than import trade or import commerce" in the chapeau, Congress recognized that there was no need for this self-restraint with respect to imports, even though they represent part of the foreign commerce of the United States. Although some have referred to this as the "import exception," that is not an accurate description. Import trade and commerce are excluded at the outset from the coverage of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) in the same way that domestic interstate commerce is excluded. This means only that conduct in both domestic and import trade is subject to the Sherman Act's general requirements for effects on commerce, not to the special requirements spelled out in the FTAIA. Where the FTAIA does apply, it removes from the Sherman Act's reach commercial activities taking place abroad, unless those activities adversely affect imports to the United States.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

HN10[] International Aspects, Foreign Trade Antitrust Improvements Act

Regarding the treatment by the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) of nonimport, non-domestic commerce. the FTAIA handles that problem by laying down a general rule placing all (nonimport) activity involving foreign commerce outside the Sherman Act's reach and then bringing such conduct back within the Act provided that it meets the two criteria provided. The first criterion dictates the kinds of effects that truly foreign commerce must have in the U.S. market. Conduct involving trade or commerce with foreign nations must have a direct, substantial, and reasonably foreseeable effect on either (A) U.S. domestic commerce (phrased awkwardly as "trade or commerce which is not trade or commerce with foreign nations") or U.S. import commerce, or (B) the export trade or commerce of a U.S. exporter. *15 U.S.C.S. § 6a(1)*. The second criterion is that the direct, substantial and foreseeable effect shown under *§ 6a(1)* must give rise to a substantive claim under the Sherman Act.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

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

HN11[] International Aspects, Foreign Trade Antitrust Improvements Act

The Foreign Trade Antitrust Improvements Act of 1982, *15 U.S.C.S. § 6a*, does not require any special showing in order to bring import commerce transactions back into the Sherman Act because they were never removed from the statute. That does not mean, however, that plaintiffs are home free. Rather, a court must still apply the rules governing import commerce for purposes of the antitrust laws.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

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

HN12[] International Aspects, Commerce With Foreign Nations

The Sherman Act covers imports when actual and intended effects on U.S. commerce have been shown. The Sherman Act covers foreign conduct producing a substantial intended effect in the United States. The United States Court of Appeals for the Third Circuit has suggested that this standard is met where the defendants' conduct targets import goods or services.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

HN13[] International Aspects, Foreign Trade Antitrust Improvements Act

Trade involving only foreign sellers and domestic buyers (i.e., import trade) is not subject to the extra layer of protection under the Foreign Trade Antitrust Improvements Act of 1982, *15 U.S.C.S. § 6a*, against Sherman Act claims implicating foreign activities.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

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

HN14[] **International Aspects, Foreign Trade Antitrust Improvements Act**

Regardless of whether a case is brought by the government or in private litigation, it is essential to meet the criteria spelled out by the Foreign Trade Antitrust Improvements Act of 1982, *15 U.S.C.S. § 6a*.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

HN15[] **International Aspects, Foreign Trade Antitrust Improvements Act**

After excluding foreign activities from the scope of the Sherman Act, the Foreign Trade Antitrust Improvements Act of 1982, *15 U.S.C.S. § 6a* brings back into the statute's reach conduct that has a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

HN16[] **International Aspects, Foreign Trade Antitrust Improvements Act**

No one needs to read the words "substantial" and "foreseeable" into the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), *15 U.S.C.S. § 6a*. Congress put them there, and in so doing, it signaled that the word "direct" used along with them had to be interpreted as part of an integrated phrase. Superimposing the idea of "immediate consequence" on top of the full phrase results in a stricter test than the complete text of the statute can bear. To demand a foreseeable, substantial, and "immediate" consequence on import or domestic commerce comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA's coverage.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

HN17[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The word "direct" as used in the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), *15 U.S.C.S. § 6a*, addresses the classic concern about remoteness—a concern, incidentally, that has been at the forefront of international ***antitrust law*** at least since it was written in Alcoa that a court should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. Just as tort law cuts off recovery for those whose injuries are too remote from the cause of an injury, so does the FTAIA exclude from the Sherman Act foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

HN18[] International Aspects, Foreign Trade Antitrust Improvements Act

If a foreign company is engaged in direct import sales, it must naturally comply with U.S. law just as all of its domestic competitors do. If its foreign sales do not meet the threshold for "effects" on import or domestic commerce established by cases such as Hartford Fire and Summit Health, then, for those transactions, it has nothing to worry about. If the hypothetical foreign company is engaged in the kind of conduct outside the United States that the Foreign Trade Antitrust Improvements Act of 1982, *15 U.S.C.S. § 6a*, addresses, then its actions can be reached only if there are direct, substantial, and reasonably foreseeable effects.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

International Law > Authority to Regulate > Anticompetitive Activities

HN19[] International Aspects, Commerce With Foreign Nations

While the United States Supreme Court has held that the U.S. antitrust laws are not to be used for injury to foreign customers, the Court has reaffirmed the well-established principle that the U.S. antitrust laws reach foreign conduct that harms U.S. commerce: application of U.S. antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused.

Antitrust & Trade Law > Sherman Act > Claims

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN20[] Sherman Act, Claims

No matter what the quality of the foreign conduct, the Foreign Trade Antitrust Improvements Act of 1982, *15 U.S.C.S. § 6a*, will not cover it unless the plaintiff manages to state a claim under the Sherman Act.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

HN21[] International Aspects, Foreign Trade Antitrust Improvements Act

If an antitrust complaint alleges straightforward import transactions, the plaintiffs must allege that the conduct of foreign cartel members was (1) meant to produce and (2) did in fact produce some substantial effect in the United States. The import trade or commerce exclusion under the Foreign Trade Antitrust Improvements Act of 1982, *15 U.S.C.S. § 6a*, requires that the defendants' conduct target import goods or services.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

HN22[] International Aspects, Foreign Trade Antitrust Improvements Act

The Foreign Trade Antitrust Improvements Act of 1982, *15 U.S.C.S. § 6a*, itself demands that the facts of each case must be evaluated for compliance with its demands.

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

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

HN23[] Motions to Dismiss, Failure to State Claim

If the allegations in a complaint state a claim, as required by *Fed. R. Civ. P. 8*, they thus are enough to withstand a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*.

Counsel: For MINN-CHEM, INCORPORATED, GAGE'S FERTILIZER & GRAIN, INCORPORATED, THOMASVILLE FEED & SEED, INCORPORATED, Plaintiffs - Appellees:J. Timothy Eaton, Attorney, SHEFSKY & FROELICH, LTD., Chicago, IL; Steven A. Hart, Attorney, SEGAL, MCCAMBRIDGE, SINGER & MAHONEY, Chicago, IL; Bruce L. Simon, Attorney, PEARSON SIMON WARSHAW & PENNY LLP, San Francisco, CA.

For INDIRECT PURCHASERS, Plaintiff - Appellee: Christopher P. Lovell, Attorney, LOVELL STEWART HALEBIAN, New York, NY; Marvin A. Miller, Attorney, MILLER LAW LLC, Chicago, IL; Beverly Tse, Attorney, KIRBY MCINERNEY & SQUIRE, New York, NY; Bruce L. Simon, Attorney, PEARSON SIMON WARSHAW & PENNY LLP, San Francisco, CA.

For DIRECT PURCHASER PLAINTIFFS, Plaintiff - Appellee: Steven A. Hart, Attorney, SEGAL, MCCAMBRIDGE, SINGER & MAHONEY, Chicago, IL; Marvin A. Miller, Attorney, MILLER LAW LLC, Chicago, IL; Bruce L. Simon, Attorney, PEARSON SIMON WARSHAW & PENNY LLP, San Francisco, CA.

For AGRIUM INCORPORATED, Defendant - Appellant: Richard Parker, O'MELVENY & MYERS LLP, Washington, DC.

For **[**2]** MOSAIC COMPANY, Defendant - Appellant: Charles A. Rothfeld, Attorney, MAYER BROWN LLP, Washington, DC; Stephen M. Shapiro, Attorney, MAYER BROWN LLP, Chicago, IL.

For POTASH CORPORATION OF SASKATCHEWAN, INCORPORATED, Defendant - Appellant: Brian J. Murray, Attorney, JONES DAY, Chicago, IL.

For JSC URALKALI, Defendant - Appellant: Jeffrey L. Kessler, WINSTON & STRAWN LLP, New York, NY.

For BPC CHICAGO, LLC, Defendant - Appellant: Robert A. Milne, Attorney, WHITE & CASE, New York, NY.

For JSC SILVINIT, Defendant - Appellant: Duane M. Kelley, Attorney, WINSTON & STRAWN LLP, Chicago, IL.

For AMERICAN ANTITRUST INSTITUTE, Amicus Curiae: Richard M. Brunell, Attorney, AMERICAN ANTITRUST INSTITUTE, Newton, MA.

For UNITED STATES OF AMERICA, FEDERAL TRADE COMMISSION, Amicus Curiaes: Nickolai G. Levin, Attorney, DEPARTMENT OF JUSTICE, Antitrust Division, Appellate Section, Washington, DC.

Judges: Before EASTERBROOK, Chief Judge, and POSNER, MANION, KANNE, WOOD, SYKES, TINDER, and HAMILTON, Circuit Judges.*

Opinion by: WOOD

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* Circuit Judges Flaum, Rovner, and Williams took no part in the consideration or decision of this case.

Opinion

[*848] WOOD, *Circuit Judge*. Potash, a naturally occurring mineral used in agricultural fertilizers and other **[**3]** products, is produced and sold in a global market. In this case, the plaintiffs, U.S. companies that are direct and indirect purchasers of potash, accuse several global producers of price-fixing in violation of the U.S. anti-trust laws. See *15 U.S.C. §§ 1 et seq.* The district court denied the defendants' motion to dismiss the complaint, but it certified its ruling for interlocutory appeal under *28 U.S.C. § 1292(b)*. We agreed with that court's assessment of the importance of the issues presented and accepted the appeal. A panel of the court concluded that the complaint failed to meet the requirements of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), *15 U.S.C. § 6a*, and it thus voted to reverse. *Minn-Chem, Inc. v. Agrium Inc., 657 F.3d 650 (7th Cir. 2011)*. We then decided to rehear the case *en banc*. We hold first that ***HN1***[] the FTAIA's criteria relate to the merits of a claim, and not to the subject-matter jurisdiction of the court. We therefore overrule our earlier *en banc* decision in *United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942 (7th Cir. 2003)*. We then address the applicable standards for antitrust cases involving import commerce and the restrictions imposed by **[**4]** the FTAIA. We conclude that the district court correctly ruled that the complaint does state a claim under the federal antitrust laws.

I

The district court's opinion details the critical facts alleged in the Complaint, see *In re Potash Antitrust Litig., 667 F. Supp. 2d 907, 915-19 (N.D. Ill. 2009)*, but for convenience we briefly summarize them here. The term "potash" refers to mineral and chemical salts that are rich in potassium. It is mined from naturally occurring ore deposits and its primary use is in agricultural fertilizers, but it is also used in the production of such varied products as glass, ceramics, soaps, and animal feed supplements. Importantly for our later antitrust analysis, potash is a homogeneous commodity: One manufacturer's supply is interchangeable with an-other's. As a result, buyers choose among suppliers based largely on price. Markets for this type of product are especially vulnerable to price-fixing.

We focus our analysis on the Direct Purchaser Amended Consolidated Class Action Complaint (referred to here simply as the Complaint), because the complaint filed by the indirect potash purchasers focuses primarily on state law remedies (since indirect purchasers **[**5]** are not entitled to sue for damages under the federal antitrust laws, see *Illinois Brick Co. v. Illinois, 431 U.S. 720, 729, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977))*.[1] The Complaint alleges that the world's potash reserves are confined to a handful of areas, with over half of global capacity located in just two regions—Canada and the former Soviet Union (in particular, Russia and Belarus). Commercially, the industry has been dominated by a small group of companies that market, sell, and distribute potash. The key actors are:

- Potash Corporation of Saskatchewan (Canada) Inc. and its U.S. subsidiary Potash Sales (USA), Inc. (collectively PCS), the world's largest producer of potash;
- Mosaic Company and Mosaic Crop Nutrition (Mosaic) a Delaware company headquartered in Minnesota, number three globally;

[*849] • Agrium Inc. and Agrium U.S. Inc. (Agrium), a Canadian corporation and its wholly owned U.S. subsidiary;

- Uralkali, a Russian joint venture headquartered in Moscow; fifth largest in the world and holder of a one-half interest in JSC Belarusian Potash Company (Belarusian Potash), which acts as the exclusive distributor of potash for Uralkali;

- Belaruskali, a Belarusian company and the owner of the other one-half interest **[**6]** in Belarusian Potash, which, as it is for Uralkali, is Belaruskali's exclusive distributor;

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[1] The indirect purchasers had sought injunctive relief under the federal antitrust laws, but the district court dismissed those claims, *667 F. Supp. 2d at 941*, and they are not now before us.

- Silvinit, a Russian company that sells potash throughout the world, including the United States; and
- IPC, another Russian company, which is Silvinit's exclusive distributor.

The Complaint alleges that as of 2008, these seven entities produced approximately 71% of the world's potash.

In 2008, the United States consumed 6.2 million tons of potash. Of that total, 5.3 million tons were imports, and PCS, Mosaic, Agrium, and Belarusian Potash (acting for both Uralkali and Belaruskali, its equal and joint owners) were responsible for the lion's share of those sales. Data for other years covered by the Complaint are comparable.

The total world market for potash, in which the United States is an important consumer (second only to China, Complaint ¶51), is allegedly under the thumb of a global cartel consisting primarily of the companies listed above. This cartel restrained global output of potash in order to inflate **[**7]** prices. The cartel members used a rolling strategy: They would first negotiate prices in Brazil, India, and China (Complaint ¶111), and then use those prices as benchmarks for sales to U.S. customers. (Complaint ¶¶117-121). For example, in May 2004, the cartel arranged for prices to increase by $20 per ton for some foreign customers; shortly thereafter, prices in the United States went up by precisely the same amount.

The cartel initiated a sustained and successful effort to drive prices up beginning in mid-2003; by 2008 potash prices had increased at least 600%. The plaintiffs assert that this increase cannot be explained by a significant uptick in demand, changes in the cost of production, or other changes in input costs. In fact, U.S. consumption of fertilizer, of which potash is a consistent part, remained relatively steady throughout the period covered by this case; demand declined somewhat in 2008 but then returned to normal levels in 2009.[2] One might think that the decrease in demand in 2008 was because of the increase in price, but the slippage in demand did not build up over the entire Class Period and appears to have been only temporary, and is thus not correlated to potash **[**8]** price movements. Furthermore, the specific allegation in the Complaint that a $100 per ton increase in the price of potash adds only $0.03 to the production cost of a bushel of corn suggests that demand for potash is inelastic. Complaint ¶54. Prices for potash rose and stayed high, increasing even while fertilizer prices declined. Based on World Bank statistics, average fertilizer price indices rose from 1.0 to 2.2, and then fell back to 1.0 in 2008, while potash price indices started in 2008 at 1.0 and rose to 3.5 by the end of the year. Earnings by cartel members reinforce this picture of financial gain even in **[*850]** the face of waning demand: PCS posted first-quarter income figures in 2008 that tripled its previous-year figure, while Mosaic's earnings for that quarter were up more than tenfold over the year before.

The Complaint **[**9]** goes into detail about ways in which the defendants managed their collective output. (A cartel will always try to restrict output to the level where marginal cost equals marginal revenue, but in the real world, this normally requires constant adjustment.) For example, when global demand for potash declined in 2005, rather than decreasing its price, PCS announced that it was shutting down three of its mines in November and December 2005 for "inventory control purposes." Complaint ¶88. This action had the effect of removing 1.34 million tons of potash from the world market. At the same time, rather than jumping into the gap this drastic cutback created, Mosaic announced that it too was implementing temporary cutbacks that would remove an additional 200,000 tons from the market. These (allegedly) coordinated and deep reductions continued into 2006. In the first three months of that year, PCS reduced output from 2.4 million tons to 1.3 million tons, removing yet another 1.1 million tons from the market, or the equivalent of 32 weeks of mining. Uralkali reduced its output by 200,000 tons, and Belaruskali cut its exports back by 50%, or 250,000 tons. In the second quarter of that year, **[**10]** Silvinit followed suit with mine stoppages that removed about 100,000 tons from the market. Collectively, these three companies removed over half a million tons of potash from the market in early 2006. See Complaint ¶¶88-93. Their compatriots applauded the "discipline" of the former Soviet Union producers, "noting that many years earlier when demand for potash declined those same producers had sought to maintain volume over price and flooded the market with excess supply." Complaint ¶93.

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[2] Data from the International Fertilizer Industry Association give the following figures for 2003 through 2009: 21,203.1 (2003); 20,090.7 (2004); 19,273.3 (2005); 20,770.9 (2006); 19,455.1 (2007); 16,045.7 (2008); and 18,908.2 (2009). See http://www.fertilizer.org/ifa/ifadata/search (last visited June 25, 2012). These data appear to refer to thousands of metric tons.

China was a particular target of the cartel's efforts, given its importance as a consumer. The shortages created by Uralkali's and PCS's supply restrictions in the first half of 2006 induced China to accept an increase in the price of potash. Shortly thereafter, a similar price increase was implemented throughout the world. Complaint ¶95. Comparable actions took place in 2007, as the Complaint rehearses in detail. The plaintiffs assert that a number of the defendants had excess capacity throughout the period between 2003 and mid-2009 (which represents the Class Period defined in ¶1 of the Complaint). PCS, for instance, had a utilization rate of only 54% to 69%, and Uralkali bragged in December 2007 **[**11]** that it had the "ability to add significant capacity on the cheapest basis vs. global peers." Complaint ¶¶133-134. This pattern of restrained output made it possible for the cartel to maintain its inflated prices, but the excess capacity inevitably gave its members an easy opportunity to cheat, and so the group had to coordinate to ensure that its price control efforts were not undermined.

The Complaint also points to several ways in which the cartel members had the opportunity to cooperate, to conspire on future actions, and to monitor one another's actions for possible cheating. First, the major suppliers participated in joint ventures that facilitated coordination. PCS, Agrium, and Mosaic were joint venturers and equal shareholders in Canpotex Ltd., a Canadian company that sold, marketed, and distributed potash throughout the world excluding the United States. Through that vehicle, those three companies had access to one another's sensitive production and pricing information. Canpotex in turn entered into cooperative marketing agreements with the Russian and Belarusian entities. As part of those deals, Canpotex agreed to market Uralkali potash outside North America and Europe. **[*851]** For **[**12]** their part, the former Soviet producers coordinated their sales and marketing through Belarusian Potash. That joint venture, formed between Uralkali and Belaruskali in 2005, supplied 34% of the market for potash by the following year. Complaint ¶26. Silvinit has sought to join the venture, and one of its owners (with a 20% share) owns 60% of the stock of Uralkali.

Beyond the access created by these structural relations among the entities, there were other more immediate opportunities to collude. The defendants routinely held meetings during the Class Period and engaged in an exchange program through which senior executives from each visited the others' plants. These meetings gave the defendants an opportunity to exchange sensitive information. Critically, one such meeting of the key players at PCS, Canpotex, Mosaic, Uralkali, Belaruskali, and Silvinit—mostly at the presidential level—took place in October 2005. As we described above, in the very next month, November 2005, PCS and Mosaic announced significant production cutbacks; the others followed suit with additional supply reductions through the beginning of 2006.

In addition, all of the defendants are members of the International **[**13]** Fertilizer Industry Association and the Fertilizer Institute, and they regularly attended those trade organizations' conferences. During one such meeting in Turkey, in May 2007, the defendants announced an additional price increase.

The Complaint contains, in its 165 paragraphs, many more details, which we discuss as needed below. What we have said here, however, is enough to set the stage for the two legal issues before us: how the FTAIA should be interpreted, and whether the district court correctly allowed this case to go forward.

II

Whether this case can be entertained by a court in the United States turns on the global reach of the antitrust laws, and to a significant degree on the Foreign Trade Antitrust Improvements Act of 1982, *15 U.S.C. § 6a*. Before delving into the FTAIA's requirements, however, we take this opportunity to revisit the question whether that law affects the subject-matter jurisdiction of the district court or if, on the other hand, it relates to the scope of coverage of the antitrust laws. Nine years ago, in *United Phosphorus v. Angus Chemical*, the *en banc* court concluded that the former interpretation was correct. *322 F.3d 942, 952 (7th Cir. 2003)*. In so doing, **[**14]** we relied on the legislative history of the statute, the vocabulary used by a number of commentators, and a number of court decisions that used the word "jurisdiction" in describing the requirement that challenged conduct must affect interstate or import commerce in specified ways.

Since that decision, ***HN2***[] the Supreme Court has emphasized the need to draw a careful line between true jurisdictional limitations and other types of rules. Thus, in *Morrison v. Nat'l Austl. Bank Ltd.., 561 U.S. 247, 130 S.*

Ct. 2869, 177 L. Ed. 2d 535 (2010), which dealt with the securities laws, the Court squarely rejected the notion that the extraterritorial reach of § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), raises a question of subject-matter jurisdiction. Id. at 2877. "[T]o ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. **HN3**[] Subject-matter jurisdiction, by contrast, refers to a tribunal's power to hear a case." *Id*. (citing Union Pacific R. Co. v. Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 67, 130 S. Ct. 584, 596, 175 L. Ed. 2d 428 (2009); Arbaugh v. Y&H Corp., 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d **[*852]** 1097 (2006); United States v. Cotton, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002)). The Court might have added to that list Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 130 S. Ct. 1237, 1243, 176 L. Ed. 2d 18 (2010), **[**15]** Kontrick v. Ryan, 540 U.S. 443, 455, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004), and Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Even more recently, the Court restated this proposition in Henderson v. Shinseki, 562 U.S. 428, 131 S. Ct. 1197, 1202-03, 179 L. Ed. 2d 159 (2011). Notably, what may have been thought a nascent idea at the time *United Phosphorus* was decided (as one can tell by the dates of decision in our list) has now become a firmly established principle of statutory construction.

The panel in the present case had no quarrel with the proposition that this recent string of decisions undermined the holding in *United Phosphorus*. 657 F.3d at 653. It commented that "[t]hese intervening developments suggest that *United Phosphorus* may be ripe for reconsideration," but it was hesitant to take that step on its own. The panel also observed that the same issue had recently come before the Third Circuit, which held that the FTAIA does not impose a jurisdictional limit but instead establishes an element of a Sherman Act claim. Id. at 659 n.3 (citing Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011)). Indeed, the *Animal Science* opinion expressly approved the position of the *United Phosphorus* dissenters. **[**16]** 654 F.3d at 469 n.8. We agree with the panel that this issue is indeed ripe for reconsideration and ought to be settled now.

The Supreme Court's decision in Morrison, we believe, provides all the guidance we need to conclude that, like **HN4**[] § 10(b) of the Exchange Act, the FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts. As the Court put it, **HN5**[] limitations on the extraterritorial reach of a statute describe what conduct the law purports to regulate and what lies outside its reach. The Supreme Court itself used much the same language with respect to the antitrust laws in its decision in F. Hoffmann-La Roche Ltd v. Empagran S.A.., 542 U.S. 155, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004), which dealt specifically with the FTAIA. The Court spoke, for example, of the FTAIA's "removing from the Sherman Act's reach" certain types of conduct, id. at 161, and whether it was reasonable under the facts presented there "to apply this law to conduct that is significantly foreign," id. at 166. Even if one thought the language in *Empagran* to be less than dispositive, we can now see no way to distinguish this case from *Morrison*.

We add briefly that the interpretation we adopt today—that **[**17]** the FTAIA spells out an element of a claim—is the one that is both more consistent with the language of the statute and sounder from a procedural standpoint. **HN6**[] When Congress decides to strip the courts of subject-matter jurisdiction in a particular area, it speaks clearly. The FTAIA, however, never comes close to using the word "jurisdiction" or any commonly accepted synonym. Instead, it speaks of the "conduct" to which the Sherman Act (or the Federal Trade Commission Act) applies. This is the language of elements, not jurisdiction.

HN7[] From a procedural standpoint, this means that a party who wishes to contest the propriety of an antitrust claim implicating foreign activities must, at the outset, use Federal Rule of Civil Procedure 12(b)(6), not Rule 12(b)(1). This is not a picky point that is of interest only to procedure buffs. Rather, this distinction affects how disputed facts are handled, and **[*853]** it determines when a party may raise the point. While "it is the burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution," FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) (citations **[**18]** and quotation marks omitted), we "accept as true all of the allegations contained in a complaint," Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)) subject, of course, to the limitations articulated in those cases. Likewise, subject-matter jurisdiction must be secure at all times, regardless of whether the parties raise the issue, and no matter how much has been invested in a case. See, *e.g.,* Cotton, 535 U.S. at 630 (citing *Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 29 S. Ct. 42, 53 L. Ed. 126 (1908))*. By contrast, a motion to dismiss for failure to state a claim may only be brought as late as trial. *Fed . R. C iv. P. 12(h)(2)*. Although this is a significant difference, we note that foreign connections of the kind at issue here are unlikely to be difficult to detect, and so we are confident that parties who want to argue that a particular claim fails the requirements of the FTAIA will be able to do so within these generous time limits.

III

Having established that the FTAIA relates to the merits of a claim, rather than the subject-matter jurisdiction of the court, we can now turn to the principal issues in this appeal. We consider first how the **[**19]** statute should be interpreted and then, on that understanding of the law, we decide whether the district court correctly found that the Complaint stated a claim that could go forward.

A

Although the FTAIA has been parsed in a number of judicial opinions, including notably *Empagran*, we think it important to begin with the language of the statute, in order to place our discussion of these decisions in context. We note that the 1982 legislation that we are examining actually amended both the Sherman Act, see *15 U.S.C. § 6a*, and the Federal Trade Commission Act, see *15 U.S.C. § 45(a)(3)*, using identical language. That fact is important insofar as it underscores the generality of the issue we face: The statute applies not only to private actions, such as this one, but also to actions brought by the two federal agencies entrusted with the enforcement of the antitrust laws. Since it is the Sherman Act that applies to our case, however, from this point forward we cite only its provision. It reads as follows:

> *§ 6a*. Conduct involving trade or commerce with foreign nations
>
> ***HN8***[] *Sections 1 to 7* of this title [*i.e.*, the Sherman Act] shall not apply to conduct involving trade or commerce (other than import **[**20]** trade or import commerce) with foreign nations unless—
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of *sections 1 to 7* of this title, other than this section.
>
> **[*854]** If *sections 1 to 7* of this title apply to such conduct only because of the operation of *paragraph (1)(B)*, then *sections 1 to 7* of this title shall apply to such conduct only for injury to export business in the United States.

HN9[] The opening phrase (sometimes referred to as a *chapeau* in international circles) reflects Congress's effort to indicate that the Sherman Act does not apply to every arrangement that literally can be said to involve trade or commerce with foreign nations. As the Supreme Court stressed in *Empagran*, the public recognition of this limitation was inspired largely by international comity. But, by inserting the parenthetical "other than import trade or import **[**21]** commerce" in the *chapeau*, Congress recognized that there was no need for this self-restraint with respect to imports, even though they represent part of the foreign commerce of the United States. Although some, including the Third Circuit in *Animal Science*, have referred to this as the "import exception," that is not an accurate description. Import trade and commerce are excluded at the outset from the coverage of the FTAIA in the same way that domestic interstate commerce is excluded. This means only that conduct in both domestic and import trade is subject to the Sherman Act's general requirements for effects on commerce, not to the special requirements spelled out in the FTAIA. Where the FTAIA does apply, it "remov[es] from the Sherman Act's reach . . . commercial activities taking place abroad, unless those activities adversely affect . . . imports to the United States" *Empagran,* 542 U.S. at 161. The Court's decision in Hartford Fire Ins. Co. v. California, 509 U.S. 764, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993), suggests a pragmatic reason for this distinction: The applicability of U.S. law to transactions in which a good or service is being sent directly into the United States, with no intermediate stops, is both **[**22]** fully predictable to foreign entities and necessary for the protection of U.S. consumers. Foreigners who want to earn money from the sale of goods or services in American markets should expect to have to comply with U.S. law.

Next, we come to ***HN10***[] the statute's treatment of nonimport, non-domestic commerce. *Empagran* explained that the FTAIA handles that problem by "lay[ing] down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach . . . [and then] bring[ing] such conduct back within" the Act provided that it meets the two criteria provided. *Id. at 162* (emphasis in original). The first criterion dictates the kinds of effects that truly foreign commerce must have in the U.S. market. Conduct "involving trade or commerce . . . with foreign nations" must have "a direct, substantial, and reasonably foreseeable effect" on *either* [A] U.S. domestic commerce (phrased awkwardly as "trade or commerce which is not trade or commerce with foreign nations") or U.S. import commerce, *or* [B] the export trade or commerce of a U.S. exporter. See § 6a(1). The export trade provision plays no part in our case, and so we do not address it further here. The second **[**23]** criterion, which was the focus of *Empagran*, is that the direct, substantial and foreseeable effect shown under subpart (1) must give rise to a substantive claim under the Sherman Act. The reason this was important in *Empagran* is that the plaintiffs there were foreign purchasers of allegedly price-fixed products that were sold in foreign markets. The Court held that their claims fell outside the scope of the Sherman Act. In our case, by contrast, the plaintiffs are all U.S. purchasers, and so the particular problem addressed in *Empagran* does not arise here.

[*855] Thus, before we can address the merits of the complaint, we must address two distinct questions of statutory interpretation. The first is how to define pure import commerce—that is, the kind of commerce that is not subject to the special rules created by the FTAIA. Second, we must explore the FTAIA's standards further and explain what it takes to show that foreign conduct has a direct, substantial, and reasonably foreseeable effect on U.S. domestic or import commerce.

1

There can be no question that the import commerce exclusion puts some of the conduct alleged in the Complaint outside the special rules created in the FTAIA for Sherman **[**24]** Act claims. The plaintiffs are U.S. entities that have purchased potash directly from members of the alleged cartel. The defendant members of the cartel are all located outside the United States. Those transactions that are directly between the plaintiff purchasers and the defendant cartel members *are* the import commerce of the United States in this sector.

HN11[] The FTAIA does not require any special showing in order to bring these transactions back into the Sherman Act, as *Empagran* put it, because they were never removed from the statute. That does not mean, however, that plaintiffs are home free. Rather, we must still apply the rules governing import commerce for purposes of the antitrust laws. For several decades, the leading authority on this subject was Judge Learned Hand's opinion for the Second Circuit in United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945) (*Alcoa*). There the court (sitting as a court of last resort because the Supreme Court lacked a quorum) held that***HN12***[] the Sherman Act covers imports when actual and intended effects on U.S. commerce have been shown. In *Hartford Fire*, the Supreme Court confirmed this rule, stating that "the Sherman Act covers foreign **[**25]** conduct producing a substantial intended effect in the United States." 509 U.S. at 797. The Third Circuit has suggested that this standard is met where "the defendants' conduct target[s] import goods or services." Animal Science, 654 F.3d at 470.

As noted, the Complaint before us alleges import transactions. Thus, the only outstanding question is whether this import trade has been substantially and intentionally affected by an anticompetitive arrangement (*i.e.*, something that would violate the U.S. antitrust laws). There is nothing particularly "international" about that question. Effects on commerce are a part of every Sherman Act case. See, *e.g.,* Hartford Fire, supra (import commerce); Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991) (interstate commerce). We address the adequacy of the Complaint under the Sherman Act in more detail below.

2

As we already have observed, ***HN13***[] trade involving only foreign sellers and domestic buyers (*i.e*., import trade) is not subject to the FTAIA's extra layer of protection against Sherman Act claims implicating foreign activities. Some of the activities alleged in the Complaint, however, may be best understood as sufficiently outside the arena of simple **[**26]** import transactions as to require application of the FTAIA. For example, Canpotex is the unified marketing and sales agent for Agrium, Mosaic and PCS in all markets *except* Canada and the United States, yet its actions are an important part of the alleged scheme to set inflated benchmark prices. Presumably, in order to avoid *Illinois Brick's* prohibition on "pass on" antitrust damages, *431 U.S. at 728*, the plaintiffs are **[*856]** seeking to hold firms like Canpotex jointly and severally liable for any damages the direct sellers might be ordered to pay, perhaps under a conspiracy theory. If this were an action by the Department of Justice or the Federal Trade Commission, we would not need to worry about *Illinois Brick*, but ***HN14***[] regardless of whether the case is brought by the government or in private litigation, it is essential to meet the criteria spelled out by the FTAIA. We thus take a closer look at what kind of conduct "involve[s] trade or commerce . . . with foreign nations" and what showing is necessary to demonstrate "direct, substantial and reasonably foreseeable" effects on domestic [*i.e*., "not trade or commerce with foreign nations"] or import commerce.

The first question—whether the conduct **[**27]** alleged in this case "involves" foreign commerce—is readily answered. The Complaint alleges an international cartel in a commodity, and it asserts that the cartel succeeded in raising prices for direct U.S. purchasers of the product, potash. This alleged arrangement plainly involves foreign commerce, and so we move immediately to the second inquiry—the task of parsing the statute's central requirements. As *Empagran* put it, ***HN15***[] after excluding foreign activities from the scope of the Sherman Act, the FTAIA brings back into the statute's reach conduct that has a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce.

The potash cartel described in the Complaint is one for which the requirements of substantiality and foreseeability are easily met. There is little dispute that the Complaint has alleged substantial effects: The Complaint alleges that 5.3 million tons of potash were imported into the United States in 2008 alone, and the Complaint elsewhere asserts that the vast majority of these imports came from the defendants. From 2003 to 2008, the price of potash increased by over 600%. We do not need to belabor the point. These allegations easily satisfy **[**28]** the requirement to show substantial effects in the U.S. market. Wherever the floor may be, it is so far below these numbers that we do not worry about it here.

Foreseeability is equally straightforward. It is objectively foreseeable that an international cartel with a grip on 71% of the world's supply of a homogeneous commodity will charge supracompetitive prices, and in the absence of any evidence showing that arbitrage is impossible (and there is none here), those prices (net of shipping costs) will be uniform throughout the world. Higher prices cannot be divorced from reductions in supply, and so the effects alleged here are a rationally expected outcome of the conduct stated in the Complaint.

The question that has caused more discussion among various courts and commentators is what it takes to show "direct" effects. One school of thought, launched by the Ninth Circuit's split decision in *United States v. LSL Biotechs., 379 F.3d 672 (9th Cir. 2004)*, has borrowed the definition of the word "direct" that the Supreme Court adopted for a different statute, the Foreign Sovereign Immunities Act (FSIA), *28 U.S.C. § 1605(a)(2)*; see *Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992)*. **[**29]** The word appears in the exception for foreign sovereign immunity that applies for commercial activity that takes place outside the territory of the United States when "that act causes a direct effect in the United States." In that setting, the Court held that an effect is "direct" if it "follows as an immediate consequence of the defendant's . . . activity." *Id. at 618*. The other school of thought has been articulated by the Department of Justice's Antitrust Division, which takes the position that, for FTAIA **[*857]** purposes, the term "direct" means only "a reasonably proximate causal nexus." Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, *61 N.Y.U. Ann. Surv. Am. L. 415, 430 (2005)* (remarks of the Deputy Assistant Attorney General); Brief for Appellant United States of America 38 in *United States v. LSL Biotechs., supra*, *available at* *http://www.justice.gov/atr/cases/f200200/200243.pdf* (directness is a synonym for proximate cause).

In our view, the Ninth Circuit jumped too quickly to the assumption that the FSIA and the FTAIA use the word "direct" in the same way. Critically, the Supreme Court in *Weltover* **[**30]** reached its definition of "direct" for FSIA purposes only after refusing to import from the legislative history of that statute the notion that an effect is "direct" only if it is both "substantial" and "foreseeable." *504 U.S. at 617*. "[W]e reject," it said, "the suggestion that *§ 1605(a)(2)* contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Id. at 618*. Only then did the Court endorse the appellate court's definition that an effect is "direct" if it follows "as an immediate consequence" of the defendant's activity. *Id*.

HN16[] No one needs to read the words "substantial" and "foreseeable" into the FTAIA. Congress put them there, and in so doing, it signaled that the word "direct" used along with them had to be interpreted as part of an integrated phrase. Superimposing the idea of "immediate consequence" on top of the full phrase results in a stricter test than the complete text of the statute can bear. To demand a foreseeable, substantial, and "immediate" consequence on import or domestic commerce comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA's coverage.

We are persuaded that the Department of Justice's **[**31]** approach is more consistent with the language of the statute. ***HN17***[] The word "direct" addresses the classic concern about remoteness—a concern, incidently, that has been at the forefront of international ***antitrust law*** at least since Judge Hand wrote in *Alcoa* that "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." *148 F.2d at 443*; see also *LSL Biotechs., 379 F.3d at 683-91* (Aldisert, J., dissenting) (tracing the history of the FTAIA's effects test through *Alcoa*). Just as tort law cuts off recovery for those whose injuries are too remote from the cause of an injury, so does the FTAIA exclude from the Sherman Act foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce.

This understanding of the FTAIA should allay any concern that a foreign company that does any import business at all in the United States would violate the Sherman Act whenever it entered into a joint-selling arrangement overseas regardless of its impact on the American market. A number of safeguards exist to protect against that risk. ***HN18***[] If the hypothetical foreign com-pany is engaged **[**32]** in direct import sales, it must naturally comply with U.S. law just as all of its domestic competitors do. If its foreign sales do not meet the threshold for "effects" on import or domestic commerce established by cases such as *Hartford Fire* and *Summit Health*, then, for those transactions, it has nothing to worry about. If the hypothetical foreign company is engaged in the kind of conduct outside the United States that the FTAIA addresses, then its actions can be reached only if there are direct, substantial, and **[*858]** reasonably foreseeable effects. This is a standard with teeth, as the many cases that have been dismissed for failing to meet those criteria attest. *E.g., Turicentro, S.A. v. Am. Airlines, Inc., 303 F.3d 293 (3d Cir. 2002)*; *Carpet Grp. Int'l v. Oriental Rug Imps. Ass'n, 227 F.3d 62 (3d Cir. 2000)*; *McGlinchy v. Shell Chem. Co., 845 F.2d 802 (9th Cir. 1988)*; *Filetech S.A. v. France Telecom S.A., 212 F. Supp. 2d 183 (S.D.N.Y. 2001)*.

Empagran is consistent with the interpretation we adopt here. ***HN19***[] While it holds that the U.S. antitrust laws are not to be used for injury to foreign customers, it goes on to reaffirm the well-established principle that the U.S. antitrust laws reach foreign **[**33]** conduct that harms U.S. commerce:

> [O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused.

Empagran, 542 U.S. at 165. Finally, we note that *§ 6a(2)* will protect many a foreign defendant. ***HN20***[] No matter what the quality of the foreign conduct, the statute will not cover it unless the plaintiff manages to state a claim under the Sherman Act. In this connection, we point out that a great many joint-selling arrangements are legal, efficiency-enhancing structures. See, *e.g., Texaco Inc. v. Dagher, 547 U.S. 1, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*; *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*.

B

Having described the requirements for both simple import commerce and the FTAIA, our final task is to measure the Complaint against these standards. In particular, we must decide whether the plaintiffs have plausibly alleged that the defendants' conduct took place either in import commerce and are thus subject to the more general rules of *Hartford* ***[**34]*** *Fire* for effects on commerce, or if they have in whole or in part described conduct subject to the FTAIA, and if so, whether the allegations describe direct, substantial, and foreseeable effects on domestic or import commerce.

1

In our view, ***HN21***[] much of the Complaint alleges straightforward import transactions. Under *Hartfrd Fire* the plaintiffs thus must allege that the conduct of the foreign cartel members was (1) meant to produce and (2) did in fact produce some substantial effect in the United States. See also *Animal Science, 654 F.3d at 470* ("[T]he import trade or commerce [exclusion] requires that the defendants' conduct target import goods or services."). The Complaint contains ample material supporting both of those points.

The plaintiffs describe a tight-knit global cartel, similar to OPEC in its heyday, that restrained global output of potash so that prices throughout this homogeneous world market would remain artificially high. Just like the raisin producers in California in the famous state-action antitrust case, *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, who controlled 90% of the world market in raisins, the alleged cartel members here control a comparable share of the world market **[**35]** in potash. The purpose of this cartel was to inflate the profits of its members. Its alleged effect was substantial. The United States, according to the Complaint, is one of the two largest consumers of potash in the world, and approximately 85% of U.S. potash comes from overseas. From 2003 to 2008, the price of potash increased six-fold. The inference from these allegations **[*859]** is not just plausible but compelling that the cartel meant to, and did in fact, keep prices artificially high in the United States.

2

We turn next to an analysis of the conduct that falls outside the import exclusion to determine whether it may nevertheless be subject to the Sherman Act under the FTAIA. For example, the Complaint alleges that Canpotex, a Canadian entity that does not sell directly into the United States, restricted supply during a period of especially difficult price negotiations with China. This supply restriction compelled Chinese buyers to accept a price increase. Complaint ¶94. We assume for present purposes that none of this literally involved import trade. Our discussion, however, is rooted in the facts of this Complaint. In that connection, it is important to recall that ***HN22***[] the FTAIA itself demands **[**36]** that the facts of each case must be evaluated for compliance with its demands. We thus address only the situation before us, in which several members of the cartel sold directly into the United States and others allegedly worked with them in connection with those efforts. The question before us is thus whether the al legations in the plaintiffs' Complaint describe conduct that had a direct, substantial, and reasonably foreseeable effect on domestic or import commerce by, for example, setting a benchmark price intended to govern later U.S. sales.

As we noted above, the effects of the supply restriction on U.S. potash prices were foreseeable. So too were the effects of forcing foreign purchasers to accept higher prices in a commoditized and cartelized market: Either someone in the cartel would cheat, or a new entrant would begin to arbitrage its purchases, or, as the plaintiffs allege, the cartel would succeed in pushing prices up across all of its markets, including the United States. And, as we have explained, there is every reason to infer that any such effects in the U.S. potash market were substantial.

We turn to the question whether these effects are "direct," as we have defined **[**37]** the term. The plaintiffs allege that the defendants would first negotiate prices in Brazil, India, and China, and then they would use those prices for sales to U.S. customers. The alleged supply reductions led to price hikes in these foreign markets, and those increases showed up almost immediately in the prices of U.S. imports. The defendants do not suggest that the potash market is insulated from these effects by regulatory structures or other arrangements, and even if they did, that would be no reason to dismiss the Complaint outright. To the contrary, the plaintiffs have alleged that the cartel established benchmark prices in markets where it was relatively free to operate, and it then applied those prices to its U.S. sales. (Benchmark prices set in one market for general use are common: think, for instance of the London Interbank Offered Rate (LIBOR), in the credit market; the Brent Crude price, formally used for North Sea oil but in general use in oil markets; or even the Medicare Fee Schedule, which though technically only for Medicare reimbursements, has widespread effects on the healthcare market.) It is no stretch to say that the foreign supply restrictions, and the concomitant **[**38]** price increases forced upon the Chinese purchasers, were a direct—that is, proximate—cause of the subsequent price increases in the United States.

HN23[] The allegations in the Complaint state a claim, as required by *Federal Rule of Civil Procedure 8*, and thus are enough to withstand a motion to dismiss under *Rule 12(b)(6)*, as interpreted by the Supreme Court in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* and *Ashcroft v. Iqbal, 556 U.S. 662, **[*860]** 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. The Complaint is not defeated by the defendants' contention that the alleged cartel was not efficacious. See *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 656 (7th Cir. 2002)*. We are also satisfied that the allegations suffice, at this stage, to support a plausible story of concerted action. See *In re Text Messaging Antitrust Litig., 630 F.3d 622 (7th Cir. 2010)*. We stress, however, that our evaluation throughout has proceeded exclusively on the face of the Complaint. Nothing we have said should be understood as a prediction of the facts that may turn up in discovery, nor are we opining about the likely fate of any possible defenses. In particular, the defendants mentioned in their opposition to the petition for rehearing **[**39]** *en banc* that some of their actions were under-taken with the approval of foreign governments (*e.g.*, Canada's). We express no opinion on either the contours or the likely success of any such argument. Similarly, we do not have before us any question about the court's personal jurisdiction over the various defendants. *Cf. J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011)*. We are not faced with the question of whether the actions of the non-selling defendants, such as Canpotex, fall outside the substantive scope of *Sherman Act § 1* (as opposed to the law's territorial reach), nor have the defendants argued that Congress as a matter of U.S. law has no constitutional power to enact laws with some extraterritorial effect. These or other theories may all be important to explore as the case goes forward, but they do not provide a reason to throw out the case on the grounds that the plaintiffs failed to show either that the challenged transactions occurred in import commerce or that they had a direct, substantial, and reasonably foreseeable effect on either the domestic or import commerce of the United States.

IV

Foreign cartels, especially those over natural resources that are scarce **[**40]** in the United States and that are traded in a unified international market, have often been the target of either governmental or private litigation. The host country for the cartel will often have no incentive to prosecute it. Canada and Russia, here (just like California in *Parker*), would logically be pleased to reap economic rents from other countries; their losses from higher prices for the potash used in their own fertilizers are more than made up by the gains from the cartel price their exporters collect. Export cartels are often exempt from a country's antitrust laws: the United States does just that, through its Webb-Pomerene Associations, see *15 U.S.C. §§ 61 et seq.*, and Export Trading Companies, see *15 U.S.C. §§ 4001 et seq.* This case is actually the mirror image of the situation described in *Empagran*, where the foreign country whose consumers are hurt would have been the better enforcer. It is the U.S. authorities or private plaintiffs who have the incentive—and the right—to complain about overcharges paid as a result of the potash cartel, and whose interests will be sacrificed if the law is interpreted not to permit this kind of case.

The world market for potash is highly **[**41]** concentrated, and customers located in the United States account for a high percentage of sales. This is not a House-that-Jack-Built situation in which action in a foreign country filters through many layers and finally causes a few ripples in the United States. To the contrary: foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) sold that product to U.S. customers. The payment of overcharges **[*861]** by those customers was objectively foreseeable, and the amount of commerce is plainly substantial. We AFFIRM the order of the district court denying the motion to dismiss for failure to state a claim.

[Sparig v. Danenberg](#)

Sparig v. Danenberg

United States District Court for the Eastern District of New York

June 29, 2012, Decided; June 29, 2012, Filed

11-CV-5206 (JG) (CLP)

Reporter

2012 U.S. Dist. LEXIS 90843 *; 2012 WL 2564231

JEREMY SPARIG, Plaintiff, - versus - KERRY DANENBERG, SARAH RUSSEL, SELECT REAL ESTATE, DANBRO STUDIOS, DUSTY LLC, Defendants.

Notice: FOR ELECTRONIC PUBLICATION ONLY

Subsequent History: Motion denied by, Sanctions disallowed by *Sparig v. Danenberg, 2013 U.S. Dist. LEXIS 205695 (E.D.N.Y., Sept. 4, 2013)*

Core Terms

commissions, broker, tortious interference, motion to dismiss, hire, photographs, salesperson, copyright infringement, racketeering activity, real estate, non-compete, violations, antitrust, alleges

Counsel: [*1] JEREMY SPARIG, Plaintiff, Pro se, Brooklyn, New York.

For Defendants: Antonio Pasquariello, CARLINSKY, DUNN & PASQUARIELLO, PLLC, Brooklyn, New York.

Judges: JOHN GLEESON, United States District Judge.

Opinion by: JOHN GLEESON

Opinion

MEMORANDUM AND ORDER

JOHN GLEESON, United States District Judge:

Plaintiff Jeremy Sparig commenced this *pro se* action on October 24, 2011, alleging a variety of claims arising from his former relationship with Select Real Estate, LLC ("SRE"), a real estate brokerage based in Brooklyn, New York. Sparig has asserted federal claims against SRE, its principals and related companies for copyright infringement, as well as violations of § 1 of the Sherman Act, *15 U.S.C. § 1*, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1961 et seq.* He has also asserted various claims under state law. For the reasons set forth below, the Defendants' motion to dismiss is granted in part and denied in part.

BACKGROUND

A. *Factual Background*

Sparig began working as a real estate salesperson for SRE, a real estate brokerage, in April 2008. Am. Compl. ¶¶ 27, 29, ECF No. 3.[1] He worked for SRE as an independent contractor, paid by commission. *Id*. ¶¶ 29, 31. When he accepted a position **[*2]** with SRE, Sparig signed a non-compete agreement. *See id*. ¶ 32. This agreement broadly prohibits Sparig from being involved with another real estate brokerage within five miles of SRE's office for a period of three years. *See id*.

When Sparig interviewed for the position with SRE, Danenberg told him that he would be provided with "expert training by a senior expert Broker." *Id*. ¶ 39(i). He would work with this senior broker on his first four transactions and they would split both the work and the commissions. *Id*. ¶ 39(v). He was told commissions would be paid one week after a lease was signed. *Id*. ¶ 39(iii). Danenberg also told Sparig about DANBRO studios, a property owned by Danenberg and his brother. *Id*. ¶ 39(vi). Danenberg told Sparig he would receive a commission of one month's rent for each unit he was able to lease at DANBRO studios. *Id*. ¶ 39(vii). Based on these and other statements by Danenberg, Sparig agreed to work for SRE and to sign the non-compete agreement. *Id*. ¶ 40.

Despite the promise of being paired with a senior broker, when Sparig began working at SRE he was actually **[*3]** paired with the next-most-junior broker. *Id*. ¶ 41. Sparig completed his first transactions alone, without training or assistance from that junior broker or others, but still had half of his commissions taken away. *See id*. ¶¶ 42-43. In addition, Sparig alleges that for each month he worked at SRE, his commissions were not paid on time and he did not receive the full amount of commissions he had earned. *See, e.g.*, ¶¶ 47, 59, 72.

In October 2008, Sparig terminated his relationship with SRE. *Id*. ¶ 84. He told Danenberg that he intended to go into the real estate business with his father. *See id*. In response, Danenberg threatened to enforce the non-compete agreement and commence litigation against Sparig that he would seek to make as lengthy and expensive as possible, causing financial ruin to Sparig and his father. *See id*. ¶ 85. SRE subsequently sent cease and desist notices to Sparig, demanding that he refrain from violating the non-compete agreement. *See, e.g., id*. ¶ 137.

Danenberg also told Sparig that any judgment against SRE would be unenforceable because SRE has no assets and all its money is funneled into various other companies. *Id*. ¶¶ 85, 138. Danenberg refused to allow Sparig to **[*4]** take some of his personal belongings as well as records he was required to maintain under New York law regulating real estate salespersons. *See id*. ¶¶ 89, 134, 160. After Sparig resigned, Danenberg instructed SRE employees to call Sparig's former clients and inform them that Sparig had been fired and that they should not work with him. *See id*. ¶¶ 88, 122. In addition, SRE failed to provide Sparig with forms documenting his experience as a salesperson there, which he needed in order to become a licensed real estate broker. *See id*. ¶¶ 102, 154, 159.

Danenberg's conduct prevented Sparig from entering into a real estate business on his own or with his father. *See id*. ¶¶ 84-85, 123-24, 151. In particular, Sparig was unable to work with the landlord of 476 Jefferson Street, with whom he had obtained an exclusive listing agreement during his time at SRE. *See id*. ¶¶ 54, 76. Although the landlord had been willing to continue to work with Sparig after he left SRE, Danenberg's conduct prevented him from doing so. *See id*. ¶¶ 76, 122, 150. Sparig also had to turn down another offer to be an exclusive listing agent for a commercial property. *Id*. ¶ 155. And the failure to provide Sparig with documentation **[*5]** of his work "made it impossible for [him] to expand his business and hire other agents." *Id*. ¶ 154.

Prior to working at SRE, Sparig had worked as a professional photographer. *Id*. ¶ 28. Although he had asked SRE to hire him as a photographer, SRE declined to do so. *See id*. ¶ 30. Sparig nevertheless employed his photography skills and equipment in his real estate work at SRE. *See id*. ¶ 90. After he left SRE, SRE continued to use Sparig's photographs to market properties on its website. *See id*. ¶¶ 90, 93, 96, 98. Sparig's attorney sent a letter to SRE demanding that it cease and desist from using Sparig's photographs. *See id*.¶ 101. SRE refused and continued to use the photographs. *See id*. ¶¶ 102-03.

B. *Procedural Background*

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[1] The facts are drawn from the Amended Complaint and are assumed to be true for purposes of this motion.

Sparig commenced this action on October 24, 2011, and filed an amended complaint on November 9, 2011. He named as Defendants both SRE and Danenberg, as well as Sarah Russell,[2] Danenberg's wife and a broker at SRE. He also named DANBRO Studios, Dusty Group, LLC, Piggyback, Inc., 31 Bushwick Corp. and other unidentified companies, all of which are allegedly owned by Danenberg.[3]

On March 23, 2012, the Defendants filed an answer and counterclaims, including a counterclaim for breach of the non-compete agreement. The Defendants also moved to dismiss the amended complaint. In addition, their motion seeks the imposition of sanctions against Sparig pursuant to *Rule 11 of the Federal Rules of Civil Procedure*.[4]

DISCUSSION

A. *Standard of Review*

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Wilson v. Merrill Lynch & Co., 671 F.3d 120, 128 (2d Cir. 2011)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009))* (internal quotation marks omitted). A court considering a motion to dismiss should assume the veracity of the well-pleaded factual allegations in the complaint "and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal, 129 S. Ct. at 1950*.

B. *Federal Claims*

1. *The Antitrust Claim*

Section 1 of the **[*7]** Sherman Act prohibits any "combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 1*. Despite its broad language, courts have recognized that *§ 1* does not prohibit every agreement that restrains trade. *See Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687-88, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*; *Ark. Carpenters Health & Welfare Fund v. Bayer AG, 604 F.3d 98, 104 (2d Cir. 2010)*, *cert. denied*, *131 S. Ct. 1606, 179 L. Ed. 2d 517 (2011)*. Instead, most agreements are subject to "rule of reason" analysis, while only a limited class of agreements is deemed per se unlawful. *See Ark. Carpenters Health & Welfare Fund, 604 F.3d at 104*.

Restrictive covenants not to compete, such as the one at issue here, are not per se violations of the Sherman Act. *Bradford v. N.Y. Times Co., 501 F.2d 51, 59-60 (2d Cir. 1974)*; *see also Capital Temporaries, Inc. of Hartford v. Olsten Corp., 506 F.2d 658, 666 (2d Cir. 1974)*. Thus, they are analyzed under the rule of reason. *Eichorn v. AT&T Corp., 248 F.3d 131, 144 (3d Cir. 2001)*; *Bradford, 501 F.2d at 60*.

Under the rule of reason, an antitrust plaintiff must allege "an adverse effect on competition, **[*8]** not merely injury to itself." *See Integrated Sys. & Power, Inc. v. Honeywell Int'l, Inc., 713 F. Supp. 2d 286, 299 (S.D.N.Y. 2010)* (citing *Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 96 (2d Cir. 1998))*. Sparig has failed to allege facts supporting a plausible claim of an adverse effect on competition in general. He has not alleged that use of the covenant not to compete has given SRE undue market power in any relevant market. While it may have inhibited Sparig's personal ability to compete with SRE, that is not the type of injury the antitrust laws are designed to address. *See Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993)* ("Insisting on proof of harm to the whole market fulfills the broad purpose of the ***antitrust law*** that was enacted to ensure competition in general, not narrowly focused to protect individual competitors."). Accordingly, the antitrust claim is dismissed.

2. *The RICO Claim*

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[2] Russell's name is misspelled as Russel in the amended complaint.

[3] Some of these companies are **[*6]** not listed in the case caption, but are listed in the body of the amended complaint.

[4] In a March 26, 2012 Order, I stated that the motion for sanctions would not be heard unless and until the Defendants' motion to dismiss is granted.

RICO prohibits, *inter alia*, conducting (or participating in the conduct of) the affairs of an enterprise affecting interstate or foreign commerce through "a pattern of racketeering activity." *18 U.S.C. § 1962(a)-(c)*; *see also* *GICC Capital Corp. v. Tech. Fin. Grp., Inc., 67 F.3d 463, 465 (2d Cir. 1995)* **[*9]** ("Under any prong of *§ 1962*, a plaintiff in a civil RICO suit must establish a 'pattern of racketeering activity.'"). "RICO provides a private right of action for treble damages for a 'person injured in his business or property by reason of a violation of *section 1962*.'" *Ideal Steel Supply Corp. v. Anza, 652 F.3d 310, 321 (2d Cir. 2011)* (quoting *18 U.S.C. § 1964(c)*), *cert. denied*, *132 S. Ct. 1636, 182 L. Ed. 2d 246 (2012)*.

Racketeering activity is defined by statute to consist of a number of specific criminal acts. Among these are certain felonies under state law, such as extortion, and violations of enumerated federal statutes, including certain types of fraud and extortion. *See id*. *§ 1961(1)*. A "pattern" of racketeering activity "*requires* at least two acts of racketeering activity." *Id*. *§ 1961(5)* (emphasis added). Thus, "while two acts are necessary, they may not be sufficient" to constitute a pattern. *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*. A pattern requires that two or more racketeering acts "are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)*; *see also* *United States v. Pizzonia, 577 F.3d 455, 465 (2d Cir. 2009)*.

The **[*10]** Defendants have moved to dismiss the RICO claim, arguing that Sparig has failed to allege the existence of an enterprise, any predicate acts or that such acts were the proximate cause of his injury. In his opposition to the Defendants' motion, Sparig concedes — with admirable candor — that his civil RICO claim in this case "may be inappropriate" and he "defer[s] to the court as to whether this claim should be dropped or retained." Sparig Aff. ¶ 107, ECF No. 23-1.

I conclude that Sparig has not alleged a RICO claim. He fails to allege a pattern of racketeering or any racketeering acts, let alone how he was injured in his business or property by reason of such acts. Sparig's speculation in his opposition that the failure to pay him commissions amounted to extortion under color of official right reflects a misapprehension of the Hobbs Act, *18 U.S.C. § 1951*. For these and other reasons, I dismiss Sparig's RICO claim.

3. *The Copyright Infringement Claim*

"In order to establish a claim of copyright infringement, 'a plaintiff with a valid copyright must demonstrate that: (1) the defendant has actually copied the plaintiff's work; and (2) the copying is illegal because a substantial similarity **[*11]** exists between the defendant's work and the protectible elements of plaintiff's.'" *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 63 (2d Cir. 2010)* (quoting *Hamil Am. Inc. v. GFI, 193 F.3d 92, 99 (2d Cir. 1999))*.

The Defendants' principal argument supporting dismissal of Sparig's copyright claim is that the copyrights in the photos at issue are owned by SRE. According to the Defendants, "[i]t is common practice in the real estate industry that [sales personnel] are called upon to photograph their inventory . . . without . . . the creation of any personal, independent copyright interest." Pasquariello Aff. ¶ 85, ECF No. 11. Because the photos were "taken incidental to [Sparig's] affiliation with [SRE]," *id*. ¶ 86, the Defendants argue that the photos are owned by SRE, not Sparig, *id*. ¶ 87.

The Defendants' argument is wrong. A copyright "vests initially in the author or authors of the work." *17 U.S.C. § 201(a)*. "As a general rule, the author is the party who *actually creates the work*, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection." *Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989)* (emphasis **[*12]** added). An exception applies to works "made for hire," for which "the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." *17 U.S.C. § 201(b)*; *see also* *Reid, 490 U.S. at 737*. A work made for hire is defined as either "a work prepared by an employee within the scope of his or her employment" or certain types of commissioned or specially ordered works where "the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." *17 U.S.C. § 101*.

Here, the Defendants do not claim that there is a signed written instrument designating the photos taken by Sparig to be works made for hire. Accordingly, the work-for-hire doctrine applies only if Sparig was an employee and took the photos in the scope of his employment. *See* Reid, 490 U.S. at 738. In *Reid*, the Court held that "the term 'employee' should be understood in light of the general common law of agency," and thus does not include independent contractors. Id. at 741; *see also* id. at 751-53. Since the parties **[*13]** agree that Sparig worked for SRE as an independent contractor, not an employee, the photos are not works made for hire. *See* id. at 753; Valdez v. Laffey Assocs., No. 07-CV-4566 (BMC) (LB), 2010 U.S. Dist. LEXIS 30160, 2010 WL 1221404, at *4 (E.D.N.Y. Mar. 26, 2010).[5]

The Defendants have cited no provision under which the ownership of a copyright is affected by "common practice" in a particular industry. Since the work-for-hire doctrine does not apply and Defendants have advanced no additional theory for dismissal of the copyright infringement claim, the motion to dismiss is denied with respect to that claim as asserted against SRE, the allegedly infringing party.

C. *State Law Claims*

Sparig has asserted a wide variety of state-law claims. Because he has pleaded a viable federal copyright claim, I have supplemental jurisdiction over **[*14]** his state-law claims, which arise out of a common nucleus of operative facts involving Sparig's employment relationship with SRE. *See* 28 U.S.C. § 1367(a); *see also* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966); Achtman v. Kirby, McInerney & Squire, LLP, 464 F.3d 328, 335 (2d Cir. 2006).

Sparig's state-law claims include assault, fraudulent inducement, intentional infliction of emotional distress, abuse of process and violations of Article 12-A of the New York Real Property law, which regulates real estate brokers and salespersons. Many of these legal theories simply do not fit the facts alleged.[6]

However, a court must construe the complaint of a *pro se* litigant "liberally and interpret it 'to raise the strongest arguments that [it] suggest[s].'" Chavis v. Chappius, 618 F.3d 162, 170 (2d Cir. 2010) (quoting Harris v. City of New York, 607 F.3d 18, 24 (2d Cir. 2010)) (alterations in original). Construing the complaint in this matter, it is clear that Sparig has **[*15]** alleged viable claims for breach of contract and tortious interference with existing contractual relations and prospective economic advantage.[7]

The facts alleged clearly establish a breach of contract. Sparig was promised he would earn commissions of a certain amount to be paid at a certain time. He did not receive the full amount of the commissions he had earned and what he did receive was paid late, in breach of that promise. Sparig may sue to recover the unpaid commissions plus interest and, perhaps, any consequential damages that were reasonably contemplated by the parties. *See* Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of N.Y., 10 N.Y.3d 187, 886 N.E.2d 127, 130, 856 N.Y.S.2d 505 (N.Y. 2008).

Sparig also has alleged SRE's tortious interference with his contractual relations with the landlord at 476 Jefferson Street. Sparig alleges that he had arranged to be the exclusive salesperson at 476 Jefferson Street, that SRE prevented him from obtaining the benefit of that agreement, which resulted in Sparig's inability to obtain

[5] In *Valdez*, the court held that photos of properties taken by a real estate salesperson constitute "listing information," ownership of which is vested in a real estate broker after the salesperson's "association" with the broker ends under New York law. *See* Valdez, 2010 U.S. Dist. LEXIS 30160, 2010 WL 1221404, at *5-6 (citing 19 N.Y. Comp. Codes R. & Regs. § 175.14). The Defendants here have not advanced this argument.

[6] I agree with the Defendants that, to the extent Sparig seeks prospective relief relating to the covenant not to compete, his claims are moot since the covenant has expired and no longer restricts him in any way.

[7] Although Sparig has not expressly pleaded a breach of contract claim, his fourteenth cause of action refers to "Nonpayment of Commissions." Am. Compl. p. 32.

commissions from that property. This **[*16]** establishes a viable tortious interference claim. *See Ullmannglass v. Oneida, Ltd., 86 A.D.3d 827, 927 N.Y.S.2d 702, 705 (App. Div. 2011)*.

Sparig has also alleged the sort of conduct that can support a claim for tortious interference with prospective economic advantage. *See Citi Mgmt. Grp., Ltd. v. Highbridge House Ogden, LLC, 45 A.D.3d 487, 847 N.Y.S.2d 33, 34 (App. Div. 2007)*; *see also Carvel Corp. v. Noonan, 3 N.Y.3d 182, 818 N.E.2d 1100, 1103, 785 N.Y.S.2d 359 (N.Y. 2004)*. Specifically, he has alleged that, in violation of New York law, SRE has withheld documents, refused to provide documentation of Sparig's work at SRE and threatened to commence litigation for an improper purpose of harassment. Through this conduct, SRE has inhibited Sparig from obtaining income from work as a real estate salesperson or broker. These alleged facts amount to a tortious interference with his prospective economic advantage.

Because I construe Sparig's complaint as sufficiently alleging claims for breach of contract, tortious interference with contractual relations and tortious interference with prospective economic advantage, the motion to dismiss is denied with respect to those claims.

D. *Piercing the Corporate Veil*

Although Sparig's dispute is with SRE (and Danenberg **[*17]** acting as SRE's principal), he has named a number of additional defendants, including Danenberg, Russell and various companies they are alleged to own. Since the owners and officers of a company are not ordinarily liable for injuries caused by the company, *see Walkovszky v. Carlton, 18 N.Y.2d 414, 223 N.E.2d 6, 7, 276 N.Y.S.2d 585 (N.Y. 1966)*, the Defendants other than SRE can be liable only if the Court pierces the corporate veil of SRE.[8]

Generally, "piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud **[*18]** or wrong against the plaintiff which resulted in plaintiff's injury." *Morris v. N.Y. State Dep't of Taxation & Fin., 82 N.Y.2d 135, 623 N.E.2d 1157, 1160-61, 603 N.Y.S.2d 807 (N.Y. 1993)*; *see also ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 952 N.E.2d 463, 475, 928 N.Y.S.2d 647 (N.Y. 2011)*; *MAG Portfolio Consultant, GMBH v. Merlin Biomed Grp. LLC, 268 F.3d 58, 63 (2d Cir. 2001)*.

Sparig alleges that Danenberg is the owner and chief operating officer of SRE and that he controls it and the other companies named as Defendants. Am. Compl. ¶¶ 130, 139. Sparig also alleges an abuse of the corporate form in that Danenberg threatened to commence frivolous litigation against Sparig for the purpose of causing him additional expense and delay while likewise shielding his own assets from any recovery through his use of corporate shells. *See, e.g., id*. ¶¶ 85,138; *see also Godwin Realty Assocs. v. CATV Enters., Inc., 275 A.D.2d 269, 712 N.Y.S.2d 39, 41 (App. Div. 2000)*; *Telenor Mobile Commc'ns AS v. Storm LLC, 587 F. Supp. 2d 594, 621 (S.D.N.Y. 2008)*, *aff'd*, *351 F. App'x 467 (2d Cir. 2009)*; *Feitshans v. Kahn, No. 06-CV-2125 (SAS), 2007 U.S. Dist. LEXIS 63028, 2007 WL 2438411, at *5 (S.D.N.Y. Aug. 24, 2007)* ("'Proof of a stripping of the assets' of a subsidiary by the parent, or of an entity by its shareholders, **[*19]** which is 'motivated by a desire to render the subsidiary [or entity] judgment proof,' constitutes a fraud or wrong in satisfaction of the second prong." (quoting *Carte Blanche (Sing.) PTE., Ltd. v. Diners Club Int'l, Inc., 758 F. Supp. 908, 917 (S.D.N.Y. 1991))* (alteration in original)). Accordingly, Sparig has sufficiently alleged that SRE's corporate veil may be pierced and Danenberg may be liable for SRE's conduct.

The same cannot be said with respect to any of the remaining Defendants.[9] Overlapping ownership is all that is alleged. Accordingly, the claims against those Defendants must be dismissed.

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[8] The Defendants argue that Sparig cannot raise a piercing-the-veil claim for the first time in his opposition to their motion. But "an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners." *Morris v. N.Y. State Dep't of Taxation & Fin., 82 N.Y.2d 135, 623 N.E.2d 1157, 1160, 603 N.Y.S.2d 807 (N.Y. 1993)*. Thus, Sparig did not need to assert a separate claim to pierce the corporate veil.

CONCLUSION

For the reasons stated above, the Defendants' motion to dismiss is denied with respect to the claims for copyright infringement, breach of contract and tortious interference against SRE and Danenberg, and otherwise granted.

So ordered.

John Gleeson, U.S.D.J.

Dated: June 29, 2012

Brooklyn, New **[*20]** York

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[9] Danenberg and Russell have submitted affidavits stating that Russell owns 99% of SRE and Danenberg owns the remaining 1%. *See* Danenberg Aff. ¶¶ 3, 5, ECF No. 11; Russell Aff. ¶ 4, ECF No. 11. If Sparig wants to further amend his complaint based on this information, he may seek leave to do so.

LexisNexis®

W. & S. Life Ins. Co. v. Countrywide Fin. Corp. (In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.)

United States District Court for the Central District of California

June 29, 2012, Decided; June 29, 2012, Filed

Case No. 2:11-ML-02265-MRP (MANx); Case No. 2:11-cv-07166-MRP (MANx); Case No. 2:11-cv-09889-MRP (MANx)

Reporter
2012 U.S. Dist. LEXIS 184429 *

In re COUNTRYWIDE FINANCIAL CORP. MORTGAGE-BACKED SECURITIES LITIGATION; WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, et al., Plaintiffs, v. COUNTRYWIDE FINANCIAL CORPORATION, et al., Defendants.NATIONAL INTEGRITY LIFE INSURANCE COMPANY, Plaintiff, v. COUNTRYWIDE FINANCIAL CORPORATION, et al., Defendants.

Subsequent History: Dismissed by, in part *Mass. Mut. Life Ins. Co. v. Countrywide Fin. Corp. (In re Countrywide Fin. Corp. Mortgage-Backed Secs. Litig.), 2012 U.S. Dist. LEXIS 121702 (C.D. Cal., Aug. 17, 2012)*

Prior History: *Sealink Funding Limited v. Countrywide Fin. Corp. (In re Countrywide Fin. Corp.), 2012 U.S. Dist. LEXIS 87189 (C.D. Cal., June 15, 2012)*

Core Terms

allegations, enterprise, mortgage, subsidiary, loans, Prospectus, conspiracy, cause of action, entities, underwriting, depositor, investor, misrepresentation, civil conspiracy, promise, cases, mortgage loan, representations, courts, intra-corporate, securitization, Certificates, reasons, negligent misrepresentation claim, special relationship, transfer title, racketeering, parties, negligent misrepresentation, motion to dismiss

LexisNexis® Headnotes

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

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

A *Fed. R. Civ. P. 12(b)(6)* motion to dismiss should be granted when, assuming the truth of the plaintiff's allegations, the complaint fails to state a claim for which relief can be granted. In deciding whether the plaintiff has stated a claim, the court must assume the plaintiff's allegations are true and draw all reasonable inferences in the plaintiff's favor. However, the court is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. A court reads the complaint as a whole, together with matters appropriate for judicial notice, rather than isolating allegations and taking them out of context.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN2[] **Federal & State Interrelationships, Erie Doctrine**

In general, the federal district court will apply federal law to federal claims and will apply the state law of the transferor forum, including the transferor forum's choice-of-law rules, to state law claims.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN3[] **Heightened Pleading Requirements, Fraud Claims**

When a plaintiff alleges fraud, it must plead misstatements with particularity under *Fed. R. Civ. P. 9(b)*. *Rule 9(b)* requires plaintiffs to identify the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation. The plaintiff must also identify the nature of the fraud through precise allegations explaining how the alleged misstatements were misleading or untrue when made.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN4[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations when suing more than one defendant and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

HN5[] **Fraud & Misrepresentation, Negligent Misrepresentation**

Courts must be sensitive to the distinctions between breach of contract cases and misrepresentation cases; more so when a contract provides specific mechanisms for redress. Failure to maintain the distinctions between contract and fraud cases raises the potential for duplicative litigation and double recoveries. As importantly, serious violence is done to the contract by failing to respect the contractual remedies that each party has agreed to. For this reason, most courts to consider the issue hold that the breach of a contractual promise of future performance typically does not constitute a misrepresentation that will support an action for fraud.

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

HN6[] **Fraud & Misrepresentation, Negligent Misrepresentation**

The United States District Court for the Central District of California will follow the Ninth Circuit rule that the failure to honor a contractual obligation does not transform the original contract into a tortious misrepresentation. Such a rule is especially appropriate when the contract contains express provisions to redress the failures that the plaintiff complains of.

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

HN7[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

To plead a violation of the Ohio Corrupt Activities Act, *Ohio Rev. Code Ann. § 2923.31 et seq.*, a plaintiff must allege that the defendant participated in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity. *Ohio Rev. Code Ann. § 2923.32(A)(1)*.

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

HN8[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

To violate the Ohio Corrupt Activities Act, *Ohio Rev. Code Ann. § 2923.31 et seq.*, each defendant must have been part of an enterprise. Enterprise includes any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity. Enterprise includes illicit as well as licit enterprises. *Ohio Rev. Code Ann. § 2923.31(C)*.

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

HN9[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Ohio Corrupt Activities Act (OCAA), *Ohio Rev. Code Ann. § 2923.31 et seq.*, is patterned on the federal Racketeer Influenced and Corrupt Organizations Act, and Ohio courts look to federal decisions to interpret the OCAA.

Governments > Courts > Judicial Precedent

HN10[] **Courts, Judicial Precedent**

Ohio courts, though not bound by decisions from courts within the Sixth Circuit, frequently cite such decisions and would likely find them more persuasive than decisions from outside the Sixth Circuit.

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

HN11[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The United States Court of Appeals for the Sixth Circuit has held that for purposes of the Racketeer Influenced and Corrupt Organizations Act, an enterprise must exist separate and apart from the defendant. Under this requirement, a corporation may not be liable for participating in the affairs of an enterprise that consists only of its own subdivisions, agents, or members. The Ohio courts that have considered the question agree.

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

HN12[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

For purposes of the Racketeer Influenced and Corrupt Organizations Act, an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose.

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

HN13[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Parties that enter commercial relationships for their own gain or benefit do not constitute an enterprise for purposes of the Racketeer Influenced and Corrupt Organizations Act.

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

HN14[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

A corporation and a law firm acting as its agent are not insufficiently distinct so as to form a Racketeer Influenced and Corrupt Organizations Act enterprise.

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

HN15[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Under a doctrine called the something more test, a parent and its subsidiary may constitute a Racketeer Influenced and Corrupt Organizations Act enterprise when each plays a different role or the decision to operate through a subsidiary facilitates the activity of the enterprise in some way. The something more test has not been endorsed by the United States Courts of Appeals for the Ninth or Sixth Circuits, or any Ohio court. The United States District Court for the Central District of California finds no indication that an Ohio court would apply the something more exception to the Ohio Corrupt Activities Act, *Ohio Rev. Code Ann. § 2923.31 et seq.*

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN16[] **Civil Conspiracy, Elements**

A civil conspiracy is a malicious combination of two or more persons to injure another person or property, in a way not competent for one alone, resulting in actual damages.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN17[] **Civil Conspiracy, Elements**

The Ohio Supreme Court has never addressed the intra-corporate conspiracy doctrine. However, the United States Court of Appeals for the Sixth Circuit predicted that the Ohio Supreme Court would adopt the doctrine. The Sixth Circuit drew upon a common sense insight that a person cannot conspire with himself and held that, since a corporation only acts through its officers, a group of corporate officers acting within the scope of employment cannot create a conspiracy.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN18[] Civil Conspiracy, Elements

The United States District Court for the Southern District of Ohio accepted the intra-corporate conspiracy doctrine but found that it did not apply to unrelated legal entities just because those entities share an employee. The court also recognized the doctrine as applied to employees acting within the scope of their employment, but declined to extend it to corporate subsidiaries. Other case law clarifies that the doctrine does not apply to employees acting outside the scope of their employment.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN19[] Civil Conspiracy, Elements

The intra-corporate conspiracy doctrine shields employees acting within the scope of their employment. The United States District Court for the Central District of California agrees; it will follow the United States Court of Appeals for the Sixth Circuit and the intermediate Ohio courts on this issue.

Governments > Courts > Judicial Precedent

HN20[] Courts, Judicial Precedent

In the absence of a controlling state supreme court decision, the federal court must predict how the state supreme court would decide an issue. It is appropriate to use intermediate appellate court decisions, statutes, and decisions from other jurisdictions as interpretive aids.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN21[] Civil Conspiracy, Elements

The United States District Court for the Central District of California concludes that, if faced with the question, the Ohio Supreme Court would hold that a corporation and its subsidiaries are not capable of conspiring with each other. First, while courts and states disagree, a majority appear to have adopted the intra-corporate conspiracy doctrine in the context of subsidiaries. Second, the majority view better serves the purpose of conspiracy law. The bedrock of any conspiracy claim is a malicious combination. The United States Court of Appeals for the Sixth Circuit noted that it is common sense that employees of a corporation do not combine when they act within the scope of their employment, they merely fulfill their role as agents of the corporation. In many ways though, an employee is more capable of combination with an employer than is a subsidiary. An employee, at least, is a human being capable of motivations distinct from his employer. A subsidiary is capable of no such independence; it is entirely controlled by the parent company.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN22[] Civil Conspiracy, Elements

The United States District Court for the Central District of California finds that, were the Ohio Supreme Court to consider the issue, it would find that members of the same corporate family, including subsidiaries, are incapable of conspiring with each other.

Securities Law > ... > Civil Liability > Blue Sky Fraud > General Overview

HN23[] **Civil Liability, Blue Sky Fraud**

Blue sky laws are designed to regulate securities transactions within (or impacting) a particular state. If a transaction touches multiple states, it follows that multiple blue sky laws may apply simultaneously. The United States District Court for the Central District of California agrees with the majority view that a plaintiff may sue under the securities laws of several states at once so long as the requirements of each state's law are met.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN24[] **Federal & State Interrelationships, Choice of Law**

Under New York law, the first step in a choice-of-law analysis is to determine whether an actual conflict exists.

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

HN25[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

New York does not permit any private action under its racketeering law. *N.Y. Penal Law § 460.20*.

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN26[] **Concerted Action, Civil Conspiracy**

New York law does not recognize a tort action for civil conspiracy.

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > Elements

HN27[] **Negligent Misrepresentation, Elements**

Applying New York law, the United States District Court for the Central District of California has repeatedly dismissed negligent misrepresentation claims by residential mortgage-backed securities investors for failure to plead a special relationship between the investor and the lender. Some courts find that Ohio has a similar special relationship requirement. Other courts eschew the special relationship language in favor of a requirement that (1) the defendant must provide false information for the guidance of the plaintiff in its business transactions and (2) the plaintiff must be the person or one of a limited group of persons for whose benefit and guidance the defendant intends to supply the information or knows that the recipient intends to supply it. In those courts' view, special relationship is merely convenient shorthand for the limiting (to information provided for use in business transactions and to a limited group) elements of a negligent misrepresentation claim.

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > Elements

HN28[] **Negligent Misrepresentation, Elements**

Ohio law does not impose a separate special relationship requirement. Rather, the term is properly viewed as shorthand for the limiting elements of the negligent misrepresentation cause of action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN29[] **Class Actions, Prerequisites for Class Action**

The general rule is that the investing public is not a sufficiently limited class.

Counsel: [*1] For Western and Southern Life Insurance Company, Western-Southern Life Assurance Company, Columbus Life Insurance Company, Integrity Life Insurance Company, Fort Washington Investment Advisors, Inc., on behalf of Fort Washington Active Fixed Income, LLC., Plaintiffs: Brian C Lysaght, LEAD ATTORNEY, Lysaght Law Group LLP, Santa Monica, CA; Alexis H Castillo, David H Wollmuth, Thomas P Ogden, Vincent T Chang, PRO HAC VICE, Wollmuth Maher & Deutsch LLP, New York, NY; Steven S Fitzgerald, PRO HAC VICE, Woolmuth Maher & Deutsch LLP, New York, NY.

For Countrywide Financial Corp., Countrywide Home Loans, Inc., Countrywide Capital Markets LLC., Countrywide Securities Corp., CWALT, Inc., CWMBS, Inc., CWHEQ, Inc., Defendants: Brian C Devine, Brian E Pastuszenski, Caroline H Bullerjahn, Inez H Friedman-Boyce, PRO HAC VICE, Brian Charles Devine, Goodwin Procter LLP, Boston, MA; Charles Joseph Faruki, Faruki Ireland & Cox PLL, Dayton, OH; Lloyd Winawer, Goodwin Procter LLP, Los Angeles, CA.

For Bank of America Corp., Bac Home Loans Servicing, LP, NB Holdings Corp., Defendants: Ashner L Rivner, LEAD ATTORNEY, PRO HAC VICE, O'Melveny & Myers LLP, New York, NY; Jonathan Rosenberg, William J Sushon, **[*2]** PRO HAC VICE, O'Melveny and Myers LLP, New York, NY; Matthew W Close, O'Melveny and Myers LLP, Los Angeles, CA.

For Angelo Mozilo, Defendant: Laura A Hinegardner, LEAD ATTORNEY, Katz Teller Brant & Hild, Cincinnati, OH; Robert Alexander Pitcairn, Jr, LEAD ATTORNEY, Katz Teller Brant Hild - 1, Cincinnati, OH; A Matthew Ashley, Allison Lauren Libeu, Mytili Gowri Bala, Irell & Manella LLP, Newport Beach, CA; Adam J Fletcher, Brian Clifton Berggren, David Siegel, Irell & Manella LLP, Los Angeles, CA.

For David Sambol, Defendant: Mark John Ruehlmann, LEAD ATTORNEY, Squire Sanders Dempsey, LLP, Cincinnati, OH; Pierre H Bergeron, LEAD ATTORNEY, Squire Sanders & Dempsey LLP, Cincinnati, OH; Frank M Scaduto, Orrick Herrington & Sutcliffe LLP, San Francisco, CA; Michael D Torpey, Orrick Herrington and Sutcliffe, San Francisco, CA; Michael C Tu, Orrick Herrington & Sutcliffe LLP, Los Angeles, CA; Robert Alan Amicone, II, Squire Sanders & Dempsey (US) LLP, Cincinnati, OH.

For Eric Sieracki, Defendant: David A Priebe, DLA Piper LLP, East Palo Alto, CA; Matthew D Caplan, Nicolas Morgan, DLA Piper LLP, Los Angeles, CA; Shirli Fabbri Weiss, DLA Piper LLP, San Diego, CA.

For Ranjit Kripalani, Jennifer **[*3]** Sandefur, Defendants: W Stuart Dornette, LEAD ATTORNEY, Taft Stettinius & Hollister - 1, Cincinnati, OH; Adam Charles McNeely, Taft Stettinius & Hollister, Cincinnati, OH; Gregory Gordon Lockhart, Taft Stettinius and Hollister LLp, Dayton, OH; Jenifer Q Doan, Joshua G Hamilton, Peter Young Hoon Cho, William F Sullivan, Paul Hastings LLP, Los Angeles, CA.

For Stanford Kurland, Defendant: Jeanne A Fugate, LEAD ATTORNEY, Christopher G Caldwell, Jeffrey M Hammer, Caldwell Leslie and Proctor PC, Los Angeles, CA; Victoria E Powers, LEAD ATTORNEY, Schottenstein Zox & Dunn, Columbus, OH.

For David A. Spector, Defendant: Christopher D Cathey, LEAD ATTORNEY, Ulmer & Berne LLP - 1, Cincinnati, OH; Jennifer M Sepic, Bingham McCutchen LLP, Los Angeles, CA; Jesse R Lipcius, Cincinnati, OH.

For N. Joshua Adler, Defendant: Jenifer Q Doan, Joshua G Hamilton, Peter Young Hoon Cho, William F Sullivan, Paul Hastings LLP, Los Angeles, CA.

For Bank of America, N.A., Defendant: Matthew W Close, O'Melveny and Myers LLP, Los Angeles, CA.

Judges: Hon. Mariana R. Pfaelzer, United States District Judge.

Opinion by: Mariana R. Pfaelzer

Opinion

ORDER RE SUBSTANTIVE MOTIONS TO DISMISS

I. INTRODUCTION & BACKGROUND

This Order concerns Defendants' motions **[*4]** to dismiss the related *Western and Southern Life Ins. Co. v. Countrywide Fin. Corp.*, 11-CV-07166-MRP (MANx) ("*Western and Southern*") and *National Integrity Life Ins. Co. v. Countrywide Fin. Corp.*, 11-CV-09889-MRP (MANx) ("*National Integrity*") actions. *Western and Southern* and *National Integrity* are part of Multidistrict Litigation No. 2265, captioned *In Re Countrywide Financial Corp. Mortgage-Backed Securities Litigation* ("the MDL"). The plaintiffs in *Western and Southern* and *National Integrity* allege violations of the Securities Act of 1933 ("the Securities Act"), the Exchange Act of 1934 ("the Exchange Act"), and a number of state laws in connection with their purchase of residential mortgage-backed securities ("RMBS") in offerings structured and sold by several of the defendants. Specifically, the *Western and Southern* and *National Integrity* plaintiffs ("Plaintiffs") argue that Countrywide Financial Corporation ("CFC"), its subsidiaries, and its former management misrepresented the quality of the underlying loans in the RMBS Certificates [1] that plaintiffs purchased. [2] They also allege that the defendants misrepresented that they would comply with various policies, best practices, **[*5]** and laws related to the transfer, servicing, and maintenance of the loans in the Offerings. Finally, Plaintiffs allege that Bank of America and several related entities are liable as Countrywide's successor.

With the Court's approval, Defendants bifurcated the briefing of motions to dismiss in *Western and Southern* and *National Integrity*. On March 9, 2012, the Court issued an order (the "First Round Order") dismissing many of the claims and defendants on the basis of timeliness and jurisdiction. *In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig., 2:11-ML-02265-MRP, 2012 U.S. Dist. LEXIS 60776, 2012 WL 1097244, at *16 (C.D. Cal. Mar. 9, 2012)*. The claims that remain in Western and Southern are: (i) two claims under the Exchange Act of 1934 that hinge upon alleged misrepresentations regarding transfer of title and loan servicing; (ii) five claims under the Ohio Securities Act that hinge upon the same transfer-of-title and servicing allegations; (iii) claims for fraud and negligent misrepresentation that hinge upon the same transfer-of-title and servicing allegations; (iv) a claim under the Ohio Corrupt Activities **[*7]** Act ("OCAA") alleging that Defendants were part of a racketeering enterprise organized for the purpose of originating risky loans, packaging those loans into RMBS, selling the RMBS to investors, and then failing to service the loans properly; (v) a claim for civil conspiracy alleging that Defendants formed an association-in-fact for the same purposes; and (vi) claims that Bank of America and related entities are liable as Countrywide's

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[1] A Certificate is a document that shows ownership of a mortgage-backed security issued pursuant to a registration statement and prospectus supplement in a public offering. Each Certificate represents a particular tranche within an offering. Because "Certificate" refers to the document evidencing ownership of a specific tranche, the Court uses the terms "tranche" and "Certificate" somewhat interchangeably. An Offering refers to the process by which the Certificates were sold to Plaintiffs. The Offering Documents refer to the Registration Statements, Prospectuses and Prospectus Supplements, Term Sheets, and other written materials pursuant to which the Certificates were offered.

[2] The Defendants are: CWALT, Inc., CWABS, Inc., CWMBS, Inc., CWHEQ, Inc., (the "Depositors"), CFC, Countrywide Home Loans, Inc. ("CHL"), Countrywide Capital Markets, LLC ("CCM"), Countrywide Securities Corp. ("CSC") (together with the Depositor Defendants, the "Countrywide Defendants" or "Countrywide"), Bank **[*6]** of America Corp., Bank of America, N.A., BAC Home Loans Servicing, LP, NB Holdings Corp. ("Bank of America" or the "Bank of America Defendants"), Angelo Mozilo, David Sambol, Eric Sieracki, Ranjit Kripalani, Stanford Kurland, David Spector, N. Joshua Adler, and Jennifer Sandefur (the "Individual Defendants").

successor. The same claims remain in *National Integrity*. In addition, *National Integrity* includes common law fraud and negligent misrepresentation claims alleging misrepresentations regarding underwriting, appraisals, loan-to-value ratios, and ratings. [3]

Defendants have moved to dismiss the remaining claims in both *Western and Southern* and *National Integrity*. Those issues are fully briefed, and the Court heard extensive oral argument on June 13, 2012. As set out more fully below, Plaintiffs have failed to allege that any statement made by the **[*8]** Defendants regarding transfer of title or servicing was actionably false. Plaintiffs have also failed to allege either an "enterprise" as required by the OCAA or an association-in-fact as required to plead civil conspiracy. National Integrity has also failed to allege a negligent misrepresentation claim under Ohio law. Finally, National Integrity's successor liability claims are defective under Delaware law. Defendants have raised a number of other grounds for dismissal; the Court finds it unnecessary to address them at this time. For the reasons set out below, *Western and Southern* is dismissed in its entirety. *National Integrity* is dismissed except for the portion of Cause of Action Fourteen related to underwriting, appraisals, loan-to-value ratios, and ratings.

II. LEGAL STANDARDS

HN1[] A *Rule 12(b)(6)* motion to dismiss should be granted when, assuming the truth of the plaintiff's allegations, the complaint fails to state a claim for which relief can be granted. *See* *Epstein v. Washington Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996)*. In deciding whether the plaintiff has stated a claim, the Court must assume the plaintiff's allegations are true and draw all reasonable inferences in the **[*9]** plaintiff's favor. *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*. However, the Court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*. A court reads the complaint as a whole, together with matters appropriate for judicial notice, rather than isolating allegations and taking them out of context. *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)*.

HN2[] In general, the Court will apply Ninth Circuit law to federal claims and will apply the state law of the transferor forum, including the transferor forum's choice-of-law rules, to state law claims. *In re Nucorp Energy Sec. Litig., 772 F.2d 1486, 1492 (9th Cir. 1985)*. More detailed choice-of-law analysis is performed as required for particular claims.

III. WESTERN AND SOUTHERN

Plaintiffs The Western and Southern Life Insurance Company, Western-Southern Life Assurance Company, Columbus Life Insurance Company, Integrity Life Insurance Company, and Fort Washington Investment Advisors, Inc., (collectively "Western and Southern") allege violations of the Exchange Act **[*10]** and Ohio law in connection with Western and Southern's purchase of 36 Certificates.

A. Western and Southern's Transfer of Title Allegations Do Not Plead Falsity

The federal, [4] OSA, [5] fraud, [6] and negligent misrepresentation [7] causes of action asserted require Western and Southern to identify a misrepresentation. ***HN3***[] Because Western and Southern alleges fraud, it must plead

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[3] Those claims were time-barred under the two-year statute of limitations applicable in *Western and Southern*, but not the six-year period applicable to *National Integrity. First Round Order, 2012 U.S. Dist. LEXIS 60776, 2012 WL 1097244, at *16*.

[4] *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148, 157, 128 S. Ct. 761, 169 L. Ed. 2d 627 (2008)* (A *§ 10(b)* "plaintiff must prove . . . a material misrepresentation or omission by the defendant . . . ."); *15 U.S.C. § 78t(a)* (requiring a primary violation for liability under *§ 20(a)*).

those misstatements with particularity under Fed. R. Civ. P. 9(b). Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1104 (9th Cir. 2003) ("It is established law, in this circuit and elsewhere, that Rule 9(b)'s particularity requirement applies to state-law causes of action."). Rule 9(b) requires plaintiffs to identify the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." Sanford v. MemberWorks, Inc., 625 F.3d 550, 558 (9th Cir. 2010). Western and Southern must also identify the nature of the fraud through "precise allegations explaining how the alleged misstatements were misleading or untrue when made." In re Stac Elecs. Sec. Litig, 89 F.3d 1399, 1409 (9th Cir. 1996). Western and Southern's Amended Complaint (the "AC") identifies three statements **[*11]** with the required "time, place, content" level of specificity:

- A representation that "each loan is secured by a valid lien on, or a perfected security interest with respect to, the Property." AC ¶ 205 (quoting CWALT 2007-16CB Prospectus Supplement at 26);
- A representation that:

    [O]n the closing date, the depositor will sell, transfer, assign, set over and otherwise convey without recourse to the trustee in trust for the benefit of the certificateholders all right, title and interest of the depositor in and to each mortgage loan and all right, title and interest in and to all other assets included in Alternative Loan Trust 2007-16CB, including all principal and interest received on or with respect to the mortgage loans, but not any principal and interest due on or before the cut-off date.

    In connection with the transfer and assignment of a mortgage loan, the depositor will deliver or cause to be delivered to the trustee, or a custodian for the trustee, the mortgage file, which contains among other things,

    □ The original mortgage note (and any modification or amendment to it) endorsed in blank without recourse, except that the depositor may deliver or cause to be delivered a lost note **[*12]** affidavit in lieu of any original mortgage note that has been lost;

    □ The original instrument creating a first lien on the related mortgaged property with evidence of recording indicated thereon or a copy of such instrument;

    □ An assignment in recordable form of the mortgage or a copy of such assignment;

    □ The original or a copy of the title policy with respect to the related mortgaged property;

    □ If applicable, all recorded intervening assignments of the mortgage or copies thereof and any riders or modifications to the mortgage note and mortgage or copies thereof (except for any documents not returned from the public recording office, which will be delivered to the trustee as soon as the same is available to the depositor). AC ¶ 206 (quoting CWALT 2007-16CB Prospectus Supplement at S-39 to S-40);
- A representation that:

    For any mortgage held through the MERS® System, the mortgage is recorded in the name of Mortgage Electronic Registration Systems, Inc., or MERS, as nominee for the owner of the mortgage loan, and subsequent assignments of the mortgage were, or in the future may be, at the discretion of the master servicer, registered electronically through the MERS® System. For each of **[*13]** these mortgage loans, MERS serves as mortgagee of record on the mortgage solely as a nominee in an administrative capacity

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[5] *See* Ohio Rev. Code §§ 1707.41 (Plaintiff must plead "the falsity of any material statement"); 1707.44(B)(4) ("No person shall knowingly make or cause to be made any false representation concerning a material and relevant fact . . . ."); 1707.44(B)(4) (Prohibiting statements or advertisements "when the person knows that the statement or advertisement is false in any material respect."); 1707.44(G) (requires predicate violation of OSA); 1707.43 (requires predicate violation of OSA).

[6] Burr v. Bd. of County Com'rs of Stark County, 23 Ohio St. 3d 69, 69, 23 Ohio B. 200, 491 N.E.2d 1101 (1986) (Fraud allegation requires "a representation . . . of a fact . . . made falsely").

[7] Delman v. City of Cleveland Heights, 41 Ohio St. 3d 1, 4, 534 N.E.2d 835 (1989) **[*14]** (negligent misrepresentation requires the Defendant to "suppl[y] false information for the guidance of others in their business transactions").

on behalf of the trustee, and does not have any interest in the mortgage loan. AC ¶ 207 (quoting CWALT 2007-16CB Prospectus Supplement at S-41).

These three statements appear in the CWALT 2007-16CB Prospectus Supplement, and substantially identical statements appear in the Prospectus Supplements for each of the other Certificates. AC ¶¶ 205-07. It is apparent from the pleadings and from the judicially noticeable Prospectus Supplements and PSAs that none of the three statements is false.

The first statement identified by Western and Southern is a representation that "each loan is secured by a valid lien on, or a perfected security interest with respect to, the Property." AC ¶ 205 (quoting CWALT 2007-16CB Prospectus Supplement at 26). Nothing in the AC casts doubt on this statement. The transfer of title allegations in paragraphs 205 through 240 say nothing about the validity of liens, the perfection of security interests, or the rather straightforward principle that loans are secured by liens. Western and Southern attempts to match the statement to its theory of harm by ascribing to it the following meaning: "each mortgage represented a valid lien *such* ***[*15]*** *that the issuing trust could foreclose* upon the mortgage in the event of a borrower's default." AC ¶ 205 (emphasis added). Nothing about the context of the statement suggests such a reading. On the contrary, it appears in a section of the Prospectus Supplements titled "Representations by Sellers; Repurchases." That section begins by stating that, "[e]ach seller or, in some cases, originator, will have made representations and warranties in respect of the loans sold" and that one of those representations may be "that each loan is secured by a valid lien." CWALT 2007-16CB Prospectus Supplement at 26. This statement has nothing to do with whether a trustee will be able to foreclose in the event of default; read properly, it does not even relate to whether the loans are properly secured by liens. Instead, it relates to representations that *may* be made by sellers. Nothing in the AC indicates that sellers may not have made such representations.

Like the first, the second statement has been quoted without reference to its context. The statement appears in a section of the Prospectus Supplement titled "Assignment of the Mortgage Loans" and begins, "*[p]ursuant to* ***[*16]*** *the pooling and servicing agreement*, on the closing date, the depositor will sell, transfer, assign, set over and otherwise convey without recourse to the trustee in trust for the benefit of the certificateholders all right, title and interest of the depositor in and to each mortgage loan . . . ." CWALT 2007-16CB Prospectus Supplement at S-39 (emphasis added). In securitization, a prospectus supplement is used to market the asset-backed security, while the PSA is the actual governing document for the trust. The timing of the process is such that RMBS are marketed and sold before a PSA has been finalized and made available to investors. Prospectus Supplements therefore will typically summarize the PSA for investors that would not otherwise have access to its terms. An RMBS investor reading the "Assignment of the Mortgage Loans" section identified by Western and Southern would understand that the "pursuant to the pooling and servicing agreement" language indicates that the section is meant as a description of the PSA rather than an independent manifestation of present intent. And, Western and Southern has not alleged that the Prospectus Supplement states any term of the PSA inaccurately. **[*17]** On the contrary, each portion of the second statement matches a portion of the PSA. *See* CW RJN 34; 54.

Western and Southern's allegations with respect to the second statement also fail to differentiate the Defendants as required by *Rule 9(b)*. The section states that, under the PSA, the *depositor* will transfer the loan and deliver the mortgage file to the trustee or the trustee's custodian. Paragraphs 209 through 217 of the AC do not mention the Depositors or indicate that the Depositors failed to take any action that they were mandated to take under the PSAs. On the contrary, this section of the AC refers to "Countrywide," a defined term that includes each of the Countrywide Defendants. But, ***HN4***[] "*Rule 9(b)* does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations when suing more than one defendant and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)* (citations and quotations omitted). For the second statement to be actionable, the AC would have to explain what actions the Depositors failed to take and which **[*18]** specific Defendants knew or should have known that the Depositors would fail to take those actions. The AC suggests that this would be a difficult task. Its allegation is that the physical mortgage documents remained with the *servicers*, not the Depositors. AC ¶¶ 209-17. The AC does not allege that the servicers were not the "custodians" of the trustees, as contemplated by the Prospectus Supplements and PSAs. *Id.* On the face of the AC, it is therefore difficult to determine (i) which Defendants could have misrepresented the Depositors' intentions and (ii) what the Depositors could or should have done differently.

Finally, nothing in the AC indicates that the third statement was false when it was made. Western and Southern argues that "Defendants' representations in the Offering Materials that MERS would be the 'beneficial owner' of each mortgage were false." AC ¶ 242. But, the statement regarding MERS in the Prospectus Supplement does not contain the words "beneficial owner." Instead, the statement says, in effect, that the mortgages may be recorded in MERS' name but that MERS serves as mortgagee only in an administrative capacity. CWALT 2007-16CB Prospectus Supplement at S-41. Western **[*19]** and Southern has not identified any reason why that statement is false or misleading.

The Court's distinctions may seem pedantic, but they illustrate a fundamental problem with Western and Southern's theory. The title transfer allegations that remain in the AC allege a litany of failures. Defendants allegedly "lost, failed to timely create, or failed to timely deliver the paperwork necessary to prove title to the mortgages and the notes under state law." AC ¶ 208. They allegedly did not comply with various states' "strict rules governing assignment of mortgages, and transfer of promissory notes and loan files." *Id.* ¶ 209. They then allegedly engaged in a cover-up by back-dating documents, signing fraudulent affidavits, and improperly pressuring homeowners. *Id.* ¶¶ 209-40. These are serious allegations and the Court does not minimize them. But if the allegations regarding assignment and servicing are true, the PSAs contain explicit provisions that allow the servicer to "put" undocumented or otherwise unsatisfactory loans back to the originators. CWALT 2007-16CB Prospectus Supplement at S-41. The Prospectus Supplements explicitly state that "[t]he cure, repurchase or substitution obligation **[*20]** constitutes the sole remedy available to certificateholders or the trustee for omission of, or a material defect in, a mortgage loan document." *Id.*

To the extent that the problems that Western and Southern identifies are actionable, it would be as claims for breach of contract or breach of fiduciary duty. ***HN5***[] Courts must be sensitive to the distinctions between such cases and misrepresentation cases; more so when a contract provides specific mechanisms for redress as the PSAs do here. Failure to maintain the distinctions between contract and fraud cases raises the potential for duplicative litigation and double recoveries. As importantly, serious violence is done to the contract by failing to respect the contractual remedies that each party has agreed to. *See Lockerby v. Sierra, 535 F.3d 1038, 1041-42 (9th Cir. 2008)* (More than intentional breach of contract necessary to commit "tortious conduct."). For this reason, most courts to consider the issue have held that the "breach of a contractual promise of future performance typically does not constitute a misrepresentation that will support an action for fraud." *Reese v. BP Exploration (Alaska) Inc., 643 F.3d 681, 691 (9th Cir. 2011)*; *see* ***[*21]*** *also United States v. Blankenship, 382 F.3d 1110, 1133 (11th Cir. 2004)* ("A 'promise' contained in a contract is not a certification that the promisor will actually perform the specified acts."); *Mills v. Polar Molecular Corp., 12 F.3d 1170, 1176 (2d Cir. 1993)* ("The failure to carry out a promise made in connection with a securities transaction is normally a breach of contract. It does not constitute fraud unless, when the promise was made, the defendant secretly intended not to perform or knew that he could not perform."); *IDT Corp. v. eGlobe, Inc., 140 F.Supp.2d 30, 35 (D.D.C. 2001)* (same).

BP Exploration, cited above, is on point. There, an oil exploration trust repeatedly filed copies of a contract with the SEC as required by various regulatory requirements. *643 F.3d at 686*. The trust repeatedly filed the contract despite the fact that, at the time of each filing, the trust was allegedly in breach of one of the contract's provisions. *Id.* The Ninth Circuit held that "contract breach is not a sufficient predicate for securities fraud" and ordered the case dismissed. The plaintiff had argued that the repeated filing of the contract (which had been forward-looking when originally signed) **[*22]** created a false impression of continuing compliance. *Id. at 691*. The Ninth Circuit disagreed, holding that "a reasonable investor would likely view the Trust's attachment of the [contract] to its SEC filings as a statement of the rights of the Trust and its unit holders, not as certification by [the Defendant] that all of its operations were in compliance with the [contract]." *Id. at 693*. This holding reflects the commonplace understanding that, "[a] 'promise' contained in a contract is not a certification that the promisor will actually perform the specified acts," it is merely an expression of the party's contractual obligation. *Id. at 691* (citing *Blankenship, 382 F.3d at 1133*). Indeed, the cases cited by the Ninth Circuit made clear that the contract in *BP Exploration* was not actionable both because it was forward-looking and because a contractual obligation is not a promise to perform, but rather a promise to either perform or submit to the contractual remedy. *Id. at 691-94*.

Western and Southern cites cases for the principle that a promise to perform a future act may be an actionable misrepresentation when the defendant has no intention of keeping the promise at the time that it **[*23]** makes the promise. Opp. at 46-47 (citing *Tibbs v. Nat'l Homes Constr. Corp., 52 Ohio App. 2d 281, 287, 369 N.E.2d 1218 (12th Dist. 1977)*. However, none of the cases cited by Western and Southern arose in the context of a "promise" to comply with contractual obligations. [8], [9] In the absence of any such authority, ***HN6***[] the Court will follow the Ninth Circuit rule that the failure to honor a contractual obligation does not transform the original contract into a tortious misrepresentation. Such a rule is especially appropriate when, as here, the PSA contains express provisions to redress the failures that Western and Southern complains of. Stripped to its essentials, the AC makes the same allegation as the plaintiff in *BP Exploration*, except that the AC is one level more attenuated. There, the plaintiff alleged that the contract itself contained a false statement. Here, Western and Southern alleges that an accurate *description* of the contract (here the PSA) is false because the defendants did not intend to follow the PSA. Even if the Defendants did not intend to follow the PSA, [10] their description of its contractual obligations was accurate, and any failure to meet those obligations is better addressed through **[*24]** other means.

For the reasons discussed above, the statements contained in Paragraphs 205 through 207 of the AC are not actionable misstatements. Causes of Action One, Two, Three, Four, Five, Seven, Eight, Nine, and Fourteen are predicated on an actionable misrepresentation. Western and Southern has failed to **[*25]** plead any such misrepresentation. Accordingly, Causes of Action One, Two, Three, Four, Five, Seven, Eight, Nine, and Fourteen are **DISMISSED WITH PREJUDICE**.

B. The OCAA Claim Does Not Allege an Enterprise

Cause of Action Six alleges a violation of the Ohio Corrupt Activities Act ("OCAA"), *Ohio Rev. Code §§ 2923.31-36*. AC ¶¶ 418-26. Specifically, it alleges that CFC, CHL, CCM, CSC, CWABS, CWALT, CWHEQ, CWMBS, Mozilo, Sambol, Bank of America, Bank of America, N.A., and BAC Servicing, together with non-party entities such as correspondent lenders, RMBS underwriters, appraisers, foreclosure law firms, PMI insurers, and the Bank of New York were part of a racketeering enterprise with the common purpose of originating risky loans, packaging those loans into RMBS, selling the RMBS to investors, and then failing to service the loans properly. *Id.* ¶¶ 420-21. ***HN7***[] To plead a violation of the OCAA, Western and Southern must allege that Defendants "participate[d] in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity." *Ohio Rev. Code § 2923.32(A)(1)*. The AC does not plead an "enterprise" as required by the statute and therefore must be dismissed.

HN8[] To violate the **[*26]** OCAA, each Defendant must have been part of an "enterprise." "'Enterprise' includes any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity. 'Enterprise' includes illicit as well as licit enterprises." *Ohio Rev. Code § 2923.31(C)*. ***HN9***[] The OCAA is patterned on the federal RICO statute, and Ohio courts look to federal decisions to interpret the OCAA. *Herakovic v.*

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[8] *Burlington Ins. Co. v. Artisan Mech., Inc.*, relied upon by Western and Southern, merely stands for the proposition that a misrepresentation as to the *existence* of a contract may be actionable. *188 Ohio App. 3d 560, 566, 2010 Ohio 3142, 936 N.E.2d 114 (Ohio Ct. App. 1st Dist. 2010)*.

[9] The Court further notes that the AC fails to plead with specificity facts that would allow the Court to infer that, at the time the Prospectus Supplements were issued, specific defendants intended for other specific defendants to violate the transfer-of-title provisions in the PSAs. Were this the AC's only deficiency, repleading the misrepresentation claims might be appropriate. As discussed above, it is not.

[10] As discussed above, the Court accepts this proposition for the sake of argument but notes that Western and Southern has failed to plead subjective intent not to perform with the requisite level of specificity under *Rule 9(b)*.

Catholic Diocese of Cleveland, 2005 Ohio 5985, P15, 2005 WL 3007145, at *3 (Ohio Ct. App. Nov. 10, 2005) ("[F]ederal case law interpreting the federal RICO law" should not be ignored.) (citing Universal Coach, Inc. v. New York City Transit Auth., Inc., 90 Ohio App. 3d 284, 291, 629 N.E.2d 28 (1993)). [11]

HN11[] The Sixth Circuit has held that an enterprise must exist separate and apart from the defendant. Shields v. UnumProvident Corp., 415 F. App'x 686, 691 (6th Cir. 2011) ("[T]he 'person' charged with violating RICO [must] be a separate entity from the 'enterprise.'"). "Under this requirement, a corporation may not be liable . . . for participating in the affairs of an enterprise that consists only of its own subdivisions, agents, or members." *Id.* The Ohio courts that have considered the question have agreed. *See* Herakovic, 2005 Ohio 5985, P25, 2005 WL 3007145, at *4 (Ohio Ct. App. Nov. 10, 2005) (dismissal appropriate because "appellants have not pled the individuals separate from the enterprise."). [12] This rule is practical and gives proper effect to the purpose of the statute. If members of a corporate family could constitute a RICO enterprise, then every act of corporate malfeasance could also be pleaded as a RICO violation, complete with its longer statute of limitations, joint and several liability, and other advantages. Each of the named OCAA defendants is a Countrywide parent, subsidiary, **[*28]** or agent. Under Shields and Herakovic, the named defendants cannot, on their own, constitute an enterprise.

Western and Southern also alleges that a number of non-parties combined with the Countrywide Defendants to form an enterprise to profit from the sale, securitization, and servicing of Countrywide mortgage loans. Opp. at 9; AC ¶ 421. HN12[] "[A]n association-in-fact enterprise must have at least three structural features: a purpose, relationships **[*29]** among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." Boyle v. United States, 556 U.S. 938, 946, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009). The AC plausibly alleges that the various non-parties had longstanding business relationships with the Countrywide Defendants. Nothing in the AC, however, creates a plausible inference that the purpose of those relationships was to "profit illegally from the sale, securitization, and servicing of Countrywide mortgage loans." Opp. at 9. On the contrary, from the face of the AC it appears that each of the non-parties identified by Western and Southern entered into a business relationship for their own commercial reasons. Even if the Court credits Western and Southern's assertion that the non-parties' actions assisted Countrywide in a scheme to "profit illegally from the sale, securitization, and servicing of Countrywide mortgage loans," (Opp. at 9) the AC makes clear that the assistance was in response to each entity's own business incentives. HN13[] Parties that enter commercial relationships "for their own gain or benefit" do not constitute an "enterprise." City of Cleveland v. Woodhill Supply, Inc., 403 F. Supp. 2d 631, 635 (N.D. Ohio 2005) **[*30]** (citing VanDenBroeck v. CommonPoint Mortgage Co., 210 F.3d 696, 699 (6th Cir. 2000) (abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 646, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008))); *see also* Morrow v. Reminger & Reminger Co., L.P.A., 183 Ohio App. 3d 40, 60, 2009 Ohio 2665, 915 N.E.2d 696 (2009) (no enterprise when each party acts in its "contractual" role); Robins v. Global Fitness Holdings, LLC, 838 F. Supp. 2d 631, 653, 2012 WL 163031, at *18 (N.D. Ohio 2012) ("routine business relationships, without more, are insufficient to establish a RICO claim"); Javitch v. Capwill, 284 F.Supp.2d 848, 857 (N.D. Ohio 2003) (business relationship, even one that furthers a fraud, is insufficient to plead a RICO enterprise); Wuliger v. Liberty Bank, No. 3:02 CV 1378, 2004 U.S. Dist. LEXIS 27353, at 18, 2004 WL 3377416 (N.D. Ohio 2004) (provision of banking services, without more, does not constitute a RICO enterprise).

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[11] The parties agree that the Court should look to federal law for interpretation of the OCAA. They disagree as to which Circuit's precedent is most helpful. The Court is interpreting an Ohio law. HN10[] Ohio courts, though not bound by decisions from courts within the Sixth Circuit, frequently cite such decisions and would likely find them more persuasive than decisions from outside the Sixth **[*27]** Circuit. The Court therefore gives preference to decisions from within the Sixth Circuit in the OCAA portion of this Order.

[12] Ohio courts are split on the related question of whether a plaintiff must also plead an enterprise distinct from the alleged pattern of corrupt activity. *Compare* State v. Lynch, 2012 Ohio 2521, P21, 2012 WL 2050862, at *4 (Ohio Ct. App. June 6, 2012) ("We will therefore herein consider whether the State indeed demonstrated a 'structure separate and apart, or distinct, from the pattern of corrupt activity' concerning appellant's heroin-dealing activities.") *with* State v. Baker, 2012 Ohio 887, P12, 2012 WL 707093, at *3 (Ohio Ct. App. Mar. 5, 2012) ("[T]his court has expressly rejected the notion that the state must prove that the enterprise is an entity separate and apart from the pattern of activity in which it engages."). The Court does not find it necessary to reach this question.

A recent case from the Southern District of Ohio is instructive. In *HMV Properties, LLC v. IDC Ohio Management., LLC,* plaintiffs brought a federal RICO claim against a number of defendants. *2:08-CV-895, 2011 U.S. Dist. LEXIS 1161, 2011 WL 53166, at *1 (S.D. Ohio Jan. 6, 2011)*. The plaintiffs alleged that they bought a number of Dairy Queen franchises based on "over-inflated property **[*31]** appraisals, over-hyped 'triple-net' leases, and the overstated expertise of several of the [d]efendants." *Id.* They further alleged that the various appraisers, brokers, sellers, and managers of the franchises formed an enterprise with the purpose of duping the plaintiffs into purchasing over-valued assets. *Id.* The court found that the plaintiffs had failed to allege an enterprise because, "[p]laintiffs have alleged only a string of actions taken by [d]efendants either severally or in small sub-groups, and they have alleged no facts that support any allegation of "coordinated behavior" among the Defendants." *Id. 2011 U.S. Dist. LEXIS 1161, at *35, [WL] at 13*. There may have been bilateral relationships between the various defendants, and various defendants may have acted improperly, but that is not the same as an allegation that the defendants acted as an ongoing and continuing organization. *Id.* [13]

In this case, like *HMV Properties,* Western and Southern has identified a number of parties to the securitization process. Many of the identified parties are Countrywide-owned or Countrywide agents and therefore incapable of constituting an enterprise on their own. As to the non-Countrywide entities, the AC pleads a number of facts from which the Court *might* conclude that the parties acted improperly in response to incentives set by Countrywide or by the securitization process generally, and then attempts to bootstrap a conclusion that these thousands of diverse and disparate entities shared a common purpose and cooperated with each other in furtherance of that purpose. The AC contains no facts indicating that the various non-Countrywide entities it identifies coordinated their behavior or combined as an enterprise. On the contrary, a number of the AC's allegations indicate that these **[*33]** entities were actively competing with each other for Countrywide's business.

Western and Southern has identified a number of non-parties that were allegedly part of the enterprise. The Court addresses each and its alleged role in the enterprise briefly:

- Correspondent lenders such as People's Choice Mortgage, Summit Mortgage LLC, Loans for Residential Homes Mortgage Corporation, Sprint Funding Corporation, Ameribanq Mortgage Group LLC, and E-Loan, Inc. AC ¶¶ 168-88; 419-20. The allegations in the AC, as summarized by the Western and Southern, are that the correspondent lenders would "'churn out' large numbers of loans, without regard to quality," based on the price they would fetch in the secondary market rather than the borrower's ability to repay. Opp. at 12. At the risk of being glib, this allegation amounts to one that "Countrywide offered to buy something, and the lenders obliged." Western and Southern has identified exactly the type of arms-length business transaction, with each party pursuing its own independent economic interests, that does not constitute a RICO enterprise.

- Real estate appraisers controlled or influenced by Countrywide, including LandSafe, Inc. ("LandSafe"). **[*34]** AC ¶¶ 245-50; 420. LandSafe was a Countrywide subsidiary and therefore cannot constitute an enterprise for the reasons set out above. [14] The allegations respecting other appraisers are vague, but they

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[13] Western and Southern argues that *HMV Properties* does not apply because it involved a federal RICO claim and relied on *pre-Boyle* authority. Opp. at 17-18 n.23. To the contrary, Ohio courts look to federal RICO cases to interpret the OCAA (*supra*, n.11), and *HMV Properties* explicitly considered *Boyle* and held that allegations similar **[*32]** to the ones in this case were insufficient. *HMV Properties, LLC, 2011 U.S. Dist. LEXIS 1161, at *37, 2011 WL 53166 at *14* ("Plaintiffs do little more than offer conclusory statements as to the existence of an association-in-fact enterprise without offering any facts in support of the *Boyle* factors: purpose, relationship, or longevity.").

[14] Two recent cases have held that Countrywide and LandSafe could constitute a RICO enterprise. *In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig, 601 F. Supp. 2d 1201, 1214-15 (S.D. Cal. 2009)*; **[*37]** *Johnson v. KB Home, 720 F. Supp. 2d 1109, 1120-21 (D. Ariz. 2010)*. Those cases did so ***HN15***[] under a doctrine called the "something more" test, which holds that a parent and its subsidiary may constitute a RICO enterprise when each plays a different role or the decision to operate through a subsidiary facilitates the activity of the enterprise in some way. *In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig., 601 F. Supp. 2d at 1214-15*. The "something more" test has not been endorsed by the Ninth Circuit, Sixth Circuit, or any Ohio court. The Court finds no indication that an Ohio court would apply the "something more" exception, and therefore declines to address it in this case.

amount to an allegation that Countrywide pressured brokers to use "acceptable" appraisers that would provide inflated valuations. AC ¶¶ 247-250. If true, these allegations mean that the various brokers responded to market incentives created by Countrywide and hired appraisers accordingly. The AC does not allege that the "acceptable" appraisers had any direct relationship with Countrywide or otherwise constituted an enterprise.

• Underwriters of Countrywide RMBS, including Credit Suisse First Boston LLC and Deutsche Bank Securities, Inc. AC ¶¶ 123; 420. The allegations relating to the underwriters are that they ignored red flags and "waived in" to the securitizations noncompliant and risky loans. *Id.* ¶¶ 124-30. The role of an underwriter is to act as a sales agent for the issuer. Nothing in the AC indicates that the underwriters worked together to operate the affairs of an enterprise rather than their own affairs. [15] The most damning possible inference possible from the facts in the AC **[*35]** is that the underwriters responded to pressure (real or perceived) from Countrywide and "waived in" loans that did not meet standards. This is the type of bilateral conduct that does not constitute a RICO enterprise. Every securities issue has an underwriter; if a claim of underwriter complicity were sufficient, then every securities claim could be recast as a RICO claim.

• Foreclosure law firms, including Lerner, Sampson & Rothfuss of Cincinnati, that allegedly promoted forgery, perjury, and tampering in attempting to cover up Countrywide's failure to meet Transfer of Title obligations and vest losses on bad loans in the securitization trusts. Opp. at 10; AC ¶¶ 229-40. For the reasons set out above,***HN14***[] a corporation and a law firm acting as its agent are not insufficiently distinct so as to form a RICO enterprise. *See Kelly v. Palmer, Reifler, & Associates, P.A., 681 F. Supp. 2d 1356, 1380 (S.D. Fla. 2010)* ("The Palmer Law Firm's tactics, even if deceptive or extortionate, were not separate and apart from its corporate client seeking to obtain a civil recovery from the [plaintiffs."). [16]

• PMI insurers that allegedly paid unlawful kickbacks to Countrywide, including Mortgage Guaranty Insurance **[*36]** Corporation, Genworth Mortgage Insurance Corporation, Radian Guaranty Inc., United Guaranty Residential Insurance Company, Triad Guaranty Insurance Company, and Republic Mortgage Insurance. AC ¶¶ 262-276. As with the underwriter allegations, the AC alleges that the various PMI insurers entered into bilateral commercial agreements with Countrywide. The AC does not allege that the PMI insurers agreed or cooperated with each other in any way. Moreover, if the Court credits the AC's allegations that the PMI insurers were forced to pay kickbacks to Countrywide under a pay-to-play system, then the PMI insurers are properly viewed as *victims*, not members of a racketeering enterprise.

• Bank of New York Mellon ("BNY"), the trustee for the RMBS trusts, which allegedly furthered the enterprise's goals by failing to enforce Countrywide's repurchase obligations. AC ¶ 420. The AC contains no factual allegation, much less one that would survive challenge under *Twombly*, that BNY's actions as trustee were not unilateral.

Nothing in the AC indicates that any of the groups above shared a "common purpose" and coordinated with each other as required to plead an enterprise. Many of the allegations indicate the opposite, that the entities engaged in bilateral business dealings with Countrywide but in sharp competition with each other. That is the type **[*39]** of rimless hub-and-spoke structure that the Third Circuit considered and found wanting in *In re Ins. Brokerage*

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[15] *In re Ins. Brokerage Antitrust Litig.*, cited by Western and Southern, is instructive. *618 F.3d 300 (3d Cir. 2010)*. There, the Third Circuit found that, under *Boyle*, a series of bilateral contracts between one broker and many insurers did not constitute a RICO enterprise. *Id. at 375*. The insurers were not connected as part of an enterprise because, "plaintiffs' factual allegations do not plausibly imply anything more than parallel conduct by the insurers." *Id. at 374*. A bid-rigging allegation succeeded, **[*38]** because bid-rigging required the cooperation of the various insurers. *Id. at 377-78*. Nothing in the AC alleges that the underwriters coordinated or cooperated with each other. On the contrary, the implication of the AC is that Countrywide pressured the underwriters to compete with each other by "waiving in" increasing numbers of noncompliant loans.

[16] The Court also notes that the allegations relating to foreclosure misconduct do not make economic sense. The gist of Plaintiff's foreclosure misconduct allegations is that foreclosure firms attempted to cover up deficiencies in title transfers and foreclose on borrowers. But it is not clear how that behavior could have hurt noteholders. If the foreclosure firms were successful, then the recovery to the trusts would increase; if unsuccessful, the trusts would not be in any worse position than before the misconduct.

Antitrust Litig., 618 F.3d 300 (3d Cir. 2010). Western and Southern has cited no reason why such a structure suffices to plead an enterprise in this case.

C. WESTERN AND SOUTHERN'S CIVIL CONSPIRACY CLAIM FAILS UNDER THE INTRA-CORPORATE CONSPIRACY DOCTRINE

Cause of Action Seventeen alleges that Defendants are liable for civil conspiracy because they "formed an association in fact of entities that conspired to underwrite and purchase fraudulently and improperly underwritten loans, to package those loans for resale, and to fraudulently service such loans through use of fraudulent and forged documents in foreclosures and overcharges to borrowers for insurance and other services." AC ¶ 497. ***HN16***[] A civil conspiracy is a "malicious combination of two or more persons to injure another person or property, in a way not competent for one alone, resulting in actual damages." *Kenty v. Transamerica Premium Ins. Co., 72 Ohio St.3d 415, 419, 1995 Ohio 61, 650 N.E.2d 863 (1995)* (citation omitted).

Defendants argue that the civil conspiracy claim must be dismissed under the "intra-corporate conspiracy doctrine." The intra-corporate **[*40]** conspiracy doctrine provides that members of the same corporate family, including subsidiaries and employees, cannot conspire with each because they are the same legal entity. Western and Southern argues that the doctrine does not apply (or at least that it does not apply to separate legal entities such as subsidiaries). Opp. at 64-65. Western and Southern apparently concedes that its civil conspiracy claim is barred if the doctrine applies to legally distinct entities that are nevertheless wholly owned by the same corporate parent.

HN17[] The Ohio Supreme Court has never addressed the intra-corporate conspiracy doctrine. In 2009, however, the Sixth Circuit predicted that the Ohio Supreme Court would adopt the doctrine. *Bays v. Canty, 330 F. App'x 594, 594 (6th Cir. 2009)*. *Bays* drew upon a "'common sense' insight 'that a person cannot conspire with himself'" and held that, "since a corporation only acts through its officers, a group of corporate officers acting within the scope of employment cannot create a conspiracy." *Id.* Western and Southern cites three cases to dispute the Sixth Circuit's finding. Opp. at 64 n.71 (citing *Ohio Bureau of Workers' Comp. v. MDL Active Duration Fund, LTD., 476 F. Supp. 2d 809, 825-26 (S.D. Ohio 2007)*; **[*41]** *Nilavar v. Mercy Health Sys., 142 F. Supp. 2d 859, 889 (S.D. Ohio 2000)*; *Berryhill v. Khouri, No. 10-CV-721073, 2011 Ohio Misc. LEXIS 364, at *7 (Ohio C.P., Jan. 13, 2011))*. ***HN18***[] *Ohio Bureau of Workers' Comp.* accepted the intra-corporate conspiracy doctrine but found that it did not apply to unrelated legal entities just because those entities share an employee. *476 F. Supp. 2d at 825-26*. *Nilavar* recognized the doctrine as applied to employees acting within the scope of their employment, but declined to extend it to corporate subsidiaries. *142 F. Supp. 2d at 888-89*. *Berryhill* merely clarified that the doctrine does not apply to employees acting outside the scope of their employment. *2011 Ohio Misc. LEXIS 364, at *7*.

Even the cases cited by Western and Southern recognize that ***HN19***[] the intra-corporate conspiracy doctrine shields employees acting within the scope of their employment. The Court agrees; it will follow *Bays* and the intermediate Ohio courts on this issue. *Bays, 330 F. App'x at 594*; *Tandem Staffing v. ABC Automation Packing, Inc., 2000 Ohio App. LEXIS 2366, 2000 WL 727534, at *8 (Ohio App. June 7, 2000)*; *Scanlon v. Gordon F. Stofer & Bro. Co., 1989 Ohio App. LEXIS 2528, 1989 WL 69400, at *16 (Ohio App. June 22, 1989)*; *Schrock v. D & N Development, Inc., 1995 Ohio App. LEXIS 3709, 1995 WL 495488, at *2 (Ohio App. June 28, 1995)*.

Western **[*42]** and Southern does not argue that any of the Individual Defendants acted outside the scope of their employment. The remaining question is therefore whether the intra-corporate conspiracy doctrine applies to related corporate entities like the ones in this case. *Nilavar* held that it does not. *142 F. Supp. 2d at 889*. Defendants cite two Ohio trial court cases that have held the opposite. *Hometown Health Plan v. Aultman Health Foundation, 2009 Ohio Misc. LEXIS 550, 2009 WL 1806759 (Ohio Ct. Com. Pl. Apr. 15, 2009)*; *Andrew v. Power Marketing Direct Inc., 2010 WL 7405622 (Ohio Ct. Com. Pl. May 20, 2010)*. ***HN20***[] In the absence of a controlling Ohio Supreme Court decision, the Court must predict how the Ohio Supreme Court would decide the issue. *Gravquick A/S v. Trimble Navigation Int'l Ltd., 323 F.3d 1219, 1222 (9th Cir. 2003)*. It is appropriate to use "intermediate appellate court decisions, statutes, and decisions from other jurisdictions as interpretive aids." *Id.*

HN21[] The Court concludes that, if faced with the question, the Ohio Supreme Court would hold that a corporation and its subsidiaries are not capable of conspiring with each other. First, while courts and states disagree, a majority appear to have adopted the intra-corporate **[*43]** conspiracy doctrine in the context of subsidiaries. *See* *Platten v. HG Bermuda Exempted Ltd., 437 F.3d 118, 131 (1st Cir. 2006)* ("[A] family relationship among corporations" will not support a civil conspiracy claim under Massachusetts law); *Davidson & Schaaff, Inc. v. Liberty Nat. Fire Ins. Co., 69 F.3d 868, 871 (8th Cir. 1995)* ("[T]wo subsidiaries of the same parent cannot conspire" under Missouri law.); *Okusami v. Psychiatric Inst. of Washington, Inc., 959 F.2d 1062, 1066, 295 U.S. App. D.C. 58 (D.C. Cir. 1992)* (Civil conspiracy not possible between a parent and its subsidiary); *Tate v. Sallie Mae, Inc., 3:10-CV-00386, 2011 U.S. Dist. LEXIS 93235, at *6, 2011 WL 3651813, at *3 (W.D.N.C. Aug. 19, 2011)* (same; North Carolina law); *Pizza Mgmt., Inc. v. Pizza Hut, Inc., 737 F. Supp. 1154, 1166 (D. Kan. 1990)* (same; Kansas law); *Bryant Heating and Air Cond. Corp. v. Carrier Corp., 597 F.Supp. 1045, 1054 (S.D. Fla. 1984)* (same; Florida law) *Bunch v. Artec Int'l Corp., 559 F. Supp. 961, 970 (S.D.N.Y. 1983)* (same; Oregon and Pennsylvania law); *Chrysler Credit Corp. v. Rebhan, 66 N.C. App. 255, 259, 311 S.E.2d 606 (1984)* (same; Michigan law). *But see* *ASARCO LLC v. Americas Mining Corp., 396 B.R. 278, 417-18 (S.D. Tex. 2008)* ("[T]he most well-reasoned approach is **[*44]** the one that recognizes a cause of action for conspiracy between a parent and subsidiary only when the parent acts outside its role as 100% owner of the subsidiary."); *Blades v. Countrywide Home Loans, Inc., CIVA1:06CV1000LG-JMR, 2007 U.S. Dist. LEXIS 69903, at *10, 2007 WL 2746678 (S.D. Miss. Sept. 18, 2007)* ([T]he separate nature of these subsidiaries prevents the Court from holding that CFC, the parent company, should be considered the same entity as both subsidiaries."); *Seeco, Inc. v. Hales, 341 Ark. 673, 22 S.W.3d 157, 173 (Ark. 2000)* (refusing to apply the doctrine to civil conspiracy claims against wholly owned subsidiaries of the same parent company); *Allied Capital Corp. v. GC-Sun Holdings, L.P., 910 A.2d 1020, 1044 (Del. Ch. 2006)* (refusing to apply the doctrine under Delaware law). Second, the majority view better serves the purpose of conspiracy law. The bedrock of any conspiracy claim is a "malicious combination." *Kenty, 72 Ohio St.3d at 419*. *Bays* noted that it is common sense that employees of a corporation do not "combine" when they act within the scope of their employment, they merely fulfill their role as agents of the corporation. *330 Fed. App'x at 594*. In many ways though, an employee is more capable of combination **[*45]** with an employer than is a subsidiary. An employee, at least, is a human being capable of motivations distinct from his employer. A subsidiary is capable of no such independence; it is entirely controlled by the parent company.

The Supreme Court explicitly considered this issue in the context of ***antitrust law***:

> [T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *§ 1* of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for *§ 1* scrutiny.

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). **[*46]** *Copperweld* was an antitrust case, but the Supreme Court could as easily have been discussing any conspiracy. A conspiracy charge will not lie without multiple independent actors. But, as explained in *Copperweld,* a parent and subsidiary have "not . . . two separate corporate consciousnesses, but one." *Id.* The logic of *Copperweld* does not apply only to ***antitrust law***, but rather any cause of action that requires a "combination." Applying it here is a logical application of *Bays'* "common sense" approach to the combination requirement. Accordingly, ***HN22***[] the Court finds that, were the Ohio Supreme Court to consider the issue, it would find that members of the same corporate family, including subsidiaries, are incapable of conspiring with each other. Every member of the alleged conspiracy is a member of the Countrywide corporate family. Accordingly, Cause of Action Seventeen is **DISMISSED WITH PREJUDICE**.

IV. NATIONAL INTEGRITY

National Integrity's complaint (the "Complaint") is identical in most respects to the Amended Complaint in *Western and Southern*. The only significant difference is that National Integrity filed its action in the Southern District of New York. This fact compels the Court to **[*47]** apply New York law, including New York choice-of-law rules. *In re Nucorp Energy Sec. Litig., 772 F.2d at 1492*. In The First Round Order, the Court found that National Integrity was a New York resident, that its common law claims should therefore be evaluated under New York's statute of limitations, and that those claims were therefore timely. *First Round Order, 2012 U.S.Dist. LEXIS 60776, 2012 WL 1097244, at 15-16*. The presence of those claims and the applicability of New York law require further analysis of the state law claims. National Integrity's federal claims are identical to Western and Southern's and are **DISMISSED WITH PREJUDICE** for the same reasons set out above.

A. Choice of Law is Not Applicable to National Integrity's OSA Claims

In the First Round Order, the Court implicitly applied Ohio law to National Integrity's OSA claims. *Id. 2012 U.S. Dist. LEXIS 60776, [WL] at *16*. In a related case, the Court analyzed the potential for overlapping and/or conflicting blue sky laws. *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig., 2:11-ML-02265-MRP, 2012 U.S. Dist. LEXIS 59620, at *11, 2012 WL 1322884, *2 (C.D. Cal. Apr. 16, 2012)* ("*MassMutual*"). The Court held that conflict-of-law analysis is not necessary for Blue Sky laws because they are nonexclusive. As the Court explained **[*48]** in *MassMutual:*

> ***HN23***[] Blue Sky laws are designed to regulate securities transactions within (or impacting) a particular state. If a transaction touches multiple states, it follows that multiple Blue Sky laws may apply simultaneously. The Court agrees with the majority view that a plaintiff may sue under the securities laws of several states at once so long as the requirements of each state's law are met.

Id. [17] Nothing about the OSA requires a different result. The Court therefore adopts *MassMutual* in this case. Because Blue Sky laws may overlap, it is unnecessary to perform a conflict analysis with respect to National Integrity's OSA claims.

Only the transfer-of-title-related OSA claims survived the *First Round Order. 2012 U.S. Dist. LEXIS 60776, 2012 WL 1097244, at 16*. The Court considered and dismissed identical OSA transfer of title allegations in Section III.A. above. The same law and the same analysis apply to National Integrity's OSA claims. National Integrity's OSA claims are therefore **DISMISSED WITH PREJUDICE**.

B. National Integrity's Racketeering and Conspiracy Claims Must Be Dismissed Under Either New York or Ohio Law

HN24[] Under New York law, the first step in a choice-of-law analysis is to **[*50]** determine whether an actual conflict exists. *Matter of Allstate Ins. Co. (Stolarz), 81 N.Y.2d 219, 223, 613 N.E.2d 936, 597 N.Y.S.2d 904 (1993)*. In Section III.B above, the Court determined that identical allegations fail under the OCAA. ***HN25***[] New York

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[17] *MassMutual* was based on, among others, the following cases: *Lintz v. Carey Manor Ltd., 613 F. Supp. 543, 551 (W.D. Va. 1985)* ("Just as the same act can violate both federal and state law simultaneously, or a state statute as well as state common law, so too can it violate several Blue Sky laws simultaneously."); *Simms Inv. Co. v. E.F. Hutton & Co., 699 F. Supp. 543, 546 (M.D.N.C. 1988)* ("[T]he securities laws of two or more states may be applicable to a single transaction without presenting a conflict of laws question."); *Barnebey v. E.F. Hutton & Co., 715 F. Supp. 1512, 1536 (M.D. Fla 1989)* **[*49]** ("[N]o reason to apply a traditional conflicts of laws analysis" when suit was brought under a state Blue Sky law.); *Chrysler Capital Corp. v. Century Power Corp., No. 91 Civ. 1937, 1992 U.S. Dist. LEXIS 9187, at *6, 1992 WL 163006, at *2 (S.D.N.Y. June 24, 1992)* ("[B]ecause application of multiple state securities laws to a single securities transaction does not present a conflict of laws issue, [defendant]'s argument that only New York law may apply to the transaction at issue is rejected."); *United Heritage Life Ins. Co. v. First Matrix Investor Services, No. CV 06-0496, 2009 U.S. Dist. LEXIS 91245, at *13, 2009 WL 3229374, at *4 (D. Idaho Sept. 30, 2009)* ("[M]ore than one state's securities laws can apply to a transaction.").

does not permit *any* private action under its racketeering law. N.Y. Penal Law § 460.20. Similarly, Section III.C finds identical conspiracy allegations deficient under Ohio law. Like racketeering, **HN26**[] "New York law does not recognize a tort action for civil conspiracy." Vasile v. Dean Witter Reynolds Inc., 20 F. Supp. 2d 465, 481 (E.D.N.Y. 1998) *aff'd sub nom. Vasile v. Dean Witter Reynolds, Inc., 205 F.3d 1327 (2d Cir. 2000)*. Plaintiffs do not dispute either point.

Ohio and New York law differ, but each would require dismissal of National Integrity's racketeering and conspiracy causes of action. The Court therefore finds no actual conflict between them in this case. Causes of Action Six and Fifteen are **DISMISSED WITH PREJUDICE**.

C. National Integrity's Negligent Misrepresentation Claim is Barred

The parties agree that Ohio law should apply to National Integrity's negligent misrepresentation claim. **HN27**[] Applying New York law, this Court has repeatedly dismissed negligent misrepresentation **[*51]** claims by RMBS investors for failure to plead a "special relationship" between the investor and Countrywide. *Dexia Holdings, Inc. v. Countrywide Fin. Corp., 2:11-CV-07165-MRP, 2012 U.S. Dist. LEXIS 71374at *26, 2012 WL 1798997, at *7 (C.D. Cal. Feb. 17, 2012)*; *Allstate Ins. Co. v. Countrywide Fin. Corp., 824 F. Supp. 2d 1164, 1192 (C.D. Cal. 2011)*. Some courts have found that Ohio has a similar "special relationship" requirement. *Doe v. SexSearch.com, 551 F.3d 412, 418 (6th Cir. 2008)* ("[A] claim for negligent misrepresentation requires 'a special relationship under which the defendant supplied information to the plaintiff for the latter's guidance in its business transaction.'") (citing *Ziegler v. Findlay Indus., Inc., 464 F. Supp. 2d 733, 738 (N.D. Ohio 2006))*; *Advantage Renovations, Inc. v. Maui Sands Resort, Co., L.L.C., 2012 Ohio 1866, P31, 2012 WL 1493826, at *7 (Ohio Ct. App. 2012)* (Ohio law requires "special duty or relationship"); *McNabb v. Hoeppner, 2011 Ohio 3224, P22, 2011 WL 2571386, at *4 (Ohio Ct. App. 2011)* (dismissing for lack of a "special relationship"). Other courts have eschewed the "special relationship" language in favor of a requirement that "(1) the defendant must provide false information for the guidance of the plaintiff **[*52]** in its business transactions and (2) the plaintiff must be the person or one of a limited group of persons for whose benefit and guidance the defendant intends to supply the information or knows that the recipient intends to supply it." *Nat'l Mulch & Seed, Inc. v. Rexius Forest By-Products Inc., 2:02-CV-1288, 2007 U.S. Dist. LEXIS 24904, at *38, 2007 WL 894833, at *9-11 (S.D. Ohio Mar. 22, 2007)* (citing *Gutter v. Dow Jones, Inc., 22 Ohio St.3d 286, 288, 22 Ohio B. 457, 490 N.E.2d 898 (1986))*. In those courts' view, "special relationship" is merely convenient shorthand for the limiting (to information provided for use in business transactions and to a limited group) elements of a negligent misrepresentation claim. *In re Nat'l Century Fin. Enters., Inc., Inv. Litig., 580 F. Supp. 2d 630, 647 (S.D. Ohio 2008)*.

The approach taken in *National Mulch & Seed* is persuasive. **HN28**[] Ohio law does not impose a separate "special relationship" requirement. Rather, the term is properly viewed as shorthand for the limiting elements of the cause of action. *2007 U.S. Dist. LEXIS 24904, at *38, 2007 WL 894833, at *9-11*. National Integrity alleges that it is part of a "limited class" of purchasers because (i) it is an institutional investor, (ii) its portfolio managers had face-to-face meetings with Countrywide, **[*53]** and (iii) Countrywide provided data and helped National Integrity develop pricing models. Opp at 62. These allegations are not sufficient to state a claim for negligent misrepresentation under Ohio law.

HN29[] The general rule is that the investing public is not a sufficiently limited class. *Federated Mgmt. Co. v. Coopers & Lybrand, 137 Ohio App. 3d 366, 738 N.E.2d 842, 855-56 (Ohio Ct. App. 2000)*. National Integrity has alleged that it is a sophisticated institutional investor, but nothing about the Certificates or Offering Materials limited purchases to such entities. Two cases from Ohio district courts help frame the issue. In *In re National Century Financial Enterprises, Inc., Investment Litigation,* the court held that representations made in connection with a private placement may state a claim for negligent misrepresentation because participation in the private placement was limited to a small group of Qualified Institutional Buyers ("QIBs"). *580 F. Supp. 2d at 652-53* (QIB purchasers constitute a sufficiently limited group). A more recent case, *Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Services, LLC*, held that even QIBs constitute an insufficiently limited group to state a cause of action **[*54]** for negligent misrepresentation. *813 F. Supp. 2d 871, 881-82 (S.D. Ohio 2011)*. The *Ohio Police* court also dismissed claims relating to non-private placements because the "complaint [did] not allege that the securities . . . were offered only to qualified institutional investors or only to pension funds." *Id. at 881*. The same analysis applies here. Any investor with sufficient means was eligible to buy the Certificates at issue in this case. And thousands of investors from around the world bought the same or substantially the same Countrywide-issued RMBS. That is not the type of limited class that will support a negligent misrepresentation claim.

National Integrity's allegations regarding face-to-face meetings and data provision do nothing to narrow the scope of the "class." The data and pricing models that National Integrity discusses were publicly available to any investor on Countrywide's website. Complaint ¶ 374. Similarly, the face-to-face meetings that National Integrity cites to were at marketing road shows and public investor forums. Complaint ¶ 81. These events were open to the public. More importantly, the alleged misrepresentations that National Integrity complains of occurred **[*55]** in the Offering Documents, not in the face-to-face meetings. Those Offering Documents were available to the entire investing world. Accordingly, an action for negligent misrepresentation is unsustainable under Ohio law. Cause of Action Seven is **DISMISSED WITH PREJUDICE**.

D. THE PARTIES HAVE NOT IDENTIFIED ANY CONFLICT BETWEEN NEW YORK AND OHIO WITH RESPECT TO THE COMMON LAW FRAUD CLAIM

National Integrity's only remaining primary claim is for common law fraud. The representations that National Integrity has identified relating to transfer of title are not false for the reasons set out in Section III.A above. That leaves National Integrity's allegations premised on underwriting, appraisals, loan-to-value ratios, and ratings. Applying New York law, the Court has repeatedly held that identical allegations are better addressed on a more complete factual record. *Dexia Holdings, Inc. v. Countrywide Fin. Corp., 2:11-CV-07165-MRP, 2012 U.S. Dist. LEXIS 71374, 2012 WL 1798997, at *5-6 (C.D. Cal. Feb. 17, 2012)*; *Allstate Ins. Co. v. Countrywide Fin. Corp., 824 F. Supp. 2d 1164, 1183-88 (C.D. Cal. 2011)* ("*Allstate I*"). National Integrity argues that Ohio substantive law should apply to its common law claims (Opp. at 71), but **[*56]** no party has identified a material difference between the laws of Ohio and New York with respect to common law fraud. The Court will therefore adopt its previous rulings in *Allstate* and *Dexia* with respect to the common law fraud claim. National Integrity's fraud allegations premised on underwriting, appraisals, loan-to-value ratios, and ratings are sufficient at the motion to dismiss stage.

E. DELAWARE LAW BARS NATIONAL INTEGRITY'S SUCCESSOR LIABILITY CLAIMS

The *National Integrity* action was transferred from a district court in New York. Accordingly, New York's choice-of-law rules apply to National Integrity's claims. In *Allstate*, the Court applied New York's choice-of-law rules to a successor liability claim against Bank of America. *Allstate I, 824 F. Supp. 2d at 1171-72*. The Court found that Delaware law applies to such claims, and that the claims are barred under Delaware law. *Id. at 1171-74*; *1192-93*. The logic of *Allstate* applies with equal force in this case. Accordingly, Cause of Action Thirteen is **DISMISSED WITH PREJUDICE.**

V. CONCLUSION

For the reasons set out above, the *Western and Southern* action is **DISMISSED WITH PREJUDICE**. Cause of Action Fourteen in *National Integrity* may proceed **[*57]** based on allegations relating to underwriting, appraisals, loan-to-value ratios, and ratings. *National Integrity* is otherwise **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED.

DATED: June 29, 2012

/s/ Mariana R. Pfaelzer

Hon. Mariana R. Pfaelzer

United States District Judge

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de Botton v. Kaplin

Common Pleas Court of Philadelphia County, Pennsylvania, Civil Trial Division

July 3, 2012, Decided

NO. 1997

Reporter
2012 Phila. Ct. Com. Pl. LEXIS 189 *

CLAUDE de BOTTON, et al. vs. MARC B. KAPLIN, ESQ., et al.

Subsequent History: **[*1]** Superior Court Nos. 1635 EDA 2012, __ EDA 2012.

Vacated by, Remanded by, Judgment entered by *De Botton v. Kaplin Stewart Reiter & Stein, 2014 Pa. Super. Unpub. LEXIS 927 (Feb. 11, 2014)*

Vacated by, Remanded by *De Botton v. Ellis Acquisition, L.P., 97 A.3d 799, 2014 Pa. Super. LEXIS 795 (Pa. Super. Ct., Feb. 11, 2014)*

Vacated by, Remanded by *De Botton v. Kaplin, 97 A.3d 799, 2014 Pa. Super. LEXIS 829 (Pa. Super. Ct., Feb. 11, 2014)*

Later proceeding at *De Botton v. Bpg, 2018 Phila. Ct. Com. Pl. LEXIS 217, 2018 WL 11424110 (Jan. 11, 2018)*

Prior History: *BPG Real Estate Investors-Straw Party II, L.P. v. Bd. of Supervisors, 990 A.2d 140, 2010 Pa. Commw. LEXIS 111 (Pa. Commw. Ct., Mar. 5, 2010)*

Core Terms

town center, mixed use, documents, Tract, false and misleading, Sherman Act, anti trust law, allegations, conspiracy, geographic, residents, requests, oppose, sham

LexisNexis® Headnotes

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

Civil Procedure > Discovery & Disclosure > General Overview

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

Generally, the standard of review on appeal of a discovery order is abuse of discretion.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Antitrust & Trade Law, Sherman Act

Within the body of law particular to the Sherman Act, *15 U.S.C.S. § 1 et seq.*, there are concepts which represent sub-textual matters that define and shape the attendant jurisprudence. One such concept is known as a "Twombly" issue.

Antitrust & Trade Law > Sherman Act > Claims

HN3[] Sherman Act, Claims

Because *15 U.S.C.S. § 1* (Sherman Act) does not prohibit all unreasonable restraints of trade, but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether challenged anticompetitive conduct stems from an independent decision or from an agreement, tacit or express. While a showing of parallel business behavior is admissible circumstantial evidence from which a fact finder may infer an agreement, it falls short of conclusively establishing an agreement or itself constituting a Sherman Act offense. Even conscious parallelism, a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions, is not in itself unlawful. The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.

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

HN4[] Complaints, Requirements for Complaint

While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his or her entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

HN5[] Noerr-Pennington Doctrine, Right to Petition Immunity

15 U.S.C.S. § 1 makes it unlawful for persons to engage in a combination or conspiracy in restraint of trade. However, a wide variety of undertakings by persons acting in concert, to seek legislative action, judicial relief, administrative agency activity, or action by the executive branch of government may result in governmental steps which restrain competitors or diminish competition. Indeed, the very act of seeking that governmental relief, even if unsuccessful, may have adverse competitive effects. Similarly, monopolization or attempts to monopolize, which are proscribed by *15 U.S.C.S. § 2*, may be advanced by an individual or firm seeking one of these forms of governmental assistance. Additionally, conduct which is regulated by other provisions of the antitrust laws may also involve or be affected by governmental intervention and private requests for such assistance. Although such conduct may raise competitive concerns which the antitrust laws are generally designed to protect, petitions by individuals or groups of persons for governmental action or intervention implicate other important political, and even constitutional, values. There are various reasons why private requests for such action are generally immunized from challenge under the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

HN6[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

Undertakings by persons acting in concert to seek legislative action, judicial relief, administrative agency activity, or action by the executive branch of government are generally immunized from challenge under the antitrust laws because permitting an antitrust action to be predicated on private requests for governmental action would actually impair the ability of the government to function. Because the government in a representative democracy is acting on behalf of its citizens and must know what they desire and believe would best serve their interests, it is important that these channels of communication be encouraged and kept open.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

HN7[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

Undertakings by persons acting in concert to seek legislative action, judicial relief, administrative agency activity, or action by the executive branch of government are generally immunized from challenge under the antitrust laws because prohibiting such private requests would raise constitutional questions. The First Amendment protects freedom of speech and the right to petition governmental officials. Thus, even if Congress, when enacting the Sherman Act, *15 U.S.C.S. § 1 et seq.*, had sought to limit these constitutional rights, it is doubtful that such a result would be permissible.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

HN8[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

Undertakings by persons acting in concert to seek legislative action, judicial relief, administrative agency activity, or action by the executive branch of government are generally immunized from challenge under the antitrust laws because the United States Supreme Court has inferred a contrary legislative intent. Congress affirmatively chose not to extend the antitrust laws to reach conduct of a distinctly political nature.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN9[] **Noerr-Pennington Doctrine, Sham Exception**

An exemption from Noerr-Pennington immunity for undertakings by persons acting in concert to seek legislative action, judicial relief, administrative agency activity, or action by the executive branch of government arises if the "petitioning activities" are not in good faith. Petitioning activities which are a "mere sham" of true attempts to engage in political conduct, and which are designed simply to exclude competitors or injure competition, are not protected from antitrust scrutiny.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN10[] **Noerr-Pennington Doctrine, Sham Exception**

Allegations of a use of the political process solely to deny competitors "free and unlimited access" to administrative agencies and the courts are sufficient to take the conduct outside the scope of Noerr-Pennington immunity.

Judges: ALLAN L. TERESHKO, J.

Opinion by: ALLAN L. TERESHKO

Opinion

On May 22, 2012, this Court entered an Order and Findings in support thereof, stating in relevant part:

> After conducting an in camera review of the submitted documents, the following are found to be discoverable and are **ordered to be produced**. The numbers used to identify the documents are referenced from Defendant's charted submissions:
>
> **1(and 2), 8, 15, 16, 17, 18, 19, 21, 23, 24 (and 27), 30, 33, 36 (and 46), 38, 39, 48, 49 (and 54), 53 (and 60), 57, 59, 61, 62, 82, 83 and 88**.
>
> The following documents are **not required to be produced**:
>
> **3, 4, 5, 6, 7, 11 (and 13), 26 (and 28), 32, 37 (47 and 52), 44 (and 45), 75 (and 78), 81**.
>
> Some of the documents on the *need not produce list* are there because they are repetitious of other documents on the *must produce list*. If they are on the *must produce list*, this will control.
> Further, the documents in Defendants' chart, numbers 84 through and including 94 were not produced. They appear to be publicly available research documents and if such is accurate, they are equally available to Plaintiff and need not be produced.
>
> Group three, which is a series of Amended Federal **[*2]** Complaints in various non-final draft form, need not be produced.
> The unredacted versions of the documents required to be produced must be within ten (10) days.

Following the entry of this Court's Findings and Order, the Kaplin Stewart Defendants[1] appealed on May 30, 2012 and filed their Concise Statement of Errors complained of on Appeal on June 22, 2012. (See Docket). The BPG Defendants[2] appealed on May 31, 2012 and filed their Concise Statement of Errors Complained of on Appeal on June 21, 2012.

The issue to be addressed on appeal is whether the documents ordered to be produced are protected from discovery by an attorney/client privilege existing between the Kaplin Stewart Defendants and the BPG Defendants or by virtue of the work product doctrine.

HN1[] Generally, the standard of review on appeal of a discovery order is abuse of discretion." *Lockley v. CSX Transp. Inc., 2010 Pa. Super. 167, 5 A.3d 383, 388 (2010)*, *quoting* *Berkeyheiser v. A-Plus Investigations, Inc., 2007 Pa. Super. 336, 936 A.2d 1117, 1125 (2007)*.

The underlying Action is a Wrongful Use of Civil Process brought by a real estate developer against another real estate developer and its counsel defendants. The Action maintains that Defendants brought Sherman Anti-Trust

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[1] Kaplin Stewart Meloff Reiter & Stein, P.C., Marc B. Kaplin, Esquire, Barbara Anisko, Esquire, and Pamela Tobin, Esquire

[2] Ellis Acquisition, L.P., Management Partnership Benefit, L.P., Executive Benefit Partnership Campus, L.P., Berwind Property Group, Ltd., Genber/Management Campus, LLC, Cottages at Ellis Owners Association, Inc., Kelly Preserve Owners Association, Inc., Ellis Preserve Owners Association, Inc., Campus Investors Office 2B, L.P., Campus Investors Cottages, L.P, Campus Investors D Building, L.P., Campus Investors H Building, L.P., Campus Investors I Building, L.P., Campus Investors 25, L.P., Campus Investors Office B, L.P., BPG Real Estate Investors-Straw Party 2, L.P., and BPG **[*3]** Real Estate Investors-Straw Party 1, L.P.

claims in Federal Court in violation of *42 Pa. C.S. 8371* Pa. Cons. Stat. Ann. *§8351 et seq*. The Federal claims alleged violations of *Section 1* of the Sherman Act (Restraint of Trade) and *Section 2* of the Act (Attempted Monopolization). ***HN2***[] Within the body of law particular to the Sherman Act, there are concepts which represent sub-textual matters that define and shape the attendant jurisprudence.

One such concept is **[*4]** known as a "*Twombly*" issue. For purposes of this decision, the issue is best captured by Headnotes 3 and 5 of the Lawyer's Edition of the *Twombly* opinion. *Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929*; *550 U.S. 544, 127 S.Ct. 1955, 167 L. Ed. 2d 929*; *550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929*; *550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007 U.S. Lexis 5901. (2007)*.

> ***HN3***[] Because § 1 (*15 U.S.C.S. §1*) of the Sherman Act does not prohibit all unreasonable restraints of trade, but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. While a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short to conclusively establishing agreement or itself constituting a Sherman Act offense. Even conscious parallelism, a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful. The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much **[*5]** in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. *Id*. LEd HN 3.
>
> ***HN4***[] While a complaint attached by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a Plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. *Id*. LEd HN5.

Another such concept is known as the *Noerr Pennington* Doctrine. For purposes of this decision, a competent but necessarily limited explanation follows:

> ***HN5***[] *Section 1* of the Sherman Act makes it unlawful for persons to engage in a "combination...or conspiracy, in restraint of trade." However, a wide variety of undertakings by persons acting in concert, to seek legislative action, judicial relief, administrative agency activity, or action by the executive branch of government might result in governmental steps which restrain competitors or diminish competition. Indeed, the very act of seeking that governmental relief even if unsuccessful **[*6]** may have adverse competitive effects. Similarly, "monopolization or attempts to monopolize," which are proscribed by *Section 2* of the Sherman Act, might be advanced by an individual or firm seeking one of these forms of governmental assistance. Additionally, conduct which is regulated by other provisions of the antitrust laws may also involve or be affected by governmental intervention and private requests for such assistance.
>
> Although such conduct may raise competitive concerns which the antitrust laws are generally designed to protect, petitions by individuals or groups of persons for governmental action or intervention implicate other important political, and even constitutional, values. In the seminal decision dealing with the interface of antitrust prohibitions and the right to seek governmental relief, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc*., the Supreme Court identified various reasons that private requests for such action are generally *immunized* from challenge under the antitrust laws.
>
> ***HN6***[] First, permitting an antitrust action to be predicated on private requests for governmental action would actually impair the ability of the government to function. Because **[*7]** the government in a representative democracy is acting on behalf of its citizens and must know what they desire and believe would best serve their interests, it is important that these channels of communication be encouraged and kept open. ***HN7***[] Second, prohibiting such private requests would raise constitutional questions. The *First Amendment* protects freedom of speech and the right to petition governmental officials. Thus, even if Congress in 1890, when enacting the Sherman Act, had sought to limit these constitutional rights, it is doubtful that such a result would be

permissible. ***HN8***[] Third, the *Noerr* Court inferred a contrary legislative intent. The Fifty-first Congress affirmatively chose not to extend the antitrust laws to reach conduct of a distinctly *political* nature.

10-77 Federal ***Antitrust Law*** § 77.1.

HN9[] The exemption from the *Noerr-Pennington* immunity would arise if the "petitioning activities" were not in good faith.

In *Noerr*, the Supreme Court stated that petitioning activities which were a "mere sham" of true attempts to engage in political conduct, and which were designed simply to exclude competitors or injure competition, would not be protected from antitrust scrutiny. Yet, this was **[*8]** mere dictum; the Court found that the facts there fell far short of the "sham" attempt.

In *California Motor Transport Co. v. Trucking Unlimited*, however, the Supreme Court held that ***HN10***[] allegations that defendants used the political process solely to deny their competitors "free and unlimited access" to administrative agencies and the courts were sufficient to take the conduct outside the scope of the *Noerr-Pennington* immunity. However, the plaintiffs' allegations in that case were rather general, and therefore the contours of the "sham exception" were still left unclear.

In *California Transport*, the parties were competing groups of trucking companies subject to regulation by federal and state agencies. The defendants were principally established carriers; the plaintiffs were attempting to enter some of the defendants' markets. The plaintiffs alleged that the defendants instituted frequent, groundless and harassing actions before administrative agencies and in the courts, in an attempt to frustrate the adjudicative process and with the purpose of denying to the plaintiffs "free and unlimited access" to those tribunals. It was this type of conduct which the Supreme Court concluded might result **[*9]** in the loss of *Noerr* immunity.

10-77 Federal ***Antitrust Law*** § 77.4.

The third issue, which dominates the scope of discovery here, was made very much apparent as a result of the Federal Court's dismissal of the underlying Sherman Act Complaint. This issue is the failure of the Plaintiffs in the Federal Action to prove that a "relevant geographic market" exists. *BPG Real Estate Investors Straw Party 1, L.P., et al. v. Claude de Botton, et al*., 2:09-CV-01714 SD Doc. 43 (Federal Opinion).

Therefore, the scope of discovery should allow for inquiry into the areas which include acts by the Defendants here which are relevant to:

1. How the relevant geographic market was defined in the underlying Federal Complaint;

2. Issues concerning the level of fact pleading necessary to satisfy the pleading requirement established under *Twombly* and its progeny;

3. Issues concerning the *Noerr-Pennington* Doctrine which involve the Plaintiff's right to petition governmental agencies as part of permitted political conduct and Plaintiff's inherent *First Amendment Rights*;
4. Issues concerning whether the petitioning activities were "mere sham."

Various allegations in Defendant's Federal Complaint implicate the above **[*10]** issues.

B. The Relevant Market

28. The relevant market in this action is the business of developing and operating mixed use town centers located at the intersection of Route 3, an east/west axis, and Route 252, a north/south axis in the Township (the **"Intersection")**.
29. The physical location of mixed use town centers is circumscribed by a number of unique factors. Mixed use town centers can only be built where a municipality is pre-disposed to such development and/or use zoning regulations permit flexible or mixed use development. Because mixed use town centers must be substantially sized to accommodate their multiple uses, including pedestrian circulation and parking facilities, they also

require significant acreage and therefore can only be located in areas where large tracts of land are available for development. In addition, easy access to highways and the presence of a surrounding population at the appropriate density and per capita and household income levels are essential ingredients of mixed use town center developments, particularly for their retail, office and entertainment components, to be able to thrive.

30. The Ellis Preserve Tract uniquely fulfills the above criteria in **[*11]** that: (a) in or about 2001, the Township designated in its Comprehensive Plan the location of the Ellis Preserve Tract as suited for mixed use town center development; (b) at over 200 acres, the Ellis Preserve Tract contains the requisite amount of acreage for development as a mixed use town center; (c) the Ellis Preserve Tract is located at the cross roads of two major highways, Route 3 and Route 252, giving north/south and east/west access; and (d) market studies confirm that the Ellis Preserve Tract is surrounded by the requisite population demographics, as to both density and per capita and household income levels, so as to be particularly suited for mixed use town center development.
31. The Ellis Preserve Tract and the Marville Tract are the exclusive sites within the Township which can be developed as mixed use town centers due to their size, access to major highways and proximity to the required population density at the required per capita and household income levels.

32. Because the Ellis Preserve Tract and the Marville Tract are located within a mile and a half of each other, Plaintiffs and the de Botton entities are in direct competition for the same category of high-end **[*12]** retail, commercial and office tenants and for residential tenants/buyers looking to lease space or buy homes in mixed use town centers within the Township.
* * *
38. The approximately five mile area surrounding the cross roads of the two major access and travel roads (Route 3 and 252), with the requisite demographics, make the relevant geographic market a premium destination for mixed use town center development, as recognized in the Township's Comprehensive Plan.
39. Madison/Marquette had defined the relevant geographic market for the Shoppes of Marville as five miles.
40. Claude de Botton has admitted in deposition testimony that the geographic market for the Ellis Preserve MUTC and for the Marville MUTC is five miles.
* * *
64. Public meetings were held on the proposed agreement at which the de Botton Entities, directly or indirectly, through their co-conspirators MadisonMarquette, Franklin, Semeister and IC4NS, continued to oppose the Ellis Preserve MUTC by continuing to make false and misleading statements about the Ellis Preserve MUTC as more fully described in paragraphs 80 and 81 below.
* * *

F. Defendants' Anti-Competitive Conduct and False Statements

66. Once the de Botton Entities **[*13]** obtained Township approval for development of the Marville MUTC, Defendants orchestrated a scheme and embarked on a course and pattern of anticompetitive conduct to prevent, deter and delay the development of the Ellis Preserve MUTC.
67. Commencing in or around early 2007, Defendants knowingly and intentionally agreed, combined and conspired with MadisonMarquette, Franklin, IC4NS and Semeister to orchestrate and engage in a course of conduct to delay, obstruct and intentionally prevent development of the Ellis Preserve MUTC and to prevent competition for tenants and residential buyers in the mixed use town center market in the Township.
68. Upon information and belief, de Botton and Semeister agreed that Semeister would form IC4NS for the specific purpose of creating and fomenting community opposition aimed at the Ellis Preserve MUTC and not the Marville MUTC in order to delay, protract the public hearing process in an attempt to influence the Township to take action against the Ellis Preserve MUTC or inordinately delay any approval of the Ellis Preserve MUTC until the Marville MUTC was developed and operating.
* * *

71. Upon information and belief, de Botton and Franklin agreed to use **[*14]** MadisonMarquette to influence the Township to take action against the Ellis Preserve MUTC.
* * *

74. de Botton tried to prevent, deter and/or delay the Township from approving the Ellis Preserve MUTC by engaging in a publicity campaign to incite the neighboring business and residential community to oppose the Ellis Preserve MUTC, and by conspiring with and funding, either directly or indirectly, community opposition and legal proceedings in opposition to the MUTC, including, *inter alia*:

a. On or about June 15, 2007, de Botton funded the widespread distribution of a letter to residents of the Township suggesting that the Ellis Preserve MUTC would harm the Township: "Do we need, and can the area support, two new retail centers called Lifestyle Village or Town Center" and "Which one, do you think, would most affect traffic in the center of town, the LIFESTYLE CENTER one mile away from town, or the TOWN CENTER in the major crossroads of town." The Defendants attempt to differentiate the Marville MUTC as a "lifestyle center" and the Ellis Preserve MUTC as a "town center" but the terms are interchangeable.

b. Similarly, on or about June 30, 2007, de Botton funded the distribution of a letter **[*15]** to residents of the Township referring to a "new developer" proposing to create a town center on the Ellis Preserve Tract and questioning whether the community could handle this new development.

c. de Botton thereafter funded the distribution of further mailings to residents of the Township promoting false and misleading statements about BPG's proposed MUTC including disparaging BPG's reputation as a developer/owner capable of developing the Ellis Preserve MUTC.

* * *

76. In written and verbal communications to individual members of the Board and Planning Commission, de Botton and Franklin threatened to abandon the Marville MUTC plan and construct and lease five box stores instead if the Ellis Preserve MUTC was approved.

77. de Botton has also attempted to prevent, deter and/or delay the Township from approving the Ellis Preserve MUTC by causing representatives of Defendants to speak out at public meetings against the Ellis Preserve MUTC and make false and misleading statements without identifying their affiliation with Defendants so as to give the impression of wide-spread opposition to the Ellis Preserve MUTC.

* * *

80. Upon information and belief, de Botton in combination and conspiracy **[*16]** with Semeister used IC4NS as an artifice and/or instrumentality to disseminate and distribute false and misleading information to the public concerning the Ellis Preserve MUTC including, *inter alia*:

a. On or about August 8, 2007, Semeister, published in the *Delaware County Press* a statement which contained false and misleading information concerning the Ellis Preserve MUTC and which urged all residents of Newtown Township to oppose the Ellis Preserve MUTC;

b. On or about August 29, 2007, Semeister published in the *Delaware County Press* a Letter to the Editor purporting to be on behalf of IC4NS, which contained false and misleading information concerning the Ellis Preserve MUTC and which urged all residents of Newtown Township to oppose the Ellis Preserve MUTC;

* * *

80. f. IC4NS has held informational meetings to which it has invited the public and at which it has disseminated false and misleading information about the Ellis Preserve MUTC including, *inter alia*, falsely conveying that the proposed development will have a negative impact on local traffic, require road improvements at taxpayer's expense, will burden public services, cause taxes to rise significantly, increase crime, threaten **[*17]** the environment and result in property condemnations.

* * *

81. Upon information and belief, de Botton, in combination and conspiracy with Semeister, caused IC4NS to disseminate false and/or misleading statements about the Ellis Preserve MUTC to libel, disparage and defame BPG and to play on the public's fears, concerns and prejudices...

* * *

82. de Botton's and Semeister's intent was to incite the public to attend and oppose the Ellis Preserve MUTC at Township public hearings using the false and misleading information.

* * *

96. Defendants used and continue to use the municipal and judicial process, without probable cause and in complete disregard of the law, to directly interfere with BPG's ability to proceed with the Ellis Preserve MUTC.
97. The malicious and sham use of governmental and judicial proceedings and the publicity campaign was and continues to be motivated by anticompetitive conduct and monopolistic purposes.

These documents were found, after an in camera review, to be directly discoverable or reasonably contemplated to lead to discoverable evidence which is the touchstone for discoverability (citations omitted).

For the foregoing reasons, this Court respectfully requests that **[*18]** its decision to order the production of certain documents identified in its Order of May 22, 2012 be AFFIRMED.

BY THE COURT:

ALLAN L. TERESHKO, J.

7-3-12

DATE

End of Document

Organ Recovery Sys. v. Preservation Solutions, Inc.

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

July 4, 2012, Decided; July 4, 2012, Filed

Case No. 11 C 4041

Reporter

2012 U.S. Dist. LEXIS 92430 *; 2012 WL 2577500

ORGAN RECOVERY SYSTEMS, INC., Plaintiff, vs. PRESERVATION SOLUTIONS, INC., GARY L. SWANSON, BRIDGE TO LIFE, LTD., and BTL SOLUTIONS, LLC, Defendants.

Prior History: *Organ Recovery Sys., Inc. v. Preservation Solutions, Inc., 2012 U.S. Dist. LEXIS 4634 (N.D. Ill., Jan. 13, 2012)*

Core Terms

allegations, customers, argues, counterclaim, manufacturer, organ, preservation, lawsuit, monopoly power, motion to dismiss, Lanham Act, advertising, consumers, communications, deceptive, confidential information, amended complaint, abuse of process, market power, contends, products, asserts, agrees, discovery, prices, label, sham, confidentiality agreement, false designation, passing off

LexisNexis® Headnotes

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

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

In considering a party's motion to dismiss, the court takes as true the facts alleged by the party whose complaint or counterclaim is challenged.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN2[] **Contract Conditions & Provisions, Integration Clauses**

It is well settled under the doctrine of merger and the parol evidence rule that a written agreement which is complete on its face supersedes all prior agreements on the same subject matter.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN3[] **False Advertising, Lanham Act**

Section 43(a)(1)(B) of the Lanham Act, *15 U.S.C.S. § 1125(a)(1)(B)*, forbids the use of any false or misleading description of fact, or false or misleading representation of fact, which in commercial advertising or promotion, misrepresents the nature, characteristics, or qualities of the seller's or another person's goods.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN4[] **False Advertising, Lanham Act**

To establish a claim under the false or deceptive advertising prong of section 43(a)(1)(B) of the Lanham Act, *15 U.S.C.S. § 1125(a)(1)(B)*, a plaintiff must prove: (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a loss of goodwill associated with its products.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN5[] **False Advertising, Lanham Act**

Advertising is a subset of persuasion and refers to dissemination of prefabricated promotional materials. Section 43(a) of the Lanham Act, *15 U.S.C.S. § 1125(a)*, addresses promotional material disseminated to anonymous recipients. This definition contrasts a form of promotion to anonymous recipients with face-to-face communication such as a person-to-person pitch by an account executive.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN6[] **False Advertising, Lanham Act**

Commercial advertising or promotion within the meaning of section 43(a) of the Lanham Act, *15 U.S.C.S. § 1125(a)*, may consist of unsolicited statements to numerous potential clients with which an advertiser had no relationship. To be covered under § 43(a), representations must involve commercial speech by a defendant, for the purpose of influencing customers to buy the defendant's goods or services, and must be disseminated sufficiently to the relevant purchasing public to constitute advertising or promotion within that industry. Where the potential purchasers in the market are relatively small in number, a single promotional presentation to an individual purchaser may be sufficient to invoke the protections of the Lanham Act.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN7[] **False Advertising, Lanham Act**

Section 43(a) of the Lanham Act, *15 U.S.C.S. § 1125(a)*, does not cover every instance in which a business speaks to the customer of another business, even if the speaker is lying.

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

HN8[] Deceptive & Unfair Trade Practices, State Regulation

The Illinois Consumer Fraud Act (ICFA), *815 ILCS 505/2*, does not apply to fraudulent transactions which take place outside Illinois. The critical question in deciding whether an in-state transaction occurred is whether the circumstances relating to the disputed transactions occurred primarily and substantially in Illinois. The place of injury or deception is only one of the circumstances, however, and a case in which the bulk of the circumstances that make up a fraudulent transaction occur within Illinois, and the only thing that occurs out-of-state is the injury or deception, the claim may be actionable.

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

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

HN9[] Trade Practices & Unfair Competition, State Regulation

The following factors are suggestive of a claim that may be brought under the Illinois Uniform Deceptive Trade Practices Act (IUDTPA), *815 ILCS 510/2*, and the Illinois Consumer Fraud Act (ICFA), *815 ILCS 505/2*: (1) the contracts containing the deceptive statements were all executed in Illinois; (2) the defendant's principal place of business was in Illinois; (3) the contract contained express choice-of-law and forum-selection clauses specifying that any litigation would be conducted in Illinois under Illinois law; (4) complaints regarding the defendant's performance were to be directed to its Chicago office; and (5) payments for the defendant's services were to be sent to its office in Illinois.

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

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

HN10[] Trade Practices & Unfair Competition, State Regulation

The fact that a scheme to defraud was disseminated from a company's headquarters in Illinois is insufficient without more to support a claim under the Illinois Uniform Deceptive Trade Practices Act (IUDTPA), *815 ILCS 510/2*, and the Illinois Consumer Fraud Act (ICFA), *815 ILCS 505/2*.

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

HN11[] Intentional Interference, Elements

To succeed on a claim for tortious interference with prospective economic advantage under Illinois law, a plaintiff must prove (1) the plaintiff's reasonable expectation of a future business relationship; (2) the defendant's knowledge of that expectation; (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectations from ripening; and (4) damages.

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

HN12[] Intentional Interference, Elements

Illinois courts require a plaintiff claiming tortious interference with prospective economic advantage to demonstrate a sufficiently strong expectancy that he or she would receive a particular economic advantage and have rejected claims by, for example, a plaintiff who alleged only having undergone several interviews and been invited back for further interviews.

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

HN13[] Actual Monopolization, Claims

The offense of monopoly under § 2 of the Sherman Act, 15 U.S.C.S. § 2, has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. The plaintiff must also allege that defendant's conduct has caused antitrust injury, because private antitrust litigation is limited to suits by those persons for whose benefit the laws were enacted.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN14[] Actual Monopolization, Monopoly Power

Monopoly power for purposes of § 2 of the Sherman Act, 15 U.S.C.S. § 2, is the power to control prices or exclude competition. It is a seller's ability to charge a price above the competitive level (roughly speaking, above cost, including the cost of capital) without losing so many sales to existing competitors or new entrants as to make the price increase unprofitable. Monopoly does not mean that there is only one seller — a seller who has a large market share may be able to charge a price persistently above the competitive level despite the existence of competitors.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN15[] Actual Monopolization, Monopoly Power

The concept of market power in a Sherman Act § 1 case, 15 U.S.C.S. § 1, is defined as the ability to raise prices above the competitive level by restricting output. Monopoly power under 15 U.S.C.S. § 2 requires, of course, something greater than market power under § 1. Market power may well be a factor to consider in determining whether a business has monopoly power, but an allegation of market share accompanied by the Wilk factors is not sufficient to survive a Fed. R. Civ. P. 12(b)(6) motion on a § 2 claim.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN16[] Actual Monopolization, Monopoly Power

If a plaintiff fails to identify any facts from which the court can infer that defendants had sufficient market power to have been able to create a monopoly, its § 2 Sherman Act claim, 15 U.S.C.S. § 2, may be properly dismissed on a Fed. R. Civ. P. 12(b)(6) motion.

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

HN17[] Attempts to Monopolize, Elements

It is generally required that to demonstrate attempted monopolization under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

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

HN18[] **Attempts to Monopolize, Elements**

To state a claim for attempted monopolization in violation of the Sherman Act, *15 U.S.C.S. § 2*, a claimant must allege a dangerous probability of achieving monopoly power, which requires that the antitrust defendant currently has market power and that such market power will tend to approach monopoly power if the alleged unlawful conduct remains unchecked. Market share indicates market power only when sales reflect control of the productive assets in the business, for only then does it reflect an ability to curtail total market output.

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

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

HN19[] **Actual Monopolization, Claims**

The Seventh Circuit has recommended the greatest restraint in condemning any unilateral practice as monopolization, because any firm's unilateral conduct is almost always deemed lawful unless it creates a dangerous probability of success in monopolizing.

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

HN20[] **Regulated Practices, Monopolies & Monopolization**

Antitrust law condemns practices that drive up prices by curtailing output. The injury must be the result of anti-competitive behavior, meaning injury resulting from acts that either reduce output or raise prices to consumers.

Torts > Intentional Torts > Abuse of Process > Elements

HN21[] **Abuse of Process, Elements**

In order to state a claim for abuse of process, the pleading must allege the existence of an ulterior purpose or motive and some act in the use of legal process not proper in the regular prosecution of the proceedings.

Torts > Intentional Torts > Abuse of Process > Elements

HN22[] **Abuse of Process, Elements**

Unlike malicious prosecution, which involves filing a baseless suit to harass or intimidate an antagonist, abuse of process is the use of the litigation process for an improper purpose, whether or not the claim is colorable. The gist of the abuse of process tort is said to be misuse of legal process primarily to accomplish a purpose for which it was not designed, usually to compel the victim to yield on some matter not involved in the suit. If the plaintiff can show instigation of a suit for an improper purpose without probable cause and with a termination favorable to the now plaintiff, she has a malicious prosecution or a wrongful litigation claim, not a claim for abuse of process. The mere institution of proceedings, even with a malicious motive, does not in and of itself constitute abuse of process.

Torts > Intentional Torts > Abuse of Process > Elements

HN23[] **Abuse of Process, Elements**

Absent an inappropriate act in the regular prosecution of a suit, an abuse of process action will not lie.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Trade Secrets Law > ... > Remedies > Damages > Costs & Attorney Fees

Trade Secrets Law > Misappropriation Actions > General Overview

HN24[] **Basis of Recovery, Statutory Awards**

See *765 ILCS 1065/5*.

Trade Secrets Law > Misappropriation Actions > General Overview

HN25[] **Trade Secrets Law, Misappropriation Actions**

The Illinois Trade Secrets Act (ITSA) provides that it does not affect other civil remedies that are not based upon the misappropriation of a trade secret. *765 ILCS 1065/8(b)(2)*.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > False Designation of Origin

Torts > Business Torts > Unfair Business Practices > Elements

HN26[] **Likelihood of Confusion, False Designation of Origin**

A party's claim under § 43 of the Lanham Act that a competitor passed off goods as the party's and that it used a false designation of origin will succeed only if the party shows that the competitor uses in commerce any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which is likely to cause confusion, or to cause mistake, or to deceive as to the origin, sponsorship, or approval of its goods. *15 U.S.C.S. § 1125(a)(1)(A)*.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > False Designation of Origin

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN27[] **Likelihood of Confusion, False Designation of Origin**

Claims alleging false representation under the Lanham Act, *15 U.S.C.S. § 1125(a)*, are subject to *Fed. R. Civ. P. 9(b)*.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > False Designation of Origin

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN28[] **Likelihood of Confusion, False Designation of Origin**

Although false designation claims under the Lanham Act, *15 U.S.C.S. § 1125(a)*, need not involve allegations that the defendant misused a specific logo or mark, there does need to be some indication that the defendant made a false representation.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN29[] **False Advertising, Lanham Act**

The fact that a scheme to defraud was disseminated from a company's headquarters in Illinois is insufficient to support a claim under the Illinois Uniform Deceptive Trade Practices Act (IUDTPA), *815 ILCS 510/2*, and the Illinois Consumer Fraud Act (ICFA), *815 ILCS 505/2*.

Counsel: **[*1]** For Organ Recovery Systems, Inc., a Delaware corporation, Plaintiff, Counter Defendant: Michael Robert Osterhoff, LEAD ATTORNEY, Adam Louis Marchuk, Amy Suzanne Dolgin, Dawn L Johnson, Devon Curtis Beane, K&L Gates LLP, Chicago, IL.

For Preservation Solutions, Inc., a Wisconsin corporation, Gary L Swanson, an Individual, Defendants, Counter Claimants: Sean Brendan Crotty, LEAD ATTORNEY, Jerry Scott Menge, Robert F. Coleman & Associates, Chicago, IL; Allison Renee Grow, Eugene J. Schiltz, Coleman Law Firm, Chicago, IL.

For Bridge to Life, Ltd., a Delaware corporation, BTL Solutions LLC, a Delaware Corporation, Defendants, Counter Claimants: William Francis Dolan, LEAD ATTORNEY, Jeremy John Gray, Jones Day (CH), Chicago, IL; Alex Peter Middleton, Danielle Rose Olivotto, Jones Day, Chicago, IL.

Judges: MATTHEW F. KENNELLY, United States District Judge.

Opinion by: MATTHEW F. KENNELLY

Opinion

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Organ Recovery Systems, Inc. (ORS) has sued Preservation Solutions, Inc., its president Gary L. Swanson, Bridge to Life, Ltd., and BTL Solutions, LLC, for breach of contract, false advertising and unfair competition under the Lanham Act, deceptive trade practices, and **[*2]** consumer fraud. Both Preservation Solutions and Swanson (collectively PSI) and Bridge to Life and BTL Solutions (collectively BTL) filed motions to dismiss ORS's first amended complaint, which the Court granted in part. *Organ Recovery Systems, Inc. v. Preservation Solutions, Inc.,* *No. 11 C 4041, 2012 U.S. Dist. LEXIS 4634, 2012 WL 116041 (N.D. Ill. Jan. 16, 2012)*. Both PSI and BTL have now moved to dismiss ORS's second amended complaint. In addition, BTL and PSI have each filed counterclaims against ORS, and ORS has moved to dismiss those claims. In this decision, the Court rules on each of the motions to dismiss.

Background

HN1[] In considering each party's motion to dismiss, the Court takes as true the facts alleged by the party whose complaint or counterclaim is challenged. *Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7, 570 F.3d 811, 820 (7th Cir. 2009)*. The Court will discuss the allegations in more detail as necessary.

ORS's allegations are substantially similar to those the Court discussed in its previous decision, with which the Court assumes familiarity. ORS provides two solutions that are used to preserve kidneys during transplant procedures. One of these solutions, "KPS-1," is based on a freely available **[*3]** recipe developed by the University of Wisconsin. ORS attempted to improve the solution's packaging and shelf life. It entered into a contract with PSI to have PSI assist with testing, manufacturing and obtaining regulatory approval for KPS-1. The contract prohibited PSI from using or disclosing ORS's confidential information.

Since 2008 or 2009, BTL has competed with ORS in the organ preservation solutions market. The two companies sell formulas based on the same solutions and have focused on innovations in packaging and storage. ORS alleges that PSI misappropriated ORS's confidential information by using it in FDA applications and delivering it to BTL. ORS also makes a series of allegations regarding communications by BTL and/or PSI to current or prospective ORS customers that suggested false or damaging information about ORS products.

In its previous decision, the Court granted in part defendants' motions to dismiss an earlier version of ORS's complaint. Specifically, the Court dismissed claims by ORS against PSI for breach of fiduciary duty and for imposition of a constructive trust (as a separate claim rather than a remedy). The Court also dismissed ORS's claim against all defendants **[*4]** for civil conspiracy.

Discussion

A. ORS's amended complaint

1. Counts one and two

In its amended complaint, ORS asserts two claims against PSI alone. In count one, ORS alleges that PSI breached a "confidentiality agreement" that the two businesses made in 2000 "for the purpose of exploring the possibility of engaging PSI to perform work for ORS involving the development of and improvements to organ preservation solutions." 2d Am. Compl. ¶ 21. The agreement states that ORS "desires to explore the possibility of engaging [PSI] for the purpose of prototype & development of disposables and [illegible]." *Id.*, Ex. A at 1. According to ORS, PSI breached its obligations under the confidentiality agreement by "among other things, filing 510K applications with the FDA impermissibly based on ORS's Confidential Information and/or using ORS's Confidential Information in the design and development of packaging and label claims for organ preservation solutions sold and offered for sale by BTL and/or others." *Id.* ¶ 103.

In count two, ORS claims that PSI breached a 2002 contract between the parties under which PSI agreed to create solutions. PSI does not seek dismissal of count two. It contends, however, **[*5]** that count one should be dismissed because the 2000 confidentiality agreement merged into the 2002 contract. The 2002 contract contains a provision stating that it "is the entire agreement between [ORS and PSI] concerning the provision of the services described in Exhibit B (Statement of Work)." *Id.*, Ex. B at 2. The contract also "supersedes any prior agreements (including without limitation any non-disclosure agreements) proposals or other communications, oral, written, between the parties with respect to the Services." *Id.* Exhibit B to the agreement indicates that PSI agrees to undertake five projects, including "processing specifications to support the initial 510(k) for KPS-1," "initial production of KPS-1," and "design modification to packaging and shelf-life extension." *Id.*, Ex. B at 10.

HN2[] "It is well settled under the doctrine of merger and the parol evidence rule that a written agreement which is complete on its face supersedes all prior agreements on the same subject matter." *Barille v. Sears Roebuck and Co., 289 Ill. App. 3d 171, 177, 682 N.E.2d 118, 123, 224 Ill. Dec. 557 (1997)*. ORS does not appear to contest that the 2000 confidentiality agreement merged into the parties' later contract. In **[*6]** particular, ORS does not argue that the 2002 agreement is incomplete on its face, and it does not argue that the two documents concern different subject matter. ORS does argue, however, that "to the extent ORS entrusted Confidential Information to PSI prior to January 30, 2002, it was subject to the terms of the Confidentiality Agreement and any misappropriation would be subject to the terms of the Confidentiality Agreement." ORS Resp. to PSI Mot. to Dismiss at 10.

ORS does not allege that PSI did anything impermissible before the 2002 contract became effective. Rather, it alleges only that it entrusted PSI with confidential information while the confidentiality agreement was in effect. ORS offers no legal support for its argument that a breach of the 2000 confidentiality agreement that occurred, if at all, only after the 2002 contract is separately actionable under the earlier, merged agreement. The Court agrees with PSI that the earlier contract merged into the later one and therefore dismisses count one.

2. Count three

a. ORS's claims against PSI

In count three, ORS asserts claims under section 43(a)(1)(B) of the Lanham Act, *15 U.S.C. § 1125(a)(1)(B)*, against both sets of defendants. **[*7]** ***HN3***[] "Section 43(a)(1)(B) of the Lanham Act . . . forbids the use of any false or misleading description of fact, or false or misleading representation of fact, which in commercial advertising or promotion, misrepresents the nature, characteristics, or qualities of the seller's or another person's goods." *Schering- Plough Healthcare Prods. v. Schwarz Pharma, Inc., 586 F.3d 500, 503 (7th Cir. 2009)* (citing *15 U.S.C. § 1125(a)(1)(B)*) (brackets and ellipses in original omitted).

ORS's Lanham Act claims against PSI appear to be based solely on a letter that PSI sent on September 12, 2011 to (among others) an Illinois organ procurement organization ("OPO") called Gift of Hope Organ & Tissue. The letter reads as follows:

> Dear OPO Administrator:
>
> We have been informed that one of the companies that has distributed UW Cold Storage Solution in compliance with the Preservation Solutions Inc. (PSI) FDA 510K applications, K073693, K083453, and K091245 is presently distributing a Solution not manufactured by PSI. . . .
>
> This is critical to you and your patients for the following reasons:
>
> 1. The instructions for use allowed for the substituted product may be different from PSI's UW Cold Storage Solution.
>
> 2. **[*8]** The PSI product has been stability tested, reviewed and certified for storage and shipping at room temperature. (USP definition)
>
> 3. The PSI UW Cold Storage Solution has been stability tested, reviewed and certified for use without a final filter. PSI's UW Cold Storage Solution is certified to meet both USP and European Pharmacopeial limits for endotoxin.
>
> The transplant solution is an integral part of your organ transplant procedure. We know that patient safety is paramount and that full disclosure is essential to protecting your patient. Please check the product label to determine the manufacturer of the solution being supplied to your center.

2d Am. Compl., Ex. I. ORS alleges, on information and belief, that "PSI sent the same letter to OPO administrators, hospitals and other potential ORS customers throughout the country" and that "[n]umerous customers and potential customers have expressed confusion and concern regarding the content of PSI's letter." *Id.* ¶¶ 95-96. ORS alleges that two OPO employees contacted ORS to follow up on PSI's letter and that a third e-mailed other OPOs asking if "anyone know[s] what is going on?" *Id.* ¶¶ 98- 100.

HN4[] "To establish a claim under the false or deceptive **[*9]** advertising prong of § 43(a) of the Lanham Act, a plaintiff must prove: (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a loss of goodwill associated with its products." *Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 819 (7th Cir. 1999)*.

In its motion to dismiss, PSI first argues that ORS does not allege the type of conduct that § 43(a) is intended to reach — essentially, that the letter does not qualify as "commercial advertising or promotion." **HN5**[] "Advertising is a subset of persuasion and refers to dissemination of prefabricated promotional materials." *Zurich Ins. Co. v. Amcor Sunclipse North America, 241 F.3d 605, 607 (7th Cir 2001)*. The Seventh Circuit has stated "that § 43(a) addresses 'promotional **[*10]** material disseminated to anonymous recipients.'" *Sanderson v. Culligan Intern. Co., 415 F.3d 620, 624 (7th Cir. 2005)* (quoting *First Health Group Corp. v. BCE Emergis Corp., 269 F.3d 800, 804 (7th Cir. 2001))*. This definition contrasts "a form of promotion to anonymous recipients" with "face-to-face communication" such as "a person-to-person pitch by an account executive." *First Health Group, 269 F.3d at 803*.

In this same vein, the Seventh Circuit determined that "three . . . supposedly false . . . person-to-person communications at trade shows" did not qualify as advertising under § 43(a). *Sanderson, 415 F.3d at 624*. The court has also noted that "letters sent to customers do not come within the scope of § 43(a)(1)(B)." *ISI Intern., Inc. v. Borden Ladner Gervais LLP, 316 F.3d 731, 733 (7th Cir. 2003)*. The Seventh Circuit has never held, however, that "anonymous" must mean that a corporation cannot know the identities of the recipients of the communications.

This Court has recently determined that **HN6**[] commercial advertising or promotion within the meaning of § 43(a) may consist of "unsolicited statements to numerous potential clients with which [an advertiser] had no relationship." *Gov't Payment Serv., Inc. v. LexisNexis VitalChek Network, Inc., No. 12 C 1946, 2012 U.S. Dist. LEXIS 73943, 2012 WL 1952905, at *5 (N.D. Ill. May 29, 2012)*. **[*11]** This Court has also noted determinations from other circuits stating that to be covered under § 43(a), representations must "involve commercial speech by a defendant, for the purpose of influencing customers to buy the defendant's goods or services, and must be disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry." *Installation Servs., Inc. v. Elec. Research, Inc., No. 04 C 6906, 2005 U.S. Dist. LEXIS 17185, 2005 WL 645244, at *2 (N.D. Ill. Mar. 21, 2005)*. Another court has concluded that "where the potential purchasers in the market are relatively small in number a single promotional presentation to an individual purchaser may be sufficient to invoke the protections of the Lanham Act." *Derby Indus., Inc. v. Chestnut Ridge Foam, Inc., 202 F. Supp. 2d 818, 822-23 (N.D. Ind. 2002)*.

PSI contends that ORS's Lanham Act claim fails because "actionable advertising must be anonymous" and ORS has alleged only "[p]erson to person statements" by PSI. PSI Reply at 2-3. ORS, however, has alleged that the letter was received by "potential ORS customers throughout the country." 2d Am. Compl. ¶ 95. The fact that the letter that ORS submitted with its amended **[*12]** complaint is addressed "Dear OPO Administrator" rather than to a named individual or business supports ORS's suggestion that it was a mass unsolicited communication. The Court concludes that even if PSI's letter was specifically targeted to OPOs — which would mean that PSI knew the identities of all recipients based on its mailing list — ORS has alleged that the letters were a generalized solicitation rather than an individualized communication. For this reason, ORS has not failed to allege "commercial advertising or promotion."

PSI next argues that ORS has not alleged that the letter had the necessary effect on customers. Because ORS is arguing not that the letter made false statements but rather that it made statements that "may be literally true or ambiguous, but which implicitly convey a false impression [or] are misleading in context," ORS must "prove that the statement is misleading in context by demonstrated actual consumer confusion." *Hot Wax, 191 F.3d at 820*. The Court agrees with ORS that claims that three OPO employees expressed confusion — two of them directly to ORS — allege customer confusion sufficiently to survive PSI's motion to dismiss. These allegations could also **[*13]** support a finding that ORS is "likely to be injured as a result of" PSI's statements. *See id. at 819*.

For these reasons, the Court declines to dismiss count three as against PSI.

b. ORS's claims against BTL

BTL makes an argument similar to one of PSI's arguments: apart from one press release, the communications that ORS contends provide a basis for a Lanham Act claim do not constitute "commercial advertising or promotion." In response, ORS argues that several of its allegations independently support the claim and those that do not should be construed in the aggregate.

In a section of its complaint entitled "BTL's Misrepresentations," ORS alleges that a BTL officer sent a "broadcast email to 'Organ Procurement Professional[s]'" stating falsely that it was "Bridge to Life that made the FDA approved label change for the room-temperature storage of UW solution possible." 2d Am. Compl. ¶ 65. ORS argues that it was ORS itself, not BTL, that enabled the label change and that for BTL to imply otherwise is damaging to ORS. ORS alleges that BTL issued a press release in April 2009 that contained similar information. *Id.* ¶ 74.

Both of these statements can support a claim that BTL engaged in advertising **[*14]** or commercial speech. Even if ORS knew all of the businesses that would receive the broadcast e-mail, the allegations would allow for a finding that the e-mail was not specifically targeted to any of them individually. Rather, as characterized by ORS, the e-mail was an anonymous communication not in the sense that a television commercial is anonymous, but in that it was a generic communication to a large group, and each recipient was provided with the same material.

ORS alleges that "BTL attempted to acquire one of ORS' customers, New England Organ Bank, by making false and disparaging remarks about ORS" and that "[u]pon information and belief, BTL has made similar statements to other potential customers and ORS's existing customers as well." *Id.* ¶ 70. These allegations cannot serve as the basis for a Lanham Act claim because they describe individualized communications. ***HN7***[] The Lanham Act does not cover every instance in which a business speaks to the customer of another business, even if the speaker is lying. ORS alleges that this act occurred because BTL was specifically trying to acquire a particular customer. Whether or not this might be actionable under another legal theory, it does **[*15]** not amount to "advertising" for purposes of the Lanham Act.

The same is true of ORS's allegations that it and BTL both responded to a call for proposals from a transplant organization in the United Kingdom and that BTL's response improperly included false statements about ORS. BTL's statements were individualized communications, as were the two additional examples of person-to-person communications listed in the amended complaint — ORS alleges that named BTL personnel "told" something to named OPO personnel. 2d Am. Compl. ¶¶ 84-85. This is likewise true of ORS's allegation that "BTL has told organ preservation solution customers that ORS has had a recall of SPS-1 when, in fact, it was BTL that had a recall of its static preservation solutions." *Id.* ¶ 89. Although ORS contends that these communications are examples of a larger advertising campaign, the manner in which they are alleged in the amended complaint does not permit that characterization.

The Court therefore declines to dismiss count three in its entirety as against BTL but circumscribes ORS's claims to those the Court has indicated may viably be characterized as advertising within the meaning of § 43(a).

3. Counts four and five

a. [*16] ORS's claims against PSI

In count four, ORS asserts a claim under the Illinois Uniform Deceptive Trade Practices Act (IUDTPA), *815 ILCS 510/2*, against both sets of defendants. In count five, it asserts a claim under the Illinois Consumer Fraud ACT (ICFA), *815 ILCS 505/2*, against both sets of defendants.

ORS bases its claims against PSI on two sets of allegations. First, ORS alleges that PSI is liable under IUDTPA and ICFA for the conduct discussed in the previous section, because "claims under [IUDTPA and ICFA] rise and fall with . . . Lanham Act claims." *M. Arthur Gensler, Jr. & Assocs., Inc. v. Strabala, No. 11 C 3945, 2012 U.S. Dist. LEXIS 21255, 2012 WL 600679, at *3 (N.D. Ill. Feb. 21, 2012)* (citing *MJ & Partners Rest. Ltd. P'ship v. Zadikoff, 10 F. Supp. 2d 922, 929 (N.D. Ill. 1998))*. PSI argues that because the Lanham Act claims are deficient, these claims fail as well. The Court has determined, however, that ORS's Lanham Act claim based on PSI's letter survives. PSI offers no other argument regarding why this portion of ORS's IUDTPA claim or its ICFA claim should be dismissed.

ORS's IUDTPA claim also contains allegations that PSI "engaged in unfair and deceptive trade practices by exploiting ORS's Confidential **[*17]** Information for [its] own gain" by filing "applications with the FDA impermissibly based on ORS's Confidential Information" and using the information "in the design and development of the packaging for BTL's organ preservation solutions." 2d Am. Compl. ¶¶ 122-24. [1] After the Court issued its previous decision in this case, PSI filed a motion seeking clarification. At a hearing on the motion, the Court stated:

> I don't think the complaint alleges that PSI itself ever made a deceptive claim about its products in the way that it alleges that BTL did. On the other hand, the plaintiff has alleged the PSI made the solutions for BTL using the plaintiff's confidential information. And that at least in theory could fit under a section of the [IUDTPA] as other conduct creating a likelihood of confusion. The complaint can be read, I think fairly, as saying that PSI and Swanson as the makers of the solution then supported and profited from this sort of what the statute calls a deceptive practice. . . .
>
> So I'm, frankly, not quite sure as I sit here exactly what the theory is that the plaintiff is advancing on Count 4, but I guess I'm not prepared to dismiss it at this point. It may be that what ought **[*18]** to happen is it ought to be repled in some way, or it maybe ought to be tweaked, I guess.

Feb. 6, 2012 Tr. at 6-7.

PSI appears to suggest that ORS's failure to "tweak" its allegations mandates dismissal. The Court did not state, however, that ORS was required to alter its complaint in order for this claim to survive. As the Court indicated during the hearing, ORS's allegations of conduct by PSI provide a sufficient basis for a claim that PSI can be found to have engaged in "other conduct which similarly creates a likelihood of confusion or misunderstanding." *815 ILCS 510/2(a)(12)*.

For these reasons, the Court declines to dismiss count five as against PSI.

b. ORS's claims against BTL

BTL argues that ORS has failed to allege a significant connection between the conduct at issue and Illinois, which both IUDTPA and ICFA require. The Illinois Supreme Court has held that ***HN8***[] ICFA does not "apply to fraudulent transactions which take place outside Illinois." *Avery v. State Farm Mut. Auto. Ins. Co., 216 Ill. 2d 100, 185, 835 N.E.2d 801, 853, 296 Ill. Dec. 448 (2005)*. **[*19]** The "critical question" in deciding whether an in-state transaction occurred is "whether the circumstances relating to [the] disputed transactions . . . occurred primarily and substantially in Illinois." *Id. at 187, 835 N.E.2d at 854*. "The place of injury or deception is only one of the circumstances," however, and a case in which "the bulk of the circumstances that make up a fraudulent transaction

[1] Although the amended complaint indicates that ORS asserts a claim based on this confidential information against BTL as well as PSI, neither BTL's motion to dismiss nor ORS's response mentions the point.

occur within Illinois, and the only thing that occurs out-of-state is the injury or deception," the claim may be actionable. *Id. at 187, 835 N.E.2d at 853*.

The Seventh Circuit has noted that the *Avery* standard is "not exactly self defining." *Morrison v. YTB Intern., Inc., 649 F.3d 533, 538 (7th Cir. 2011)*. The Illinois Supreme Court did indicate, however, that factors including ***HN9***[] the following were suggestive of a claim that may be brought under IUDTPA and ICFA: "(1) the contracts containing the deceptive statements were all executed in Illinois; (2) the defendant's principal place of business was in Illinois; (3) the contract contained express choice-of-law and forum-selection clauses specifying that any litigation would be conducted in Illinois under Illinois law; (4) complaints regarding **[*20]** the defendant's performance were to be directed to its Chicago office; and (5) payments for the defendant's services were to be sent to its Chicago office." *Avery, 216 Ill. 2d at 189, 835 N.E.2d at 855*.

Bridge to Life (one of the two defendants referred to in this opinion collectively as BTL) is a Delaware corporation that has its principal place of business in Illinois. ORS is also headquartered in Illinois. ***HN10***[] "The fact that a scheme to defraud was disseminated from a company's headquarters in Illinois is insufficient" without more. *Phillips v. Bally Total Fitness Holding Corp., 372 Ill. App. 3d 53, 58, 865 N.E.2d 310, 315, 309 Ill. Dec. 947 (2007)*. In this case, however, both the plaintiff and one of the defendants are headquartered in Illinois. (Defendants use "BTL" in the counterclaim, referring to themselves collectively, allowing for an inference that the circumstances of "BTL's" transactions were the same for both of them.) It is likely that the disputed communications - which include press releases and a blast e-mail - originated in Illinois and that ORS felt harm in Illinois. In that event, even if all of the disputed communications reached only out-of-state plaintiffs, that would not necessarily **[*21]** place the acts beyond ICFA's reach. *Avery, 216 Ill. 2d at 187, 835 N.E.2d at 853*. The Court declines to dismiss count four on this basis at this stage of the proceedings.

BTL argues that IUDTPA claims are subject to the same territoriality requirement as ICFA claims. *See LG Elecs. USA, Inc. v. Whirlpool Corp., 809 F. Supp. 2d 857, 859- 61 (N.D. Ill. 2011)*. Other than its argument that IUTDPA claims are also analyzed under the Lanham Act, BTL offers no other argument that the Court should dismiss count five. For the reasons already stated, the Court declines to do so.

4. Count six

In count six, ORS asserts a claim against BTL for tortious interference with prospective economic advantage. ***HN11***[] To succeed on this claim under Illinois law, a plaintiff must prove "(1) the plaintiff's reasonable expectation of a future business relationship; (2) the defendant's knowledge of that expectation; (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectations from ripening; and (4) damages." *Ali v. Shaw, 481 F.3d 942, 944 (7th Cir. 2007)*.

BTL argues that ORS's complaint fails to identify anyone with whom ORS had an actual "expectation of a future business relationship." **[*22]** ***HN12***[] Illinois courts require a plaintiff to demonstrate a "sufficiently strong expectancy" that he or she would receive a particular economic advantage and have rejected claims by, for example, a plaintiff who alleged only having "undergone several interviews [and] been invited back for further interviews." *Anderson v. Vanden Dorpel, 172 Ill. 2d 399, 409-411, 667 N.E.2d 1296, 1300-01, 217 Ill. Dec. 720 (1996)*; *see also Aslam v. Bd. of Educ. of City of Chi., No. 06 C 4920, 2008 U.S. Dist. LEXIS 83798, 2008 WL 3978562, at *8 (N.D. Ill. Aug. 25, 2008)* (dismissing claims by plaintiff "relying on . . . merely the hope of being eligible to receive a job offer in the future"); *Automated Concepts, Inc. v. Weaver, No. 99 C 7599, 2000 U.S. Dist. LEXIS 11560, 2000 WL 1134541, at *7 (N.D. Ill. Aug. 9, 2000)* ("[A] 'track record' of receiving work from a particular customer in the past, in and of itself, does not establish a reasonable expectation of . . . entering into any particular future business relationship."); *Hoopla Sports and Ent., Inc. v. Nike, Inc., 947 F. Supp. 347, 358 (N.D. Ill. 1996)* ("[A]lthough a plaintiff need not allege that it had a firm offer in hand prior to the alleged interference, mere allegations that the plaintiff was involved in the process of negotiations **[*23]** with a third party were insufficient.").

For the most part, BTL is correct that ORS has failed to plead an actual expectancy. For example, as the Court indicated earlier, ORS emphasizes an incident in which both ORS and BTL responded to a British OPO's "request to submit a proposal to supply the UK with static cold storage solution." 2d Am. Compl. ¶ 79. The OPO then "relied on BTL's misrepresentation [about the quality of ORS's solutions] in making [its] purchasing decisions." *Id.* ¶ 82. The Court concludes that ORS's allegations regarding this incident are insufficient because there is no indication that there was an actual business expectancy. Mere unsuccessful solicitation does not give rise to a tortious interference claim.

ORS cites two cases in support of its claims. In one, a resort developer successfully alleged that there was a business expectancy after he received a letter of interest from a large hotel company and "entered into preliminary negotiations" about a property. *Clarage v. Kuzma, 342 Ill. App. 3d 573, 577, 795 N.E.2d 348, 353, 276 Ill. Dec. 995 (2003)*. In the other, "allegations that negotiations regarding an exclusive supply agreement were conducted" were sufficient. *Laser Inds., Ltd. v. Eder Instrument Co., 573 F. Supp. 987, 993 (N.D. Ill. 1983)*. **[*24]** ORS argues that these cases show that allegations of "preliminary stages of negotiation are sufficient" to support a claim for tortious interference. ORS Resp. to BTL Mot. to Dismiss at 12. Even that is true, ORS has not alleged that it had entered any kind of negotiations with the British OPO, but only that it responded to a call from proposals. ORS has not alleged any response from the British OPO indicating interest or the initiation of a business relationship, and this allegation therefore cannot support ORS's tortious interference claim against BTL.

ORS also alleges that BTL made misrepresentations to three specific OPOs and alleges generally that ORS has made "misrepresentations to consumers" and that "consumers have relied on the same or similar misrepresentations made by BTL in making their purchasing decisions." 2d Am. Compl. ¶¶ 81-86. With one exception, these allegations suffer from the same problem as those in the previous paragraph: even if BTL's communications influenced the consumers' decisions, there is no allegation that ORS had a prospective business arrangement or a relationship of any kind with them.

ORS does allege that BTL made misstatements to Juan Ramirez, an **[*25]** employee of One Legacy OPO. "[B]ased on his belief that BTL's solutions were the only 'Belzer UW' solutions in the marketplace, and after having previously orally committed to purchasing ORS's products, [the employee] chose to purchase BTL's products instead." *Id.* ¶ 86. ORS's statement that it had received a commitment from One Legacy to purchase its product constitutes a sufficient allegation of a business expectancy.

BTL argues, however, that the allegations regarding Ramirez cannot support a claim because ORS has not alleged that BTL had "knowledge of that expectation." *See Ali, 481 F.3d at 944*. The Court agrees. Nothing in ORS's amended complaint suggests, generally or specifically, that BTL knew that Ramirez had agreed to purchase ORS products or had entered a business relationship with ORS in any way.

For these reasons, the Court dismisses count six.

B. BTL's counterclaim

1. Count one

In count one of its counterclaim, BTL alleges that ORS has engaged in monopolization in violation of the Sherman Act, *15 U.S.C. § 2*. BTL alleges that ORS dominates the organ preservation solutions market and has utilized anti-competitive tactics — primarily the filing of this lawsuit — to drive BTL out **[*26]** of business and punish PSI for working with BTL. According to BTL, this has, among other things, "increased costs to customers by preventing competitive entrants from reaching economies of scale." BTL Countercl. ¶ 76.

HN13[] The "offense of monopoly under *§ 2* of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

Goldwasser v. Ameritech Corp., 222 F.3d 390, 396-97 (7th Cir. 2000) (quoting Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)) (internal quotation marks omitted). BTL must also allege that ORS's conduct has caused "antitrust injury" because "private antitrust litigation is limited to suits by those persons for whose benefit the laws were enacted." Robert F. Booth Trust v. Crowley, 687 F.3d 314, No. 10-3285, 2012 U.S. App. LEXIS 11927, 2012 WL 2126314, at *1 (7th Cir. June 13, 2012).

ORS argues that BTL's allegations are insufficient to meet each of these three requirements. First, ORS argues that BTL has not alleged facts sufficient to establish that ORS has monopoly **[*27]** power in the relevant market. ***HN14***[] "Monopoly power is the power to control prices or exclude competition." United States v. E.I. du Pont Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). It "is a seller's ability to charge a price above the competitive level (roughly speaking, above cost, including the cost of capital) without losing so many sales to existing competitors or new entrants as to make the price increase unprofitable." Sheridan v. Marathon Petroleum Co., 530 F.3d 590, 594 (7th Cir. 2008). "Monopoly" does not mean that there is only one seller — "a seller who has a large market share may be able to charge a price persistently above the competitive level despite the existence of competitors." *Id.*

In its response to ORS's motion to dismiss, BTL relies in large part on the Seventh Circuit's statement that it has not "rule[d] out [the] approach" of "relying solely on market share as a basis for inferring market power . . . especially . . . where there are barriers to entry and no substitutes from the consumer's perspective." Wilk v. Am. Med. Ass'n, 895 F.2d 352, 360 (7th Cir. 1990). BTL contends that its allegation that ORS has a sixty-eight percent market share is sufficient to allege monopoly **[*28]** power when considered along with the barriers to entry posed by the FDA approval process and the small number of participants in the organ preservation solutions market.

Wilk, however, does not concern the definition of monopoly power. Rather, the quoted discussion involves ***HN15***[] the concept of market power in a Sherman Act § 1 case, which is defined as "the ability to raise prices above the competitive level by restricting output." Id. at 359. "Monopoly power under § 2 requires, of course, something greater than market power under § 1." Eastman Kodak, 504 U.S. at 481. Market power may well be a factor to consider in determining whether a business has monopoly power, but BTL provides no support for the proposition that an allegation of market share accompanied by the *Wilk* factors is sufficient to survive a 12(b)(6) motion on a § 2 claim.

The only other fact that BTL argues is indicative of monopoly power is that in "2008 to 2009, ORS implemented massive price increases (300% or higher) for some of its products, including the 'kits' that are necessary for the use of its machine perfusion pumps." BTL Countercl. ¶ 31. The ensuing paragraph of the counterclaim states, "ORS exercises monopoly power **[*29]** in the organ preservation solution market, as evidenced by its ability to unilaterally impose large price increases on its customers." *Id.* ¶ 32. ORS argues that these allegations are irrelevant because the relevant market in this case is that of organ solutions, not kits, and the price increase is indicative only of ORS's power in the kits market.

The Court agrees that the language in paragraph thirty-one provides no indication of ORS's power in the organ preservation solutions market, and paragraph thirty-two is a legal conclusion. The statement about price increases thus cannot provide an additional basis for finding monopoly power, leaving BTL with only its allegations regarding market power. As the Court has explained, these allegations are insufficient.

HN16[] If a plaintiff "fail[s] to identify any facts from which the court can infer that defendants had sufficient market power to have been able to create a monopoly, [its] § 2 claim may be properly dismissed" on a Rule 12(b)(6) motion. Endsley v. City of Chicago, 230 F.3d 276, 282 (7th Cir. 2000) (internal quotation marks and citation omitted). In *Endsley*, the Seventh Circuit considered allegations that the tolls for the Chicago Skyway **[*30]** bridge were higher than what was needed to meet operating costs, violating § 2. The court concluded that plaintiffs had failed to allege "that defendant had enough market power to create a monopoly" because "very viable" alternative options were available to consumers even though the Skyway was "more desirable." Id. at 282-83. "If the Skyway tolls become too high, drivers will take one of the alternate routes." Id. at 283.

BTL has not alleged that no viable alternatives exist for customers who find ORS's prices for organ preservation solutions to be too high. Although a firm need not be the only seller in a market to exercise monopoly power, BTL's allegation that its "sales account for approximately 28 percent [of] both the static and machine perfusion forms of Wisconsin-formula solutions" cuts against an implication that customers lack other options. BTL Countercl. ¶ 20. The same is true of BTL's allegation that "ORS has been forced to reduce its prices or forestall price increases due to the competitive presence of BTL in the marketplace." *Id.* ¶ 29.

The Court concludes that BTL has not alleged facts sufficient to support a finding that ORS has exercised monopoly power at any time relevant **[*31]** to this lawsuit. The Court therefore dismisses count one of BTL's counterclaim.

2. Count two

In count two of its counterclaim, BTL alleges, based on essentially the same facts set forth in count one, that ORS has engaged in conduct that constitutes attempted monopolization in violation of the Sherman Act. ***HN17***[] "[I]t is generally required that to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*.

BTL argues that it has alleged anti-competitive acts, primarily based on ORS's filing of this lawsuit. BTL contends that the lawsuit amounts to sham litigation and that ORS's claims are objectively baseless. Since the filing of this lawsuit, BTL alleges, it "has been forced to divert most of its available revenue away from research on pioneering organ preservation technology and into a legal defense against ORS's sham and baseless claims." BTL Countercl. ¶ 25. "BTL has had no choice but to reduce its research and development efforts, which will delay the **[*32]** introduction of these new and improved products to the organ transplant community." *Id.* BTL also argues in its brief that ORS has used the lawsuit to try to capture the production of organ preservation solutions by, for example, seeking the placement of PSI's assets in a constructive trust. BTL contends that because ORS has an exclusive relationship with an entity that BTL alleges is the only other manufacturer of organ preservation solutions in the country, ORS's success in this lawsuit — or even its continued prosecution of the suit — will drive BTL and PSI out of the marketplace. If the lawsuit turns out to be baseless, BTL argues, that will indicate that ORS filed the suit in bad faith to produce exactly these effects.

ORS argues that even if it had filed a sham lawsuit, it would not be liable under the Sherman Act based on that alone. BTL's allegations, however, concern not just the filing of this suit but ORS's alleged use of it to gain effective control of the manufacture of organ preservation solutions. The Court agrees with BTL that if ORS's actions and motivation are as alleged, that would constitute an anti-competitive act.

HN18[] BTL must also allege a "dangerous probability of **[*33]** achieving monopoly power," which requires that "the antitrust defendant currently has market power and that such market power will tend to approach monopoly power if the alleged unlawful conduct remains unchecked." *Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, Inc., 669 F. Supp. 2d 895, 901 (N.D. Ill. 2009)*. "Market share indicates market power only when sales reflect control of the productive assets in the business, for only then does it reflect an ability to curtail total market output." *Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1414 (7th Cir. 1989)*.

ORS makes no argument specifically directed at count two, and it does not discuss at all the question of its probability of achieving monopoly power. ***HN19***[] The Seventh Circuit has recommended "the greatest restraint in condemning any unilateral practice as 'monopolization'" because "any firm's unilateral conduct is almost always deemed lawful unless it creates a dangerous probability of success in monopolizing." *Schor v. Abbott Labs., 457 F.3d 608, 613 (7th Cir. 2006)*. If ORS acted in the manner described in the previous paragraphs, however, and if it succeeded in driving BTL and PSI out of the marketplace, **[*34]** ORS would end up with a market share of nearly ninety percent. It would also have an exclusive relationship with the only remaining manufacturer. Thus if BTL and PSI were to leave the marketplace, ORS would almost certainly achieve monopoly power. Assuming the truth of

BTL's allegations, therefore, BTL has sufficiently alleged the dangerous probability element of an attempted monopolization claim.

ORS also argues that BTL has failed to allege that ORS's conduct could cause an antitrust injury. ***HN20***[] "***Antitrust law*** condemns practices that drive up prices by curtailing output." *Sanderson, 415 F.3d at 623*. The injury must be the result of anti-competitive behavior, meaning "injury resulting from acts that either reduce output or raise prices to consumers." *Medrad, Inc. v. Sprite Dev., LLC, No. 08 C 5088, 2011 U.S. Dist. LEXIS 99848, 2011 WL 3900730, at *3 (N.D. Ill. Sept. 6, 2011)*; *see also* *Midwest Gas Servs., Inc. v. Indiana Gas Co., 317 F.3d 703, 714 (7th Cir. 2003)* (rejecting claim of antitrust injury when "losses [do not] stem from . . . behavior that is anticompetitive, *e.g.*, predatory pricing"). According to ORS, BTL's allegations regarding the lawsuit fail to include facts regarding prices or output. The Court disagrees. **[*35]** BTL's claim is essentially that ORS is trying to prevent BTL from succeeding in the marketplace, which would leave ORS as the only real option for consumers. BTL also alleges that ORS is trying to control output by trying to disable PSI. Taking BTL's allegations in the light most favorable to BTL, as required at this stage of the proceedings, it has sufficiently alleged that ORS's success in its alleged endeavor would have a high likelihood of lowering output and raising prices of organ preservation solution. The Court accordingly declines to dismiss the count two on this basis.

ORS argues that if a claim based on sham litigation survives, the Court should stay count two and the associated discovery until the end of this lawsuit. At that point, if ORS has prevailed in its action against BTL, BTL's sham litigation counterclaim necessarily will fail because a successful claim, by definition, cannot constitute sham litigation. *See, e.g.,* *Rubloff Dev. Group, Inc. v. SuperValu, Inc., 863 F. Supp. 2d 732, 2012 U.S. Dist. LEXIS 41304, 2012 WL 1032784 (N.D. Ill. Mar. 27, 2012)* (citing *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993))* ("As to the sham lawsuit branch, the lawsuits must **[*36]** first be objectively meritless before any exploration of subjective intent can be undertaken. A successful action, by definition, cannot be objectively meritless.").

ORS has also separately moved the Court for a stay. BTL argues that a stay is inappropriate because it would lead to needless duplication of extensive discovery proceedings. For example, BTL argues that delaying discovery would result in the need to re-depose several witnesses at additional inconvenience and expense at a later point in time, when those witnesses' memories of the relevant events will be less clear than it is today. BTL argues that a stay will also lead to further disputes between the parties as they fight about whether particular discovery requests are relevant only to antitrust issues. BTL also claims that the motion comes too late, having been filed four months after BTL filed its counterclaim and after a significant amount of discovery has already been exchanged.

The Court concludes that a stay is justified. As described above, success by ORS on one or more of its claims would leave BTL unable to prevail on count two. The discovery on ORS's claims and the antitrust counterclaim is not so intertwined so **[*37]** as to make a stay pointless. The Court is unpersuaded that it will be unable to sort out relevance issues as BTL contends. On the flip side, a stay may allow all concerned to avoid a great deal of expensive and time-consuming discovery. The Court grants ORS's motion for a stay of discovery with regard to count two of BTL's counterclaim.

3. Count three

In count three, BTL asserts a claim for abuse of process based on its arguments that this lawsuit is a sham. ***HN21***[] "In order to state a claim for abuse of process, the pleading must allege the existence of an ulterior purpose or motive and some act in the use of legal process not proper in the regular prosecution of the proceedings." *Reed v. Doctor's Assocs, Inc., 355 Ill. App. 3d 865, 875, 824 N.E.2d 1198, 1206, 291 Ill. Dec. 948 (2005)*. BTL argues that it has "allege[d] in detail that ORS brought its sham litigation to interfere with BTL's business" and that "Illinois courts hold that suits brought for such purposes are 'not proper' and state a claim for abuse of process." BTL Resp. to ORS Mot. to Dismiss at 11.

ORS responds that BTL has mischaracterized the nature of a claim for abuse of process. The Court agrees:

> HN22[] Unlike malicious prosecution, which involves filing **[*38]** a baseless suit to harass or intimidate an antagonist, abuse of process is the use of the litigation process for an improper purpose, whether or not the claim is colorable. "The gist of the abuse of process tort is said to be misuse of legal process primarily to accomplish a purpose for which it was not designed, usually to compel the victim to yield on some matter not involved in the suit . . . . If the plaintiff can show instigation of a suit for an improper purpose without probable cause and with a termination favorable to the now plaintiff, she has a malicious prosecution or a wrongful litigation claim, not a claim for abuse of process."

Nightingale Home Healthcare, Inc. v. Anodyne Therapy, LLC, 626 F.3d 958, 963 (7th Cir. 2010) (quoting 2 Dan B. Dobbs, *The Law of Torts* § 438 (2001)). "The mere institution of proceedings, even with a malicious motive, does not in and of itself constitute abuse of process." *Landau v. Schneider, 154 Ill. App. 3d 875, 878, 506 N.E.2d 735, 737, 106 Ill. Dec. 935 (1987)*.

BTL essentially alleges that ORS's entire lawsuit was designed to drive BTL out of business by subjecting it to overly burdensome attorneys' fees. BTL cites two cases in support of its allegations. BTL **[*39]** argues that the judge in the first case denied a motion to dismiss because the bringing of a lawsuit to interfere with business can support a claim. The judge in that case, however, noted that the claimant alleged that the plaintiff was using the proceedings to hire an employee and interfere with a particular business relationship. *Junction Solutions, LLC v. MBS Dev., Inc., No. 06 C 1632, 2007 U.S. Dist. LEXIS 86953, 2007 WL 4234091, at *4 (N.D. Ill. Nov. 20, 2007)*.

BTL's second case does include language to the effect that "harassment, economic hardship, and distraction from the marketplace in order to control the market are acts in the use of legal process." *Helene Curtis Inds., Inc. v. Milo Corp., No. 84 C 5217, 1985 U.S. Dist. LEXIS 23870, 1985 WL 1282 (N.D. Ill. May 2, 1985)*. To the extent that this case implies that simply filing a lawsuit for these purposes gives rise to a claim of abuse of process, however, the Court concludes that subsequent Seventh Circuit precedent has foreclosed this contention. *See* *Nightingale, 626 F.3d at 963*; *Evans v. West, 935 F.2d 922, 923 (7th Cir. 1991)* HN23[] ("Absent an 'inappropriate act' in the regular prosecution of a suit, an abuse of process action will not lie."). Because BTL has not alleged an "inappropriate **[*40]** act" beyond filing and maintaining the instant lawsuit, the Court dismisses count three of BTL's counterclaim.

4. Count four

Section 5 of the Illinois Trade Secrets Act (ITSA), *765 ILCS 1065/5*, provides: HN24[] "If a claim of misappropriation is made in bad faith . . . the court may award reasonable attorney's fees to the prevailing party." In count four of its counterclaim, BTL alleges that it is entitled to damages under ITSA based on the following events. ORS initiated this lawsuit with a complaint that included allegations that ORS's "trade secrets" had been stolen. After BTL moved to dismiss the complaint, ORS filed an amended complaint that did not include the phrase "trade secrets." In the amended complaint, ORS classified the information that had been the subject of its trade secrets claim as "confidential information," the misappropriation of which was the basis for a claim of civil conspiracy. The Court granted BTL's motion to dismiss this claim, concluding that ORS had not alleged anything other than the misappropriation of information and that the claim was therefore preempted by ITSA.

ORS argues that this sequence of events does not render BTL a "prevailing party" for purposes of **[*41]** the statute. ORS points out that it voluntarily filed a new complaint that did not include a trade secrets claim and that the claim the Court dismissed did not implicate ITSA because it sought a separate remedy. BTL responds that there is "no doubt that, absent the unlikely contingency of a reversal on appeal, ORS could never revive its misappropriation claim." BTL Resp. to ORS Mot. to Dismiss at 12. As ORS notes, however, BTL cites no authority to support its assertion that the Court's dismissal of ORS's civil conspiracy claim can support BTL's current ITSA damages claim just because the dismissed claim involved the same factual allegations and the word "misappropriation." BTL's contention is also unconvincing in light of the fact that HN25[] ITSA provides that it "does not affect . . . other civil remedies that are not based upon the misappropriation of a trade secret." *765 ILCS 1065/8(b)(2)*. The Court concludes that BTL has not shown that ITSA permits a defendant to recover damages as a prevailing party when a plaintiff has dismissed its own claim. The Court therefore grants ORS's motion to dismiss count four of BTL's counterclaim.

5. Count five

In count five of its counterclaim, BTL asserts **[*42]** a claim against ORS under § 43(a) of the Lanham Act. BTL contends that ORS has engaged in false advertising by misrepresenting that it has FDA approval to sell its SPS-1 solution with a label indicating that the solution does not need to be filtered before use. BTL attaches to its counterclaim two documents retrieved from ORS's website. The documents appear to be pamphlets or brochures, and they include statements that no filter is necessary for the use of ORS products.

ORS argues that this claim cannot survive not because the communications do not constitute advertising, but because ORS has, in fact, received approval from the FDA. In support of this argument, ORS submits four letters. The first is a letter from an FDA employee to ORS's director of regulatory affairs. In the letter, the FDA asked ORS to address marketing concerns, including the fact that the product as labeled did not include a filtering requirement. In its response to the FDA's letter, ORS stated, "Data comparing unfiltered SPS-1 to filtered SPS-1 solutions demonstrate that unfiltered SPS-1 is equivalent to filtered SPS-1 solutions." ORS Mot. to Dismiss BTL Countercl. Ex. B at 5. ORS's response to the FDA also stated **[*43]** that ColStorSol, PSI's name for the solution that ORS purchased and marketed as SPS-1, had been approved for marketing without a filtering requirement.

In a subsequent letter to ORS, the FDA stated that it had found that SPS-1 was "substantially equivalent . . . to legally marketed predicate devices." *Id.* Ex. D at 1. The FDA told ORS that it "may, therefore, market the device, subject to the general controls provisions of the Act [which] include requirements for . . . labeling, and prohibitions against misbranding." *Id.* ORS argues that the Court may take judicial notice of these documents and that they unambiguously indicate that the FDA approved ORS's labeling practice, which in turn would preclude a claim that ORS's advertisement was false.

The Court agrees that the documents appear consistent with ORS's assertion that the FDA has approved the practices regarding which ORS responded. Even were the Court to consider these documents in the context of a Rule 12(b)(6) motion, however, neither the counterclaim nor these documents contain sufficient details about FDA practice for the Court to say that the letter constitutes "approval" for purposes of this particular claim. The Court therefore **[*44]** declines to dismiss count five.

C. PSI's counterclaim

In its counterclaim, PSI asserts claims under the Lanham Act § 43(a), IUDTPA, and ICFA. All three claims are premised on PSI's allegations that after it rejected a proposed exclusivity agreement with ORS, ORS terminated PSI's services and engaged another manufacturer. The solutions produced by the other manufacturer have been substandard, PSI says, resulting in several of ORS's customers noticing problems with the solution and raising complaints. PSI alleges that ORS solicited business by telling prospective customers about PSI's services and that ORS's current customers therefore believe that the solutions are made by PSI. Because ORS did not inform its customers that it was switching manufacturers, PSI says, the customers now believe that PSI is responsible for the defective solutions. PSI also alleges that ORS continues to use an instructional insert stating that the solution does not have to be filtered before use. This insert was originally added by PSI, further confusing consumers regarding the current source of ORS's solutions.

In count three of its counterclaim, PSI asserts claims under Lanham Act § 43(a) based on this alleged **[*45]** conduct. PSI does not indicate in its counterclaim precisely what portion of this section forms the basis for its claim. It argues in its briefs, however, that ORS is liable for "passing off" its goods as PSI's and that it used a "false designation of origin." Thus ***HN26***[] the claim will succeed only if PSI shows that ORS "uses in commerce . . . any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which

. . . is likely to cause confusion, or to cause mistake, or to deceive as to . . . the origin, sponsorship, or approval of [its] goods." *15 U.S.C. § 1125(a)(1)(A)*.

ORS states repeatedly that it is under no "legal or regulatory duty" to disclose the identity of or change in its manufacturers. PSI's claims, however, are premised not on the existence of a separate legal duty but on the allegation that certain conduct by ORS has caused confusion.

ORS contends that PSI's allegations cannot support a false designation claim under the Lanham Act because of two binding cases. In the first, the Supreme Court held that incorporation of an uncopyrighted video into a copyrighted videotape did not provide a basis for a claim of false designation **[*46]** of origin. *Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 123 S. Ct. 2041, 156 L. Ed. 2d 18 (2003)*. The Court stated that the "'origin' of 'goods' . . . is the producer of the tangible product sold in the marketplace." *Id. at 31*. In the second case, the Seventh Circuit found that a furniture manufacturer's claim against another manufacturer for the uncredited use of its pre-made table legs likewise could not survive. *Bretford Mfg., Inc. v. Smith System Mfg. Co., 419 F.3d 576, 581 (7th Cir. 2005)*. The court noted in that case that "the question is whether the consumer knows who has produced the finished product." *Id.* "As far as [the consumer] was concerned, the table's 'origin' was Smith System, no matter who made any component or subassembly." *Id.*

ORS argues that even though PSI manufactures the solution, the solution itself is not the finished product. Rather, the product is solution labeled and bagged by ORS, thereby rendering it ORS's product regardless of who made the solution itself. ORS argues that it can be held liable only if it "falsely represents, as its own, a tangible 'good' manufactured by [PSI]." ORS Reply at 8. According to ORS, the solution is only a component of the tangible good — it **[*47]** is more akin to the wood in the table rather than to the table itself.

PSI maintains that its claim is for "passing off" (leading customers to believe that the ORS-sold solution is PSI's product) rather than "reverse passing off" (selling PSI's solution under ORS's name). Although *Bretford Manufacturing* dealt with reverse passing off, the case focuses on what alleged conduct can support a claim for false designation of origin. The case's focus on the finished product for purposes of a false designation claim is pertinent whether the claim is for passing off or reverse passing off.

Either way, however, the Court does not find ORS's arguments convincing at this point. PSI's allegations clearly suggest that the customers at issue believe that they are buying solution. The solution is not just a component of its package; it is a tangible product. By contrast, a customer who buys a table likely would not consider the purchase to be "wood" or "legs." PSI's allegations that customers have asked it to provide more information about its solutions further support its implication that the customers understand the product they are purchasing to be coming from PSI. *See* *Bretford Mfg., 419 F.3d at 580* **[*48]** (considering whether product incorporated "design elements" that "consumers understand . . . to signify the goods' *origin* and not just its attributes") (emphasis in original). The Court concludes that *Dastar* and *Bretford Manufacturing* do not bar PSI's Lanham Act claim.

ORS also argues, however, that PSI's complaint is insufficiently specific to meet the standards of *Rule 9(b)*. ***HN27***[] "Claims alleging false representation under the Lanham Act are subject to *Rule 9(b)*." *MPC Containment Sys., Ltd. v. Moreland, No. 05 C 6973, 2006 U.S. Dist. LEXIS 55780, 2006 WL 2331148, at *2 (N.D. Ill. Aug. 10, 2006)* (citations omitted). The Court agrees that PSI's allegations, at least in their current form, do not meet *Rule 9(b)*'s requirements. The only allegations made other than in conclusory form are the following: PSI alleges that "an OPO in Philadelphia, Pennsylvania that recently purchased SPS-1, believing that it was still being manufactured by PSI, complained to PSI that its product was off color." PSI Countercl. ¶ 25. PSI also alleges that "an OPO in Nebraska contacted PSI after receiving SPS-1 with two lot numbers in order to confirm if the products had been manufactured by PSI (or by another manufacturer)" and that "[o]n information **[*49]** and belief, other OPOs have been similarly confused regarding the current source of KPS-1 and SPS-1. *Id.* ¶¶ 26-27.

The Court agrees with PSI that this suggests that the customers believed that PSI was making the solution, and that they therefore had not been informed otherwise. The counterclaim, however, contains no detail whatsoever about the manner in which these customers came to believe, or the reason that they continue to believe, that PSI manufactured the solutions in the first place. ***HN28***[] Although false designation claims need not involve allegations that the defendant misused a specific logo or mark, there does need to be some indication that the defendant made a false representation. *Cf.* *Illinois Tool Works, Inc. v. Chester Bros. Machined Prods., Inc., No. 05 C 5002, 2006 U.S. Dist. LEXIS 57316, 2006 WL 2191982, at *3 (N.D. Ill. July 27, 2006)* ("Though misbranding can give rise to a false designation claim, such claims can also be based on representations that lead consumers to believe that the mark's owner sponsored or otherwise approved [its] use.").

PSI states "on information and belief" that "when ORS began using PSI as the manufacturer of its KPS-1 and SPS-1 solutions, it informed each of the OPOs to which **[*50]** it was selling the solutions that they had been manufactured by PSI." *Id.* ¶ 22. Without any indication, however, of what method ORS used to provide this information — what designation, design element, advertising, solicitation, or other means of communication — the allegation falls short of what *Rule 9(b)* requires. *See* *Specht v. Google, Inc., 660 F. Supp. 2d 858, 865 (N.D. Ill. 2009)* (general allegations on information and belief, without factual specifics, that defendants used a mark in promotional materials to sell "goods and services" was insufficient to survive motion to dismiss). Similarly, although PSI alleges that ORS's continued use of PSI's instructional insert is confusing, it has not provided a copy of the insert. Nor has PSI identified any characteristics of the insert that might lead customers to identify the solution with PSI even though ORS is responsible for the rest of the packaging. The Court concludes that count three, in its current form, must be dismissed.

In counts one and two, PSI asserts its own IUDTPA and ICFA claims, which it argues are subject to essentially the same legal standard as each other. *See* *Unichem Corp. v. Gurtler, 148 Ill. App. 3d 284, 292, 498 N.E.2d 724, 729, 101 Ill. Dec. 400 (1986)* **[*51]** (passing off under the IUDTPA involves "the deception of a consumer as to the source of a product."); *Microsoft Corp. v. Logical Choice Computers, Inc., No. 99 C 1300, 2001 U.S. Dist. LEXIS 479, 2001 WL 58950, at *8 (N.D. Ill. Jan. 22, 2001)* (quoting *815 ILCS 505/2*) ("[L]iability under ICFA] may arise upon 'the use or employment of any practice described in Section 2 of [IUDTPA] in the conduct of any trade or commerce."). PSI does not dispute ORS's contention that IUDTPA and ICFA claims regarding passing off are subject to the pleading requirements of *Rule 9(b)*. *See* *Nakajima All Co., Ltd. v. SL Ventures Corp., No. 00 C 6594, 2001 U.S. Dist. LEXIS 7535, 2001 WL 641415, at *6 (N.D. Ill. May 312001)* (IUDTPA claims); *Karpowicz v. General Motors Corp., No. 97 C 1390, 1997 U.S. Dist. LEXIS 10604, 1997 WL 413929, at *6 (N.D. Ill. 1997)* (ICFA claims).

For the reasons the Court has explained, PSI has not made sufficiently specific allegations of conduct by ORS that resulted in customer confusion. In addition, as ORS points out, PSI has alleged no acts connecting the allegations to Illinois other than the fact that ORS is headquartered here. As the Court discussed above regarding ORS's claims against BTL, ***HN29***[] "[t]he fact that a scheme to defraud was disseminated from a company's **[*52]** headquarters in Illinois is insufficient." *Phillips, 372 Ill. App. 3d at 58, 865 N.E.2d at 315*.

For these reasons, the Court dismisses PSI's counterclaim.

Conclusion

For the reasons stated above, the Court grants ORS's motion to dismiss PSI's counterclaim [docket no. 78]; ORS's motion to dismiss as to counts one, three, and four of BTL's counterclaim [docket no. 82]; PSI's motion to dismiss as to count one of ORS's complaint [docket no. 121]; BTL's motion to dismiss as to count six of ORS's complaint [docket no. 117]; and ORS's motion for a stay of discovery relating to count two of BTL's counterclaim [docket no. 128]. The Court otherwise denies the motions to dismiss.

/s/ Matthew F. Kennelly

MATTHEW F. KENNELLY

United States District Judge

Date: July 4, 2012

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GSI Tech., Inc. v. Cypress Semiconductor Corp.

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

July 6, 2012, Decided; July 6, 2012, Filed

CASE NO. 5:11-cv-03613 EJD

Reporter
2012 U.S. Dist. LEXIS 93888 *; 2012 WL 2711040

GSI TECHNOLOGY, INC., Plaintiff, v. CYPRESS SEMICONDUCTOR CORPORATION, Defendant.

Subsequent History: Motion denied by *Gsi Tech. v. Cypress Semiconductor Corp., 2015 U.S. Dist. LEXIS 9362 (N.D. Cal., Jan. 20, 2015)*

Summary judgment denied by *Gsi Tech. v. Cypress Semiconductor Corp., 2015 U.S. Dist. LEXIS 9378 (N.D. Cal., Jan. 27, 2015)*

Core Terms

alleges, competitors, Networking, Sherman Act, antitrust, products, vendors, relevant market, customers, statute of limitations, boycott, motion to dismiss, anti trust law, market power, membership, unfair competition, rule of reason, Technology, announced, restrain, overt, lock

Counsel: **[*1]** For GSI Technology, Inc., a Delaware Corporation, Plaintiff: Arthur Joel Shartsis, LEAD ATTORNEY, James Patrick Martin, Mary Jo Shartsis, Robert E. Schaberg, Shartsis Friese LLP, San Francisco, CA.

For Cypress Semiconductor Corporation, a Delaware corporation, Defendant: Lee H. Rubin, LEAD ATTORNEY, Christopher J. Kelly, Mayer Brown LLP, Palo Alto, CA.

Judges: EDWARD J. DAVILA, United States District Judge.

Opinion by: EDWARD J. DAVILA

Opinion

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

[Docket Item No. 14]

Presently before the court is Defendant Cypress Semiconductors Corporation's ("Defendant") Motion to Dismiss the Complaint filed by Plaintiff GSI Technology, Inc. ("Plaintiff"). See Docket Item No. 14. Plaintiff filed written opposition to the motion. The court found this matter suitable for decision without oral argument pursuant to Civil *Local Rule 7-1(b)* and previously vacated the hearing date.

This court has subject matter jurisdiction under *28 U.S.C. § 1337* and *28 U.S.C. § 1331*, as this action arises under *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*, and *Sections 4* and *16* of the Clayton Act, *15 U.S.C. §§ 15(a)* and *26*. This court also has supplemental subject matter jurisdiction of the pendent state **[*2]** law claims under *28 U.S.C. § 1367(a)*. For the reasons explained below, Plaintiff's Motion to Dismiss will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

The allegations contained in this section are taken largely from the Complaint. Plaintiff and Defendant are manufacturers of memory technology and chips known as static random access memory ("SRAM"). See Compl., at ¶¶ 1-2. The SRAM market consists of a small number of customers making early market entry a critical success factor for networking memory vendors. See id., at ¶ 24. Customers in the SRAM market demand standardized products, thus it is critical for manufacturers to comply with recognized standards. See id., at ¶ 3. The Institute of Electrical and Electronics Engineers ("IEEE") and the JEDEC Solid State Technology Associations ("JEDEC") are two recognized standard-setting organizations for memory components. See id., at ¶ 2. These organizations provide an open and public standard setting process, in which all competitors in the market have equal access to the same information at the same time allowing for competitive products and competitive product introduction schedules. See id., at ¶¶ 3-4.

In February 1999, Defendant decided **[*3]** to pursue its own unique product development and bypass the open standard setting processes provided by the IEEE and the JEDEC. See id., at ¶¶ 1, 4. To achieve this goal, Defendant and two principal competitors, Integrated Device Technology, Inc. ("IDT") and Micron Technology, Inc. ("Micron"), entered into a combination, which they named the "QDR Consortium" (the "Consortium"). See id., at ¶ 3. The purpose of the Consortium was to develop standards for higher performance networking SRAM products outside of the open and public standard setting organizations to obtain a competitive advantage over other competitors. See id., at ¶ 2. The Consortium members shared information and combined their market power to define and promote a family of SRAMs that would address the new market demand. See id., at ¶ 27. Despite Plaintiff's continuous request for open membership and participation by others, the Consortium excluded Plaintiff and other SRAM vendors. See id., at ¶ 28.

After being excluded from the Consortium, Plaintiff, IBM, Samsung, and Motorola started a separate group known as "SigmaRAM" to facilitate the design and development of an open SRAM standard. See id., at ¶ 30. Unlike the Consortium **[*4]** members, the members in SigmaRAM opened participation to any company and complied with JEDEC's standard setting process. See id., at ¶ 30.

On February 16, 2000, the Consortium announced that it had completed the specifications of its initial QDR and DDR SRAM architectural design. See id., at ¶ 32. Even though the Consortium announced that it would publish the data sheets for QDR and DDR SRAM, it only did so after a sufficient time delay. See id., at ¶ 33. With the time delay, the Consortium members had a "time-to- market" competitive advantage over all SRAM vendors. See id., at ¶ 33. The Consortium further compounded the injury to competitors by publishing only minimally complete data sheets. See id., at ¶ 33. Through these actions, the Consortium created a barrier to market entry that excluded its competitors for one to two years, thereby assuring Consortium members a generational lock in with Cisco, other major networking equipment manufacturers, network processor vendors and Field-Programmable Gateway Arrays ("FPGA") vendors. See id., at ¶ 33.

After Cisco decided to use the Consortium's Quad SRAM, the membership of the Consortium has been shifting. In January 2001, the Consortium **[*5]** announced that NEC Corporation was joining the Consortium. See id., at ¶ 34. Thereafter, in April 2001 Samsung withdrew from SigmaRAM and joined the Consortium. See id., at ¶ 34. [1] On September 24, 2001, Hitachi, Ltd. ("Hitachi") joined the Consortium. See id., at ¶ 35. Currently, the Defendant and Renasas Electronic Corporation ("Renesas") are the only members of the Consortium. See id., at ¶ 48. Defendant has functioned as the leader and principal member of the Consortium since its inception. See id., at ¶ 8.

The Consortium members, through their combined market power and limited membership, created exclusive but de facto product standards, which allowed them to lock in customers and impede entry into the SRAM market, thereby harming competition and consumers. See id., at ¶ 56. Plaintiff believes that pursuant to the Consortium's

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[1] Plaintiff believes that Samsung's membership in the Consortium was granted on the condition that Samsung drop all public use, promotion or attribution of the SigmaRAM name. See Compl., at ¶ 34.

exclusionary agreement, the full terms of which are presently unknown, Defendant had, and exercised, a veto over Plaintiff's numerous requests, including in 1999, **[*6]** 2003, 2004, 2008, and 2011, to be admitted to participation in the Consortium. See id., at ¶ 51(c). The Consortium and its member have repeatedly refused requests to operate as an "open" forum of competitive SRAM vendors or to operate under the supervision of an industry recognized standards setting organization, such as JEDEC. See id., at ¶ 51(I). As a direct result of the Consortium's exclusionary combination from 1999 to and including the present date, the Consortium collectively designed, developed, manufactured and introduced generations of its QDR and DDR SRAM and several enhanced product family devices in the market free of any timely and effective competition from any other networking SRAM vendors. See id., at ¶ 51(g). With each new product released, the Consortium delayed the public release of its data sheets inflicting independent and accumulating injury on Plaintiff and other SRAM competitors outside the Consortium. See id., at ¶ 51(g). In addition, Consortium members also required SRAM customers to sign non-disclosure agreements so that buyers could be ready to accept the new version of devices before non-Consortium competitors could learn of their existence. See id., at **[*7]** ¶ 23. By its conduct, the Consortium has also harmed consumers by denying them the benefits of innovation in product development and lower prices. See id., at ¶ 6.

Plaintiff commenced the instant action in this court on July 22, 2011 for (1) violation of *section 1* of the Sherman Act, *15 U.S.C. § 1*, (2) violation of *sections 16720* and *16726* of the California Business & Profession Code, and (3) violation of *section 17200 et. seq.* of the California Business & Profession Code. This motion followed.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient specificity to "give the defendant fair notice of what the. . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal quotations omitted). A complaint which falls short of the *Rule 8(a)* standard may therefore be dismissed if it fails to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. "Dismissal under *Rule 12(b)(6)* is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008)*.

When **[*8]** deciding whether to grant a motion to dismiss, the court must accept as true all "well-pleaded factual allegations." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)*. The court must also construe the alleged facts in the light most favorable to the plaintiff. *Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1988)*. However, "courts are not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly, 550 U.S. at 555*. Moreover, anything beyond the pleadings generally may not generally be examined. *Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990)*. But "material which is properly submitted as part of the complaint may be considered." *Twombly, 550 U.S. at 555*.

III. DISCUSSION

A. First Cause of Action: Violation of § 1 Sherman Act

Plaintiff alleges that Defendant's conduct violated *section 1* of the Sherman Act, *15 U.S.C. § 1*. *Section 1* prohibits restraints on trade: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restrain of trade or commerce ... is declared to be illegal." To prevail on a cause of action for violation of *15 U.S.C. § 1*, a plaintiff must plead, "(1) a contract, **[*9]** combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)*.

i. Unlawful Agreement

Defendant argues the Complaint fails to allege facts plausibly supporting an inference that Plaintiff's exclusion from the Consortium was the product of an unlawful agreement among competitors. See Motion, Docket Item 14, at 5. The court disagrees.

To sufficiently plead the first element of *section 1* of the Sherman Act, the complaint must set forth:

> [E]nough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."

Kendall, 518 F.3d at 1047 (quoting *Twombly, 550 U.S. at 556*). In Kendall, the 9th Circuit granted the defendants' motion to dismiss because the plaintiffs had an opportunity to conduct **[*10]** discovery and still did not allege any facts in their amended complaint to support their theory that the defendants conspired with each other to restrain trade. *Id. at 1048*.

In this case, the Plaintiff set forth enough factual matter to meet the pleading requirement established in Kendall. The Complaint alleges that in late July 1999, Defendant, IDT and Micron announced the formation of the Consortium with the purpose of defining and developing new networking SRAM architectures. See Compl., at ¶¶ 27, 29. From the time of the Consortium's inception in 1999, Defendant, "on behalf of the Consortium" and pursuant to the group's exclusionary agreement, denied Plaintiff's requests in 1999, 2003, 2004, 2008, and 2011 to be admitted to membership in the Consortium. See id., at ¶ 51(a)-(c). The Consortium's exclusionary agreement afforded its members the opportunity to exclude their competing SRAM vendors and to prevent them from entering the SRAM market on a timely and competitive basis. See id., at ¶ 51(d). Although the makeup of the Consortium fluctuated over time, there are still plausible grounds to infer an agreement, especially since Defendant, the leader of the Consortium, has been a **[*11]** member from the group's inception. The allegations of the Complaint sufficiently assert the existence of an unlawful agreement.

ii. Unreasonable Restraint of Trade

As to the second element, Defendant argues that the Complaint fails to plead that Plaintiff's exclusion from the QDR Consortium unreasonably restrained trade. See Motion, at 5. The court disagrees.

Section 1 of the Sherman Act prohibits, "[o]nly unreasonable or undue restraints" of trade. *OSC Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1467 (9th Cir. 1986)* (citing *Standard Oil v. United States, 221 U.S. 1, 58-60, 31 S. Ct. 502, 55 L. Ed. 619 (1911))*. Most antitrust claims are, "analyze[d] under a 'rule of reason,' according to which the finder of fact must decided whether the question practice imposes an unreasonable restraint on competition, taking into account a variety of factors . . . ." *California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1133 (9th Cir. 2011)* (quoting *State Oil v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997))*. "The rule of reason is the presumptive or default standard, and it requires that the antitrust plaintiff to 'demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive.'" Id. (quoting *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006))*. **[*12]** "Some types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se." *State Oil, 522 U.S. at 10*. The Supreme Court has expressed reluctance to adopt per se rules where the "economic impact of certain practices is not immediately obvious." *Dagher, 547 U.S. at 5*.

Plaintiff alleges that its exclusion from the QDR Consortium, "constituted a group boycott and/or concerted refusal to deal," warranting a per se analysis. See Compl., at ¶ 51(d). Three characteristics indicative of a per se illegal boycott are: "(1) the boycott cuts off access to a supply, facility, or market necessary to enable the victim firm to compete; (2) the boycotting firm possesses a dominant market position; and (3) the practices are not justified by plausible arguments that they enhanced overall efficiency or competition." *Hahn v. Oregon Physicians' Serv., 868*

F.2d 1022, 1030 (9th Cir. 1988). Although the Supreme Court recognizes group boycotts as per se illegal, it holds that the category of activities compromising group boycotts, "is not to be expanded indiscriminately." FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986).

The **[*13]** allegations in the Complaint do not establish a per se illegal boycott because they do not illustrate that Defendant "cut off" Plaintiff's access to the market. Here, the Complaint expressly alleges that has continued to market and sell Networking SRAM products throughout the period of the alleged conspiracy, introducing a new, high-performance product introduced as recently as 2010. See Compl., at ¶ 56. By its own admission, Plaintiff's efforts to sell its products have been at least "minimally successful." Id. Though the Complaint alleges that the Consortium prevented the Plaintiff, "from entering the Networking SRAM market on a timely and competitive basis" (See Compl., at ¶ 51(d)), these accusations alone do not demonstrate a sufficient "cut off" to fall under the narrow category of illegal boycotts. Therefore, the Complaint's allegations should be analyzed under the "rule of reason."

"Under the rule of reason, to decide whether a challenged restraint is unreasonable under the Sherman Act, '[t]he focus is on actual effects that the challenged restraint has had on competition in a relevant market.'" Adaptive Power Solutions, LLC v. Hughes Missile Sys. Co., 141 F.3d 947, 950 (9th Cir. 1998) **[*14]** (quoting Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1410 (9th Cir. 1991)). To make this showing the plaintiff must establish both that the defendant possessed (1) market power within the relevant market, and that (2) the defendant's conduct harmed competition within that market. Id. at 951.

a. Market Power

"In order to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a 'relevant market.' That is, the plaintiff must allege both that a 'relevant market' exists and that the defendant has power within that market." Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1044 (9th Cir. 2008). In that regard, the Ninth Circuit has held:

> There is no requirement that these elements of the antitrust claim be pled with specificity. An antitrust complaint therefore survives a Rule 12(b)(6) motion unless it is apparent from the facts of the complaint that the alleged market suffers a fatal legal defect. And since the validity of the "relevant market" is typically a factual element rather than a legal element, alleged markets may survive scrutiny under Rule 12(b)(6) subject to factual testing by summary judgment or trial.

Id. at 1045 **[*15]** (citation omitted).

The facts pleaded in this case illustrate the existence of a relevant market and that the defendant has power within that market. First, the Complaint alleges that in 2001, industry analysts estimated that the Consortium would supply "two-thirds" of Fast SRAM worldwide. See Compl., at ¶ 36. Throughout the Complaint, Plaintiff alleges that the goal of the Consortium was monopolization of the market (e.g. ¶ 1), that Defendant and Consortium members combined their market power to exclude competitors (e.g. ¶ 27), and that the Consortium has excluded not only Plaintiff but other competitors from the market (e.g. ¶ 28). The Complaint further alleges that Defendant was the largest Networking SRAM supplier in 2010. Id. at ¶ 47. These allegations are sufficient at the pleading stage, as the Ninth Circuit made clear in Newcal Industries, Inc. v. Ikon Office Solution.

b. Injury to Competition

"It can't be said often enough that the antitrust laws protect competition, *not* competitors." United States v. Syufy Enters., 903 F.2d 659, 668 (9th Cir. 1990). Consequently, "[t]o succeed on a rule of reason claim, an antitrust plaintiff must prove that the restraint in question injures **[*16]** competition in the relevant market." Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc., 732 F.2d 1403, 1408 (9th Cir. 1984) (citing Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979)). "In order to plead injury to competition . . . sufficiently to withstand a motion to dismiss, 'a section one claimant may not merely recite the bare legal conclusion that competition has been restrained unreasonably.'" *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1198 (9th Cir. 2012)* (citing *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 507-08 (9th Cir.1989))*. A claimant "'must, at a minimum, sketch the outline of [the injury to competition] with allegations of supporting factual detail.'" Id. (citing *Les Shockley Racing, Inc., 884 F.2d at 508*).

"In sketching the outline of an injury to competition . . . the claimant must identify a contract, combination or conspiracy that has an anticompetitive effect. Courts have held that agreements between competitors in the same market (referred to as 'horizontal agreements') may injure competition." Id. An example of a horizontal agreement is when, "a group of competitors . . . act in concert to harm another competitor or exclude **[*17]** that competitor from the market and thus 'protect . . . dealers from real or apparent price competition' from the targeted competitor." Id. (citing *United States v. Gen. Motors Corp., 384 U.S. 127, 146-147, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966))*. With a horizontal agreement the harm to one market competitor can be considered an injury to competition, "when the relevant market is both narrow and discrete and the market participants are few." *Les Shockley Racing, Inc., 884 F.2d at 508-509*.

Here, the Complaint provides an outline of the injury to competition by describing the harmful effects the Consortium's horizontal agreement has on outside competitors. The Complaint alleges that in February 1999 Defendant reached an agreement with two of its competitors to share information for the development of new Networking SRAM products. See Compl., at ¶ 1. According to the Complaint, the Consortium used its agreement to exclude, "Plaintiff and other competitors from participation in development of product standards intended to serve the market and their ability to enter the market in a timely manner and to compete effectively for those customers." See id. Without timely access to product standards, numerous SRAM vendors were **[*18]** forced to exit the market. See id., at ¶ 14. Additionally, the Complaint alleges that because delayed market entry, even by just a few months, the Consortium locked in the market's few purchasers, including Cisco. See id., at ¶¶ 24, 33. The Complaint further alleges that competition has been harmed in that customers have been denied the benefits of innovation and product development and lower prices. See id. at ¶ 6. Since the Complaint alleges a detailed outline of the injury to competition it satisfies the Court's pleading standard.

iii. Injury to Plaintiff

Defendant argues that the Complaint does not adequately allege an injury to the Plaintiff. See Motion, at 20. Again, the court disagrees.

A plaintiff seeking damages under the antitrust laws must shows that is has been "injured in his business or property" as a result of the claimed offense. *15 U.S.C. § 15(a)*. "Antitrust injury is defined not merely as injury caused by an antitrust violation, but more restrictively as 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Glen Holly Entm't, Inc. v. Tektronix, Inc., 352 F.3d 367, 371 (9th Cir. 2002)* (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. **[*19]** The Ninth Circuit has identified four requirements for antitrust injury: (1) unlawful conduct, (2) causing injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent. *American Ad Mgmt. Inc. V. Gen. Tel. Co., 190 F.3d 1051, 1055 (9th Cir. 1999)*. In addition, the Ninth Circuit requires that the injured party be a participant in the same market as the alleged malefactors. *Glen Holly Entm't, 352 F.3d at 372*.

The Complaint's allegations taken as true show that the Defendant caused an antitrust injury to the Plaintiff under the Ninth Circuit's requirements. The Complaint alleges that as a result of the Consortium's unlawful exclusion of Plaintiff and other competitors from its private de facto standards setting, Plaintiff has been injured in its ability to market competitive products and to lock in key customers. See Compl., at ¶ 64. The Complaint further alleges that as a result of Defendant's conduct, Plaintiff suffered multiple injuries such as lost revenues, lost profits and market share, and the stifling of product innovation. See Compl., at ¶¶ 56-57, 64, 66. Plaintiff also alleges that from **[*20]** 2007 to 2010 it introduced "succeeding higher density and faster products," however it was, "unable to gain market acceptance as a result of the conduct alleged." See Compl., at ¶ 56. Defendant's conduct is the type that antitrust laws were intended to prevent because it allegedly denied consumers, "the benefits of innovation in product development and lower prices." See Compl., at ¶ 6. The court therefore cannot conclude on a motion to dismiss that Plaintiff suffered no injury under the Ninth Circuit's requirements.

B. Second and Third Cause of Action: Cartwright Act and Unfair Competition

i. Cartwright Act

The Cartwright Act is "California's ***antitrust law***" and "was modeled after the Sherman Act." *County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*. Accordingly, analysis under the Cartwright Act "mirror the analysis under federal law." Id. (citing *Nova Designs, Inc. v. Scuba Retailers Ass'n, 202 F.3d 1088, 1091 (9th Cir. 2000)*, and *Mailand v. Burckle, 20 Cal. 3d 367, 375, 143 Cal. Rptr. 1, 572 P.2d 1142 (1978))*; see also *Colonial Med. Group, Inc. v. Catholic Health Care West, 444 Fed. Appx. 937, 2011 WL 2938227, at *2 (9th Cir. 2011)* ("the requirements for a claim under California's Cartwright Act are **[*21]** identical to those for a claim under the Sherman Act"). Consequently, Plaintiff's Cartwright Act claim should not be dismissed for the same reasons as its Sherman Act claim.

ii. Unfair Competition Claim

Business and Professions Code *section 17200* governs anti-competitive business practices and has a major purpose in preserving fair business competition. *Belton v. Comcast Cable Holdings, LLC, 151 Cal. App. 4th 1224, 1233, 60 Cal. Rptr. 3d 631 (2007)*. *Section 17200*, "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." Id. Plaintiff's Unfair Competition Claim is expressly predicated on Defendant's alleged violations of the Sherman and Cartwright Acts. See Compl., at ¶ 75-76. Since Defendant's Motion depends on the assumption that Plaintiff has no claim under the Sherman and Cartwright Acts, the motion to dismiss this claim will be denied.

C. Statute of Limitations

Finally, Defendant claims that Plaintiff's claims are barred by the statute of limitations. See Motion, at 22. The court disagrees.

Plaintiff's claims are subject to a four-year limitations period, which runs from the date cause of action accrues. See *15 U.S.C. § 15(b)* **[*22]** (Sherman Act); *Cal. Bus. & Prof. Code § 16750.1* (Cartwright Act); Cal. Bus. & Prof. *§ 17208* (Unfair Competition Law). While private antitrust claims are subject to four-year statute of limitations, a new cause of action arises "each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time." *Hennegan v. Pacifico Creative Serv., 787 F.2d 1299, 1300 (9th Cir. 1986)* (citing *In re Multidistrict Vehicle Air Pollution Litig., 591 F.2d 68, 70 (9th Cir. 1979))*. If a plaintiff, "alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act." *Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir. 1987)*. An overt act will restart the statute of limitations if: (1) it is a new and independent act that is not merely a reaffirmation of a previous act; and (2) it inflicts new and accumulating injury on the plaintiff. *Id. at 238*.

Plaintiff has alleged continuing violations and corresponding injuries suffered during the limitations period. The Complaint alleges that in October, 2008, and in January, 2011, Plaintiff requested membership in **[*23]** the Consortium and open standard setting, which requests were rejected as part of a continuing effort to exclude Plaintiff as a competitor from the Networking SRAM market. See Compl., at ¶ 45, 48, 51(c). The overt acts alleged in the Complaint are not limited only to denials of membership. The Complaint also alleges that between 2007 and 2010, the Consortium announced and offered a succession of variants on their second generation Networking SRAM device, each of which altered the elements of the devices' definitions in order to keep the public definitions in flux until late 2010, and each of which caused further injury to Plaintiff. See id., at ¶ 51(g). As alleged in the Complaint, the "Consortium's introduction of each generation and each enhancement of its QDR and DDR SRAM products inflicted new, independent and accumulating damage and injury on Plaintiff, other SRAM competitors and competition in general by excluding them from access to information and extending the lock in of Networking SRAM customers to QDR products." See id., at ¶ 51(g). The overt actions that allegedly occurred during the four years prior to the filing of the Complaint are independents actions that caused further **[*24]** injury to the Plaintiff, therefore they satisfy the statute of limitations.

IV. ORDER

Based on the foregoing, Defendant's Motion to Dismiss is DENIED.

IT IS SO ORDERED.

Dated: July 6, 2012

/s/ Edward J. Davila

EDWARD J. DAVILA

United States District Judge

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Nexstar Broad., Inc. v. Granite Broad. Corp.

United States District Court for the Northern District of Indiana, Fort Wayne Division

July 9, 2012, Decided; July 9, 2012, Filed

CAUSE NO. 1:11-CV-249 RM

Reporter
2012 U.S. Dist. LEXIS 95024 *; 2012 WL 2838547

NEXSTAR BROADCASTING, INC., Plaintiff vs. GRANITE BROADCASTING CORPORATION, WISE-TV LICENSE, LLC, AND WISE-TV, INC., Defendants

Subsequent History: Reconsideration denied by *Nexstar Broad., Inc. v. Granite Broad. Corp., 2012 U.S. Dist. LEXIS 145045 (N.D. Ind., Oct. 9, 2012)*

Prior History: *Nexstar Broad., Inc. v. Granite Broad. Corp., 2011 U.S. Dist. LEXIS 125116 (N.D. Ind., Oct. 28, 2011)*

Core Terms

advertising, antitrust, affiliation, programming, network, anti trust law, allegations, competitor, television, contends, prices, Broadcasting, conspiracy, market power, predatory, network affiliation, anticompetitive, foreclose, hiring, cases, spot, motion to dismiss, denigrating, distributor, proprietary, conspiring, consumer, stations, enforcement mechanism, advertising revenue

Counsel: **[*1]** For Nexstar Broadcasting Inc, Plaintiff: Ankur Kapoor PHV, Lloyd E Constantine PHV, Matthew L Cantor PHV, PRO HAC VICE, Constantine Cannon LLP - NY/NY, New York, NY; Jeffrey C McDermott, Krieg DeVault LLP - Car/IN, Carmel, IN; Libby Y Goodknight, Krieg DeVault LLP - Ind/IN, Indianapolis, IN.

For Granite Broadcasting Corporation, Wise-TV License LLC, Wise-TV Inc, Defendants: Jennifer Marie Johnson, Philip A Whistler, LEAD ATTORNEYS, Ice Miller LLP - Ind/IN, Indianapolis, IN; John P Erkmann PHV, Michael D Hays PHV, PRO HAC VICE, Dow Lohnes PLLC, Washington, DC.

Judges: Robert L. Miller, Jr., United States District Judge.

Opinion by: Robert L. Miller, Jr.

Opinion

OPINION and ORDER

This antitrust suit focuses on the market in the Fort Wayne, Indiana, area for television local spot advertising supported by network programming. Until its affiliation expired at the end of last July, Nexstar Broadcasting, Inc. operated the FOX affiliate in Fort Wayne. Granite Broadcasting Corporation became the FOX affiliate, giving Granite and Malara Broadcasting (with which Granite is allegedly associated) five of the six network affiliations in the Fort Wayne area. Nexstar contends that by its anticompetitive conduct, Granite has foreclosed **[*2]** it from the market. Granite has moved to dismiss Nexstar's complaint for failure to state a claim. The court heard argument on June 14, and now denies Granite's motion.

The issue on a motion to dismiss under *Federal Rule of Procedure 12(b)(6)* isn't "whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Caremark, Inc. v. Coram Healthcare Corp., 113 F.3d 645, 649 (7th Cir. 1997)*. The complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. Detailed factual allegations aren't required, but the complaint must contain enough factual matter "to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*; *see also* *Morrison v. YTB Int'l, Inc., 649 F.3d 533, 538 (7th Cir. 2011)*; *Brooks v. Ross, 578 F.3d 574, 581 (7th Cir. 2009)*. To plead a plausible claim, a complaint must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. at 678*; *see* **[*3]** *also* *Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010)* ("[T]he plaintiff must give enough details about the subject-matter of the case to present a story that holds together."). "Threadbare recital of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal, 556 U.S. at 678*.

The complaint needn't specifically plead each element the pleader must prove at trial, *see* *Reynolds v. CB Sports Bar, Inc., 623 F.3d 1143, 1147 (7th Cir. 2010)*; *Bausch v. Stryker Corp., 630 F.3d 546, 560 (7th Cir. 2010)*, *cert. denied*, *132 S. Ct. 498, 181 L. Ed. 2d 346 (Oct. 31, 2011)*, but it must contain enough factual allegations to make it more than a "sheer possibility" that the defendant has acted unlawfully. *Ashcroft v. Iqbal, 556 U.S. at. 678*; *accord*, *In re Text Messaging Antitrust Litigation, 630 F.3d 622, 629 (7th Cir. 2010)*, *cert denied*, *131 S. Ct. 2165, 179 L. Ed. 2d 937 (Apr. 25, 2011)* ("[T]hat the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as 'preponderance of the evidence' **[*4]** connote."). "The required level of factual specificity rises with the complexity of the case." *McCauley v. City of Chicago, 671 F.3d 611, 616 (7th Cir. 2011)*; *Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010)* ("A more complex case . . . will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff's mind at least, the dots should be connected."); *Limestone Development Corp., 520 F.3d at 803* ("RICO cases, like antitrust cases, are 'big' cases and the defendant should not be put to the expense of big-case discovery on the basis of a threadbare claim.").

I.

Nexstar brings this suit against Granite and its subsidiaries, WISE-TV License, LLC and WISE-TV, Inc. (to whom the court collectively refers as "Granite"), alleging that Granite engaged in anti-competitive conduct with Malara Broadcasting and other unnamed co-conspirators that significantly limited or foreclosed competition in the television local spot advertising market in the Fort Wayne designated market area by restricting access to an essential element of competition-network programming, to the detriment of competitors (like Nexstar), local advertisers, **[*5]** and consumers, and that its actions constitute an unreasonable restraint of trade, an attempt to monopolize, and a conspiracy to monopolize in violation of §§ 1 and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2* (Counts 1-3), § 7 of the Clayton Act, *15 U.S.C. § 18* (Count 4), and Indiana's Antitrust Act, *Ind. Code §§ 24-1-2-1* and *24-1-2-2* (Count 5).

The court accepts (without vouching for their truth) the following factual allegations in the complaint as true for purposes of the motion to dismiss:

Nexstar owns and operates WFFT-TV, one of five commercial full-power television stations in Fort Wayne and the exclusive FOX network affiliate from October 1986 until Nexstar's agreement with FOX Broadcasting terminated on July 31, 2011.

Granite owns and controls WISE-TV, the exclusive NBC affiliate and MyNetworkTV affiliate in the Fort Wayne DMA, and controls the advertising sales and revenues of WPTA-TV, the exclusive ABC affiliate and the CW affiliate in the

Fort Wayne designated market area, under an advertising representation agreement with Malara Broadcasting, which owns WPTA-TV.

Access to network programming is an essential element, or "key input," for competition in the television local spot **[*6]** advertising market in the Fort Wayne designated market area. As a result of its relationship with Malara, Granite controls access to network programming for ABC, NBC, CW and MyNetworkTV and about 45 percent of the broadcast television local spot advertising revenues in the Fort Wayne designated market area.

When Nexstar's agreement with FOX Broadcasting ended in 2011, Granite paid a supra-competitive price to become the new exclusive FOX affiliate in Fort Wayne (effective August 1, 2011), providing Granite with control over programming and local advertising for five of the six major national network affiliations and three of the "Big Four" networks in the Fort Wayne DMA (ABC, NBC, FOX, CW, and MyNetwork TV), substantially increasing Granite's share of the television local spot advertising market, and significantly limiting or foreclosing competitors' access to network programming and their ability to compete for advertising revenues.

Since announcing its agreement with FOX in July 2011, Granite, Malara, and/or Indiana's NewsCenter (the brand name for Granite's consolidated operations in Fort Wayne) have used offers lucrative compensation packages to entice several key Nexstar sales employees **[*7]** who have confidential and proprietary information pertaining to Nexstar's advertising prices. Granite also has tried to speed the movement of advertisers from Nexstar's WFFT-TV to the stations Granite and Malara owns by telling advertisers that WFFT-TV won't have "must have" network programming. or will be going off the air, or is about to be sold, or will discontinue local news.

Granite's collusive aggregation of exclusive network affiliations, denigrating commercial speech, and predatory hiring is harming competition generally, and Nexstar specifically. The injuries include lost advertising revenues, higher operating costs (such as the cost of new equipment and licenses to broadcast new programs to replace the network programming from which Nexstar is foreclosed, and the cost of producing competitive news broadcasts), loss of experienced sales staff and their confidential and proprietary information. Local advertisers will have to pay higher prices for advertising, so consumers will have to pay higher prices for what local advertisers sell.

Nexstar asks the court to: (1) enjoin Granite and Malara, their directors, officers, employees, agents, successors, and assigns from directly or **[*8]** indirectly controlling television stations affiliated with ABC, CBS, FOX, and NBC; (2) order Granite to cease efforts to employee individuals currently employed by Nexstar's WFFT-TV, to delete or expunge any WFFT-TV proprietary and confidential information provided, and to enjoin and restrain Granite from all attempts to discover such information in the future; and (3) award Nexstar actual and treble damages, interest, attorneys' fees, and costs.

In support of its dismissal motion, Granite contends that: (1) the complaint doesn't sufficiently allege antitrust injury; (2) Nexstar lacks standing to maintain a private antitrust action; (3) the allegations of denigrating commercial speech and predatory hiring don't state an actionable antitrust claim; and (4) Nexstar hasn't sufficiently alleged a conspiracy in Counts 1 and 3.

II.

A. *Antitrust Injury*

An antitrust claim has three elements: (1) conduct that violates the antitrust laws; (2) antitrust injury, and (3) measurable damages. *In re Scrap Metal Antitrust Litig., 527 F.3d 517, 532 (6th Cir. 2008)*; *Deich-Keibler v. Bank One, 243 Fed. Appx. 164, 168 (7th Cir. 2007)*; *Deiter v. Microsoft Corp., 436 F.3d 461, 467 (4th Cir. 2006)*; *Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005)*; **[*9]** *In re Urethane Antitrust Litigation, 251 F.R.D. 629, 634 (D. Kan. 2008)*; *City of Auburn v. Mavis, 468 N.E.2d 584, 585 (Ind. App. 1984)*. To satisfy the requirement of antitrust injury, Nexstar must show that it suffered an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful," *Brunswick Corp. V. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*, meaning that it "suffered a loss that stems from a competition-reducing aspect of the defendant's behavior." *In re Urethane Antitrust Litigation, 251 F.R.D. at 634*.

Granite contends that Nexstar hasn't alleged antitrust injury because the only injuries alleged are higher consumer prices and the loss of its exclusive FOX affiliation contract (a change from one exclusive distributor to another), and the antitrust laws weren't intended to prevent either, citing, *e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582-583, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) ("Respondents cannot recover . . . for any conspiracy by petitioners to charge higher than competitive prices in the American market."); O.K. Sand & Gravel, Inc. v. Martin Marietta Techs., Inc., 36 F.3d 565, 572-573 (7th Cir. 1994) **[*10]** ("price increases could not be considered an antitrust injury to competitors"); Alberta Gas Chems. Ltd. v. E.I. DuPont de Nemours & Co., 826 F.2d 1235, 1242-1243 (3rd Cir 1987); Ralph C. Wilson Indus., Inc. v. Chronicle Broad. Co., 794 F.2d 1359, 1364 (9th Cir. 1986) ("competition is not injured where a distributor seeks to obtain a product at the expense of any or all potential distributors"); Arnett Physician Group, P.C. v. Greater Lafayette Health Svcs. Inc., 382 F.Supp.2d 1092, 1095-1096 (N.D. Ind. 2005) (substitution of one exclusive radiology services provider for another doesn't violate antitrust laws); Agency Development, Inc. v. Med. Am. Ins. Co., 310 F.Supp.2d 538, 544-545 (W.D.N.Y. 2004) ("Plaintiff's alleged drop in sales and lost profits . . . are not the result of any anticompetitive conduct of defendants [but r]ather . . .the result of the lawful termination of an agency contract."); Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co., 161 F.Supp.2d 876, 884 (N.D. Ill. 2001) ("plaintiff suffers no antitrust injury when prices are raised by a defendant's behavior"); Futurevision Cable Sys. Of Wiggins, Inc. v. Multivision Cable TV Corp., 789 F.Supp. 760, 770, 771 n.6 and 775 (S.D. Miss. 1992) **[*11]** (network's selection of one distributor over another fails to state a restraint of trade violation), *aff'd without opinion*, *986 F.2d 1418 (5th Cir. 1993)*.

Granite also contends that Nexstar hasn't alleged that any anticompetitive conduct on Granite's part caused Nexstar's injury — that but for the violation (which Granite understands to be Granite's acquisition of the FOX network affiliation), the injury (which Granite understands to be loss of the Fox affiliation and programming) wouldn't have occurred. *Citing* Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 395 (7th Cir. 1993); O.K. Sand & Gravel, Inc. v. Martin Marietta Techs., Inc., 36 F.3d at 573-574; Agency Dev., Inc. v. Med. Am. Ins. Co., 310 F.Supp.2d at 544-545. Granite contends that the alleged injury would be the same no matter who succeeded Nexstar as the FOX affiliate, *see* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977); Alberta Gas Chems. Ltd. v. E.I. DuPont de Nemours & Co., 826 F.2d at 1241-1242, 1246, and that "Nexstar's alleged injury flows from its termination of FOX's exclusive programming distributor agreement and its own unwillingness to pay for **[*12]** that programming, rather than from anything illegal that Granite did."

Nexstar says the injury it alleges isn't the loss of a single exclusive-dealing relationship (the FOX affiliation agreement) or higher prices, as Granite suggests, but rather the loss of the ability to compete at all in the local advertising market, so its case differs from the cases on which Granite relies. Nexstar says it and other television stations in the Fort Wayne area have suffered and/or will suffer an antitrust injury as a result of Granite and Malara's collusive aggregation of the exclusive contracts for five of the six national network affiliations in the Fort Wayne area - not just the FOX affiliation. That collusive aggregation, Nexstar says, cuts off an essential or "key" input for effective competition in the local advertising market ("must have" network programming), creates a barrier to entry and expansion in that market, and gives Granite the market power to effectively foreclose competition and to raise advertising prices above competitive levels. Nexstar reasons that its injury flows from the harm to competition perpetrated by Granite, and satisfies the "but for" causation and antitrust injury **[*13]** requirements for antitrust standing. *Citing e.g.*, Fishman v. Estate of Wirtz, 807 F.2d 520, 533 (7th Cir. 1986); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 745 F.2d 441, 449-450 (7th Cir. 1984); Medscan v. N.Y. Univ. Sch. of Med., 430 F.Supp.2d 140, 148-149 (S.D.N.Y. 2006) (Chin, J.).

Granite replies that Nexstar's "aggregation" theory of liability is meritless because Nexstar had access to network programming until August 2011 and suffered no injury until it lost its bid to renew the FOX affiliation contract. Granite concludes that its pre-2011 network affiliations couldn't have been the "but for" cause of the alleged injury, that this is a simple case of one exclusive distributor replacing another, and that the antitrust laws weren't intended to prevent that type of injury or the higher consumer prices that might result.

The conduct complained of and the injury alleged aren't as simple as Granite contends. The complaint alleges that Granite, either alone or with Malara and others, engaged in a course of conduct that had the purpose and effect of excluding competition in the television local spot advertising market in violation of the antitrust laws when it: (1) entered into agreements **[*14]** and/or conspired with Malara and others to consolidate market power, raise the price of advertising, acquire exclusive affiliation agreements with five of the six major national television networks in the Fort Wayne DMA, and deny competitors' access to "must have" network programming, the large consumer audiences that it attracts and that advertisers target, and the advertising revenues that it generates[1] (2) accelerated the movement of advertisers from Nexstar's WFFT-TV to the stations Granite and Malara own by telling advertisers that WFFT-TV won't be able to access "must have" network programming and will be going off the air, is about to be sold, or will no longer broadcast local news; and (3) approached and tried to entice (through offers of high compensation) several key Nexstar sales employees with confidential and proprietary information about Nexstar's WFFT-TV advertising prices.

Nexstar says Granite's acquisition of the FOX affiliation in 2011 simply nailed the lid on the coffin, and alleges that no offsetting efficiency rationale or pro-competitive benefit that justifies Granite's acts. Nexstar says Granite's actions have caused Nexstar to incur past and future substantial harm in the form of lost profits (advertising revenues), higher operating costs, and the loss of experienced sales staff and the proprietary information they possess.

Nexstar's aggregation or "chain reaction" theory of liability was pleaded in each of its claims, as was the requisite antitrust injury. Contrary to Granite's assertions, the alleged facts support a reasonable inference that Granite's concerted pre-2011 actions gave it the market power needed to acquire control over all a majority of the network affiliations and network programming in the Fort Wayne DMA and the advertising sales and revenues those affiliations generate, to the exclusion of other competitors. Whether Nexstar can prove that Granite's concerted actions are illegal per se or under the rule of reason (*i.e.*, that Granite was involved in a horizontal conspiracy **[*16]** with the purpose and effect of excluding direct competitors from the market, or that the alleged conduct would always or almost always tend to restrict competition and decrease output, without justification), *see* *Broadcast Music, Inc. v. CBS, 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1980)*, and whether Granite's actions were the "but for" cause of Nexstar's alleged injuries remains to be determined. The court can't decide at the pleadings stage whether Nexstar would have suffered identical injuries had someone else acquired the FOX affiliation, as Granite contends. While Nexstar's injuries might have been the same if another competitor had purchased the FOX affiliation, it could be inferred plausibly from the complaint's allegations that Granite, because of its market power, was the only competitor who could and would pay a "supra-competitive" price for the FOX affiliation agreement.

The complaint contains enough in the way of factual allegations to make Nexstar's antitrust claims "plausible" and to survive a motion to dismiss.

B. *Antitrust Standing*

"Standing . . . examines the connection between the asserted wrongdoing and the claimed injury to limit the class of potential plaintiffs to those who are in the best **[*17]** position to vindicate the antitrust infraction." *Greater Rockford Energy and Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 395 (7th Cir. 1993)*. "[N]ot all persons who have suffered an injury flowing from [an] antitrust violation have [antitrust standing]." *In re Industrial Gas Antitrust Litigation, 681 F.2d 514, 516 (7th Cir. 1982)*. "From the class of injured persons suffering an 'antitrust injury' only those parties who can most efficiently vindicate the purposes of the antitrust laws have antitrust standing to maintain a private action . . . ." *Serfecz v. Jewel Food Stores, 67 F.3d 591, 598 (7th Cir. 1995)* (quoting *In re Indus. Gas Antitrust Litig., 681 F.2d 514, 516 (7th Cir. 1982)*; *accord*, *Kochert v. Greater Lafayette Health Svcs, Inc., 463 F.3d 710, 716 (7th Cir 2006)*.

A court considers multiple factors in determining whether a plaintiff has antitrust standing, including: (1) "the causal connection between the damages claimed by the antitrust plaintiff and the harm to the plaintiff;" (2) "the nature of the injury suffered by the plaintiff and the relationship between the injury and the type of conduct sought to be

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[1] It's not clear from the complaint when the alleged anti-competitive conduct actually began, but it could reasonably be inferred that it started in 2005 with the acquisition of WISE-TV (the NBC affiliate), sale of WPTA-TV to Malara, and subsequent agreements between Granite and Malara which effectively **[*15]** transferred operation and control of WPTA-TV back to Granite.

redressed by providing a private remedy for antitrust violations;" **[*18]** (3) "the directness of the asserted injury;" and (4) "the risk of duplicate recoveries or (conversely) the difficulties of apportioning damages among various classes of plaintiffs." *Nelson v. Monroe Reg'l Med. Ctr., 925 F.2d 1555, 1562-63 (7th Cir. 1991)*. *See also Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 537-46, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*; *Kochert v. Greater Lafayette Health Servs., 463 F.3d at 718*; *Sanner v. Bd. of Trade of the City of Chicago, 62 F.3d 918, 927 (7th Cir. 1995)*. "The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." *Associated General Contractors v. California State Council of Carpenters, 459 U.S. at 542*.

Granite contends that Nexstar lacks antitrust standing because it can't prove antitrust injury or but for causation, and so isn't the party that "can most efficiently vindicate the purposes of the antitrust laws." *Citing Kochert v. Greater Lafayette Health Svcs, Inc., 463 F.3d at 716*; *Serfecz v. Jewel Food Stores, 67 F.3d at 598*. **[*19]** But the issue at this stage isn't whether Nexstar will prevail on the merits; it's whether the complaint sufficiently alleges a "plausible" antitrust claim. *Ashcroft v. Iqbal, 556 U.S. at 678*; *In re Text Messaging Antitrust Litigation, 630 F.3d at 629*. While "[t]he required level of factual specificity rises with the complexity of the case," *McCauley v. City of Chicago, 671 F.3d 611, 616 (7th Cir. 2011)*; *Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010)* ("A more complex case...will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff's mind at least, the dots should be connected."); *Limestone Development Corp., 520 F.3d at 803* ("Rico cases, like antitrust cases, are "big" cases and the defendant should not be put to the expense of big-case discovery on the basis of a threadbare claim."), the court already has decided that Nexstar has sufficiently alleged antitrust injury and stated a plausible claim under federal and state antitrust laws. Nexstar doesn't purport to stand in the shoes of third parties (advertisers or consumers) or complain about "secondary consequences arising from an injury to a third **[*20]** party." *Sanner v. Bd. of Trade of the City of Chicago, 62 F.3d at 929*. Nexstar's alleged injuries appear to be direct, and the risk of duplicate recoveries appears remote at this stage. *See Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469, 492 (7th Cir. 2002)*. Based on the record before the court so far, Nexstar has the requisite antitrust standing.

C. *Denigrating Speech and Predatory Hiring*

Granite asks the court to dismiss Nexstar's claims of denigrating commercial speech and predatory hiring, contending that such allegations don't state an actionable anti-trust claim under our circuit's law. *See Sanderson v. Culligan Int'l Co., 415 F.3d 620, 624 (7th Cir. 2005)* ("Commercial speech is not actionable under the antitrust laws."); *Mercatus Group, LLC v. Lake Forest Hospital, 641 F.3d 834, 852, 854 n.12 (7th Cir. 2011)* (noting that the Seventh Circuit has "never recognized predatory hiring as a valid theory of antitrust liability"). Granite cites *Mercatus Group, LLC v. Lake Forest Hospital, 641 F.3d at 850-51*, for the proposition that "speech made in the commercial context does not violate the antitrust laws unless it . . . is accompanied by some sort of 'enforcement mechanism' designed **[*21]** somehow to coerce or compel [the listener] to heed the admonition," and contends that Nexstar hasn't alleged that Granite engaged in any coercive threats or that "advertisers and the public" aren't free to accept or ignore Granite's alleged denigrating comments.

Nexstar maintains that Granite's predatory hiring and disparagement of Nexstar are part of Granite's "course of conduct" and evidence Granite's specific intent to monopolize the Fort Wayne market for television local spot advertising, *Mercatus Group, LLC v. Lake Forest Hospital, 641 F.3d at 852* (acknowledging that "false and misleading statements about a competitor" can be anticompetitive, albeit minimally); *DSM Desotech Inc. v. 3D Sys. Corp., 2009 U.S. Dist. LEXIS 5980, 2009 WL 174989 at *10 (N.D. Ill. Jan. 26, 2009)* ("'an intent to control prices and destroy competition'" can be inferred from predatory or anticompetitive conduct), and that Granite's ability to wield market power and withhold necessary inputs (like network programming) are coercive enforcement mechanisms. *See Mercatus Group, LLC v. Lake Forest Hospital, 641 F.3d at 851-852, 855*. Nexstar contends that Granite's market power also gives it the ability to offer supra-competitive compensation **[*22]** packages to WFFT-TV's skilled advertising sales staff, giving Granite access to confidential and proprietary pricing information, and enhancing Granite's ability to exercise market power by charging supra-competitive prices for advertising.

Whether Granite's alleged derogatory or disparaging statements are actionable in antitrust depends on the nature of the speech (who it made the statements to and what it said), and whether there was an "enforcement mechanism" in place — whether Granite's statements were backed by any sort of coercive conduct or threat (*i.e.*, the ability to boycott, to enter into agreements not to advertise certain products, or an inherent authority that it could leverage to compel advertisers to deal exclusively with Granite). *Mercatus Group, LLC v. Lake Forest Hospital, 641 F.3d at 850-852*; *Sanderson v. Culligan Int'l Co., 415 F.3d 620, 623-624 (7th Cir. 2005)*; *Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397, 399-400 (7th Cir. 1989)*. "[A]bsent an accompanying coercive enforcement mechanism of some kind, even demonstrably false "[c]ommercial speech is not actionable under the antitrust laws." *Mercatus Group, 641 F.3d at 852* (quoting *Sanderson v. Culligan Int'l Co., 415 F.3d at 624*). **[*23]** "The genuine anticompetitive effects of false and misleading statements about a competitor are minimal, at best . . . As a result, courts must exercise 'caution . . . against attaching much weight to isolated examples of disparagement,' and claims based on one competitor's disparagement of another 'should presumptively be ignored.'" *Mercatus Group, 641 F.3d at 852* (quoting *American Prof'l Testing Service, Inc., v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997)* [quoting 3 P. AREEDA & D. TURNER, ***ANTITRUST LAW***, ¶ 737b at 280-281 (1978)]. *See also* *American Council of Certified Podiatric Physicians & Surgeons v. American Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 370 (6th Cir. 2003)*; *National Ass'n of Pharmaceutical Mfrs. v. Ayerst Labs, 850 F.2d 904, 916 (2d Cir. 1988)*.

The allegations of denigrating speech and predatory hiring standing alone might not suffice to state an antitrust claim, but Nexstar doesn't contend they would. Nexstar alleges that they are part of a course of conduct (or "chain reaction") and show Granite's intent to monopolize the television advertising market and destroy competition, *see* *DSM Desotech Inc. v. 3D Sys. Corp., 2009 U.S. Dist. LEXIS 5980, 2009 WL 174989 at *10 (N.D. Ill. Jan. 26, 2009)*, **[*24]** and that Granite had a coercive enforcement mechanism (market power and the ability to limit input), and could use it to back its derogatory statements and force advertisers to deal exclusively with it. *See* *Mercatus Group, 641 F.3d at 851, 855*. Those allegations suffice.

D. *Conspiracy to Violate Antitrust Laws (Counts I and III)*

Granite contends that Nexstar's conspiracy claims (Counts I and III) should be dismissed because a conspiracy "requires proof of at least two independent economic actors,"*see* *Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 536-540 (7th Cir. 1986)*, and the "judicial admissions" in the complaint conclusively establish that Malara (the only named conspirator) has a "unity of economic interest" with Granite, isn't an "independent center of decisionmaking," and therefore isn't capable of conspiring with Granite to violate the antitrust laws. *American Needle, Inc. v. NFL, __ U.S. __, 130 S.Ct. 2201, 2209-2212, 176 L. Ed. 2d 947 (2010)* ("the question in not whether the defendant is a legally single entity or has a single name . . . [but] whether there is a 'contract, combination . . . or conspiracy' amongst 'separate economic actors pursuing separate economic interests,' such **[*25]** that the agreement 'deprives the marketplace of independent centers of decisionmaking'"); *Cooperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* ("the coordinated activity of a parent [corporation] and its wholly owned subsidiary must be viewed as that of a single enterprise" for purposes of a conspiracy to restrain trade in violation of Section 1 of the Sherman Act).

Nexstar maintains that an entity's nature and ability to combine or conspire is a fact question, *L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1387 (9th Cir. 1984)*, and that the facts alleged in its complaint show that Granite and Malara are independent economic entities capable of conspiring: "Like the competitor NFL teams in American Needle, Granite and Malara have acted in concert to join "independent centers of decisionmaking" and have placed a revenue stream-spot advertising from Fort Wayne advertising sales-under common control. Absent their agreement, Granite and Malara would compete for advertisers and would not be able to join their resources to foreclose competitors from network programming."

The complaint contains various descriptions of Malara and its relationship with Granite. It alleges **[*26]** that Malara owns WPTA-TV, and that Granite entered into agreements with Malara to operate the station and serve as its advertising representative. The complaint also alleges that Malara is "Granite's partner" and a "co-conspirator", that "Granite . . . defined Malara as a Granite subsidiary" in submissions to the bankruptcy court in the Southern District of New York in 2007, and that Indiana's NewsCenter (the brand name for Granite's consolidated operations in Fort

Wayne) "currently identifies Granite as 'the present owner' of WPTA." But those allegations don't foreclose the possibility that Malara is an independent entity capable of conspiring with Granite. The complaint contains enough in the way of factual allegations to make Nexstar's conspiracy claims "plausible". Nothing more is required at this stage of the proceedings.

III.

For the foregoing reasons, the court DENIES the defendants' motion to dismiss [Doc. No. 32].

SO ORDERED.

ENTERED: July 9, 2012

/s/ Robert L. Miller, Jr.

Judge

United States District Court

Catena v. Capitol Records, Inc.

United States District Court for the Central District of California

July 11, 2012, Decided; July 11, 2012, Filed

CASE NO. CV 12-00806 MMM (JCx)

Reporter
2012 U.S. Dist. LEXIS 199411 *

FELICE CATENA, Plaintiff, vs. CAPITOL RECORDS, LLC f/k/a CAPITOL RECORDS, INC., A DIVISION OF EMI MUSIC NORTH AMERICA, LLC, Defendant.

Core Terms

royalties, partnership, recording, unfair, fraudulent, allegations, individual member, consumers, contracts, parties, royalty payment, motion to dismiss, download, licenses, music, prong, business practice, contends, sentence, songs, contractual, courts, entity, unfair business practice, reasonably susceptible, factual allegations, susceptible, conclusory, references, ambiguity

Counsel: **[*1]** For Felice Catena, Plaintiff: Mark L Block, Wargo and French LLP, Los Angeles, CA USA; Paul H Duvall, King and Ballow, San Diego, CA USA; Richard S Busch, PRO HAC VICE, King and Ballow, Nashville, TN USA.

For Capitol Records Llc, A Division of Emi Music North America LLC doing business as Capitol Records Inc, Defendant: Jennifer A Jones, Kelly M Klaus, Melinda E LeMoine, Munger Tolles and Olson LLP, Los Angeles, CA USA.

Judges: MARGARET M. MORROW, UNITED STATES DISTRICT JUDGE.

Opinion by: MARGARET M. MORROW

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

On December 22, 2011, Felice Catena commenced this action against Capitol Records ("Capitol") in Los Angeles Superior Court.[1] Capitol removed the action to federal court on January 30, 2012, invoking the court's diversity jurisdiction.[2] On March 7, 2012, it filed a motion to dismiss the complaint.[3] Catena opposes the motion.[4]

I. FACTUAL BACKGROUND

[1] Notice of Removal Pursuant ("Removal"), Docket No. 1 (Jan. 30, 2012), Exh. A ("Complaint").

[2] Removal at 2.

[3] Motion to Dismiss Pursuant to *Fed. R. Civ. P. 12(b)(6)* ("Motion"), Docket No. 14 (Mar. 7, 2012). See also Reply in Support of Capital Records, LLC's Motion to Dismiss for Failure to State a Claim ("Reply"), Docket No. 18 (May 7, 2012).

[4] Plaintiff's Response to Defendant's Motion to Dismiss ("Opp."), Docket No. 17 (Apr. 30, 2012).

Catena is the heir and holder of legal rights to the intellectual property and estate of her deceased brother, Bruce Gary, a member of a musical group known as The Knack.[5] The Knack's hit songs include "My Sharona," a number one single in 1979, and "Good Girls Don't."[6] The group's debut album, titled **[*2]** "Get the Knack," sold more than 2 million copies in the United States and more than 6 million copies worldwide.[7]

Catena alleges that under the terms of a recording agreement between members of The Knack and Capitol, the group gave Capitol certain of its recorded performances ("the masters").[8] In exchange, Capitol agreed to manufacture, distribute, sell, and license the masters for distribution "in various configurations."[9] The agreement dictated the royalties Capitol was to pay for its licensing of the masters; specifically, it stated that "[w]ith respect to any use of masters recorded hereunder . . . by a licensee of Capitol . . . in lieu of any other royalty specified in this agreement Capitol shall pay . . . 50% of Capitol's net receipts from such licensee . . ., computed on the same quantity, basis and in the same manner as Capitol is paid."[10]

Catena asserts that Capitol licensed the masters to several third parties, including music download providers such as iTunes, cMusic, Amazon, Verizon, and T-Mobile, so that those providers could manufacture and sell music downloads, master tones and ring tones to the public.[11] She contends that Capitol received income from these licenses, **[*3]** and that it has "continuously and persistently" failed to pay 50% of its net receipts as required by the recording agreement.[12] Instead, Capitol purportedly paid Catena and members of The Knack at a lower royalty rate, pursuant to provisions of the recording agreement that were applicable to its sale of phonorecords rather than to licensing of the masters.[13]

Catena notified Capitol of its failure to pay members of The Knack the royalties they were due; despite this, Capitol has allegedly failed to make remit the monies owing.[14] She asserts, on information and belief, that Capitol knew its agreements with music download providers were licenses that entitled Catena and members of The Knack to 50% of the net receipts from the sales. Nonetheless, she contends, Capitol "deliberately and purposefully . . . vetted . . . [the] . . . practices at issue . . . at its highest corporate levels," chose to ignore its contractual obligations in order to accrue greater profits for itself, and enlisted music download providers' help "in an effort to re-characterize its dealings with them."[15] Catena alleges that Capitol "has employed and continues to employ a host of unfair tactics and strategies . . **[*4]** . to minimize [its] exposure from the unlawful conduct" alleged.[16]

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[5] Complaint, ¶ 1.

[6] *Id.*

[7] *Id.*

[8] *Id.*, ¶ 9.

[9] *Id.*

[10] *Id.*, ¶ 10.

[11] *Id.*, ¶ 11.

[12] *Id.*

[13] *Id.*, ¶ 12.

[14] *Id.*, ¶ 13.

[15] *Id.*, ¶ 15.

[16] *Id.*

She pleads claims for breach of contract; violation of California's e Unfair Competition Law ("UCL"), Business and Professions Code *§ 17200, et seq.*; an accounting; and declaratory relief.[17]

II. DISCUSSION

A. Legal Standard Governing Motions to Dismiss under *Rule 12(b)(6)*

A *Rule 12(b)(6)* motion tests the legal sufficiency of the claims asserted in the complaint. A *Rule 12(b)(6)* dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)*. The court must accept all factual allegations pleaded in the complaint as true, and construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*; *Mier v. Owens, 57 F.3d 747, 750 (9th Cir. 1995)*. It need not, however, accept as true unreasonable inferences or legal conclusions cast in the form of factual allegations. See *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* ("While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough **[*5]** to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)" (citations omitted)).

Thus, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*; see also *Twombly, 550 U.S. at 545* ("Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)" (citations omitted)); *Moss v. United States Secret Service, 572 F.3d 962, 969 (9th Cir. 2009)* ("[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief," citing *Iqbal* and *Twombly*).

The manner in which the court assesses the adequacy and plausibility of a plaintiff's allegations is described in *Telesaurus VPC, LLC v. Power, 623 F.3d 998 (9th Cir. 2010)*, where the court said:

> "For purposes of our review, we begin by identifying pleadings that, because they are no more than **[*6]** conclusions, are not entitled to the assumption of truth. We disregard threadbare recitals of the elements of a cause of action, supported by mere conclusory statements. After eliminating such unsupported legal conclusions, we identify well-pleaded factual allegations, which we assume to be true, and then determine whether they plausibly give rise to an entitlement to relief." *Id. at 1003* (citations and quotation marks omitted).

B. Whether Plaintiff's Claims Should Be Dismissed

1. Interpretation of the Recording Agreement

The gravamen of defendant's motion is that the express terms of the recording agreement preclude Catena from suing Capitol for the payment of royalties. A court may grant a motion to dismiss based on interpretation of a contract so long as the contract's terms are unambiguous. *Bedrosian v. Tenet Healthcare Corp., 208 F.3d 220*, *[published in full-text format at 2000 U.S. App. LEXIS 2840], 2000 WL 206633, *1 (9th Cir. Feb. 23, 2000) (Unpub.*

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[17] *Id.*, ¶¶ 16-41.

Disp.) ("Resolution of contractual claims on a motion to dismiss is proper if the terms of the contract are unambiguous."). If the contract's terms are reasonably susceptible of more than one meaning, however, the motion must be denied. See *Velasquez v. GMAC Mortg. Corp., 605 F.Supp.2d 1049, 1069 (C.D. Cal. 2008)* ("While the resolution of contractual claims on a motion to dismiss may be proper if the terms of the contract are unambiguous, a motion to dismiss should not **[*7]** be granted where the contract 'leaves doubt as to the parties' intent,'" quoting *Consul Ltd. v. Solide Enters., Inc., 802 F.2d 1143, 1149 (9th Cir. 1986))*; *Rodman v. Safeway, Inc., No. C 11-03003, 2011 U.S. Dist. LEXIS 126212, 2011WL 5241113,*3 (N.D. Cal. Nov. 1, 2011)* (denying a motion to dismiss a breach of contract claim "[b]ecause Plaintiff adequately alleges the existence of a contract, which both parties construe to be binding, and which is susceptible to Plaintiff's reasonable construction").

"A party's assertion of ambiguity does not require the district court to allow additional opportunities to find or present extrinsic evidence if the court considers the contract language and the evidence the parties have presented and concludes that the language is reasonably susceptible to only one interpretation." *Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1017 (9th Cir. 2012)*. "That conclusion can be reached . . . on a motion to dismiss if the evidence can properly be considered under *Rule 12(b)(6)*." *Id.*; see also *AMC Tech., LLC v. CiscoSystems, Inc., No. 11—CV—03403 PSG, 2012 U.S. Dist. LEXIS 6487, 2012 WL 174949,*4 (N.D. Cal. Jan. 20, 2012)* ("The mere suggestion that extrinsic evidence could create an ambiguity is not sufficient where there is no language in the contract that is reasonably susceptible to the meaning allegedly supported by that evidence"). Although the material facts alleged in the complaint must be construed in plaintiff's **[*8]** favor, "the court [is not] required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors, 266 F.3d 979 (9th Cir. 2001)*. Nor is the court required to accept as true allegations that are contradicted by documents incorporated in the complaint or properly subject to judicial notice. *Id.*

The parties do not dispute that California law governs interpretation of the recording agreement. "Under California law,'[t]he fundamental goal of contract interpretation is to give effect to the mutual intent of the parties as it existed at the time of contracting.'" *Skilstaf, Inc., 669 F.3d at 1015* (quoting *Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 989 (9th Cir. 2006)* (per curiam)). "Because California law recognizes that the words of a written instrument often lack a clear meaning apart from the context in which the words are written, courts may preliminarily consider any extrinsic evidence offered by the parties." *Id. at 989-90*; see also *Dore v. Arnold Worldwide, Inc., 39 Cal.4th 384, 391, 46 Cal. Rptr. 3d 668, 139 P.3d 56 (2006)* ("'[E]ven if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible,'" quoting *Morey v. Vannucci, 64 Cal.App.4th 904, 912, 75 Cal. Rptr. 2d 573 (1998))*. "If the court decides, after consideration of this evidence, that the language of a contract, in **[*9]** the light of all the circumstances, is fairly susceptible of either one of the two interpretations contended for, extrinsic evidence relevant to prove either of such meanings is admissible." *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal.2d 33, 40, 69 Cal. Rptr. 561, 442 P.2d 641 (1968)*. "If, however, the court decides that the contract is not reasonably susceptible to more than one interpretation, the court can reject the assertion of ambiguity." *Skilstaf, 669 F.3d at 1015*.

"It is the outward expression of the agreement, rather than a party's unexpressed intention, which the court will enforce." *Winet v. Price, 4 Cal.App.4th 1159, 1165, 6 Cal. Rptr. 2d 554 (1992)*. "Language in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract." *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co., 18 Cal.4th 857, 868, 77 Cal. Rptr. 2d 107, 959 P.2d 265 (1998)* (internal citation and quotations omitted); see also *CAL. CIV. CODE § 1641* ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other").

While only an excerpt of the recording agreement is attached to the complaint,[18] Capitol has proffers the entire agreement in support of its motion.[19] Capitol also proffers a February 12, 1982, letter indicating that Bruce Gary

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[18] Complaint, Exh. A.

had terminated his membership in The Knack, and invoked a provision in the agreement concerning a **[*10]** "member [who] ceases to be a member of the Group."[20] While a court may not ordinarily rely on matters outside the pleadings in deciding a Rule a *12(b)(6)* motion, under the incorporation by reference doctrine, a court can consider a document if "(1) the complaint refers to the document; (2) the document is central to plaintiff's claim; and (3) no party questions the authenticity of the [document]." *Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)*; see also *Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)* ("If the documents are not physically attached to the complaint, they may be considered if the documents' 'authenticity . . . is not contested' and 'the plaintiff's complaint necessarily relies on them," quoting *Parrino v. FHP, Inc., 146 F.3d 699, 705-06 (9th Cir. 1998))*.

Catena's complaint refers to and necessarily relies on the recording agreement. It also references Gary's membership in The Knack, and "all subsequent amendments and supplements" to the agreement.[21] Catena does not dispute the authenticity of the copies of the recording agreement and February 1982 letter that Capitol has proffered. Consequently, the court will rely on these documents in deciding the motion.

The agreement is in two parts — the first is the "agreement" between the members of The Knack (Doug Fieger, Berton Averre, Bruce Gary, and Prescott Niles) and Capitol. **[*11]** This portion is written in the first person and signed by all four members of the group and a representative of Capitol. The second part is a "group supplement," which is paginated consecutively with the agreement and states that it is "an integral part of the Agreement to the same extent as if included therein."[22] The group supplement is signed only by the members of The Knack.[23] The parties' dispute centers on the proper interpretation to be given paragraphs 1(a) and 6 of the group supplement. Paragraph 1(a) states:

> "All payments under the Agreement . . . shall be paid to The Knack partnership. . . . Except as provided in Paragraph 8, Doug Fieger, Berton Averre, Bruce Gary, and Prescott Niles all agree to look solely to The Knack partnership for payment of all royalties and/or fees, as the case may be, and will not assert any claim in this regard against Capitol or in this regard attempt to prevent the manufacture, sale, or distribution of phonograph records manufactured from masters recorded under the Agreement."[24]

Paragraph 6 states that "[i]f any member ceases to be a member of the Group, such member shall continue to look solely to The Knack partnership for payment of all applicable **[*12]** royalties and/or fees in accordance with Paragraph 1.a. of this Group Supplement."[25]

Capitol contends that these provisions clearly and unambiguously require individual members of The Knack to look solely to "The Knack partnership" for "payment of all royalties and fees," and bar "any claim in this regard against Capitol." As each of Catena's claims is based on purportedly unpaid royalties, Capitol contends the contract maintenance of the suit. Capitol also notes that the contract and the group supplement differentiate between Capitol's rights and obligations with respect to The Knack as a whole, and its rights and obligations with respect to individual members of the group. Capitol cites various paragraphs of the agreement as evidence of this,[26] and

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[19] Declaration of Melinda E. LeMoine in Support of Motion to Dismiss ("LeMoine Decl."), Docket No. 15 (Mar. 7, 2012), Exh. A ("Recording Agreement").

[20] *Id. at 40*; LeMoine Decl., Exh. B ("Gary Letter").

[21] Complaint, ¶ 2.

[22] Recording Agreement at 38.

[23] *Id. at 42*.

[24] *Id. at 38*.

[25] *Id. at 40*.

[26] See, e.g., *id. at 33* ("Payments to me provided herein other than union scale shall be made to "The Knack", c/o Upstart Management, or to such other address as I may direct Capitol by notice in writing, and payment so made shall fulfill Capitol's

contrasts them with provisions that reference individual Knack members by name, clarifying that some have different rights and obligations than others.[27] When read in light of these other provisions, Capitol contends, paragraphs 1(a) and 6 of the group supplement require that the individual members of The Knack seek payment of any unpaid royalties from The Knack partnership, rather than from Capitol.

While this interpretation of the contract **[*13]** is certainly reasonable, it is not the *only* construction of which the agreement is susceptible. As noted, paragraph 1(a) states that the group's members "all agree to look solely to The Knack partnership *for payment of all royalties and/or fees*, as the case may be, and will not assert *any claim in this regard* against Capitol. . . ."[28] Capitol emphasizes the first italicized phrase, arguing that it encompasses all claims that implicate or concern royalty payments. Paragraph 1(a), however, begins with the sentence: "All payments under the Agreement other than applicable union scale shall be paid to The Knack partnership, c/o Upstart Management, or such other address as Capitol is notified in writing." This sentence requires that payments Capitol makes to the group members under the agreement "shall be paid" to the partnership; it thus describes the manner in which Capitol is to make royalty payments to members of The Knack. The second sentence, which is the focus of the parties' dispute, states that individual members of The Knack will look to the partnership for "the payment of all royalties and/or fees." Capitol's interpretation may be the more obvious one based on the plain language **[*14]** of the second sentence; its interpretation could be said to, however, disregard the immediately preceding sentence, which appears to limit the "royalties and/or fees" that are the subject of the second sentence to the "payments under the Agreement" that "shall be paid" to the partnership entity. Because of this, the second sentence of Paragraph 1(a) is reasonably susceptible of being a reference to the recourse individual members of The Knack had available to obtain the "payment of all royalties and/or fees" that Capitol had paid pursuant to the first sentence of the paragraph. Stated differently, the sentences can be interpreted together to mean that after Capitol made required royalty payments to The Knack partnership, individual members of the group could only recoup their percentage of the payment made by Capitol "under the Agreement" from the partnership. Paragraph 1(a) clearly bars the individual members from asserting "any claim in this regard" against Capitol.

Catena's claim, however, is not that Capitol validly paid royalties due to The Knack partnership and that she has not received the percentage of the royalty payments to which she is entitled. Instead, she alleges that **[*15]** Capitol is withholding royalty payments from The Knack that it is required to make in violation of the recording agreement. Her claim that Capitol is not making "[a]ll payments under the Agreement" is thus distinct from a claim that the partnership failed to pay its members profits Capitol paid to it.

Capitol argues that this interpretation is unreasonable, and requires that the contract be construed to mean that the "individual members [of The Knack] won't bring claims for royalties against Capitol unless the individuals have claims for royalties against Capitol."[29] To the contrary, Catena's construction of paragraph 1(a) merely reads the paragraph as a whole, and does not single out the phrase "all royalties and/or fees" for special emphasis. See *People v. Doolin, 45 Cal. 4th 390, 413 n.17, 87 Cal. Rptr. 3d 209, 198 P.3d 11 (2009)* ("Courts must interpret the contractual language to give force and effect to every provision and avoid an interpretation that renders some clauses nugatory, inoperative or meaningless" (internal citations omitted)).

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obligation hereunder to each of the group's signatories"); *id. at 39* ("If we refuse or neglect to fail to perform together for Capitol in fulfillment of the obligations agreed to be performed under the Agreement, Capitol may by notice in writing terminate the Agreement entirely. . .").

[27] See, e.g., *id. at 39* ("the said professional name shall be and remain the property of Doug Fieger"); *id.* ("[I]f either Doug Fieger or Berton Averre leaves the Group, and a mutual agreement cannot be reached as to a replacement therefor, Capitol may elect to terminate the engagement of the remaining members of the Group by notice in writing"); *id. at 42* (stating that "[a]ll approvals, consents, selections, and notifications shall be made solely by, and all consultations shall be solely with" Fieger or the group's manager).

[28] Recording Agreement at 38 (emphasis added).

[29] Motion at 12.

Under the facts of this case, Capitol's interpretation would place Catena and the individual members of The Knack in the position of suing "The Knack partnership," i.e. each other, for money none of them possesses. In a practical **[*16]** sense, therefore, Capitol's construction may result in individual members being unable to assert that Capitol is withholding royalty payments in violation of the contract. This may further support the existence of a contractual ambiguity. See *Battram v. Emerald Bay Community Assn., 157 Cal. App. 3d 1184, 1189, 204 Cal. Rptr. 107 (1984)* ("'[W]here a contract is susceptible of two interpretations, the courts shall give it such a construction as will make it lawful, operative, definite, reasonable and capable of being carried into effect . . . .[and] avoid an interpretation which will make [the contract] extraordinary, harsh, unjust, inequitable or which would result in absurdity.'" (quoting *Howe v. American Baptist Homes of the West, Inc., 112 Cal.App.3d 622, 626-627, 169 Cal. Rptr. 418 (1980))*.

Capitol responds that while individual members of The Knack can assert rights to royalties only against the partnership, The Knack *partnership* can sue Capitol. Under this interpretation, the individual members' rights would be preserved and collectively they would have recourse against Capitol if it breached the terms of the agreement. Neither the agreement nor the group supplement, however, is signed by anyone on behalf of "The Knack partnership."[30] Nor, other than the fact that the agreement was structured to pay royalties to the group, and through it, to individual members, is there any **[*17]** information the court can consider concerning the past or current existence of such a partnership. See *Love v. The Mail on Sunday, 489 F.Supp.2d 1100, 1106-07 (C.D. Cal. 2007)* ("Plaintiff simply does not demonstrate that he and Defendant were 'carry[ing] on as coowners a business for profit.' It is uncontested that Plaintiff and Defendant wrote songs together and, until 1969, co-owned those songs. However, this collaboration and co-ownership of songs does not show that they were engaged as co-owners of a business. Further, the assets that Plaintiff characterizes as 'partnership assets' — the copyrights to their co-authored songs — are not owned by any partnership entity between Plaintiff and Defendant, or even by Plaintiff and Defendant jointly or in common; instead these copyright have been owned by Rondor since 1969. Plaintiff and Defendant are each entitled to royalties based on those copyrights, but there is no evidence that their entitlement to royalties runs through any partnership between them. Rather, Rondor pays royalties directly to Plaintiff and directly to Defendant individually. In short, Plaintiff's evidence cannot satisfy the 1994 UPA's definition of 'partnership.' In addition, Defendant has demonstrated that objective indicia of partnership **[*18]** simply do not exist, and that there is no evidence that the parties entered into a partnership orally. Indeed, it is undisputed that Plaintiff and Defendant never signed any type of written partnership agreement, that they never had any discussions regarding what would be done with the songs they wrote together, that Plaintiff cannot recall any conversations with Defendant about the need to inform each other regarding the use of the songs, that Plaintiff never filed partnership tax returns in connection with the songwriting royalties received from the exploitation of the co-authored songs, and that there is no 'partnership entity' that currently collects the songwriting royalties for the co-authored songs"). Indeed, some of the language in the recording agreement suggests that it is a contract between Capitol and four individuals, as it speaks in the first person and repeatedly refers to "my exclusive personal services" and the obligations of individual Knack members.[31]

A somewhat more compelling argument in Capitol's favor is that its reading of the contract is the more sensible one given the agreement's purposes and goals. As noted, the royalty agreement defines the royalty rate on **[*19]** a group basis and provides that Capitol can make a group royalty payment to fulfill its contractual obligation to The Knack's members.[32] The agreement does not define the share of group royalties due any individual member of The

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[30] Recording Agreement at 37, 42. The signature pages do note that the individual signatories are the "[g]roup performing as 'The Knack.'"

[31] See, e.g., *id.* at 1, 3 ("Capitol hereby guarantees me . . ."); *id.* at 12 ("At any time within three years after my royalty statement is rendered to me hereunder . . ."); *id.* at 21 ("Capitol and I agree to indemnify and hold the other harmless from any claims, damages, expenses (including reasonable attorney's fees), and litigation which may come about as a result of a breach by Capitol or me . . . of any of our respective representations or warranties contained in this agreement. . . . Capitol shall have the right to withhold from royalties otherwise payable to me. . .").

[32] *Id. at 33*.

Knack, and does not explicitly state that Gary (Catena's predecessor) is to receive a 25% share, as Catena contends.[33] Interpreting the agreement in the manner Capitol suggests would ensure that it would not be drawn into any internal dispute among the group's members regarding payments or percentages, and that any dispute regarding the division of royalties could be addressed without its involvement. While such an interpretation is, once again, quite plausible, it does not answer what a member of The Knack is to do if Capitol breaches its contractual obligations by withholding royalty payments altogether. The lack of any clear answer to this question on the face of the contract suggests that Catena's construction of the agreement is also plausible, since it preserves the right of individual members of The Knack to bring a claim for unpaid royalties against Capitol. The court reaches this conclusion in part because the court has before it no allegations or evidence **[*20]** that a legal entity known as "The Knack" partnership ever existed, that the entity continues in existence today, or that, if dissolved, there were or were not specific provisions in The Knack's partnership agreement that controlled what happened to partnership assets post-dissolution. Given that the face of the contract is reasonably susceptible of different meanings, the answers to these questions, as well as evidence of the parties' intent that will be developed through discovery, is critical to construing the contract in the proper manner.

Consequently, the court cannot conclude at this stage of the litigation that Capitol's interpretation is the only reasonable construction of the contract. The court wishes to emphasize that it does not definitively decide in this order the proper interpretation of the contract, as that determination must await further factual development. While the plain language of the agreement is susceptible of the interpretation Capitol advances, Catena's alternate construction is also reasonable. Because the contract is susceptible of more than one reasonable interpretation, Capitol's motion to dismiss all of Catena's claims must be denied.[34] See **[*21]** *Yang v. Home Loan Funding, Inc., No. CV F 07-1454 AWI GSA, 2010 U.S. Dist. LEXIS 21837, 2010 WL 670958, *14 (E.D. Cal. Feb. 22, 2010)* ("While the issue with respect to timing of rate changes for the first year is close and has been the subject of disagreement between courts, this court finds that the ambiguity is sufficient for present purposes to warrant denial of the motion to dismiss"); compare *Skilstaf, Inc., 669 F.3d at 1016* (affirming dismissal of a claim where the contract was "susceptible to only one interpretation").

2. Whether the UCL Claims Must Be Dismissed

Capitol next argues that Catena's UCL claim is barred for reasons independent of proper interpretation of the recording agreement. "The UCL was enacted 'to protect . . . consumers and competitors by promoting fair competition in commercial markets for goods and services.'" *Linear Tech. Corp. v. Applied Materials, Inc., 152 Cal.App.4th 115, 135, 61 Cal. Rptr. 3d 221 (2007)* (quoting *Kasky v. Nike, Inc., 27 Cal.4th 939, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002))*. It is "sweeping, embracing anything that can properly be called a business practice and at the same time is forbidden by law." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*; *Palestini v. Homecomings Fin., LLC, No. 10CV1049-MMA, 2010 U.S. Dist. LEXIS 72985, 2010 WL 3339459, *9 (S.D. Cal. Aug. 23, 2010)* (same).

The act defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice." *Bus. & Prof. Code § 17200*; *Cel-Tech Communications, 20 Cal.4th at 180*. "'An act can be alleged to violate any or all of the three prongs of the UCL — unlawful, unfair, or fraudulent.'" *Id.* (quoting *Berryman v. Merit Prop. Mgmt., Inc., 152 Cal.App.4th 1544, 1554, 62 Cal. Rptr. 3d 177 (2007))*.

California courts have held that "an **[*22]** action under the UCL is not an all-purpose substitute for a tort or contract action." *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1150, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)* (citations and quotes omitted). "Contractual duties are voluntarily undertaken by the parties to the contract, not imposed by state or federal law." *Smith v. Wells Fargo Bank, N.A., 135 Cal.App.4th 1463, 1484, 38 Cal. Rptr.*

[33] Opp. at 10.

[34] Given the court's conclusion, it declines to address Catena's contention that she was not required to look to the partnership for royalty payments because Gary had ceased being a member of The Knack. (Opp. at 13-14.)

3d 653 (2005) (internal modification and quotation omitted). "[A] breach of contract [can only] . . . form the predicate for Section 17200 claims, provided it also constitutes conduct that is 'unlawful, or unfair, or fraudulent.'" Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal.App.4th 638, 645, 72 Cal. Rptr. 3d 903 (2008) (emphasis original). Consequently, Catena must plead some element of unfairness, unlawfulness, or fraud in addition to a "garden-variety" breach of contract claim in order to allege a viable UCL claim. See Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1152 (9th Cir. 2008) (rejecting the argument that breach of a contract to pay royalties constituted a violation of the UCL because it was not independently "unlawful, unfair [or] fraudulent"); Boland, Inc. v. Rolf C. Hagen (USA) Corp., 685 F.Supp.2d 1094, 1110 (E.D. Cal. 2010) ("An act that breaches a contract may also breach the UCL, but only when the act is unfair, unlawful or fraudulent for some additional reason" (emphasis added)).

Capitol contends that because Catena is neither a consumer nor a competitor, she is not among the class of people the UCL was designed to protect. This argument is linked to a second, which is that Catena asserts a standard **[*23]** breach of contract claim, and she should be restricted to seeking contractual remedies and not be permitted to assert a separate claim for unfair business practices. Capitol cites Linear Technology Corp. v. Applied Materials, Inc., 152 Cal.App.4th 115, 61 Cal. Rptr. 3d 221 (2007), which held that "where a UCL action is based on contracts not involving either the public in general or individual consumers who are parties to the contract, a corporate plaintiff may not rely on the UCL for the relief it seeks." Id. at 135. In *Linear Technology*, the Court of Appeal observed that "the harm [plaintiff] suffered . . . result[ed] from contracts specifically with the plaintiff," and that "[t]he other alleged victims likewise are sophisticated corporate customers who have entered or will enter their own contracts with respondents, although neither these victims nor the contracts are identified in the complaint." Id. at 136. The court concluded: "In these circumstances, where a UCL action is based on contracts not involving either the public in general or individual consumers who are parties to the contract, a corporate plaintiff may not rely on the UCL for the relief it seeks." *Id.*

Linear Technology Corp.'s facts clearly track the facts of this case. Catena does not purport to represent a class of consumers who **[*24]** were injured by a deceptive business practice aimed at the public at large. Instead, her claims are based on a specific contract between the individual members of a musical group and a recording label concerning royalty payments. While Catena cites authority for the proposition that "a systematic breach of certain types of contracts (e.g., breaches of standard consumer or producer contracts involved in a class action) can constitute an unfair business practice under the UCL," Arce v. Kaiser Foundation Health Plan, Inc., 181 Cal.App.4th 471, 489-90, 104 Cal. Rptr. 3d 545 (2010) (citing Smith v. Wells Fargo Bank, N.A., 135 Cal.App.4th 1463, 1483, 38 Cal. Rptr. 3d 653 (2005), the contract at issue here is not a boilerplate consumer contract of the type that unwary consumers typically enter into with large corporate entities. Compare Ansanelli v. JP Morgan Chase Bank, N.A., No. C 10-03892 WHA, 2011 U.S. Dist. LEXIS 32350, 2011 WL 1134451, *9 (N.D. Cal. Mar. 28, 2011) ("[D]efendant argues that plaintiffs fail to 'allege that the purported unfair business practices offend an established public policy or [that] the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' It is sufficient that plaintiffs have alleged injury by a policy of defendant that violates law and public policy"). Instead, Gary and other members of The Knack are more properly deemed "sophisticated corporate customers" as that term was used in Linear **[*25]** Technology Corp. Despite alleging the existence of an "unfair business practice," the complaint does not identify other individuals who were similarly injured by Capitol's conduct.

Fairly read, the complaint discusses a single contract — that between The Knack and Capitol. See also Sybersound Records, Inc., 517 F.3d at 1153 ("Courts are institutionally ill-suited to enforce and superintend private contracts among business entities where the concerned entities themselves are not parties to the suit"); Rosenbluth Int'l, Inc. v. Superior Court, 101 Cal.App.4th 1073, 1077, 124 Cal. Rptr. 2d 844 (2002) (distinguishing between "actions brought to assert the claims of individual consumers under section 17200, which lend themselves well to representative UCL cases, and actions that involve sophisticated business finance issues, which do not").

Pleading a UCL claim based on these facts is not necessarily impossible, however. James v. UMG Recordings, Inc., Nos. C 11-01613 SI, C 11-02431 SI, 2012 U.S. Dist. LEXIS 55298, 2012 WL 1376977, *2 (N.D. Cal. Apr. 19, 2012) is instructive here. That case also involved claims brought by a small group of recording artists against a defendant that was allegedly withholding royalty payments in violation of a contract. 2012 U.S. Dist. LEXIS 55298, [WL] at *2. As here, "[a] central question in th[e] litigation [was] whether, within the meaning of the recording contracts, agreements between defendant and digital retailers, such as **[*26]** Apple/iTunes or Amazon.com, for the sale of digital products like downloads and/or ringtones are license agreements or resale agreements." *Id.* The plaintiffs alleged a UCL claim, which defendant sought to resolve on an early motion for summary judgment. In the motion, it repeated arguments it had made in an earlier motion to dismiss, namely, that plaintiffs' UCL claim was based on "purely private contractual arrangements, which [did] not affect consumers." *Id.* The *James* court disagreed, stating that it had previously denied defendant's motion to dismiss because "plaintiffs could base the[ ] UCL claim on a systematic breach of contracts theory, in part because they alleged defendant's conduct was part of a 'broad scheme' involving misinformation and deception of the public regarding royalty payments to musicians." *Id.* Regarding the summary judgment motion, the court stated that it could not "fully assess the impact of defendant's conduct on the plaintiffs as well as the public interest based on the current record, and [that] plaintiffs should be given a full opportunity to develop that record, including expert testimony as necessary." *Id.* The factual allegations of the *James* complaint **[*27]** are similar to those in this case, suggesting that Catena may plausibly be able to plead a UCL claim. As discussed in more detail *infra*, however, Catena's allegations of a coordinated effort among record labels to breach contracts with artists by paying lower royalty rates than those to which they were entitled on licenses to music download providers are conclusory, unsupported by facts, and therefore not plausible under *Iqbal*.

Consequently, the court must dismiss Catena's UCL claim as pled because she has alleged nothing more than a simple breach of contract in support of the claim. To provide further guidance for any amended complaint, however, the court addresses Catena's specific claims under each of the UCL's three prongs to determine if she has adequately pled the statutory elements of the claim. "'A plaintiff alleging unfair business practices under the[ ] [UCL] must state with reasonable particularity the facts supporting the statutory elements of the violation.'" *Saldate v. Wilshire Credit Corp., 686 F.Supp.2d 1051, 1067 (E.D. Cal. 2010)* (citing *Khoury v. Maly's of California, Inc., 14 Cal.App.4th 612, 619, 17 Cal. Rptr. 2d 708 (1993))*.

a. The "Fraudulent" Prong

"The 'fraudulent' prong [of] the UCL requires a plaintiff to 'show deception to some members of the public, or harm to the public interest,' or to allege that 'members of the public **[*28]** are likely to be deceived.'" *Id.* (citing *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc., 178 F.Supp.2d 1099, 1121 (C.D. Cal. 2001)*, and *Medical Instrument Development Laboratories v. Alcon Laboratories, No. C 05-1138 MJJ, 2005 U.S. Dist. LEXIS 41411, 2005 WL 1926673, *5 (N.D. Cal. Aug. 10, 2005)*).

The parties agree that a claim asserted under this prong of the UCL sounds in fraud, and is therefore subject to the heightened pleading standard of *Rule 9(b)*.[35] See *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)* ("[W]e have specifically ruled that *Rule 9(b)*'s heightened pleading standards apply to claims for violations of the CLRA and UCL. . . . [Where] the claim is . . . 'grounded in fraud' or . . . 'sound[s] in fraud,' . . . the pleading . . . as a whole must satisfy the particularity requirement of *Rule 9(b)*," quoting *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003)* ("In cases where fraud is not a necessary element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct. In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event, the claim is said to be 'grounded in fraud' or to 'sound in fraud,' and the pleading of that claim as a whole must satisfy the particularity requirement of *Rule 9(b)*")).

Rule 9(b) requires that the facts constituting the fraud be pled with specificity. Conclusory allegations are insufficient. *Fed.R.Civ.Proc. 9(b)*; *Moore v. Kayport Package Exp., Inc., 885 F.2d 531, 540 (9th Cir. 1989)* ("A **[*29]** pleading is sufficient under *Rule 9(b)* if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer to the allegations. While statements of the time, place and nature of the alleged fraudulent activities are sufficient, mere conclusory allegations of fraud are insufficient"). See also *Walling v. Beverly Enters., 476 F.2d 393, 397 (9th Cir. 1973)* (concluding that allegations stating the time, place, and nature of

[35] Opp. at 22.

allegedly fraudulent activities meet *Rule 9(b)*'s particularity requirement). *Rule 9(b)* "does not require nor make legitimate the pleading of detailed evidentiary matter." All that is necessary is "identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Id.* (alleging in conclusory fashion that defendant's conduct was fraudulent was not sufficient under *Rule 9(b)*).

Catena contends that she has pled the existence of a scheme through which "Capitol [ ]withheld monies due to Plaintiff," and she "was led to believe that the royalty rates paid by Capitol accurately reflected the amounts actually owed . . . and accurately accounted for the nature of Capitol's agreements with the third-party vendors."[36] The scheme was purportedly executed in coordination "with other **[*30]** major record labels," and was "vetted . . . at [Capitol's] highest corporate levels."[37] These allegations are deficient for several reasons. First, the gravamen of Catena's claim under the fraudulent prong of the UCL appears to be that Capitol represented to members of The Knack that its licenses with third party music download providers were not covered by the royalty provision that entitled them to higher fees. The contract contains no such representation, however, and Catena does not allege *any* specific instance in which a Capitol representative made such a statement to a member or members of The Knack. Nor does she allege a single instance in which a Capitol representative told a member or members of The Knack that they were entitled to receive the payments Catena seeks in the complaint, much less the content of any representations, where and when they took place, who made them, or any of the other information that is necessary to survive under *Rule 9(b)*.

Although Catena cites various allegations that purportedly detail Capitol's "knowing and/or reckless failure to properly account to and pay Plaintiff royalties pursuant to the recording agreement,"[38] these paragraphs merely cite contract **[*31]** provisions that require Capitol to pay a certain amount of money in royalties. Proper categorization of the license fees Capitol received under agreements with third party download providers is the core of Catena's contract dispute with Capitol. The court can discern no additional element that elevates her claim above a standard breach of contract action or transforms it into a fraudulent business practice.

Catena's claim under the UCL's fraudulent prong fails for another reason, which is the complaint's failure to allege what deception Capitol's conduct worked upon the public. *Saldate, 686 F.Supp.2d at 1067*. Catena contends that references to "other artists" and their contracts suffices to meet her pleading burden.[39] These vague and scattered references to third parties who may have been similarly "deceived" by Capitol's conduct are insufficient to support a UCL claim. Moreover, even if other artists were affected by Capitol's practice, the court perceives no connection between that deception and members of the public at large. The complaint identifies not a single representation made to members of the public concerning Capitol's business practices, or how those practices would have affected a consumer of The Knack's **[*32]** music or some other group's music in any way. While the complaint contains occasional references to the fact that third party music download providers sold the downloads to "the general public,"[40] the mere suggestion that "the public" is indirectly implicated is not adequate to state a claim for fraudulent business practices. See *Express, LLC v. Fetish Group, Inc., 464 F.Supp.2d 965, 980 (C.D. Cal. 2006)* ("Express does not point to any evidence suggesting that the representations concerning the copyright were disseminated to the public, let alone likely to deceive the public. Therefore, Express has failed to raise a triable issue of material fact for a cause of action under *§ 17200* based on 'fraudulent conduct'"). Consequently, Catena's UCL claim based on "fraudulent" business practices fails.

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[36] Opp. at 22-23; see also Complaint, ¶ 15..

[37] *Id.*, ¶ 15.

[38] Complaint, ¶¶ 9-15.

[39] *Id.*, ¶ 14 ("Defendant knew that its agreements with Music Download Providers were licenses, and that Plaintiff and other artists were entitled to 50% of net receipts").

[40] *Id.*, ¶ 2.

b. The "Unlawful" Prong

"For an action based upon an allegedly unlawful business practice, the UCL 'borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.'" *Stearns v. Select Comfort Retail Corp., 763 F.Supp.2d 1128, 1150 (N.D. Cal. 2010)* (quoting *Cel-Tech Communications, 20 Cal.4th at 180*, in turn citing *Farmers Ins. Exch. Super. Ct. v. Superior Court, 2 Cal.4th 377, 383, 6 Cal. Rptr. 2d 487, 826 P.2d 730 (1992))*; see also *Jackson v. Ocwen Loan Servicing, LLC, No. 2:10-cv-00711-MCE-GGH, 2010 U.S. Dist. LEXIS 93524, 2010 WL 3294397, *5 (E.D. Cal. Aug. 20, 2010)* ("'Unlawful' practices are practices 'forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulation, or court-made'" **[*33]** citing *Saunders v. Superior Court, 27 Cal.App.4th 832, 838-39, 33 Cal. Rptr. 2d 438 (1994)*, and *People v. McKale, 25 Cal.3d 626, 632, 159 Cal. Rptr. 811, 602 P.2d 731 (1979))*.

Catena does not allege that Capitol's conduct violated any law or regulation. Indeed, her opposition suggests that her "unlawful" business practices claim is predicated solely on Capitol's alleged breach of contract.[41] As the court has already noted, the mere allegation of a breach of contract does not suffice to state a UCL claim in the absence of some additional element that causes Capitol's conduct to be unlawful. Catena cites the Ninth Circuit's decision in *F.B.T. Productions, LLC v. Aftermath Records, 621 F.3d 958 (9th Cir. 2010)*, which addressed a similar dispute and interpreted the parties' contract to mean that "agreements permitting third parties to use its sound recordings to produce and sell permanent downloads and mastertones are licenses," rather than "full price records sold in the United States . . . through normal retail channels." *Id. at 964, 966*. While the decision certainly provides support for Catena's breach of contract claim, *F.B.T. Products, LLC* did not involve a UCL claim of any kind, and addressed a different contract between different parties. Catena therefore cannot rely on it to argue that the contract at issue between *these* parties in *this* case is unlawful.

As a result, Catena's UCL claim for "unlawful" business practices must be **[*34]** dismissed.

c. The "Unfair" Prong

"[A] practice may be deemed unfair even if not specifically proscribed by some other law." *Cel-Tech Communications, 20 Cal.4th at 180*. "To sufficiently plead an action based on an 'unfair' business act or practice, a plaintiff must allege facts showing the 'unfair' nature of the conduct and that the harm caused by the conduct outweighs any benefits that the conduct may have." *Jackson, 2010 U.S. Dist. LEXIS 93524, 2010 WL 3294397 at *5* (citing *Motors, Inc. v. Times Mirror Co., 102 Cal.App.3d 735, 740, 162 Cal. Rptr. 543 (1980))*.

Capitol cites *Cel-Tech* for the proposition that an unfair act is "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech, 20 Cal.4th at 187*. The California Supreme Court specifically noted, however, that the case before it involved competitors alleging anticompetitive practices; it appears clear that the Court did not intend this definition to extend beyond the context of the case, and to apply to other violations of the UCL's "unfair" prong. *Id. at 187 n. 12* ("This case involves an action by a competitor alleging anticompetitive practices. Our discussion and this test are limited to that context. Nothing we say relates to actions by consumers or **[*35]** by competitors alleging other kinds of violations of the unfair competition law such as 'fraudulent' or 'unlawful' business practices or 'unfair, deceptive, untrue or misleading advertising'"). Nonetheless, in the years since *Cel-Tech*, it "has produced confusion among the California appellate courts over whether the clarified definition of 'unfair' is properly applied to consumer cases." *Kilgore v. KeyBank, 712 F.Supp.2d 939, 951 (N.D. Cal. 2010)*, rev'd on other grounds, *673 F.3d 947 (9th Cir. 2012)*; see also *Williamson v. Reinalt-Thomas Corp., No. 5:11—CV—03548—LHK, 2012 U.S. Dist. LEXIS 58639, 2012 WL 1438812, *11-12 (N.D. Cal. Apr. 25, 2012)* (observing that the "question of what constitutes an unfair business practice appears to be unsettled," and surveying conclusions reached by California Courts of Appeal and federal

[41] Opp. at 21.

courts). But see *National Rural Telecommunications Co-op. v. DIRECTV, Inc., 319 F. Supp. 2d 1059, 1075 (C.D. Cal. 2003)* ("The test annunciated in *Cel-Tech*, however, applies only to cases between direct competitors, not all 'commercial' cases").

The court need not resolve this question here, as the complaint contains no allegations that distinguish Catena's claim under the UCL's "unfair" prong from her breach of contract claim. Her opposition does not cite any paragraphs in the complaint that plead the additional required element, stating only that "it is impossible to see how the benefits Capitol received by withholding and under-accounting **[*36]** for royalties due to Plaintiff would outweigh the harm that this underpayment and under-accounting caused Plaintiff."[42] This conclusory assertion is no way explains how why Capitol's conduct was unfair beyond a mere violation of the contract. Catena simply parrots the applicable legal standard without pleading facts that support a conclusion it was violated. As a result, Catena's UCL claim for unfair business practices must be dismissed.

III. CONCLUSION

For the reasons stated, the court grants Capitol's motion to dismiss Catena's UCL claim. The remainder of its motion is denied. Plaintiff may file an amended complaint within twenty (20) days of the date of entry of this order, if she can do so consistent with the reasoning set forth in this order.

DATED: July 11, 2012

/s/ Margaret M. Morrow

MARGARET M. MORROW

UNITED STATES DISTRICT JUDGE

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[42] Opp. at 20.

Polypore Int'l, Inc. v. FTC

United States Court of Appeals for the Eleventh Circuit

July 11, 2012, Decided

No. 11-10375

Reporter
686 F.3d 1208 *; 2012 U.S. App. LEXIS 14195 **; 2012-1 Trade Cas. (CCH) P77,970; 23 Fla. L. Weekly Fed. C 1284; 2012 WL 2814311

POLYPORE INTERNATIONAL, INC., a corporation, Petitioner, versus FEDERAL TRADE COMMISSION, Respondent.

Subsequent History: Motion granted by *Polypore Int'l, Inc. v. FTC, 133 S. Ct. 1309, 185 L. Ed. 2d 174, 2013 U.S. LEXIS 1083 (U.S., 2013)*

US Supreme Court certiorari denied by *Polypore Int'l v. Ftc, 2013 U.S. LEXIS 4832 (U.S., June 24, 2013)*

Prior History: **[**1]** Petition for Review of a Decision of the Federal Trade Commission. Agency No. FTC 9327.

In the Matter of Polypore Int'l, Inc., 2010 FTC LEXIS 97 (F.T.C., Dec. 13, 2010)

Disposition: AFFIRMED.

Core Terms

batteries, separators, deep-cycle, customers, acquisition, motive, competitor, plant, producers, prices, argues, divestiture, lessen, effective, products, acquire, merger, relevant market, Clayton Act, concentration, markets, sales, anticompetitive, manufactured, monopoly, compete, switch

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

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

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > Judicial Review

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

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

A court reviews the Federal Trade Commission's legal conclusions de novo. The court also reviews the application of the facts to the law de novo. The court's review of the factual findings is governed by *15 U.S.C.S. § 45(c)*, which provides that the findings of the Commission as to the facts, if supported by evidence, shall be conclusive. The statute forbids a court to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. The court must accept the Commission's findings of fact if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. A court accords deference to the Commission's chosen remedy for violations of the Clayton Act.

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

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > Clayton Act > Scope

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

Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, prohibits acquisitions where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly. The United States Congress enacted § 7 to arrest anticompetitive tendencies in their incipiency. The intense congressional concern with economic concentration counseled against requiring elaborate proof of market structure, market behavior, or probable anticompetitive effects. Instead, a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. This test comported with economic theory because competition is greatest when there are many sellers, none of which has any significant market share. Once the government makes a showing that a firm controls an undue percentage share of the relevant market and the acquisition would cause a significant increase in the concentration, the defendant must produce evidence that shows the market share statistics inaccurately show the probable effect on competition.

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

HN3[] **Antitrust & Trade Law, Clayton Act**

Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, is concerned with probabilities, not certainties. Unsuccessful bidders are no less competitors than the successful one.

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

HN4[] **Antitrust & Trade Law, Clayton Act**

Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, is intended to arrest the trend toward concentration, the tendency to monopoly, before the consumer's alternatives disappear. In a healthy, growing market, the fact that an acquired company did not win a contract or had never sold in the market is not conclusive.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

HN5[] Clayton Act, Claims

In the context of § 7 of the Clayton Act, *15 U.S.C.S. § 18*, evidence of intent is highly probative because knowledge of intent may help the court to interpret the facts and to predict consequences.

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN6[] Antitrust & Trade Law, Clayton Act

The acquisition by an already dominant firm of a new or nascent rival can be just as anticompetitive as a merger to monopoly. If the rival has already made its first sale in the monopolist's market, the merger is clearly horizontal. If the rival has not yet made its first sale, the tendency is to call the acquisition a potential competition or non-horizontal merger. But the distinction between actual and potential competition is readily exaggerated. For example, a firm that submits bids against the dominant firm but loses is clearly an actual competitor, perhaps even forcing the dominant firm to lower its bid in the face of a rival bidder. But even the firm that is preparing to make its first bid or its first sale must be counted as an actual rival once the entry decision has been made. Acquisition of such a rival preserves the dominant firm's status, at least until another nascent rival appears on the scene. In most such cases, it is not worthwhile to ascertain the number of rivals or the likelihood or time period in which another nascent rival will appear. The important point is that the acquisition eliminates an important route by which competition could have increased in the immediate future. It thus bears a very strong presumption of illegality that should rarely be defeated.

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

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Mergers & Acquisitions Law > Antitrust > Market Definition

HN7[] Market Definition, Relevant Market

Defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other. As such, it is a factual question that an appellate court reviews for clear error. The factors the appellate court looks at are industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. The boundaries of the product market are determined by the reasonable interchangeability of use between the product itself and substitutes for it.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Discretion

HN8[] Remedial Powers, Discretion

The Federal Trade Commission has broad discretion in the formulating of a remedy for unlawful practices.

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

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

HN9[] **Clayton Act, Remedies**

The relief in an antitrust case must be effective to redress the violations and to restore competition.

Counsel: For POLYPORE INTERNATIONAL, INC., a corporation, Petitioner: Paul T. Denis, Steven Bradbury, Gorav Jindal, Dechert, LLP, WASHINGTON, DC; Sean P. McConnell, Dechert, LLP, PHILADELPHIA, PA.

For FEDERAL TRADE COMMISSION, Respondent: Michele Arington, Donald S. Clark, John F. Daly, Federal Trade Commission, Office of General Counsel, WASHINGTON, DC; Catherine M. Moscatelli, U.S. Federal Trade Commission, WASHINGTON, DC; William L. Rikard, Jr., Parker Poe Adams & Bernstein, LLP, CHARLOTTE, NC.

Judges: Before EDMONDSON, ANDERSON, and FARRIS,[*] Circuit Judges.

Opinion by: ANDERSON

Opinion

[*1210] ANDERSON, Circuit Judge:

Polypore International appeals the Federal Trade Commission's decision finding a violation of § 7 of the Clayton Act and ordering divestiture. The Commission held that Polypore's February 2008 acquisition of Microporous would substantially lessen competition or tend to create a monopoly in relevant markets.

[*1211] I. FACTS AND PROCEDURAL HISTORY

Polypore and the acquired Microporous Products are producers of battery separators. Battery **[**2]** separators are membranes installed between the positive and negative plates in flooded lead-acid batteries to prevent short circuits and to regulate the flow of electrical current between the plates. The manufacturers of these separators make them for different types of batteries and their size and thickness are adjusted accordingly. Different types of batteries also perform better with separators made of different materials.

Polypore, through its Daramic division, primarily manufactured pure polyethylene ("PE") separators for use in automotive and motive batteries. Automotive batteries, also known as starter-lighter-ignition ("SLI") batteries, are used in cars, trucks, buses, boats, and jet skis, while motive batteries are used in mobile industrial machines such as forklifts and mining equipment. Daramic also produced separators for deep-cycle batteries, which are used in equipment that requires a lower amperage over a longer period of time. Daramic had two production plants in the United States and five overseas.

The much smaller Microporous (formerly known as Amerace) manufactured pure rubber battery separators (called Flex-Sil) for use in deep-cycle batteries and a line of rubberized **[**3]** PE-based separators (CellForce) for use in motive batteries. Microporous did not yet actually sell in the SLI battery market although for several years they had been investigating entry into that market. Microporous operated one plant in Piney Flats, Tennessee, and

[*] Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

constructed one in Feistritz, Austria, which was not yet operational and was intended to serve European customers. Microporous had also purchased equipment for another production line that the parties refer to as the "line in boxes" and which constituted some of the acquired assets.

Microporous's Flex-Sil product was recognized as being the industry standard for deep-cycle batteries. Polypore introduced its Daramic HD product for the deep-cycle market, which is made of latex-coated polyethylene. It is arguably not as effective, and is used in low-end batteries. Despite a higher price, Microporous's Flex-Sil still controlled 90% of the market, while Daramic controlled the remaining 10%. The market shares were the opposite in the motive market, with Daramic owning 90% to Microporous's 10%.

The other company that produces battery separators in the United States is Entek. Entek produces separators for SLI batteries but ceased **[**4]** producing separators for motive batteries. Entek and Daramic alone competed in the SLI market, with Entek controlling 52% of sales to Daramic's 48%. One of the battery producers testified, however, that Daramic and Entek did not behave as competitors. SLI production accounts for three-quarters of all battery separator production. There are numerous other separator producers in Europe and Asia but they do not sell to North American battery makers.

The Commission identified these three battery types[1] as the relevant product markets and North America as the geographic scope of each. Major customers for the battery separators were Johnson Controls ("JCI"), the largest manufacturer of SLI batteries; Exide, the global leader in motive power batteries; Trojan Battery Company, the global leader in deep-cycle batteries and Microporous's largest customer; East Penn Battery; Crown Battery; **[*1212]** EnerSys; Douglas Battery, which makes motive and deep-cycle batteries; and U.S. Battery, which makes deep-cycle batteries.

In the early to mid 2000s, **[**5]** Microporous began testing the waters of the SLI market. One of Daramic's vice presidents, Tucker Roe, testified that its largest customer, JCI, told him that Microporous was bidding on SLI contracts in 2003. Daramic responded to this information by convincing JCI to enter into a long-term supply contract by suggesting that it would cut off supply to JCI's European facilities if JCI declined Daramic's long-term contract. Microporous in fact ran sample SLI separators for JCI in 2003 and 2004, and obtained for its product the status of "qualified" by JCI. For other reasons, however, JCI ultimately entered into a contract with Entek. Microporous began talks in 2007 with Exide about producing SLI separators for Exide's North American and European markets, and the two companies entered into memoranda of understanding in September 2007 and February 2008. Exide tested some of the sample separators that Microporous created, and planned to purchase Microporous separators beginning in 2010. Polypore was concerned about losing East Penn Battery to Microporous after it learned of Microporous's overtures in this area, and the Commission found that Polypore made price concessions in order to retain **[**6]** East Penn's business.

Polypore internal memos reveal that it had developed the "MP Plan," which was a response to competition from Microporous. The MP Plan sought to secure long-term contracts with customers that Polypore thought were in danger of switching to Microporous. Internal memos reveal Polypore's concern about losing business to this "real threat." Polypore's 2008 budget projected that Daramic would lose increasing amounts of business to Microporous and would be forced to reduce prices if it did not acquire Microporous. Indeed, Daramic froze its 2009 prices because of fear about Microporous. One battery producer, EnerSys, used Microporous's prices in the motive market as leverage to bring down Daramic's prices, succeeding in that effort in 2004. Polypore was also concerned that it would lose East Penn's business if it did not act.

The president of Daramic put Microporous on the top of his list of potential acquisitions to "eliminate price competition." The 2008 budget predicted that it could increase the prices of CellForce and Microporous's industrial products if it did acquire Microporous. Microporous was in the process of expanding its production capacity in both North America **[**7]** and Europe, constructing a new plant in Feistritz, Austria, with two PE lines that could produce either motive or SLI battery separators. Its plan was to shift production of its motive battery separators for European

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[1] The ALJ identified a fourth battery type - the uninterruptible power source("UPS") — but the Commission rejected that finding, and it is not at issue on appeal.

customers to Austria so that it could increase that production for domestic customers in the United States. A March 2005 memo from the Daramic head of sales to the CEO warned that Microporous's plans for expansion into a second line would result in a loss of customers for Daramic. Through the next two years, the threat of Microporous's expansion was the subject of numerous memoranda, and acquisition was discussed as a means to avoid costly competition.

The Commission issued an administrative complaint on September 9, 2008. Specifically relevant to the issues in this appeal, the FTC charged that Polypore's acquisition of Microporous may substantially lessen competition or tend to create a monopoly for several types of battery separators, in violation of § 7 of Clayton Act.[2] After a four-week hearing, the ALJ issued an extensive opinion holding that **[*1213]** the acquisition was reasonably likely to substantially lessen competition in four relevant markets. It ordered the divestiture **[**8]** of all acquired assets, including the plant in Austria. Polypore appealed the decision to the Commission, which issued a comprehensive opinion affirming the decision for three of the relevant markets — SLI, motive, and deep-cycle — but not for the fourth, UPS batteries. Thus, it issued a modified divestiture order. On appeal, Polypore argues that the Commission erred when it employed the Philadelphia National[3] presumption to find that Polypore had illegally merged to a duopoly in the SLI market. It also asserts that the Commission erred when it found one market for both Microporous's and Polypore's deep-cycle battery separators, and that Entek would not enter the motive battery separator market. Finally, Polypore challenges the Commission's inclusion of Microporous's Austrian plant in the divestiture order.

II. STANDARD OF REVIEW

HN1[] We review the Commission's legal conclusions de novo. *Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1063 (11th Cir. 2005)*. We also review the application of the facts to the law de novo. *FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454, 106 S. Ct. 2009, 2016, 90 L. Ed. 2d 445 (1986)*. Our review of the factual findings is governed by *15 U.S.C. § 45(c)*, which provides that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." The statute forbids a court to "make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences." *FTC v. Algoma Lumber Co., 291 U.S. 67, 73, 54 S. Ct. 315, 318, 78 L. Ed. 655, 18 F.T.C. 669 (1934)*. The court must accept the Commission's findings of fact if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 71 S. Ct. 456, 459, 95 L. Ed. 456 (1951)* (quotation marks omitted). We accord deference to the Commission's **[**10]** chosen remedy for violations of the Act. *Jacob Siegel Co. v. FTC, 327 U.S. 608, 611, 66 S. Ct. 758, 760, 90 L. Ed. 888, 42 F.T.C. 902 (1946)*.

III. DISCUSSION

A. SLI Separators

Polypore argues that the Commission erred when it analyzed the acquisition as a horizontal merger by treating Microporous as an actual competitor in the SLI separator market rather than a potential competitor. By treating Microporous as an actual competitor, Polypore also argues that the Commission improperly relied on the presumption of liability found in Philadelphia National. Polypore argues that the Commission should have used only the potential competition doctrine because Microporous had not entered the SLI market at the time of the acquisition or in the years beforehand.

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[2] The complaint also charged Polypore with entering into an unlawful joint marketing agreement with Hollingsworth & Vose, in violation of § 5 of the FTC Act, and that Daramic monopolized the alleged relevant markets, in violation of § 5, by executing contracts with large customers that would preclude or deter Microporous from competing effectively. The ALJ found against Polypore on **[**9]** the first count but against complaint counsel on the second. Neither decision was appealed to the Commission.

[3] *United States v. Philadelphia National Bank, 374 U.S. 321, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*.

HN2[] Section 7 of the Clayton Act prohibits acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18. Congress enacted § 7 to "arrest anticompetitive **[*1214]** tendencies in their 'incipiency.'" United States v. Phila. Nat'l Bank, 374 U.S. 321, 362, 83 S. Ct. 1715, 1741, 10 L. Ed. 2d 915 (1963) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 317, 322, 82 S. Ct. 1502, 1519-20, 1522, 8 L. Ed. 2d 510 (1962)). **[**11]** In Philadelphia National, the Supreme Court determined that the "intense congressional concern" with economic concentration counseled against requiring "elaborate proof of market structure, market behavior, or probable anticompetitive effects." Id. at 363, 83 S. Ct. at 1741. Instead, the Court stated,

> a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

Id. This test, it reasoned, comported with economic theory because competition is "greatest when there are many sellers, none of which has any significant market share . . . ." Id. (quotation and citation omitted).[4]

In United States v. El Paso Natural Gas Co., 376 U.S. 651, 84 S. Ct. 1044, 12 L. Ed. 2d 12(1964), the Supreme Court discussed a situation factually similar to the instant case. El Paso involved the acquisition of a gas company that was deemed a threat by one of its competitors, El Paso. A California utility had approached the acquired company, Pacific Northwest, about supplying natural gas, and when they reached a tentative agreement, El Paso responded by lowering its pricing and offering a firm supply of gas — as opposed to the intermittent supply that it had been providing — to the utility. Id. at 655, 84 S. Ct. at 1046. As a result, the tentative agreement with Pacific Northwest was terminated. The Court held that the acquired company was shown to have been a substantial factor in the California market: "Though young, it was prospering and appeared strong enough to warrant a 'treaty' with El Paso that protected El Paso's California markets." Id. at 659, 84 S. Ct. at 1048. The acquired company had not actually sold gas in the market but the Court noted that HN3[] § 7 of the Clayton Act was concerned with probabilities, not certainties. Id. at 658, 84 S. Ct. at 1048. **[**13]** "Unsuccessful bidders are no less competitors than the successful one." Id. at 661, 84 S. Ct. at 1049. As the Court noted, "[w]e would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes." Id. at 659, 84 S. Ct. at 1048. It then emphasized again that HN4[] § 7 was intended to "arrest the trend toward concentration, the tendency to monopoly, before the consumer's alternatives disappeared." Id. at 659, 84 S. Ct. at 1049. In a healthy, growing market, the fact that the acquired company did not win a contract or had never sold in the market was not conclusive. Id. at 660, 84 S. Ct. at 1049.

Like the acquired company in El Paso that was already engaged in the business of selling gas in other markets, Microporous was already making similar separators. It would need only to retool a production line, and it had already purchased a new one that could produce the **[*1215]** SLI separators. It had begun discussions with several companies and had produced a sample product satisfactorily for at least one large customer. It had even submitted quotes and entered into memoranda of **[**14]** understanding with another large customer. Both Polypore and El Paso certainly considered the companies that they acquired to be competitive threats. Both companies lowered their prices and gave other concessions in response to their customers' dealings with the acquired companies. Polypore began to discuss the possibility of acquiring Microporous to eliminate competition and developed the MP Plan to remove Microporous as a competitive threat not only in the deep-cycle market but also in the SLI market. As the Court stated in El Paso, the Clayton Act is about probabilities and not certainties. Polypore clearly viewed Microporous as a serious threat and sought to acquire it to eliminate that threat.

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[4] Once the Government makes a showing that the firm controls an undue percentage share of the relevant market and the acquisition would cause a significant increase in the concentration, the defendant must produce evidence that shows the market share statistics inaccurately show the probable effect on competition. **[**12]** FTC v. Univ. Health, Inc., 938 F.2d 1206, 1218 (11th Cir. 1991).

We conclude that the facts of the instant case are sufficiently similar to those in El Paso such that it guides our decision in this case. In both cases, the pre-acquisition relevant market was highly concentrated.[5] In both cases, the acquisition ensured a continuation of the high concentration and eliminated the decrease in concentration that would result from the acquired company's entry into the market. In both cases, the pre-acquisition market activity by the acquired company - although **[**15]** resulting in no actual sales — had a substantial, actual pro-competitive effect on the market.[6] In both cases, the perception by the acquiring company of the competitive threat posed by the acquired company provided additional evidence of the acquired company's competitive presence.[7] Indeed, the instant case is stronger for the government than was El Paso in that here, there was additional evidence that Polypore increased SLI prices following the acquisition.

As noted above, in concluding that the acquisition may substantially lessen competition in the SLI market, the Commission applied the Philadelphia National presumption. Polypore's primary challenge to the Commission's application of the presumption is that the Commission erred by treating Microporous as an actual competitor, rather than using the potential competitor analysis. Although we have noted that the instant case seems very close in principle to El Paso, it is true that the Supreme Court in that case did not expressly invoke the presumption, and did not expressly label the acquired company as an actual competitor.[8] However, a later Supreme Court case did so. In *United **[*1216]** States v. Marine Bancorporation, 418 U.S. 602, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974)*, the Court stated that El Paso was an actual competitor case, rather than a potential competitor case. *Id. at 623, 94 S. Ct. at 2871*. Thus, because El Paso was an actual competition case, because it is very **[**17]** close in principle to this case, and because the actual competitor issue is Polypore's primary challenge in this regard,[9] we see no error resulting from the Commission's application of the Philadelphia National presumption to find that Polypore had illegally acquired Microporous, thus substantially lessening competition.[10]

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[5] El Paso supplied more than 50% of the gas consumed in California and was the only out-of-state provider. Here, Daramic controlled 48% of the SLI market to Entek's 52%, and one battery producer testified that the two did not act as competitors.

[6] In El Paso, Pacific Northwest's dealings with the utility customer caused El Paso to depart from its previous offer of interruptible supply and offer the utility a long-term contract for firm deliveries and at lower prices. In the instant case, Microporous's dealings with East Penn caused Polypore to make price concessions to East Penn. Similarly, Microporous's overture to JCI caused Polypore to seek a longer term contract.

[7] See *Graphic Prods. Distribs., Inc. v. Itek Corp., 717 F.2d 1560, 1573 (11th Cir. 1983)* **[**16]** (***HN5***[] "Evidence of intent is highly probative . . . 'because knowledge of intent may help the court to interpret the facts and to predict consequences.'") (quoting *Chi. Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683 (1918))*.

[8] Although El Paso did not use the term actual competitor, that meaning was clear. The court held: "Unsuccessful bidders are no less competitors than the successful one." *376 U.S. at 661, 84 S. Ct. at 1049*. It also noted that the acquired company's efforts to win contracts, "though unsuccessful, had a powerful influence" on El Paso. *Id. at 659, 84 S. Ct. at 1048*. Similarly, Microporous was an unsuccessful bidder, and its efforts had an influence on the market very similar to that in El Paso.

[9] Polypore's only other argument - that the acquisition here did not increase concentration because Microporous had no actual pre-acquisition sales in the market - is foreclosed by El Paso. Moreover, the acquisition here did increase concentration in that it eliminated the pre-acquisition influence on the market exercised by Microporous. And, it eliminated the competition in the **[**18]** market which Polypore itself contemplated in its MP Plan.

[10] Our confidence that Microporous was an actual competitor is amply supported by the Supreme Court decisions in El Paso and Marine Bancorporation. That conclusion, and the applicability of the presumption, is also confirmed by the leading scholar:

> ***HN6***[] The acquisition by an already dominant firm of a new or nascent rival can be just as anticompetitive as a merger to monopoly. If the rival has already made its first sale in the monopolist's market, the merger is clearly "horizontal." If the rival has not yet made its first sale, the tendency is to call the acquisition a "potential competition" or non-horizontal merger. But the distinction between "actual" and "potential" competition is readily exaggerated. For example, a firm that submits bids against the dominant firm but loses is clearly an "actual" competitor, perhaps even forcing the dominant firm to lower its bid in the face of a rival bidder. But even the firm that is preparing to make its first bid or its first sale must be counted as an "actual" rival once the entry decision has been made.

To overcome the Philadelphia National presumption, Polypore would need to show that the merger to duopoly did not have an anticompetitive effect. This it cannot do. The representative for Exide testified that prices for SLI separators are less favorable than those submitted before the acquisition. Specifically, the representative testified that it will "pay more, in the millions of dollars more" than it did before the acquisition. Polypore has not pointed to any evidence that negates this evidence of anticompetitve effect.[11] Thus, we hold that the Commission correctly found that the merger substantially lessened competition and violated § 7 of the Clayton Act.[12]

[*1217] B. Deep-Cycle Separators

Polypore argues that its product and Microporous's product for deep-cycle batteries were not close competitive substitutes and so should not be considered part of the same product market. Polypore cites *United States Anchor Manufacturing, Inc. v. Rule Industries, Inc., 7 F.3d 986, 995-99 (11th Cir. 1993)*, **[**21]** where we held that if customers perceive a significant quality difference between the products, especially where there is a wide disparity in price, the court will treat the products as being in separate markets. Polypore argues that Microporous's pure rubber separators were recognized as being superior in deep-cycle applications and that customers were willing to pay a premium for that superiority. Daramic HD, the Polypore competitor to Microporous's Flex-Sil, was only able to gain a small portion of the deep-cycle market and was used exclusively in low-end batteries. Polypore points to the fact that several of the battery makers had not qualified Daramic HD for use and another exclusively used Microporous's product. Ninety percent of the market was in Microporous's hands and accounted for most of Microporous's sales.

HN7[] "Defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other." *U.S. Anchor, 7 F.3d at 995* (quotations and citations omitted). As such, it is a factual question that we review for clear **[**22]** error. *United States v. Engelhard Corp., 126 F.3d 1302, 1305 (11th Cir. 1997)*. In U.S. Anchor, we looked at the factors set forth in *Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*:

> industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors . . . .

U.S. Anchor, 7 F.3d at 995 (quoting *Brown Shoe, 370 U.S. at 325, 82 S. Ct. at 1523*). "The boundaries of the product market are determined by 'the reasonable interchangeability of use . . . between the product itself and substitutes for it.'"*Engelhard, 126 F.3d at 1305* (quoting *Brown Shoe, 370 U.S. at 325, 82 S. Ct. at 1523-24*).

> Acquisition of such a rival preserves the dominant firm's status, at least until another **[**19]** nascent rival appears on the scene. In most such cases, we do not believe it is worthwhile to ascertain the number of rivals or the likelihood or time period in which another nascent rival will appear. The important point is that the acquisition eliminates an important route by which competition could have increased in the immediate future. It thus bears a very strong presumption of illegality that should rarely be defeated.

4 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 912a (3d ed. 2006).

[11] Our careful review of the **[**20]** record persuades us that the several challenges to the Commission's findings of fact are wholly without merit - e.g., with respect to whether Microporous's dealings with JCI, Exide, and East Penn involved the SLI market; with respect to whether Microporous's board of directors was on board with the expansion plans of management; with respect to the imminent capability of Microporous to supply the SLI market; and with respect to whether before acquisition, Polypore did in fact act in procompetitive ways (in the SLI market as well as the other two markets) in response to Microporous's dealings in the market.

[12] Because we conclude that this case is guided by El Paso, and because the Commission properly applied the *Philadelphia National* presumption, we do not reach the Commission's alternative holding that the acquisition violated § 7 based on the potential competitor doctrine.

Here, the Commission based its finding on the switch of several battery producers from Flex-Sil to Daramic HD. Daramic HD increased its share of the market, at Flex-Sil's expense, from 3.8% in 2005 to 10.6% in 2007. The Commission specifically cited the switch by U.S. Battery and Exide, with the latter using both Flex-Sil and Daramic HD in its golf cart batteries, which make up 80% of its sales. Significantly, **[**23]** the Commission also pointed to the successful threat by three companies to switch to Daramic HD to avoid a price increase by Microporous. If the two brands were not interchangeable, the threat would not have been successful. There is also evidence that Microporous considered the two competitors: in its own pre-acquisition assessment of its value to Polypore, Microporous noted that Polypore would gain complete control of the deep-cycle separator market if the acquisition occurred.

There is ample evidence to support the Commission's finding that there was only one market for deep-cycle battery separators. **[*1218]** Several of the battery producers used both products in their deep-cycle batteries and used the presence of Daramic HD to bring down Microporous's prices. While the industry recognized that Flex-Sil, being a pure rubber separator, was superior, it was willing to substitute Daramic HD when it could in order to keep prices lower. Thus, although there were distinct prices, there were not distinct customers. The products were used for slightly different purposes — i.e., Flex-Sil was used in higher end batteries than Daramic HD — but both were used in deep-cycle applications and both were **[**24]** made in the same type of production facilities. Thus, under the *Brown Shoe* factors, we conclude that the Commission did not err when it found that there existed only one market.

C. Motive Separators

Polypore argues that the Commission erred in holding that Polypore had not shown that Entek would enter the motive battery market and counteract the anticompetitive effects of the merger to monopoly in that market. It points out that motive battery separators are made from PE, the same substance used in SLI separators. The only difference between the two types of separators is that motive separators are generally larger and thicker. Accordingly, the only difference in the production lines is larger rollers, which are easily switched out in a matter of hours. Additionally, Polypore highlights the fact that Entek produced motive separators in the 1990s, and expressed interest in resuming that role in 2006 when Daramic had a strike.

The Commission did not err when it held that Polypore had not shown that Entek was a participant in the motive battery market or that it had plans to enter it. Although Entek was approached by both Exide and EnerSys, it failed to follow through with those overtures. **[**25]** As of the time of the trial, in June 2009, Entek had not even run any material for Exide. EnerSys repeatedly made overtures to Entek, only to have it finally respond with an unsatisfactory quote. Polypore has not pointed to any evidence that rebuts these findings.

D. Divestiture

Conceding that the Commission enjoys broad authority to craft a remedy, Polypore argues that the divestiture order was too extensive because it included Microporous's Austrian plant. The Commission's authority, it argues, must relate logically to the harms identified by the Commission and the specific markets at issue. Polypore notes that the Commission specifically limited the relevant markets to North America and held that battery separator producers outside of North America did not compete here. The Commission stated that its rationale for including the Austrian plant was to allow the acquiring company to maintain sufficient capacity at the Tennessee plant to compete effectively in North America. But, Polypore asserts, the Commission had already determined that Microporous was an effective and important competitor for North American customers from its Tennessee plant alone. Additionally, Polypore posits, the **[**26]** evidence showed that there was excess production capacity at the Tennessee plant. Finally, Polypore argues that the Commission did not explain why an Asian or European separator manufacturer would not be fully satisfied with just the North American facility, which would satisfy its need for a foothold in North America.

HN8[] The Commission has broad discretion in the formulating of a remedy for unlawful practices. *Jacob Siegel Co. v. FTC, 327 U.S. 608, 611, 66 S. Ct. 758, 760, 90 L. Ed. 888, 42 F.T.C. 902 (1946)*. Here, the Commission

[*1219] did not abuse its discretion when it ordered the divestiture of the Austrian plant. The Commission reasoned that the Austrian plant needed to be divested to restore the competition eliminated by the acquisition and provide the acquirer with the ability to compete. *Ford Motor Co. v. United States, 405 U.S. 562, 573, 92 S. Ct. 1142, 1149, 31 L. Ed. 2d 492 (1972)* (***HN9***[] "The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'") (quoting *United States v. E. I. Du Pont De Nemours & Co., 366 U.S. 316, 326, 81 S. Ct. 1243, 1250, 6 L. Ed. 2d 318 (1961))*. It found that when Microporous produced CellForce for its foreign customers at its Tennessee plant, capacity constraints limited its **[**27]** ability to compete for additional North American business. However, once the Feistritz plant was constructed, Microporous was able to commit to additional North American sales to customers. Additionally, the Commission reasoned that multiple plants provide insurance against supply disruptions and provide the ability to supply local customers, which in turn made Microporous a more effective competitor. These are all reasonable considerations such that we will not disturb the order.[13]

IV. CONCLUSION

For the reasons stated above, we conclude that the Commission is due to be affirmed. The **[**28]** Commission did not err when it treated the acquisition as a horizontal merger, found that there was a single market for deep-cycle separators, determined that Entek would not enter the motive market, and included Microporous's Austrian plant in its divestiture order.

AFFIRMED.

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[13] Polypore argues in its reply brief that the divestiture order should have contained a "safety valve," like that found in *Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410 (5th Cir. 2008)*, which permitted the exclusion of certain assets in the divestiture order if the acquirer and the monitor trustee both found them unnecessary. However, Polypore neither raised this issue before the Commission nor in its initial brief so the issue is waived. See *Norelus v. Denny's, Inc., 628 F.3d 1270, 1297 (11th Cir. 2010)* (initial brief); *Cotherman v. FTC, 417 F.2d 587, 591-92 (5th Cir. 1969)* (exhaustion before the FTC).

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Crayton v. Concord EFS, Inc. (In re ATM Fee Antitrust Litig.)

United States Court of Appeals for the Ninth Circuit

December 6, 2011, Argued and Submitted, San Francisco, California; July 12, 2012, Filed

No. 10-17354

Reporter
686 F.3d 741 *; 2012 U.S. App. LEXIS 14265 **; 2012-1 Trade Cas. (CCH) P77,969; 2012 WL 2855813

In re: ATM FEE ANTITRUST LITIGATION,PAMELA BRENNAN; TERRY CRAYTON; DARLA MARTINEZ, Plaintiffs-Appellants, v. CONCORD EFS, INC.; BANK ONE CORPORATION; BANK ONE, N.A.; J.P. MORGAN CHASE & CO.; CITIBANK (WEST), F.S.B.DE; SUNTRUST BANKS, INC.; WACHOVIA CORPORATION; WELLS FARGO BANK, N.A.; SERVUS FINANCIAL CORP.; CITIBANK, N.A.; FIRST DATA CORPORATION; BANK OF AMERICA, N.A., Defendants-Appellees.

Subsequent History: US Supreme Court certiorari denied by *Brennan v. Concord Efs, 2013 U.S. LEXIS 6750 (U.S., Oct. 7, 2013)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of California. D.C. No. 3:04-cv-02676-CRB. Charles R. Breyer, District Judge, Presiding.

In re ATM Fee Antitrust Litig., 2010 U.S. Dist. LEXIS 97009 (N.D. Cal., Sept. 16, 2010)

Disposition: The court affirmed the district court's decision.

Core Terms

purchaser, interchange, district court, conspired, co-conspirator, indirect, price fixing, banks, damages, network, Plaintiffs', conspiracy, consumers, ownership, merchant, realistic possibility, antitrust, associations, pass-on, summary judgment, anti trust law, cardholder, prices, seller, card-issuing, overcharge, discount, card, alleged conspiracy, price-fixing

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN1[] **Subject Matter Jurisdiction, Federal Questions**

Federal district courts have jurisdiction over questions alleging the violation of federal laws pursuant to *28 U.S.C.S. § 1331*.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN2[] **Appellate Jurisdiction, Final Judgment Rule**

Appellate courts have jurisdiction over appeals from final decisions of district courts. 28 U.S.C.S. § 1291.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

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

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

HN3[] **Standards of Review, Clearly Erroneous Review**

Standing is a question of law for a district court to decide. The ultimate responsibility to ensure subject matter jurisdiction always lies with the court, not the parties. Because the court, and not a jury, decides standing, a district court must decide issues of fact necessary to make the standing determination. The fact-finding of a district court to support or deny standing is subject to review under the clearly erroneous standard. Where an appellate court cannot say its is left with the definite and firm conviction that a finding by the trial court is clearly erroneous; the appellate court is bound to accept it.

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

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

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

HN4[] **Entitlement as Matter of Law, Appropriateness**

When standing is challenged on summary judgment, a court shall not grant summary judgment if the movant shows that there is a genuine dispute as to any material fact. Fed. R. Civ. P. 56(a). Each element of standing must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, that is, with the manner and degree of evidence required at the successive stages of the litigation. Therefore, if there is a genuine issue of material fact, then summary judgment is inappropriate without the district court resolving the factual dispute.

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

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

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

HN5[] **Standards of Review, De Novo Review**

When a district court determines standing on summary judgment, appellate courts must determine de novo, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.

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

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

In the absence of genuine issues of material fact, appellate courts may affirm a district court's summary judgment on any ground supported by the record, regardless of whether the district court relied upon, rejected, or even considered that ground, if the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Governments > Legislation > Interpretation

HN7[] **Standing, Clayton Act**

Under § 4 of the Clayton Act, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. *15 U.S.C.S. § 15(a)*. However, the U.S. Supreme Court has interpreted that section narrowly, thereby constraining the class of parties that have statutory standing to recover damages through antitrust suits.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN8[] **Standing, Clayton Act**

The U.S. Supreme Court has held that a direct purchaser has been injured in its business as required by § 4 of the Clayton Act, *15 U.S.C.S. § 15(a)*, even though it passes on claimed illegal overcharges to its customers. The Supreme Court has also held that § 4 of the Clayton Act does not permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers. In other words, indirect purchasers may not use a pass-on theory to recover damages and thus have no standing to sue. This rule--the Illinois Brick rule--that indirect purchasers suffer no injury under § 4, was reaffirmed in Kansas v.

UtiliCorp United. In sum, a bright line rule emerged from Illinois Brick: only direct purchasers have standing under § 4 of the Clayton Act to seek damages for antitrust violations.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN9[] **Standing, Clayton Act**

The U.S. Supreme Court's firm rule in Illinois Brick does not provide courts the leeway to make a policy determination on a case-by-case basis as to whether standing should be recognized when there are special business arrangements.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN10[] **Standing, Clayton Act**

While the U.S. Supreme Court has expressed reluctance in carving out exceptions to the Illinois Brick rule, limited exceptions do exist. First, the Supreme Court recognized standing for indirect purchasers when a preexisting cost-plus contract with the direct purchaser exists. Second, indirect purchasers may have standing under a coconspirator exception. An indirect purchaser may bring suit where he establishes a price-fixing conspiracy between the manufacturer and the middleman. However, for the indirect purchaser to merit standing under this exception, the conspiracy must fix the price paid by the plaintiffs. Third, indirect purchasers may sue when customers of the direct purchaser own or control the direct purchaser, or when a conspiring seller owns or controls the direct purchaser. For example, an indirect purchaser may sue if the direct purchaser is a division or subsidiary of the price-fixing seller. There may be a fourth exception, that indirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue, relying on the seller's control of the direct purchaser.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN11[] **Standing, Clayton Act**

The coconspirator exception to the Illinois Brick rule allows an indirect purchaser to sue when coconspirators set the price paid by the plaintiff. Illinois Brick does not limit suits by consumers against a manufacturer who illegally contracted with its dealers to set the latter's resale price. The consumer plaintiff is a direct purchaser from the dealer who has conspired illegally with the manufacturer with respect to the very price paid by the consumer.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

HN12[] **Standing, Clayton Act**

The exception to the Illinois Brick rule in Shamrock Foods as applying when the direct purchaser conspires horizontally or vertically to fix the price paid by the plaintiffs. This coconspirator exception is not really an exception at all. Whether one adopts a coconspirator exception or regards this situation as outside Illinois Brick's domain, there is no tracing or apportionment to be done. If the direct purchaser conspires to fix the price paid by the plaintiffs, then the plaintiffs pay the fixed price directly and are not indirect purchasers, that this, there is no pass-on theory involved.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

HN13[] **Standing, Clayton Act**

Kendall reaffirms that the coconspirator exception to the Illinois Brick rule applies when the conspirators set the price paid by the consumer.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

HN14[] **Standing, Clayton Act**

The U.S. Court of Appeals for the Ninth Circuit agrees with the U.S. Court of Appeals for the Fourth Circuit and declines to extend the coconspirator exception past the situation when alleged coconspirators set the price paid by the plaintiffs.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN15[] **Standing, Clayton Act**

In the Illinois Brick context, fixing a price sets the price directly paid, not a price latter passed-on as part of the price at issue.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN16[] **Standing, Clayton Act**

Illinois Brick rejected exceptions for markups by middlemen or when the price-fixed good is a vital input to a larger product.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN17[] **Standing, Clayton Act**

Section 4 of the Clayton Act provides: Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue. *15 U.S.C.S. § 15(a)*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN18[] **Standing, Clayton Act**

The price paid by plaintiffs must be the price set--not merely "fixed" in some broad sense--for plaintiffs to be a direct purchaser under the narrowly defined injury requirement of § 4 of the Clayton Act, *15 U.S.C.S. § 15(a)*. Further, under the coconspirator exception, the price paid by a plaintiff must be set by the conspiracy and not merely affected by the setting of another price.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

HN19[] **Standing, Clayton Act**

Fixing one fee for the purpose and effect of inflating another fee does not make the purchaser a direct purchaser under Illinois Brick.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN20[] **Standing, Clayton Act**

Royal Printing allows indirect purchasers to sue where a direct purchaser is a division or subsidiary of a coconspirator. Royal Printing created an exception to the Illinois Brick rule when parental control existed, because applying Illinois Brick would eliminate the threat of private enforcement, and close off every avenue for private enforcement. The coconspirator parent will forbid its subsidiary or division to bring a lawsuit that would only reveal the parents own participation in the conspiracy.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN21[] **Standing, Clayton Act**

Freeman enunciates the coconspirator exception to the Illinois Brick rule as follows: Indirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust violation.

Freeman outlines that, whether a realistic possibility of suit exists, depends on the existence of ownership or control between the direct purchaser and the seller.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

HN22[] **Standing, Clayton Act**

The U.S. Court of Appeals for the Ninth Circuit declines to extend the exception to the Illinois Brick rule noted in Royal Printing and Freeman to situations where the seller does not own or control the direct purchasers, because, after Royal Printing, the U.S. Supreme Court stated that the possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule.

Governments > Legislation > Interpretation

HN23[] **Legislation, Interpretation**

Where the applicable statute does not define control, courts construe it in its ordinary, contemporary, and common meaning. Control means to exercise restraint or direction over; dominate, regulate, or command, or to have the power or authority to guide or manage.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Controlling Shareholders > Fiduciary Duties

HN24[] **Controlling Shareholders, Fiduciary Duties**

In finding that a fiduciary duty exists, a shareholder must have control of the affairs of the corporation, which does not exist unless the shareholder owns a majority of the stock or has actual control over the corporation's conduct.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Controlling Shareholders > General Overview

Evidence > Burdens of Proof > Allocation

HN25[] **Shareholder Duties & Liabilities, Controlling Shareholders**

A plaintiff who alleges domination of a board of directors and/or control of its affairs must prove it. Stock ownership alone, at least when it amounts to less than a majority, is not sufficient proof of domination or control.

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

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

HN26[] Directors & Officers, Scope of Authority

For a Delaware corporation, the board of directors has the power, authority, and responsibility to manage the corporation. *Del. Code Ann. tit. 8, § 141*.

Counsel: Joseph R. Saveri, Brendan P. Glackin, and Andew S. Kingsdale, Leiff Cabraser Heimann & Bernstein, LLP, San Francisco, California; Merrill G. Davidoff (argued), Bart D. Cohen, and Michael J. Kane, Berger & Montague, P.C., Philadelphia, Pennsylvania, for the plaintiffs-appellants.

W. Stephen Smith and Deanne E. Maynard (argued), Morrison & Foerster LLP, Washington, D.C.; Robert S. Stern and Sylvia Rivera, Morrison & Foerster LLP, Los Angeles, California, for defendant-appellee J.P. Morgan Chase Bank, N.A., successor-in-interest to Bank One, N.A.

Sonya D. Winner (argued) and Anita F. Stork, Covington & Burling LLP, San Francisco, California, for defendant-appellee Bank of America, N.A.

Stephen V. Bomse, Orrick, Herrington & Sutcliffe, LLP, San Francisco, California, for defendant-appellee Suntrust Bank, Inc.

David F. Graham and Eric H. Grush, Sidley Austin LLP, Chicago, Illinois, for defendants-appellees Citibank, N.A. and Citibank (West), FSB.

Jack R. Nelson, Reed Smith LLP, San Francisco, California, for defendant-appellee Wachovia **[**2]** Corp.

Daniel M. Wall and Joshua N. Holian, Latham & Watkins, San Francisco, California, and Donald I. Baker, Baker & Miller, Washington, D.C., for defendants-appellees Wells Fargo Bank, N.A. and Servus Financial Corp.

Peter E. Moll and Brian D. Wallach, Cadwalader, Wickcer-sham & Taft LLP, Washington, D.C., for defendants-appellees Concord EFS, Inc. and First Data Corp.

Judges: Before: Carlos F. Lucero,* Consuelo M. Callahan, and N. Randy Smith, Circuit Judges. Opinion by Judge N.R. Smith.

Opinion by: N.R. Smith

Opinion

[*744] N.R. SMITH, Circuit Judge:

Plaintiffs-Appellants (Plaintiffs) are automated teller machine (ATM) cardholders, who allege horizontal price fixing of fees paid to the ATM owners by the banks (issuing the ATM cards to the cardholders) when cardholders retrieve cash from an ATM not owned by their bank. Plaintiffs do not directly pay the allegedly fixed fee; therefore, as indirect purchasers, Supreme Court precedent prohibits Plaintiffs from bringing this suit. *See Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. Further, Plaintiffs do not qualify for the narrow exceptions to the *Illinois Brick* rule, because **[**3]** (1) they do not allege a conspiracy to fix the price paid by the Plaintiffs and (2) the banks are not controlled by each other or by the ATM network. Therefore, Plaintiffs do not have standing under *§ 4 of the Clayton Act* to proceed with their *§ 1 Sherman Act* suit. We thus affirm the district court's summary judgment dismissal of this suit for lack of antitrust standing.

We limit our discussion in this opinion to the issues relevant to standing. Because Plaintiffs lack antitrust standing, we do not address Plaintiffs' appeal regarding the district court's (1) determination that the rule of reason, and not the per se rule, applies here; (2) rejection of the single-brand, derivative aftermarket alleged in the complaint; and

* The Honorable Carlos F. Lucero, Circuit Judge for the Tenth Circuit, sitting by designation.

(3) determination that Plaintiffs' claim against Bank of America, N.A., did not relate back to the filing of the original complaint under *Rule 15(c) of the Federal Rules of Civil Procedure*.

I. BACKGROUND

A. Facts

A "foreign ATM transaction" occurs when ATM cardholders withdraw money from their bank account using an ATM not owned by their bank (which issued them **[*745]** the card). Such foreign ATM transactions involve four parties: (1) the cardholder, i.e., the person using the **[**4]** ATM to retrieve money from his or her bank account; (2) the card-issuing bank, i.e., the bank at which the cardholder holds an account and who issues the cardholder an ATM card; (3) the ATM owner, i.e., the entity that owns the machine used by the cardholder; and (4) the ATM network, i.e., the entity that connects the ATM owners with card-issuing banks. Of all these parties, the ATM network plays a particularly important role in this fact situation. The network administers agreements between card-issuing banks and ATM owners to ensure that customers can withdraw money from network member ATMs.

Foreign ATM transactions generate four fees. The cardholder must pay two of these fees—one to the ATM owner for use of the ATM (known as a "surcharge") and one to the card-issuing bank (known as a "foreign ATM fee"). The card-issuing bank also pays two of these fees—one to the ATM network that routed the transaction (known as a "switch fee") and one to the ATM owner (known as an "interchange fee"). At issue in this case are the interchange fee and the foreign ATM fee. The ATM network (not the card-issuing bank nor the ATM owners) establishes the interchange fee. Individual card-issuing banks set **[**5]** their own foreign ATM fees.

The STAR Network (STAR) is the ATM network at issue in this case. STAR has thousands of members who collectively own hundreds of thousands of ATMs nationwide. These members can be roughly divided into three groups. The first group includes so-called Independent Service Organizations ("ISOs"). ISOs own ATMs, but they are not banks and do not issue ATM cards (e.g., grocery stores or gas stations). The second group consists of financial institutions that accept deposits and issue ATM cards, but do not own any ATMs (e.g., credit unions or internet banks). The third and largest STAR member group includes financial institutions that both issue ATM cards and own ATMs. The defendant banks (or Bank Defendants) named in this case, which include all defendants except for Concord EFS, Inc. (Concord) and First Data Corporation, fit into this category. Until February 1, 2001, STAR was a member-owned network. As a member-owned network, member banks (including Bank Defendants), controlled STAR and set the interchange fees paid by the members. On February 1, 2001, Defendant-Appellee Concord, a publicly traded Delaware corporation, acquired STAR. After the acquisition by Concord, **[**6]** Bank Defendants lacked control of STAR based on ownership and board member appointment, because Concord was not owned by the member banks of STAR.

Some Bank Defendants were concerned about the acquisition by Concord, because Concord was not owned by the member banks and thus Bank Defendants would likely lose influence over policies and pricing decisions (such as interchange fees). To moderate this concern, before the acquisition STAR revised its agreement with its members to include language that indicated that it would not change fees arbitrarily and that it would consider the interests of its members before implementing any changes. Additionally, to allegedly quell the reluctance by the Bank Defendants, Concord agreed to retain the pre-acquisition Chief Executive Officer of STAR (who has no formal affiliation with the Bank Defendants) to run the new network and agreed to elect him to Concord's board of directors to give a voice to the Bank Defendants. Concord also agreed to establish a Network Advisory Board (comprised of the larger member banks including Bank Defendants) to advise Concord **[*746]** concerning the interests of the large financial institutions. The Network Advisory Board would **[**7]** provide input to Concord's board as to policy and pricing decisions, but had no authority to determine or veto interchange fee changes.

In February 2004, First Data Corporation (another Delaware corporation) acquired Concord. As such, after February 2004, First Data owned and operated STAR.[1]

B. Procedural History

On July 2, 2004, Plaintiffs filed suit. On behalf of themselves and all those similarly situated, Plaintiffs alleged that Defendants engaged in horizontal price fixing, a per se violation of *§ 1 of the Sherman Act*. They alleged that Defendants colluded to fix the STAR interchange fee, which is then passed on to Plaintiffs as part of the foreign ATM fee. Plaintiffs sought damages dating back to July 2, 2000.

Defendants filed a motion to dismiss arguing that Plaintiffs, as indirect purchasers, lacked standing to allege an antitrust violation pursuant to *Illinois Brick. In re ATM Fee Antitrust Litig., 768 F. Supp. 2d 984, 990 (N.D. Cal. 2009)*. On September 4, 2009, the district court denied the motion to dismiss. *Id. at 994*. **[**8]** Accepting all of Plaintiffs' allegations as true and construing the pleadings in the light most favorable to Plaintiffs, the district court found that Plaintiffs' suit could not be dismissed for lack of standing. *Id. at 992-94*. The court found that there was no realistic possibility that the Bank Defendants would sue STAR and that Plaintiffs alleged that they were "purchasing directly from the price-fixing conspirators . . . ." *Id. at 992*. On October 19, 2009, Plaintiffs filed their third amended complaint.

Subsequently, "Defendants . . . moved for summary judgment, [again] arguing that the *Illinois Brick* rule barring indirect purchasers from recovering monetary damages in an antitrust suit applies here and precludes Plaintiffs from seeking such damages.", *No. C 04-02676 CRB, 2010 U.S. Dist. LEXIS 97009, 2010 WL 3701912, at *4 (N.D. Cal. Sep. 16, 2010)*. On September 16, 2010, the district court granted Defendants' motion for summary judgment and dismissed Plaintiffs' claim on the ground that Plaintiffs lack standing under *Illinois Brick's* direct purchaser rule. *2010 U.S. Dist. LEXIS 97009, [WL] at *11*. Finding no genuine issue of material fact, the district court found Plaintiffs to be indirect purchasers. *2010 U.S. Dist. LEXIS 97009, [WL] at *12*. Plaintiffs did not directly **[**9]** pay the alleged fixed interchange fees—labeled by the district court as the alleged "unlawful fee." *2010 U.S. Dist. LEXIS 97009, [WL] at *5*.

> Critically, Plaintiffs do *not* allege that Defendants have conspired to illegally fix the foreign ATM fee that Plaintiffs pay to their bank when they use a foreign ATM. . . . Importantly, Plaintiffs do not allege that the Defendants or any other banks have conspired to fix the foreign ATM fee that Plaintiffs must pay. . . . Instead, Plaintiffs assert that their banks pay an unlawfully inflated interchange fee and then pass the cost of the artificially high interchange fee along to them through foreign ATM fees. . . . Plaintiffs . . . do not pay this allegedly unlawful fee directly (their banks do) and therefore are not directly harmed by it. . . . Plaintiffs do not dispute that they pay the purportedly unlawful interchange fee only indirectly. . . . Plaintiffs therefore acknowledge that they are only indirect payers of the interchange fee and that the banks are the direct payers. . . . Given that Plaintiffs **[*747]** are not "direct purchasers" of the unlawful fee, their damages claims are barred by the *Illinois Brick* rule, unless an exception to the rule applies.

*2010 U.S. Dist. LEXIS 97009, [WL] at *2, *3, *5*. The **[**10]** district court found no exception applicable.[2] *2010 U.S. Dist. LEXIS 97009, [WL] at *5-10*. The district court filed a final judgment against Plaintiffs on September 17, 2010. A timely appeal followed.

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[1] For simplicity, throughout the rest of the opinion we refer to Concord as the owner and operator of STAR even though First Data took over that role in 2004.

[2] Notably, "Plaintiffs argue[d] that there is 'no realistic possibility' that the direct purchasers of interchange fees—i.e., the card-issuing banks—would file a lawsuit challenging the unlawful fixing of those fees, for several reasons." *2010 U.S. Dist. LEXIS 97009, [WL] at *7*. The district court rejected the argument, "because it ignores the critical fact that the overwhelming majority of ATM card-issuing banks pay more in interchange fees than they receive." *Id*. In other words, they are net payers. *Id*. "Because they pay more in interchange fees than they receive, the higher the interchange fee, the higher their costs. Thus, there is a very

II. JURISDICTION AND STANDARD OF REVIEW

HN1[] Federal district courts have jurisdiction over "questions **[**11]** alleging the violation of federal laws pursuant to *28 U.S.C. § 1331*." *Del. Valley Surgical Supply Inc. v. Johnson & Johnson, 523 F.3d 1116, 1119 (9th Cir. 2008)*.**HN2**[] We have jurisdiction over appeals from final decisions of district courts. *28 U.S.C. § 1291*.

HN3[] Standing is a question of law for the district court to decide. *See Warth v. Seldin, 422 U.S. 490, 498-99, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*; *Del. Valley, 523 F.3d at 1119*; *see also Haase v. Sessions, 835 F.2d 902, 904, 266 U.S. App. D.C. 325 (D.C. Cir. 1987)* ("[T]he ultimate responsibility to ensure subject matter jurisdiction always lies with the court, not the parties."). Because the court (and not a jury) decides standing, the district court must decide issues of fact necessary to make the standing determination. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 72, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978)* (district court held four days of hearings to decide motion to dismiss for want of standing). "The fact-finding of the [district] court to support or deny standing is subject to review under the clearly erroneous standard." *Haase, 835 F.2d at 907* (citing *Duke Power, 438 U.S. at 77* ("[W]e cannot say we are left with 'the definite and firm conviction that' the finding by the trial court . . . is **[**12]** clearly erroneous; and, hence, we are bound to accept it." (citation omitted))). However, **HN4**[] when standing is challenged on summary judgment, "[t]he court shall [not] grant summary judgment if the movant shows that there is [a] genuine dispute as to any material fact . . . ." *Fed. R. Civ. P. 56(a)*; *see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* ("[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation."). Therefore, if there is a genuine issue of material fact, then summary judgment is inappropriate without the district court resolving the factual dispute. *See Bischoff v. Osceola Cnty., Fla., 222 F.3d 874, 878-80 (11th Cir. 2000)*; *see also Haase, 835 F.2d at 907, 910*. "Several [other] circuits explicitly prohibit district courts from resolving disputed factual questions or making credibility determinations essential to the question of standing on the basis of affidavits alone." Harry T. Edwards & Linda A. Elliott, *Federal Standards of Review* **[*748]** Ch. III.A (2007) (citing *Bischoff, 222 F.3d at 880-81* **[**13]** (following First and Fifth Circuit cases)). We need not decide whether the district court must conduct additional evidentiary inquiries or the necessary extent of those inquires when resolving issues of material fact at the summary judgment stage, because our holding confronts no genuine issue of material fact and does not rely on factual findings of the district court.

HN5[] When a district court determines standing on summary judgment (as is the case here), "[w]e must determine [de novo], viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Del. Valley, 523 F.3d at 1119*. **HN6**[] In the absence of genuine issues of material fact, we may affirm the district court's summary judgment "on any ground supported by the record, regardless of whether the district court relied upon, rejected, or even considered that ground," *Kling v. Hallmark Cards Inc., 225 F.3d 1030, 1039 (9th Cir. 2000)*, if "the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*.

III. DISCUSSION

HN7[] Under *§ 4 of the Clayton Act*, "any person who shall be injured in his **[**14]** business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *15 U.S.C. § 15(a)*. However, "[t]he Supreme Court has interpreted that section narrowly, thereby constraining the class of parties that have statutory standing to recover damages through antitrust suits." *Del. Valley, 523 F.3d at 1119* (citing *Illinois Brick, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707*).

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realistic possibility that these entities (or some subset of them) would file suit to challenge the fixing of interchange fees at artificially high rates." *2010 U.S. Dist. LEXIS 97009, [WL] at *8*. In the end, the district court concluded that "card-issuing banks are better-off if interchange fees are eliminated," and so they have incentive to sue. *Id*.

HN8[] The Supreme Court has held that a direct purchaser has "been injured in its business as required by *[§] 4*" even though it passes on "claimed illegal overcharge[s] to" its customers. *Illinois Brick, 431 U.S. at 724* (discussing *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968))*. Thus, defendants may not use a pass-on theory to challenge the standing of direct purchasers. However, the Supreme Court has also held that *§ 4 of the Clayton Act* does not "permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers." *Id. at 735*. In other words, indirect purchasers may not use a pass-on theory to recover damages and **[**15]** thus have no standing to sue. *Id. at 745-46*. This rule (the *Illinois Brick* rule), that indirect purchasers suffer no injury under *§ 4*, was reaffirmed in *Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 207, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*. "In sum, a bright line rule emerged from *Illinois Brick*: only direct purchasers have standing under *§ 4 of the Clayton Act* to seek damages for antitrust violations." *Del. Valley, 523 F.3d at 1120-21*.

The underlying purposes for the rule are (1) "to eliminate the complications of apportioning overcharges between direct and indirect purchasers," *UtiliCorp, 497 U.S. at 208*; (2) "to eliminate multiple recoveries," *id. at 212*; and (3) to "promote the vigorous enforcement of the antitrust laws," *id. at 214*. However, the Supreme Court has stated that, while "[t]he rationales underlying . . . *Illinois Brick* will not apply with equal force in all cases[, w]e nonetheless believe that ample justification exists for our stated decision not to 'carve out exceptions to the [direct purchaser] **[*749]** rule for particular types of markets.'" *Id. at 216* (second alteration in original) (quoting *Illinois Brick, 431 U.S. at 744*). "[E]ven assuming that any economic assumptions underlying the *Illinois Brick* **[**16]** rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions." *Id. at 217*; *see also* *Del. Valley, 523 F.3d at 1124* (*HN9*[] "The Court's firm rule does not provide us the leeway to make a policy determination on a case-by-case basis as to whether standing should be recognized when there are special business arrangements.").

HN10[] While the Supreme Court has expressed reluctance in carving out exceptions to the *Illinois Brick* rule, limited exceptions do exist. First, the Supreme Court recognized standing for indirect purchasers when a preexisting cost-plus contract with the direct purchaser exists. *Illinois Brick, 431 U.S. at 736*; *Utilicorp, 497 U.S. at 217-18*. Second, indirect purchasers may have standing under a "co-conspirator" exception. 2A Phillip E. Areeda et al., ***Antitrust Law*** ¶ 346h (3d ed. 2007). The court explained this exception, stating that "an indirect purchaser may bring suit where he establishes a price-fixing conspiracy between the manufacturer and the middleman." *Del. Valley, 523 F.3d at 1123 n.1* (citing *Arizona v. Shamrock Foods, Co., 729 F.2d 1208, 1211 (9th Cir. 1984))*. However, for the indirect purchaser **[**17]** to merit standing under this exception, the conspiracy must fix the price paid by the plaintiffs. *Shamrock Foods, 729 F.2d at 1211*. Third, indirect purchasers may sue when customers of the direct purchaser own or control the direct purchaser, *Illinois Brick, 431 U.S. at 736 n.16*, or when a conspiring seller owns or controls the direct purchaser, *Royal Printing Co. v. Kimberly Clark Corp., 621 F.2d 323, 326 (9th Cir. 1990)*. For example, an indirect purchaser may sue if the direct purchaser is a division or subsidiary of the price-fixing seller. *Id*. In *Freeman*, our court may have outlined a fourth exception, that "indirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue," relying on the seller's control of the direct purchaser. *Freeman, 322 F.3d at 1145-46* (citing *Royal Printing Co., 621 F.2d at 326*). However, whether there is such an exception is unclear, because we held that standing existed in *Freeman* based on the control or co-conspirator exceptions.[3] *See id*.

In this case, the parties argue over the contours of these exceptions. But after review, none of the exceptions allow Plaintiffs to avoid "run[ning] squarely into the *Illinois Brick* wall." *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1049 (9th Cir. 2008)*.

A. Indirect Purchasers

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[3] "[T]he exception that [*Freeman*] purported to recognize is not yet one acknowledged by the Supreme Court, which has thus far been indifferent to the question whether the **[**18]** direct purchaser is likely to sue. What the [Ninth Circuit] was really describing was a 'control' or perhaps a 'co-conspirator' exception." 2A Phillip E. Areeda et al., ***Antitrust Law*** ¶ 346f (3d ed. 2007).

Plaintiffs argue that they should be considered as direct purchasers or fit within the co-conspirator exception, because the foreign ATM fee they have paid is an illegally fixed fee as defined by ***antitrust law***.[4] However, Plaintiffs concede **[*750]** that they have never directly paid interchange fees. Instead, card-issuing banks (including Bank Defendants) pay interchange fees and then include them when they charge foreign ATM fees (alleged by Plaintiffs to be artificially inflated). In other words, the Bank Defendants pass on the cost of the interchange fees through the foreign ATM fees. The district court found Plaintiffs to be indirect purchasers, because they do not directly pay the fixed interchange fee, labeled by **[**19]** the district court as the alleged "unlawful fee." *In re ATM Fee Antitrust Litig., 2010 U.S. Dist. LEXIS 97009, 2010 WL 3701912, at *5*. The district court found it important that "Plaintiffs do not allege that the Defendants or any other banks have conspired to fix the foreign ATM fee that the Plaintiffs must pay." *2010 U.S. Dist. LEXIS 97009, [WL] at *2*. We agree with the district court that Plaintiffs are indirect purchasers.

B. Exceptions to *Illinois Brick*

1. No Preexisting Cost-Plus Contract

Plaintiffs do not contend that they had a preexisting cost-plus contract with Defendants. Therefore, this exception, allowing indirect purchasers to sue when they have a preexisting cost-plus contract with the direct purchaser, *Illinois Brick, 431 U.S. at 736*; *Utilicorp, 497 U.S. at 217-18*, does not apply here.

2. Co-Conspirator Exception and the Price "Fixed"

HN11[] This co-conspirator exception allows an indirect purchaser to sue when co-conspirators set the price paid by the plaintiff. 2A Phillip E. Areeda et al., ***Antitrust Law*** ¶ 346h ("*Illinois Brick* does not limit suits by consumers **[**20]** against a manufacturer who illegally contracted with its dealers to set the latter's resale price. The consumer plaintiff is a direct purchaser from the dealer who . . . has conspired illegally with the manufacturer with respect to the very price paid by the consumer." (footnote omitted)).

Specifically, our circuit has outlined ***HN12***[] this exception in *Shamrock Foods* as applying when the direct purchaser conspires horizontally or vertically to fix the price paid by the plaintiffs. *729 F.2d at 1211*. In *Shamrock Foods*, consumers alleged that retail grocery stores conspired with dairy producers, who also sold directly to consumers, to fix the retail prices of dairy products. *Id. Illinois Brick* did not apply, because "the retail price was the one fixed," and thus, the "theory of recovery d[id] not depend on pass-on damages." *Id.; see also id. at 1214* ("The consumers confine their claim for damages . . . solely to that overcharge resulting from a retail level price-fixing conspiracy. There is no need to apportion that overcharge because it was not passed on to the consumers through any other level in the distribution chain."). As the district court aptly noted, this co-conspirator exception is **[**21]** not really an exception at all. *In re ATM Fee Antitrust Litig., 2010 U.S. Dist. LEXIS 97009, 2010 WL 3701912, at *6*; *see also* 2A Phillip E. Areeda et al., ***Antitrust Law*** ¶ 346h ("Whether one adopts a co-conspirator exception or regards this situation as outside *Illinois Brick's* domain, there is no tracing or apportionment to be done." (footnote omitted)). If the direct purchaser conspires to fix the price paid by the plaintiffs, then the plaintiffs pay the fixed price directly and are not indirect purchasers (i.e., there is no pass-on theory involved). *See Shamrock Foods, 729 F.2d at 1211-12*.

Here, the district court found *Shamrock Foods* inapplicable, because

> Plaintiffs in this case, unlike the plaintiffs in *Shamrock Foods*, do not allege that Defendants conspired to fix the price Plaintiffs paid (*i.e.*, the foreign ATM fee). Instead, Plaintiffs allege **[*751]** that Defendants fixed the

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[4] Although the argument touches upon the initial inquiry whether Plaintiffs are indirect purchasers, we address the argument within our discussion of the co-conspirator exception.

> interchange fee that Star Network pay one another and then passed along the artificially inflated fee to Plaintiffs. Thus, unlike *Shamrock Foods*, Plaintiffs' theory of recovery expressly depends on pass-on damages. . . . In short, the *Shamrock Foods* exception applies where the Defendants have conspired to fix the price that Plaintiffs paid directly. **[**22]** That is not the case here.

In re ATM Fee Antitrust Litig., 2010 U.S. Dist. LEXIS 97009, 2010 WL 3701912, at *6 (internal quotation marks and alterations omitted). We agree with the district court.

As we emphasized in Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, the price paid by plaintiffs must be fixed. *Kendall* applies particularly well to this case, because it involved similar allegations and fee structures. In *Kendall*, merchants sued credit card companies (or Consortiums) and banks, alleging that they conspired to set the transaction fee charged to merchants for each retail transaction—i.e., the merchant discount fee—by setting the interchange fees charged by the Consortiums to the issuing banks. Id. at 1049. The merchant plaintiffs alleged that setting the interchange fees "establish[ed] a minimum amount for the merchant discount fees." *Id*. However, the merchant plaintiffs "[ran] squarely into the *Illinois Brick* wall," with respect to interchange fees, because they were not charged the interchange fee directly. *Id*. Also, "[a]ppellants allege[d] the Consortiums indirectly establish[ed] the minimum merchant discount fee the Banks charge[ed] Merchants." *Id*. "[T]his allegation [was] barred by *Illinois Brick* to the **[**23]** extent that the Consortiums d[id] not directly set the merchant discount fee; the acquiring bank sets that fee." *Id*. More importantly, the *Kendall* plaintiffs alleged that the credit card companies directly conspired with the banks *to set the merchant discount fee*, so they should have standing under the co-conspirator exception. Id. at 1050. Critically, the plaintiffs alleged a conspiracy to fix the price paid by the plaintiffs. *Id*. Although the court rejected the argument because plaintiffs provided no facts to support such a conspiracy, the court found significant the fact that the plaintiffs did "not allege any facts showing the Consortiums have any direct control over the merchant discount fee the acquiring bank chooses to charge . . . ." *Id*.

The *Kendall* plaintiffs failed to show a conspiracy "to set merchant discount fees," and "appellants [did] not allege any facts showing the Consortiums ha[d] any direct control over the merchant discount fee." *Id*. As such, ***HN13***[] Kendall reaffirmed that the co-conspirator exception applies when the conspirators set the price paid by the consumer. The same analysis applies in our case. Here, while Plaintiffs allege a conspiracy to set interchange fees, **[**24]** they fail to show a conspiracy to set foreign ATM fees. Plaintiffs do not allege that STAR has control to set foreign ATM fees. Further, Bank Defendants have no control over the foreign ATM fees of other Bank Defendants or STAR members.

The Fourth Circuit also requires that plaintiffs allege a conspiracy to fix the price paid by the plaintiffs. Dickson v. Microsoft Corp., 309 F.3d 193 (4th Cir. 2002). In *Dickson*, computer purchasers alleged that license agreements between computer sellers and Microsoft

> resulted in supracompetitive prices for Microsoft's operating system and application software. [Computer purchasers do] not allege any conspiracy between Microsoft and the OEM Defendants to set the resale price of the software. Instead, [they] claim[ ] that overcharges were passed on to the consumers by the OEM Defendants when the consumers **[*752]** purchased personal computers (PCs) from the OEM Defendants.

309 F.3d at 200. As such, *Dickson* held the claim it faced to be "materially indistinguishable from the claim under consideration in *Illinois Brick*, and [the plaintiffs'] inclusion of a conspiracy allegation [was] insufficient to circumvent the *Illinois Brick* rule." Id. at 215. *Dickson* acknowledged **[**25]** the trend of recognizing a co-conspirator exception. Id. at 214-15. However, the court "interpret[ed] these cases as standing for the more narrow proposition that *Illinois Brick* is inapplicable to a particular type of conspiracy—price-fixing conspiracies." Id. at 215. In other words, the court concluded that only a conspiracy to fix the price paid by the consumer is an exception to *Illinois Brick*, because it is "grounded on the damages theory underlying the alleged conspiracy"—i.e., "no overcharge has been passed on to the consumer." *Id. Dickson* refused to recognize an exception when plaintiffs allege a conspiracy but the conspirators did not fix the price paid by the plaintiffs, because such an action would be contrary to the Supreme Court's direction not to carve out exceptions to the *Illinois Brick* rule. Id. at 214 (citing Utilicorp, 497 U.S. at 216 ("We . . . believe that ample justification exists for our stated decision not to 'carve out exceptions to the [direct purchaser] rule for particular types of markets.'" (quoting Illinois Brick, 431 U.S. at 744))).

Although *Dickson* cites *Shamrock Foods* as an example of the co-conspirator exception, *id. at 214-15*, *Shamrock Foods* parallels **[**26]** *Dickson's* understanding that the exception only applies when the co-conspirators fix the price paid by the plaintiff. *Shamrock Foods* held that *Illinois Brick* does not apply when co-conspirators fix the retail price paid by consumers because the "theory of recovery does not depend on pass-on of damages . . . ."[5] *See 729 F.2d at 1211*. *Shamrock Foods* then indicates that a conspiracy to fix upstream prices relies on the pass-on damages *Illinois Brick* prohibits. *See id*. Therefore,***HN14***[] we agree with the Fourth Circuit and decline to extend the co-conspirator exception past the situation when alleged co-conspirators set the price paid by the plaintiffs.

Plaintiffs argue that they have standing here, because Defendants conspired to fix interchange fees for the purpose and effect of fixing foreign ATM fees. In **[**27]** sum, Plaintiffs argue that the foreign ATM fee was "fixed," because

> [w]hen the term 'fix prices' is used, that term is used in its larger sense. A combination or conspiracy formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate commerce is unreasonable per se under the Sherman Act.

Plymouth Dealers' Ass'n of N. Cal. v. United States, 279 F.2d 128, 132 (9th Cir. 1960); *see also Palmer v. BRG of Ga., Inc., 498 U.S. 46, 48, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)* (per curiam). Plaintiffs argue that Defendants conspired to fix interchange fees for the purpose of raising foreign ATM fees. Therefore, Defendants fixed the foreign ATM fees (which Plaintiffs directly paid), and Plaintiffs have standing.

However, Plaintiffs' argument hinges on what it means to "fix" a price. The district **[*753]** court and Defendants suggest that, ***HN15***[] in the *Illinois Brick* context, fixing a price sets the price directly paid, not a price latter passed-on as part of the price at issue. However, Plaintiffs argue that conspiring to set a price for the purpose and effect of raising the price at issue equates to fixing that price and makes the payers of the raised price direct purchasers.

Plaintiffs' **[**28]** argument misses the mark. *Illinois Brick* rejected this argument when it rejected "mark up" claims. *See 431 U.S. at 744*. Plaintiffs' argument re-characterizes the "mark up" claim by alleging that the Defendants imposed fixed interchange fees for the purpose of marking up foreign ATM fees. Plaintiffs' argument differs little from the argument that a fixed percentage mark up or a price-fixed good used in the ultimate product should allow indirect purchasers to sue, because the price ultimately paid by Plaintiffs includes the fixed costs. However, the Supreme Court expressly rejected such arguments, based largely on the reasoning that "[f]irms in many sectors of the economy rely to an extent on cost-based rules of thumb in setting prices . . . [and t]he intricacies of tracing the effect of an overcharge on the purchaser's prices, costs, sales, and profits . . . are not spared the litigants." *Id*. Further, Plaintiffs do not allege here that the banks agreed to fix the level of the "mark up" in the foreign ATM fees or even whether such fees would be charged at all. The third amended complaint states that "Defendants have continued to impose fixed Interchange Fees because the Bank Defendants **[**29]** mark them up to set Foreign ATM Fees, which generate substantial revenues for Bank Defendants." Plaintiffs allege a mark up of foreign ATM fees to pass on the interchange fees. The allegation contradicts *Illinois Brick*, because ***HN16***[] *Illinois Brick* rejected exceptions for markups by middlemen or when the price-fixed good is a vital input to a larger product. *431 U.S. at 743-45*.

Moreover, Plaintiffs' cited precedent does not support the argument that foreign ATM fees were fixed*. See Plymouth Dealers' Ass'n, 279 F.2d at 132*; *Palmer, 498 U.S. at 48*. Neither case involved the question of who is injured under *§ 4 of the Clayton Act* or pass-on theories. In *Plymouth Dealers' Ass'n*, car dealers agreed to a fixed price list that would be the starting point for bargaining. *279 F.2d at 132*. In *Palmer*, competitors agreed to give one of them the exclusive rights to Georgia. *498 U.S. at 47-48*. Neither involved passing on the price fixed through the price paid by the plaintiffs. Both cases determined what constituted fixing prices under *§ 1 of the Sherman Act*. *See,*

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[5] Plaintiffs argue that *Delaware Valley* construed *Shamrock Foods* to mean that plaintiffs have standing by "establish[ing] a price-fixing conspiracy between manufacturer and middleman—without regard to the price at issue." But *Delaware Valley* only discussed *Shamrock Foods* in a passing footnote and did not describe the scope of the price-fixing conspiracy. *Delaware Valley, 523 F.3d at 1123 n.1*.

e.g., Plymouth Dealers' Ass'n, 279 F.2d at 132 (holding that conspiring to raise, depress, fix, peg, or stabilize a price "is unreasonable per **[**30]** se under the *Sherman Act*" (emphasis added)).

However, as in *Illinois Brick*, our task involves determining whether Plaintiffs are injured within the meaning of § 4 of the Clayton Act. *See* Illinois Brick, 431 U.S. at 723-26. ***HN17***[] Section 4 of the Clayton Act provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . ." 15 U.S.C. § 15(a). Therefore, *Plymouth Dealers' Association* and *Palmer* decided what constitutes "anything forbidden in the antitrust laws," while *Illinois Brick* decided whether injury results based on a pass-on theory. *See* Illinois Brick, 431 U.S. at 729 ("[T]he overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning **[*754]** of [§ 4 of the Clayton Act] . . . ."). In sum, ***HN18***[] the price paid by plaintiffs must be the price set (not merely "fixed" in some broad sense) for plaintiffs to be a direct purchaser under the narrowly defined injury requirement of § 4 of the Clayton Act. Further, under the co-conspirator exception recognized in this circuit, the price paid by a plaintiff must be set by the conspiracy **[**31]** and not merely affected by the setting of another price. *See* Shamrock Foods, 729 F.2d at 1211.

Plaintiffs cite Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979 (9th Cir. 2000), for the proposition that Defendants effectively fixed foreign ATM fees by fixing interchange fees, which thus gives Plaintiffs standing. However, Plaintiffs inappropriately rely on *Knevelbaard*, because *Knevelbaard* found antitrust injury under California's Cartwright Act, which "is enlarged, by statute, in comparison to federal law." Id. at 991. "As a result, the more restrictive definition of antitrust injury under [*Illinois Brick*] does not apply to the Cartwright Act." *Id*. (internal quotation marks omitted). Because "California law affords standing more liberally than does federal law," *Knevelbaard* did not decide whether antitrust injury, or standing, existed under *Illinois Brick. See* id. at 987.

Lastly, *Freeman* fails to support Plaintiffs' argument that the foreign ATM fees were "fixed." In *Freeman*, realtor associations formed a single MLS[6] database ran by Sandicor, a corporation they created, owned, and controlled. 322 F.3d at 1141, 1146. The plaintiffs alleged that the associations conspired to fix support **[**32]** fees charged to Sandicor, and that these fees inflated the MLS fees charged by Sandicor and paid by plaintiffs. Id. at 1142. The associations fixed the support fees charged to Sandicor, and Sandicor set the MLS fees charged to subscribers. Id. at 1141, 1145. *Freeman* held that fixing the support fees artificially inflated that MLS fees paid by the plaintiffs. *See* Freeman, 322 F.3d at 1145.

Contrary to Plaintiffs' argument, Freeman demonstrates that ***HN19***[] fixing one fee for the purpose and effect of inflating another fee does not make the purchaser a direct purchaser under *Illinois Brick*. In *Freeman*, the court was forced to find an exception to *Illinois Brick* even though the court found price fixing by setting the support fees and passing them on through MLS fees. Id. at 1145-46. Therefore, in the context of Illinois Brick, fixing an upstream cost did not equate to fixing the price paid by the plaintiffs. Standing existed **[**33]** in *Freeman*, not because the associations fixed the support fees for the purpose and effect of raising MLS fees, but because of the associations' ownership and control of Sandicor (the direct purchaser). Id. at 1145-46 (citing Royal Printing, 621 F.2d at 326).

Plaintiffs argue *Freeman* relies on the co-conspirator exception, because the court noted that the associations, in essence, had agreed to have the MLS charge be $44. *See* 322 F.3d at 1146 (comparing the case to resale price maintenance and noting that "Defendants can't turn a horizontal agreement to fix prices into something innocuous just by changing the way they keep their books"). However, even if Freeman applied the co-conspirator exception, it does not help Plaintiffs. The defendants in that case conspired to effectively set the price paid by the customers of the MLS. **[*755]** *See id*. (associations effectively "agree[d] among themselves to resell [MLS database access] with support services for exactly $22.50"). Here, unlike *Freeman*, the Bank Defendants independently set the fee paid by Plaintiffs (i.e., foreign ATM fee) and the amount of such fee varies between Bank Defendants. As such,

[6] "[T]he Multiple Listing Service, or 'MLS,' [ ] lets agents share information about properties on the market with the help of a computerized database. Agents who subscribe to the MLS can peruse the listings of other subscribers and post their own." Freeman, 322 F.3d at 1140.

Defendants have not conspired to set the foreign **[**34]** ATM fees unlike the associations in *Freeman* effectively setting the price for Sandicor's MLS service.

Plaintiffs next argue that they have standing, because they "purchased directly from price-fixing Defendants," an argument closely related to the argument that the foreign ATM fees were "fixed." In other words, Plaintiffs argue that the direct purchaser Bank Defendants conspired to fix the interchange fees (an upstream cost), so Plaintiffs purchased from a horizontal price fixing conspirator. They argue *Illinois Brick* does not apply even though Defendants did not fix the price Plaintiffs directly paid, because they are purchasing from a violator. However, because *Shamrock Foods* only involved the setting of the price actually paid (and not an upstream price that was then passed on), we would have to extend our current co-conspirator exception. Though other courts have,[7] we decline to do so.

Based on our precedent in *Kendall* and *Shamrock Foods*, we recognize the co-conspirator exception only when the conspiracy involves setting the price paid by the plaintiffs. Therefore, as the district court concluded, the exception **[**37]** does not apply, because the theory of recovery depends on pass-on damages. We decline to extend the co-conspirator exception further. As in *Kendall*, Plaintiffs "run into the *Illinois Brick* wall," because Plaintiffs do not pay interchange fees directly and the Bank **[*756]** Defendants independently set foreign ATM fees.

3. Ownership and Control and Freeman's "*No Realistic Possibility that Direct Purchasers Will Sue*"

HN20[] *Royal Printing* allowed indirect purchasers to sue "where a direct purchaser is a division or subsidiary of a co-conspirator." *621 F.2d at 326*. *Royal Printing* created an exception when parental control existed, because applying *Illinois Brick* "would eliminate the threat of private enforcement," *id. at 326 n.7*, and "close off every avenue for private enforcement," *id. at 327*. "The co-conspirator parent will forbid its subsidiary or division to bring a lawsuit that would only reveal the parents own participation in the conspiracy." *Id. at 326*. In our case, neither Bank Defendants nor STAR are divisions or subsidiaries of the other. However, Plaintiffs argue that the exception in *Royal Printing* should, as construed in *Freeman, 322 F.3d at 1145-46*, apply in any event. We disagree.

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[7] In *In re TFT LCD (Flat Panel) Antitrust Litigation*, the Northern District of California held that a purchaser of a finished TFT-LCD product was a direct purchaser, even though "the alleged price-fixing conspiracy existed only with regard to TFT-LCD panels, and not finished products." *267 F.R.D. 291, 306-07 (N.D. Cal. 2010)*. **[**35]** The district court classified consumers of the final products as direct purchasers because they "purchase[d] directly from the alleged violator." *Id. at 307* (quoting *In re Sugar Indus. Antitrust Litig., 579 F.2d 13, 17 (3d Cir. 1978))*. In support of the conclusion, the Northern District of California cited two Third Circuit cases.

In *In re Sugar Industries Antitrust Litigation*, the Third Circuit classified candy wholesalers as direct purchasers because the candy manufacturers also refined sugar (sugar refiners being the alleged violators). *579 F.2d at 17-18*. In *In re Sugar Industries*, the plaintiff "limited the issue to the summary judgment only insofar as it affects the direct purchases of candy from defendants," because "in the face of *Illinois Brick* . . . plaintiff has no hope of success on the purchases from nondefendants." ***Id. at 16***. Thus, *In re Sugar Industries* actually exemplifies the exception allowed when an upstream violator controls or owns the direct purchaser, which is discussed in more detail below. *See id. at 18-19*; 2A Phillip E. Areeda et al., ***Antitrust Law*** ¶ 346f & n. 41.

Later, in *In re Linerboard Antitrust Litigation*, the Third Circuit classified purchasers of corrugated **[**36]** sheets and boxes as direct purchasers of linerboard (which was included in the purchased corrugated sheets and boxes), because the linerboard was subject to a price-fixing agreement. *305 F.3d 145, 158-60 (3d Cir. 2002)* ("*Illinois Brick* . . . bans Clayton Act lawsuits by persons who are not direct purchasers from the defendant antitrust violator."). Similarly, the Seventh Circuit has held that "the first purchaser[ ] from *outside* the conspiracy" may sue. *Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 631-32 (7th Cir. 2002)*. Thus, these cases restrict *Illinois Brick's* influence by allowing an exception when the direct purchaser conspires with the seller, even though the price illegally set is an upstream cost that is passed-on to the plaintiffs. This contradicts the Supreme Court's admonition "not to 'carve out exceptions to the [direct purchaser] rule for particular types of markets.'" *Utilicorp, 497 U.S. at 216* (quoting *Illinois Brick, 431 U.S. at 744*).

HN21[] *Freeman*, **[**38]** citing *Royal Printing*, enunciated the exception as follows: "[I]ndirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust violation." *Freeman, 322 F.3d at 1145-46*. However, *Freeman* did not create a new variation of the *Royal Printing* exception, because *Freeman* relied on ownership and control to find standing. *Id. at 1146* ("The associations own Sandicor . . ., [t]hey appoint its board of directors, and they are accused of conspiring with it."); *id. at 1146 n.12* ("*Royal Printing* applies because the associations own Sandicor."). In *Freeman*, the co-conspiring realtor associations owned and controlled Sandicor (the direct purchaser) and had the power to appoint Sandicor's board of directors. *Id*. Thus, in *Freeman*, we found no realistic possibility of suit, because the associations owned and controlled the direct purchaser.[8] *Id. at 1146*. Therefore, *Freeman* outlines that, whether a realistic possibility of suit exists, depends on the existence of ownership or control between the direct purchaser and the seller. *See, e.g., Royal Printing, 621 F.2d at 326 n.7* ("[I]f Royal Printing is . . . barred [from suing], **[**39]** and the *controlled* wholesalers will not sue, the appellees' transactions would be immune from private antitrust enforcement." (emphasis added)).

We do not overlook that Plaintiffs argue that there is no realistic possibility that the Bank Defendants will sue STAR or their co-defendants, because the district court preliminarily denied the Defendants' motion to dismiss (on September 4, 2009) on such grounds. *In re ATM Fee Antitrust Litig., 768 F. Supp. 2d at 991-92*. However on summary judgment (with more information in the record than at the time of the motion to dismiss), the district court subsequently found a lack of standing, because there was a realistic possibility of suit by pure-payer (and net-payer) direct purchasers of the interchange fee.[9] **[*757]** *In re ATM Fee Antitrust Litig., 2010 U.S. Dist. LEXIS 97009, 2010 WL 3701912*.

In *Royal Printing* and *Freeman*, the ownership or control of the direct purchasers by the conspiring sellers created no realistic possibility of suit. Here, Plaintiffs do not allege that STAR owns or controls Bank Defendants or that Bank Defendants own or control other Bank Defendants. Thus, this case does not involve a lack of a realistic possibility of suit because of the seller (STAR) prohibiting the direct purchasers (Bank Defendants) from suing through its ownership or control, as found in *Royal Printing* and *Freeman*. Instead, this case deals with whether a realistic possibility of suit exists when a direct purchaser conspires with the seller to set a cost passed-on to Plaintiffs. ***HN22***[] We decline to extend the exception noted in *Royal Printing* and *Freeman* to situations where the seller does not own or control the direct purchasers, because, after *Royal Printing*, the Supreme Court stated that **[**41]** "[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Utilicorp, 497 U.S. at 216*; *see* 2A Phillip E. Areeda et al., ***Antitrust Law*** ¶ 346h ("[T]he Supreme Court . . . has thus far been indifferent to the question whether the direct purchaser is likely to sue . . . .").

Plaintiffs argue that Bank Defendants owned or controlled STAR.***HN23***[] The applicable statute does not define control. Therefore, we construe it in its ordinary, contemporary, and common meaning. *United States v. Bennett, 621 F.3d 1131, 1139 n.2 (9th Cir. 2010)*. Control means "'to exercise restraint or direction over; dominate, regulate, or command,'" *id*. (quoting Webster's College Dictionary 297 (Random House 1991)), or to have "the 'power or authority to guide or manage,'" *id*. (quoting Webster's New Collegiate Dictionary 285 (9th ed.1983)).

Plaintiffs' outline sources purported to show that Bank Defendants' ownership and control of STAR foreclosed a realistic possibility of suit. However, Bank Defendants did not control STAR after Concord, a publicly owned Delaware corporation, purchased STAR on February 1, 2001.[10] Former stockholders of STAR owned, in aggregate,

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[8] *Freeman* concludes the paragraph discussing the exception by stating that "[t]here's no realistic possibility Sandicor will sue them," but in the corresponding footnote the court finds *Royal Printing* applicable because of the associations *ownership* of Sandicor. *322 F.3d at 1146 n.12*.

[9] We do not rely on the same reasoning as the district court, because *Royal Printing* may cast some doubt on the **[**40]** district court's conclusion. In *Royal Printing*, we found that the plaintiffs had standing to sue for the purchases they had made from wholesalers controlled by the paper manufactures even though the plaintiffs also made purchases from independent wholesalers. *Royal Printing, 621 F.2d at 324, 327-28*.

approximately **[**42]** ten percent of Concord's outstanding common stock after the merger. Because of Concord's widely disbursed ownership and Bank Defendants' small ownership percentage, Bank Defendants had insufficient ownership interests to control Concord and thus STAR. *Cf. Weinstein Enters., Inc. v. Orloff, 870 A.2d 499, 506-08 (Del. 2005)* (***HN24***[] in finding that a fiduciary duty exists, a shareholder must have control of the affairs of the corporation, which does not exist unless the shareholder owns a majority of the stock or has actual control over the corporation's conduct); *Kaplan v. Centex Corp., 284 A.2d 119, 122-23 (Del. Ch. 1971)* (***HN25***[] "A plaintiff who alleges domination of a board of directors and/or control of its affairs must prove it. Stock ownership alone, at least when it amounts to less than a majority, is not sufficient proof of domination or control." (citation omitted)). Moreover, the language added to STAR's agreement with its members does not create control, because (1) it is a negotiated agreement between STAR and its members, and (2) STAR still has the ultimate power to change interchange fees based on market conditions. The language essentially protects Bank **[*758]** Defendants from arbitrary changes, **[**43]** but Concord has the power to change interchange fees if changes are reasonably related to prevailing market conditions. Likewise, the Network Advisory Board (composed of large member banks like Bank Defendants) does not create control, because it had no power to set interchange fees or to control Concord's board. The Network Advisory Board has influence, because it represents the views of large member banks. However, input on policies and pricing issues by interested members does not constitute the type of control necessary to meet the exception to *Illinois Brick*. *See Freeman, 322 F.3d at 1145-46* (control existed from ownership); *cf. Werner v. Miller Tech. Mgmt., L.P., 831 A.2d 318, 328 (Del. Ch. 2003)* ("The ability to offer ideas [by the Advisory Board] cannot be construed as an ability to manage the affairs of Interprise."). ***HN26***[] As a Delaware corporation, Concord's board of directors has the power, authority, and responsibility to manage the corporation. *Del. Code Ann. tit. 8, § 141*. Therefore, to control STAR, the Bank Defendants must have had control of Concord's board of directors, which is not demonstrated here.

CONCLUSION

For these reasons, we AFFIRM the district court's summary judgment. Plaintiffs lack standing to seek damages for the alleged antitrust violations.

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[10] As for the time period from July 2, 2000, to February 1, 2001, there **[**44]** are no allegations that Bank Defendants controlled one another or conspired to fix foreign ATM fees. As such, the concern in *Royal Printing* of a controlling party prohibiting the direct purchaser from suing is not present here.

In re K-Dur Antitrust Litig.

United States Court of Appeals for the Third Circuit

December 12, 2011, Argued; July 16, 2012, Filed

No. 10-2077, No. 10-2078, No. 10-2079; No. 10-4571

Reporter
686 F.3d 197 *; 2012 U.S. App. LEXIS 14527 **; 103 U.S.P.Q.2D (BNA) 1497 ***; 2012-2 Trade Cas. (CCH) P77,971; 2012 WL 2877662

In Re: K-DUR ANTITRUST LITIGATION, Louisiana Wholesale Drug Co., Inc., on behalf of itself and all others similarly situated, Appellants; In Re: K-DUR ANTITRUST LITIGATION, CVS Pharmacy, Inc.; Rite Aid Corporation, Appellants; In Re: K-DUR ANTITRUST LITIGATION, Walgreen Co., Eckerd Corporation, The Kroger Co., Safeway Inc., Albertson's Inc., Hy-Vee, Inc., and Maxi Drug, Inc., Appellants; In Re: K-DUR ANTITRUST LITIGATION, Merck & Co., Inc.; Upsher-Smith Laboratories, Inc., Appellants

Subsequent History: Vacated by, Remanded by *Upsher-Smith Labs., Inc. v. La. Wholesale Drug Co., 133 S. Ct. 2849, 186 L. Ed. 2d 904, 2013 U.S. LEXIS 4861 (U.S., June 24, 2013)*

Vacated by, Remanded by *Merck & Co. v. La. Wholesale Drug Co., 133 S. Ct. 2849, 186 L. Ed. 2d 904, 2013 U.S. LEXIS 4896 (U.S., June 24, 2013)*

Adhered to, in part, Motion granted by, Remanded by *In re K-Dur Antitrust Litig., 2013 U.S. App. LEXIS 18859 (3d Cir. N.J., Sept. 9, 2013)*

Prior History: [1]** On Appeal from the United States District Court for the District of New Jersey. (D.C. No. 2-01-cv-01652). District Judge: Honorable Garrett E. Brown, Jr.

In re K-Dur Antitrust Litig., 2010 U.S. Dist. LEXIS 28918 (D.N.J., Mar. 24, 2010)

Disposition: As to the motions for summary judgment, the judgment of the district court was reversed and remanded for further proceedings. The district court's determination approving maintenance of the class action was affirmed.

Core Terms

patent, generic, antitrust, settlement, manufacturer, FTC, infringement, class member, defendants', district court, challenging, patent holder, pharmaceutical, brand, certification, FDA, license, patent infringement, plaintiffs', lost profits, parties, potassium chloride, damages, invalid, class certification, Hatch-Waxman Act, Tamoxifen, courts, variations, monopoly

LexisNexis® Headnotes

Antitrust & Trade Law > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN1[] Antitrust & Trade Law

An appellate court has jurisdiction over antitrust appeals pursuant to 28 U.S.C.S. § 1291.

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

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

HN2[] Standards of Review, De Novo Review

An appellate court exercises plenary review of a district court's grant of summary judgment, applying the same summary judgment standard that guides the district court.

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

HN3[] Sherman Act, Scope

See 15 U.S.C.S. § 1.

Antitrust & Trade Law > Sherman Act > Claims

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

HN4[] Sherman Act, Claims

Under a literal reading, 15 U.S.C.S. § 1 would make illegal every agreement in restraint of trade. However, it has not been so interpreted. Rather the U.S. Supreme Court has long construed it to prohibit only unreasonable restraints. Whether a restraint qualifies as unreasonable and therefore conflicts with the statute is normally evaluated under the "rule of reason." Applying this approach, the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect. This inquiry has been divided into three parts. First, the plaintiff must show that the challenged conduct has produced anticompetitive effects within the market. If the plaintiff meets the initial burden, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective. Finally, the plaintiff can rebut the defendant's purported pro-competitive justification by showing that the restraint is not reasonably necessary to achieve the pro-competitive objective.

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

Evidence > Burdens of Proof > Allocation

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

Courts have recognized that some types of restraints have such predictable and pernicious anticompetitive effect, and such limited potential for pro-competitive benefit, that they should be deemed unlawful per se. Examples of agreements that have been held unlawful pursuant to the per se rule include horizontal price fixing, output limitations, market allocation, and group boycotts. The per se rule is applied where a practice facially appears to be one that would always or almost always tend to restrict competition or decrease output. In some situations, courts apply an antitrust analysis that falls between the full rule of reason inquiry on the one hand and the rigid per se approach on the other. This so-called "quick look" or "truncated rule of reason" analysis applies where the plaintiff has shown that the defendant has engaged in practices similar to those subject to per se treatment. Having so shown, the plaintiff is not required to make a full showing of anticompetitive effects within the market; rather the defendant has the burden of demonstrating pro-competitive justifications.

Governments > Courts > Judicial Precedent

HN6[] **Courts, Judicial Precedent**

A court will follow the decisions of its sister courts where it finds them persuasive.

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Infringement Actions > General Overview

HN7[] **Sherman Act, Scope**

While the first two courts of appeal to address the issue of reverse payments subjected those agreements to antitrust scrutiny, later courts have gravitated toward the scope of the patent test under which reverse payments are permitted so long as (1) the exclusion does not exceed the patent's scope, (2) the patent holder's claim of infringement was not objectively baseless, and (3) the patent was not procured by fraud on the Patent and Trademark Office. As a practical matter, the scope of the patent test does not subject reverse payment agreements to any antitrust scrutiny. No court applying the scope of the patent test has ever permitted a reverse payment antitrust case to go to trial. The U.S. Court of Appeals for the Third Circuit cannot agree with those courts that apply the scope of the patent test. That test improperly restricts the application of ***antitrust law*** and is contrary to the policies underlying the Drug Price Competition and Patent Term Restoration Act, commonly known as the Hatch-Waxman Act, Pub. L. No. 98-417, 98 Stat. 1585 (1984), and a long line of U.S. Supreme Court precedent on patent litigation and competition.

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

HN8[] **Patent Invalidity, Presumption of Validity**

While persons challenging the validity of a patent in litigation bear the burden of defeating a presumption of validity, this presumption is intended merely as a procedural device and is not a substantive right of the patent holder. The presumption, like all legal presumptions, is a procedural device, not substantive law.

Patent Law > Infringement Actions > Burdens of Proof

HN9[] **Infringement Actions, Burdens of Proof**

In infringement cases it is the patent holder who bears the burden of showing infringement.

Patent Law > US Patent & Trademark Office Proceedings > General Overview

HN10[] **Patent Law, US Patent & Trademark Office Proceedings**

Courts must be mindful of the fact that a patent, in the last analysis, simply represents a legal conclusion reached by the Patent and Trademark Office.

Patent Law > General Overview

HN11[] **Patent Law**

Valid patents are a limited exception to a general rule of the free exploitation of ideas. It follows that the public interest supports judicial testing and elimination of weak patents.

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

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN12[] **Sherman Act, Scope**

If a patent is invalid, the price fixing provision of a licensing agreement will violate federal ***antitrust law*** and, as such, the licensor can not be estopped from challenging the patent. In reaching this conclusion the U.S. Supreme Court emphasized the broad public interest in freeing the United States's competitive economy from the trade restraints which might be imposed by price-fixing agreements stemming from narrow or invalid patents. It is the public interest which is dominant in the patent system and the right to challenge a patent is not only a private right to the individual, but it is founded on public policy which is promoted by his making the defence, and contravened by his refusal to make it.

Antitrust & Trade Law > Regulated Industries > General Overview

HN13[] **Antitrust & Trade Law, Regulated Industries**

Antitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies.

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

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN14[] **Sherman Act, Scope**

In passing the Drug Price Competition and Patent Term Restoration Act, commonly known as the Hatch-Waxman Act, Pub. L. No. 98-417, 98 Stat. 1585 (1984), Congress drew a careful line between patent protection and the need to provide incentives for competition in the pharmaceutical industry. The line that Congress drew between these competing objectives strongly supports the application of rule of reason scrutiny of reverse payment settlements in the pharmaceutical industry.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Infringement Actions > General Overview

HN15[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The goal of the Drug Price Competition and Patent Term Restoration Act, commonly known as the Hatch-Waxman Act, Pub. L. No. 98-417, 98 Stat. 1585 (1984), is to increase the availability of low cost generic drugs. One method Congress employed was to encourage litigated challenges by generic manufacturers against the holders of weak or narrow patents. *21 U.S.C.S. § 355(j)(5)(B)(iv)* (establishing 180-day exclusivity period as reward for successfully challenging a patent). That goal is undermined by application of the scope of the patent test which entitles the patent holder to pay its potential generic competitors not to compete. This approach nominally protects intellectual property, not on the strength of a patent holder's legal rights, but on the strength of its wallet. The principal beneficiaries of such an approach will be name brand manufacturers with weak or narrow patents that are unlikely to prevail in court. Thus while such a rule might be good policy from the perspective of name brand and generic pharmaceutical producers, it is bad policy from the perspective of the consumer, precisely the constituency Congress was seeking to protect.

Civil Procedure > Settlements > Settlement Agreements > General Overview

Patent Law > Infringement Actions > General Overview

HN16[] **Settlements, Settlement Agreements**

The judicial preference for settlement, while generally laudable, should not displace countervailing public policy objectives or Congress's determination that litigated patent challenges are necessary to protect consumers from unjustified monopolies by name brand drug manufacturers.

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Infringement Actions > General Overview

HN17[] **Sherman Act, Scope**

In the context of a reverse payment settlement agreement, the U.S. Court of Appeals for the Third Circuit rejects the scope of the patent test. In its place it will direct a district court to apply a quick look rule of reason analysis based on the economic realities of the reverse payment settlement rather than the labels applied by the settling parties.

Specifically, the finder of fact must treat any payment from a pharmaceutical patent holder to a generic patent challenger who agrees to delay entry into the market as prima facie evidence of an unreasonable restraint of trade, which could be rebutted by showing that the payment (1) was for a purpose other than delayed entry or (2) offers some pro-competitive benefit.

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Infringement Actions > General Overview

HN18[] **Sherman Act, Scope**

In the context of a reverse payment settlement agreement, there is no need to consider the merits of the underlying pharmaceutical patent suit because absent proof of other offsetting consideration, it is logical to conclude that the quid pro quo for the payment was an agreement by the generic to defer entry beyond the date that represents an otherwise reasonable litigation compromise. Of course, a patent holder may attempt to rebut a plaintiff's prima facie case of an unreasonable restraint of trade by arguing that there is in fact no reverse payment because any money that changed hands was for something other than a delay in market entry. Alternatively, the patent holder may attempt to rebut the prima facie case by demonstrating that the reverse payment offers a competitive benefit that could not have been achieved in the absence of a reverse payment. This second possible defense attempts to account for the--probably rare--situations where a reverse payment increases competition. For example, a modest cash payment that enables a cash-starved generic manufacturer to avoid bankruptcy and begin marketing a generic drug might have an overall effect of increasing the amount of competition in the market.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN19[] **Appellate Jurisdiction, Interlocutory Orders**

An appeals court has discretion to consider an interlocutory appeal even after the entry of final judgment.

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

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

HN20[] **Standards of Review, Abuse of Discretion**

An appellate court reviews class certification orders for abuse of discretion, which occurs if the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN21[] **Class Actions, Prerequisites for Class Action**

In order to certify a class under *Fed. R. Civ. P. 23(b)(3)*, a plaintiff must satisfy both the general class action prerequisites--numerosity, commonality, typicality, and adequacy of representation--and the additional requirements of predominance and superiority. *Fed. R. Civ. P. 23(a)*, *(b)(3)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

***HN22*[]** **Prerequisites for Class Action, Predominance**

In order for the predominance requirement of *Fed. R. Civ. P. 23* to be satisfied issues common to the class must predominate over individual issues. Class certification calls for the district court to conduct a rigorous assessment of the available evidence, and is only appropriate in antitrust cases where plaintiffs can show, by a preponderance of the evidence, that proof of the essential elements of the cause of action, including antitrust injury, do not require individual treatment.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

***HN23*[]** **Standing, Requirements**

The U.S. Court of Appeals for the Third Circuit has held that when an antitrust violation impacts upon a class of persons who do have standing, there is no reason in doctrine why proof of impact cannot be made on a common basis, so long as the common proof adequately demonstrates some damage to each individual.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

***HN24*[]** **Private Actions, Remedies**

The preponderance requirement of *Fed. R. Civ. P. 23* demands more than a mere threshold showing by a party seeking to certify a class and, in considering a motion for class certification, a district court is required to resolve any factual or legal disputes necessary to determine whether a plaintiff will be able to show antitrust injury for all plaintiffs with common evidence.

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

***HN25*[]** **Private Actions, Remedies**

Antitrust injury does not require a showing of lost profits. Rather, the U.S. Supreme Court has ruled that a plaintiff suffers an antitrust injury where it is overcharged for a product, regardless of whether it can show lost profits.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN26[] **Private Actions, Remedies**

For class certification a plaintiff need not prove antitrust injury actually occurred. Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members. To the extent that there were minor variations, they can be handled at trial in the context of damages.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN27[] **Prerequisites for Class Action, Adequacy of Representation**

The inquiry that a court should make regarding the adequacy of representation requisite of *Fed. R. Civ. P. 23(a)(4)* is to determine that the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously, and that there is no conflict between the individual's claims and those asserted on behalf of the class. Only a fundamental conflict will defeat adequacy of representation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN28[] **Prerequisites for Class Action, Adequacy of Representation**

A potential conflict between the representatives and some class members should not preclude the use of the class-action device if the parties appear united in interest against an outsider at the beginning of the case.

Counsel: Daniel Berger, Daniel C. Simons, David Francis Sorensen (Argued), Berger & Montague, Philadelphia, PA; Bruce E. Gerstein, Kimberly Hennings, Joseph Opper, Barry S. Taus, Garwin Gerstein & Fisher, New York, NY; Peter S. Pearlman, Cohn, Lifland, Pearlman, Herrmann & Knopf, Saddle Brook, NJ, Attorneys for Appellants, No. 10-2077.

Barry L. Refsin, Hangley, Aronchick, Segal, Pudlin & Schiller, Philadelphia, PA; Steve D. Shadowen (Argued), Hangley, Aronchick, Segal, Pudlin & Schiller, Harrisburg, PA, Attorneys for Appellants, Nos. 10-2078, 10-4571.

Deborah S. Corbishley, Scott E. Perwin, Lauren C. Ravkind, Kenny Nachwalter, Miami, FL, Attorneys for Appellants, Nos. 10-4571, 10-2079.

Gage Andretta, William E. Goydan, Robert L. Tchack, Wolff & Samson, West Orange, NJ; Jennifer K. Conrad, Steven W. Copley, A. Gregory Grimsal, Gordon, Arata, McCollam, Duplantis & Eagan, New Orleans, LA; Jaime M. Crowe, Christopher M. Curran, White & Case, Washington, DC; Ashley E. Bass, Thomas A. Isaacson, John W. Nields, Jr. (Argued), Alan M. Wiseman, Covington **[**2]** & Burling, Washington, DC; Mark A. Cunningham, David G. Radlauer, Jones Walker, New Orleans, LA; Richard H. Gill, George W. Walker, Copeland Franco Screws & Gills, Montgomery, AL; Richard Hernandez, William J. O'Shaughnessy, McCarter & English, Newark, NJ; Charles A. Loughlin, Baker Botts, Washington, DC, Attorneys for Appellees, Nos. 10-2077, 10-2078.

Ellen Meriwether, Cafferty Faucher, Philadelphia, PA, Attorney for Amicus Appellant American Antitrust Institute, Proposed Amicus Appellants, Nos. 10-2077, 10-2078.

Adam R. Lawton, Jeffrey I. Weinberger, Munger, Tolles & Olson, Los Angeles, CA, Attorneys for Amicus Appellee Pharmaceutical Research and Manufacturers of America, No. 10-2077.

Imad D. Abyad, John F. Daly, Federal Trade Commission, Washington, DC, Attorneys for Amicus Appellant Federal Trade Commission, No. 10-2077.

Richard A. Samp, Washington Legal Foundation, Washington, DC, Attorney for Amicus Appellee Washington Legal Foundation, No. 10-2077.

Werner L. Margard, III, Office of Attorney General, Columbus, OH, Attorney for Amicus Appellants, No. 10-2077.

Catherine G. O'Sullivan, United States Department of Justice, Appellate Section, Washington, DC; David Seidman, United States **[**3]** Department of Justice, Antitrust Division, Washington, DC; Malcolm L. Stewart (Argued), United States Department of Justice, Office of Solicitor General, Washington, DC, Attorneys for Amicus Appellant United States, No. 10-2077.

Donald L. Bell, II, National Association of Chain Drug Stores, Alexandria, VA, Attorney for Amicus Appellant Nat'l Ass'n Chain Drug Stores, Inc., Nos. 10-2077, 10-2078.

Judges: Before: SLOVITER, VANASKIE, Circuit Judges and STENGEL[*], District Judge.

Opinion by: SLOVITER

Opinion

[*1498]** **[*202]** OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

In this appeal, we consider the antitrust implications of an agreement by a manufacturer of a generic drug that, in return for a payment by the patent holder, agrees to drop its challenge to the patent and refrain from entering the market for a specified period of time.

A secondary issue concerns the certification by the District Court of a class of antitrust plaintiffs. Specifically, we must determine whether the antitrust injury allegedly suffered by class members can be shown through common proof, i.e. proof applicable to all plaintiffs, and whether there **[**4]** are insurmountable conflicts preventing named plaintiffs from adequately **[***1499]** representing the members of the class.

These appeals arise out of the settlement of two patent cases involving the drug K-Dur 20 ("K-Dur"), which is manufactured by Schering-Plough Corporation ("Schering"). Plaintiffs are Louisiana Wholesale Drug Company, Inc., on behalf of a class of wholesalers and retailers who purchased K-Dur directly from Schering and nine individual plaintiffs, including CVS Pharmacy, Inc., Rite Aid Corporation, and other pharmacies. Defendants are Schering and Upsher-Smith Laboratories ("Upsher Smith").[1]

[*203] I. STATUTORY AND REGULATORY FRAMEWORK

K-Dur is Schering's brand-name sustained-release potassium chloride supplement.[2] Sustained-release potassium chloride is used to treat potassium deficiencies, including those that arise as a side effect of the use of diuretic products to treat high blood pressure.

Schering did not hold a patent for the potassium chloride salt itself, as that compound is commonly known and not patentable. Instead, Schering held a formulation patent on the controlled release coating it applied to the potassium chloride crystals. Schering identified patent number 4,863,743 ("the '743 patent") as the patent that would be

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[*] Hon. Lawrence F. Stengel, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

[1] In appeals numbered 10-2077, 10-2078, and 10-2079, Appellants challenge the District Court's grant of summary judgment on behalf of defendants, relying on their patents. In No. 10-4571, defendants challenge the District Court's certification of a class of plaintiffs.

[2] After the facts at issue **[**5]** in this case, Merck & Co. acquired Schering, the named defendant in these actions. However, in keeping with the practice of the parties and amici, the court will refer to Schering.

infringed by the production of a generic version of K-Dur. Schering assigned the '743 patent to its subsidiary Key Pharmaceuticals, Inc. The '743 patent was set to expire on September 5, 2006.

By statute, a pharmaceutical company must obtain from the Food and Drug Administration ("FDA") approval before it may market a prescription drug. *21 U.S.C. § 355(a)*. For a new drug, the approval process requires submission of a New Drug Application ("NDA"), which includes exhaustive information about the drug, including safety and efficacy studies, the method of producing the drug, and any patents issued on the drug's composition or methods of use. *Id*. *§ 355(b)(1)*. The FDA publishes **[**6]** the patent information submitted in NDAs in the "Approved Drug Products with Therapeutic Equivalence Evaluations," otherwise known as the "Orange Book." *See* FDA Electronic Orange Book, *http://www.fda.gov/cder/ob/*.

In 1984, attempting to jumpstart generic competition with name brand pharmaceuticals, Congress passed the Drug Price Competition and Patent Term Restoration Act, commonly known as the Hatch-Waxman Act. Pub. L. No. 98-417, 98 Stat. 1585 (1984). The Hatch-Waxman Act amended the Federal Food, Drug, and Cosmetic Act, *21 U.S.C. §§ 301-399*, to permit a potential manufacturer of a generic version of a patented drug to file an abbreviated application for approval with the FDA. *See* *21 U.S.C. § 355(j)*. This short form application, known as an Abbreviated New Drug Application ("ANDA"), may rely on the FDA's prior determinations of safety and efficacy made in considering the application of the patented drug. *Id*. *§ 355(j)(2)(A)*.

When a generic manufacturer files an ANDA, it is also required to file a certification that, "in the opinion of the applicant and to the best of his knowledge," the proposed generic drug does not infringe any patent listed with the FDA as covering the patented drug. **[**7]** *Id*. *§ 355(j)(2)(A)(vii)*. The generic manufacturer can satisfy this requirement by certifying one of the following four options with respect to the patent for the listed drug: "(I) that such patent information has not been filed, (II) that such patent has expired, (III) [by certifying] the date on which such patent will expire, or (IV) that such patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted." *Id*. *§ 355(j)(2)(A)(vii)*. The generic manufacturers at issue here, Upsher and ESI, used the fourth of these certification options, the so-called "paragraph IV certification." *Id*. *§ 355(j)(2)(A)(vii)(IV)*. When a would-be generic manufacturer submits a paragraph IV certification, it must consult the Orange Book and provide written **[*204]** notice to each listed patent owner impacted by the ANDA. *Id*. *§ 355(j)(2)(B)(iii)(I)*. By statute, a paragraph IV certification constitutes a technical act of patent infringement. *35 U.S.C. § 271(e)(2)(A)*.

Upon receiving notice of a paragraph IV certification with respect to one of its pharmaceutical patents, the patent holder may initiate an infringement suit based on the filing of the paragraph **[**8]** IV certification alone within forty-five days after the generic applicant files its ANDA and paragraph IV certification. *21 U.S.C. § 355(j)(5)(B)(iii)*. Filing suit by the **[***1500]** patent holder within that window effects an automatic stay that prevents the FDA from approving the generic drug until the earlier of (1) thirty months have run or (2) the court hearing the patent challenge finds that the patent is either invalid or not infringed. *Id*. *§ 355(j)(5)(B)(iii)(I)*.

Congress explained that the purpose of the Hatch-Waxman Act is "to make available more low cost generic drugs." H.R. Rep. No. 98-857(I), at 14-15, *reprinted in* 1984 U.S.C.C.A.N. 2647, 2647-48. In order to encourage generic entry and challenges to drug patents, the Hatch-Waxman Act rewards the first generic manufacturer who submits an ANDA and a paragraph IV certification by providing it with a 180-day period during which the FDA will not approve subsequent ANDA applications. *21 U.S.C. § 355(j)(5)(B)(iv)*. The 180-day exclusivity period is triggered on the date on which the first ANDA applicant begins commercial marketing of its drug. *Id*. Notably, the 180-day exclusivity window is only available to the first filer of an ANDA with **[**9]** a paragraph IV certification, meaning that even if the first filer never becomes eligible to use its 180-day exclusivity period because it settles, loses, or withdraws the litigation, that potential benefit will not pass to subsequent filers. *21 U.S.C. § 355(j)(5)(D)(iii)*. It has been suggested that the first filer is usually the most motivated challenger to the patent holder's claimed intellectual property. *See* C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, *81 N.Y.U. L. Rev. 1553, 1583 (2006)* (noting "a sharp difference in incentives . . . between [the first paragraph IV] filer and all other generic firms").

As explained further below, in the years after the passage of Hatch-Waxman, some of the patent infringement suits occurring under the Hatch-Waxman framework were resolved through settlement agreements in which the patent holder paid the would-be generic manufacturer to drop its patent challenge and refrain from producing a generic drug for a specified period. These agreements are known as "reverse payment agreements" or "exclusion agreements." Concerned about the possible anticompetitive effects of reverse payment agreements, **[**10]** *see* S. Rep. No. 107-167, at 4 (2002), Congress amended Hatch-Waxman as part of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. Those amendments require branded and generic pharmaceutical companies who enter into patent litigation settlements to file those settlement agreements with the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") for antitrust review. Pub. L. No. 108-173, §§ 1111-1118, 117 Stat. 2066, 2461-64 (codified as amended at *21 U.S.C. § 355(j)*).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Approval of the '743 Patent

The patented invention claims a controlled-release dispersible potassium chloride tablet. The '743 patent was developed using a technique called "microencapsulation," a process in which small particles of a drug are coated to **[*205]** make them disperse over time. The research supporting the '743 patent built on work that Schering had done for an earlier patent for a controlled-release aspirin tablet, Patent No. 4,555,399 ("the '399 patent"). The application for what became the '743 patent was initially rejected by the Patent and Trademark Office ("PTO") as obvious in light of the '399 patent and other prior art. In order to **[**11]** circumvent the prior art, Schering amended its application for what became the '743 patent to clarify that the controlled release coating in the invention contained ethylcellulose with a viscosity of greater than 40 cp,[3] whereas the '399 patent called for the use of ethylcellulose with a viscosity of 9-11 cp. Schering argued that a coating containing ethylcellulose of greater than 40 cp was not obvious under the prior art. After this amendment, the PTO granted the '743 patent on September 5, 1989.

B. The Schering-Upsher Litigation and Settlement

In August 1995, Upsher filed the first ANDA seeking approval to produce a generic version of K-Dur to be called Klor-Con M20. Upsher provided a paragraph IV certification to Schering in November 1995, certifying that its generic would not infringe Schering's '743 patent. On December 15, 1995, within the forty-five-day window provided by Hatch-Waxman, Schering sued Upsher in the District of New Jersey for patent infringement, triggering the 30-month automatic stay in FDA approval of Upsher's generic.

Upsher's defense **[**12]** against Schering's patent infringement suit was based on differences between the chemical composition of the controlled **[***1501]** release coating in its generic product and that of the invention claimed in the '743 patent. Throughout the litigation, Upsher vigorously defended against Schering's infringement claims, at one point telling the court that Schering's claims of infringement "are baseless and could not have been made in good faith." App. at 3610.

The parties began trying to settle the infringement case at least as early as May 1997. During settlement negotiations, Upsher requested both a cash payment and an early entry date for its generic product. However, Schering expressed concern about possible antitrust problems that might arise if it made a reverse payment.

In the early morning of June 18, 1997, just hours before the District Court was to rule on the pending cross motions for summary judgment and begin, if necessary, a patent trial, Upsher and Schering agreed to settle the case. The

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[3] Centipoise, abbreviated "cp", is a measure of viscosity. McGraw-Hill Dictionary of Scientific and Technical Terms 354 (6th ed. 2003).

settlement was memorialized in an eleven-page short-form agreement dated June 17, 1997 ("the Schering-Upsher agreement"). That agreement provided that, while Upsher did not concede the validity, infringement, **[**13]** or enforceability of the '743 patent, it would refrain from marketing its generic potassium chloride supplement or any similar product until September 1, 2001, at which point it would receive a non-royalty non-exclusive license under the '743 patent to make and sell a generic form of Klor-Con. Additionally, Upsher granted Schering licenses to make and sell several pharmaceutical products Upsher had developed, including Niacor-SR, a sustained-release niacin product used to treat high cholesterol. In return, Schering promised to pay Upsher sixty million dollars ($60,000,000) over three years, plus additional smaller sums depending upon its sales of Niacor-SR **[*206]** in defined markets. While the parties to this litigation dispute whether the payment was solely for the licensing of Upsher products or instead formed part of the consideration for dropping the patent action, the agreement lists Upsher's promises to dismiss the patent infringement action and not to market any sustained-release microencapsulated potassium chloride tablet until September 1, 2001, as part of the consideration for the payment.

The settlement agreement and the acquisition of licenses from Upsher were ratified by Schering's **[**14]** board of directors on June 24, 1997. Subsequent to the settlement, Upsher and Schering abandoned plans to make and market Niacor-SR.

In this action, the parties dispute the facts related to the Niacor-SR license. Plaintiffs contend that the license was a sham and that the $60 million paid as royalties for Niacor-SR was actually compensation for Upsher's agreement to delay the entry of its generic extended-release potassium tablet. On the other hand, defendants contend that Schering's board valued the license deal separately and that $60 million was its good faith valuation of the licenses at the time.

C. The Schering-ESI Litigation and Settlement

In December 1995, ESI Lederle[4] ("ESI") filed an ANDA seeking FDA approval to make and sell a generic version of K-Dur along with a paragraph IV certification stating that its proposed generic did not infringe the '743 patent. Within the forty-five-day period provided by the Hatch-Waxman Act, Schering sued ESI for patent infringement in the Eastern District of Pennsylvania. ESI defended on the ground that, unlike K-Dur, its generic equivalent did not employ a "coating material with two different ingredients" as specified by the '743 patent, but **[**15]** rather was made by a "different technology which produces a multi-layered coating with each layer comprised of a separate material having only a single ingredient." App. at 1696-97.

In the fall of 1996, Schering and ESI agreed to participate in court-supervised mediation before a magistrate judge. The settlement agreement the parties eventually reached ("the Schering-ESI agreement") called for Schering to grant ESI a royalty-free license under the '743 patent beginning on January 1, 2004. In exchange, Schering would pay ESI $5 million up front and a varying sum depending on when ESI's ANDA was approved by the FDA. Specifically, Schering agreed to pay ESI an amount ranging from a maximum of $10 million if ESI's ANDA was approved **[**16]** before July 1999 down to a minimum of $625,000 if the ANDA was not approved until 2002. As part of the settlement, ESI also represented that it was not developing and had **[***1502]** no plans to develop any other potassium chloride product.

The FDA approved ESI's generic K-Dur product in May 1999, and Schering paid ESI the additional $10 million as required under the settlement agreement.

D. The FTC Action

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[4] ESI is the generic division of American Home Products, Inc., which changed its name to Wyeth in 2002. Melody Peterson, *American Home Is Changing Name to Wyeth*, New York Times, Mar. 11, 2002. Wyeth was subsequently acquired by Pfizer, Inc. in 2009. Pfizer, "Wyeth Transaction," http://www.pfizer.com/investors/ shareholder_services/wyeth_transaction.jsp (last visited May 8, 2012). Plaintiffs settled their claims against ESI's corporate parent Wyeth in January 2005.

In March 2001, the FTC filed a complaint against Schering, Upsher, and ESI alleging that Schering's settlements with **[*207]** Upsher and ESI unreasonably restrained commerce in violation of Section 5 of the Federal Trade Commission Act, *15 U.S.C. § 45*. Specifically, the FTC alleged that the settlement payments from Schering to Upsher and ESI constituted reverse payments intended to delay generic entry and improperly preserve Schering's monopoly.

In June 2002, after a lengthy trial, the Administrative Law Judge ("ALJ") issued an initial decision dismissing the FTC's complaint and finding that neither agreement violated Section 5 of the FTC Act. *In re Schering-Plough Corp., Initial Decision, 136 F.T.C. 956, 1092, 1263 (2002)*. The ALJ found that there was no reverse payment in the Schering-Upsher agreement because **[**17]** the licensing deal included in that agreement was separately valued and was not a payment to Upsher to delay generic entry. *Id. at 1243*. The ALJ also found that the Schering-ESI agreement was not an attempt to unlawfully preserve Schering's monopoly power in the market. *Id. at 1236, 1262-63*.

In December 2003, the FTC unanimously reversed the ALJ's ruling, finding that there was a "direct nexus between Schering's payment and Upsher's agreement to delay its competitive entry" and that this agreement "unreasonably restrain[ed] commerce." *In re Schering-Plough Corp., Final Order, 136 F.T.C. 956, 1052 (2003)*. The FTC likewise found that the ESI settlement violated ***antitrust law***, noting that Schering had not attempted to rebut the natural presumption that the payment to ESI was for delay in generic entry, except to argue unpersuasively that the parties felt judicial pressure to settle. *Id. at 1056-57*. In making these determinations, the FTC found that it was "neither necessary nor helpful to delve into the merits of the [underlying patent disputes]." *Id. at 1055*. Rather, the FTC determined that, where a name brand pharmaceutical maker pays a generic manufacturer as part of a settlement, "[a]bsent **[**18]** proof of other offsetting consideration, it is logical to conclude that the *quid pro quo* for the payment was an agreement by the generic to defer entry beyond the date that represents an otherwise reasonable litigation compromise." *Id. at 988*. In applying the rule of reason, the FTC concluded that the possible existence of a reverse payment raises a red flag and can give rise to a prima facie case that an agreement is anticompetitive. *Id. at 991, 1000-01*. The FTC concluded that the reverse payment at issue was illegal because the settling parties could show neither (1) that the payment was for something other than delay of generic entry nor (2) that the payment had pro-competitive effects. *Id. at 988-89, 1061*.

Schering appealed the FTC's ruling to the Eleventh Circuit, which reversed in *Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005)*. The Eleventh Circuit's ruling in *Schering-Plough* is discussed in Section III(C) *infra*.

E. The Instant Litigation

Separate from the FTC's challenge, various private parties filed antitrust suits attacking the settlements. Those suits, the matters giving rise to this appeal, were consolidated in the District of New Jersey by the Judicial Panel **[**19]** on Multidistrict Litigation. In 2006, by consent of the parties, the District Court appointed Stephen Orlofsky as Special Master with responsibility to handle all motions, including motions for class certification and summary judgment.[5]

[*208] On April 14, 2008, the Special Master certified a class of plaintiffs consisting of forty-four wholesalers and retailers who purchased K-Dur directly from Schering. The District Court adopted that decision on December 30, 2008.[6]

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[5] Because there was no objection to the appointment of a Special Master, we have no occasion to address the use of Special Master to prepare Reports and Recommendations on summary judgment motions. *See In re Bituminous Coal Operators' Ass'n, Inc., 949 F.2d 1165, 1168, 292 U.S. App. D.C. 309 (D.C. Cir. 1991)* ("*Rule 53 of the Federal Rules of Civil Procedure* authorizes the appointment of special masters to *assist*, not to replace, the adjudicator, whether judge or jury, constitutionally indicated for federal court litigation.") (emphasis in original) (*citing La Buy v. Howes Leather Co., Inc., 352 U.S. 249, 256, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957))*.

In February 2009, the Special Master issued a Report and Recommendation **[**20]** granting defendants' motions for summary judgment and denying plaintiffs' motions for partial summary judgment. In his Report and Recommendation, **[***1503]** the Special Master applied a presumption that Schering's '743 patent was valid and that it gave Schering the right to exclude infringing products until the end of its term, including through reverse payment settlements. Under this analysis, the settlements in this case would only be subject to antitrust scrutiny if (1) they exceeded the scope of the '743 patent or (2) the underlying patent infringement suits were objectively baseless. The Special Master determined that neither of these exceptions applied. The District Court subsequently adopted the Report and Recommendation in its entirety.

F. Economic Background and the History of Reverse Payment Settlements

Reverse payment settlements appear to be unique to the Hatch-Waxman context, and the FTC has made them a top enforcement priority in recent years. A 2010 analysis by the FTC found that reverse payment settlements cost consumers $3.5 billion annually. FTC, *Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions* 2 (2010), *available at* http://www.ftc.gov/os/2010/01/100112 payfordelayrpt.pdf. **[**21]** The FTC estimates that about one year after market entry an average generic pharmaceutical product takes over ninety percent of the patent holder's unit sales and sells for fifteen percent of the price of the name brand product. *Id*. at 8. This price differential means that consumers, rather than generic producers, are typically the biggest beneficiaries of generic entry.

III. THE ANTITRUST ISSUE (Appeals Nos. 10-2077, 10-2078, 10-2079)

A. Jurisdiction and Standard of Review

The District Court had jurisdiction pursuant to *15 U.S.C. § 15(a)* and *28 U.S.C. §§ 1331* and *1337*. ***HN1***[] This court has jurisdiction over the antitrust appeals pursuant to *28 U.S.C. § 1291*.

HN2[] This court exercises plenary review of the District Court's grant of summary judgment, applying the same summary judgment standard that guides the District Court. *Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 279 (3d Cir. 2004)*.

B. General Antitrust Standard

The Sherman Act provides, in part, that ***HN3***[] "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. ***HN4***[] Under a literal reading, this provision **[**22]** would make illegal every agreement **[*209]** in restraint of trade. *See* *Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 342, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. However, it has not been so interpreted. Rather the Supreme Court has long construed it to prohibit only unreasonable restraints. *See* *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Whether a restraint qualifies as unreasonable and therefore conflicts with the statute is normally evaluated under the "rule of reason." *Id*. Applying this approach, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Id*. This inquiry has been divided into three parts. First, the plaintiff must show that the challenged conduct has produced anti-competitive effects within the market. *United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993)*. If the plaintiff meets the initial burden, "the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective." *Id. at 669*. **[**23]** Finally, the plaintiff

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[6] The class certification decision is discussed in Section IV *infra*.

can rebut the defendant's purported pro-competitive justification by showing that the restraint is not reasonably necessary to achieve the pro-competitive objective. *Id*.

HN5[] Courts have recognized, however, that "[s]ome types of restraints . . . have such predictable and pernicious anticompetitive effect, and such limited potential for pro-competitive benefit, that they [should be] deemed unlawful *per se*." *State Oil Co., 522 U.S. at 10*. Examples of agreements that have been held unlawful pursuant to the *per se* rule include horizontal price fixing, output limitations, market allocation, and group boycotts. *See* *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*; *N. Pac. Ry. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. The *per se* rule is applied where a "practice facially appears to be one that would always or almost always tend to restrict competition or decrease output." *Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*.

In some situations, courts apply an antitrust analysis that falls between the full rule of reason inquiry on the one hand and the rigid *per se* approach on the other. This so-called **[***1504]** "quick look" or "truncated rule of reason" analysis **[**24]** applies where the plaintiff has shown that the defendant has engaged in practices similar to those subject to *per se* treatment. *See* *Brown Univ., 5 F.3d at 669*. Having so shown, plaintiff is not required to make a full showing of anti-competitive effects within the market; rather defendant has the burden of demonstrating pro-competitive justifications. *Id*.

C. Precedent from Other Circuits

Neither this court nor the Supreme Court has yet weighed in on the legality of reverse payment settlements. However, five other circuits have addressed the question. Two of those courts — the first two to consider the question — concluded that such agreements should be subject to strict antitrust scrutiny, at least where the settling parties attempted to manipulate the 180-day exclusivity period to block all potential generic competition. The three courts to address the question of reverse payments more recently have reached a contrary result, ruling that such agreements are permissible so long as they do not exceed the potential exclusionary scope of the patent.

[*210] 1. D.C. Circuit — *Andrx Pharms., Inc. v. Biovail Corp. Int'l, 256 F.3d 799, 347 U.S. App. D.C. 178 (D.C. Cir. 2001)*

The D.C. Circuit considered a reverse payment in *Andrx Pharmaceuticals, Inc. v. Biovail Corp. International, 256 F.3d 799, 347 U.S. App. D.C. 178 (D.C. Cir. 2001)*, **[**25]** *cert. denied*, *535 U.S. 931, 122 S. Ct. 1305, 152 L. Ed. 2d 216 (2002)*. Unlike the instant case, that case did not involve a settlement resolving patent litigation. Rather, while allowing the patent litigation to continue, the name brand manufacturer agreed to compensate the would-be generic producer to delay marketing a generic product.

In September 1995, Andrx Pharmaceuticals ("Andrx") filed an ANDA seeking to manufacture and sell a generic form of Cardizem CD, a heart drug for which Hoechst Marion Russell, Inc. ("HMRI") held the patent. *Id. at 803*. Andrx filed a paragraph IV certification and was timely sued for patent infringement by HMRI. *Id*. The filing of the patent infringement suit triggered the thirty-month waiting period during which the FDA could not give final approval to Andrx or any subsequent ANDA applicants seeking to make a generic version of Cardizem CD. *Id*. (citing *21 U.S.C. § 355(j)(5)(B)(iii)*). In June 1997, a second generic manufacturer, Biovail Corp. International ("Biovail"), filed an ANDA and a paragraph IV certification to produce generic Cardizem CD. Shortly thereafter, the FDA issued a tentative approval of Andrx's ANDA. *Id*.

Soon after the tentative approval was issued, HMRI and Andrx entered **[**26]** into an agreement pursuant to which HMRI would pay Andrx $40 million per year beginning on the date that Andrx received final approval from the FDA and ending on the date that Andrx either began selling generic Cardizem CD or was adjudged liable for patent infringement in the pending suit. *Id*. The apparent purpose of this agreement was to create a bottleneck by delaying the triggering of Andrx's 180-day period of exclusivity, and thereby delaying generic entry not only by Andrx but also by any other potential generic manufacturer. *Id. at 804*.

The D.C. Circuit reversed the district court's dismissal with prejudice of Biovail's antitrust claims, holding that the agreement between HMRI and Andrx could "reasonably be viewed as an attempt to allocate market share and preserve monopolistic conditions." *Id. at 811*. The D.C. Circuit treated the payment from HMRI to Andrx as *prima facie* evidence of an illegal agreement not to compete, noting that "Andrx's argument that any rational actor would wait for resolution of the patent infringement suit [before triggering the 180-day exclusivity period] is belied by the *quid* of HRMI's *quo*." *Id. at 813*.

2. Sixth Circuit — *In re Cardizem CD Antitrust Litig., 332 F.3d 896 (6th Cir. 2003)*

The **[**27]** Sixth Circuit's decision of *In re Cardizem CD Antitrust Litigation* concerned the same agreement considered by the D.C. Circuit in *Andrx*. *332 F.3d 896 (6th Cir. 2003)*, *cert. denied*, *543 U.S. 939, 125 S. Ct. 307, 160 L. Ed. 2d 248 (2004)*. The Sixth Circuit case was brought by direct and indirect purchasers of Cardizem CD who alleged that they suffered antitrust harm as a result of Andrx's agreement with HRMI to delay market entry. *Id. at 903-04*. The Sixth Circuit held that the Andrx-HRMI agreement was "a horizontal agreement to eliminate competition in the market for Cardizem CD throughout the entire United States, a classic example of a *per se* illegal restraint of trade." *Id. at 908*.

While both *Cardizem* and *Andrx* concerned an agreement that caused a bottleneck **[*211]** by preventing other generic manufactures from entering the market by delaying the triggering of the first filer's 180-day exclusivity period, **[***1505]** much of the Sixth Circuit's reasoning in *Cardizem* is equally applicable to cases, like the instant one, that do not involve bottlenecking. Specifically, the Sixth Circuit emphasized its concern that, even setting aside the bar to subsequent generic applicants, HMRI had paid Andrx not to enter the market itself, stating, "it **[**28]** is one thing to take advantage of a monopoly that naturally arises from a patent, but another thing altogether to bolster the patent's effectiveness in inhibiting competitors by paying the only potential competitor $40 million per year to stay out of the market." *Id. at 908*.

3. Eleventh Circuit — *Valley Drug Co. v. Geneva Pharms., Inc., 344 F.3d 1294 (11th Cir. 2003)* and *Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005)*

The Eleventh Circuit has also considered the question of reverse payments settlements in three significant cases. The first of these, *Valley Drug Co. v. Geneva Pharmaceuticals, Inc., 344 F.3d 1294 (11th Cir. 2003)*, *cert. denied*, *543 U.S. 939, 125 S. Ct. 308, 160 L. Ed. 2d 248 (2004)*, concerned two agreements arising out of cases where a name brand drug manufacturer sued generic manufacturers for patent infringement and the generic manufacturers defended on the ground of patent invalidity.[7] *Id. at 1299-301*. In the two agreements at issue, the name brand manufacturer agreed to pay the generic manufacturer substantial sums to refrain from entering the market until the end of the name brand manufacturer's patent term. *Id. at 1300*. The patent at issue was subsequently declared invalid in another **[**29]** case. *Id. at 1306-07*. The district court granted summary judgment to antitrust plaintiffs, holding that the settlements were *per se* violations of the Sherman Act. *Id. at 1301*. The Eleventh Circuit reversed on the ground that the name brand manufacturer held a patent that gave it the right to exclude competitors. *Id. at 1306*. In so ruling, the court emphasized the fact that the name brand manufacturer might have prevailed in the underlying patent litigation, *id. at 1309*, and highlighted policy considerations favoring the settlement of patent litigation, *id. at 1308 n.20*. The court applied neither a *per se* nor rule of reason analysis to the agreements as a whole; rather, it directed the district court to first determine whether any part of the agreement went beyond the protections afforded by the name brand manufacturer's patent and, if so, to apply traditional antitrust scrutiny only to those portions of the agreement. *Id. at 1311-1312*.

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[7] One of these agreements was a final settlement of certain claims, the other was structured, like the agreements in *Andrx* and *Cardizem*, to take effect even as the litigation continued. *See* *Valley Drug, 344 F.3d at 1300*.

A subsequent Eleventh Circuit case, **[**30]** *Schering-Plough Corp. v. FTC*, arose out of the same settlement agreement as the instant appeal.[8] *402 F.3d 1056 (11th Cir. **[*212]** 2005)*, *cert. denied*, *548 U.S. 919, 126 S. Ct. 2929, 165 L. Ed. 2d 977 (2006)*. After the FTC found that both agreements violated antitrust laws, the defendants appealed to the Eleventh Circuit. Applying the test articulated in *Valley Drug*, the Eleventh Circuit set aside the ruling of the FTC. *Id. at 1065-66, 1076*. The court rejected the FTC's conclusion that Schering's $60 million payment to Upsher was for something other than the licenses it obtained, finding by "overwhelming evidence" that the payment was only for the licenses. *Id. 1069-71*. As such, the court found that there was no reverse payment from Schering to Upsher and thus necessarily no antitrust violation in that agreement. *Id*. With respect to the ESI settlement, the court acknowledged the presence of a reverse payment but concluded that the payment was acceptable in light of judicial policy favoring settlements and the court's finding that the settlement terms "'reflect[ed] a reasonable implementation' of the protections afforded by patent law." *Id. at 1072* (quoting *Valley Drug, 344 F.3d at 1312*).[9]

[*1506]** Plaintiffs construe *Valley Drug* and *Schering-Plough* as requiring courts to conduct an *ex post* evaluation of the strength of the underlying patent before determining whether the patent shields an agreement from antitrust scrutiny. However, following oral argument **[**32]** in this case, the Eleventh Circuit explicitly rejected that interpretation of its prior holdings. In *FTC v. Watson Pharmaceuticals, Inc*., the Eleventh Circuit clarified that its prior opinions did not call for an evaluation of the strength of the patent but rather only a determination whether, absent sham litigation or fraud in obtaining the patent, the settlement agreement exceeded the scope of the patent. *FTC v. Watson Pharms, Inc., 677 F.3d 1298, 2012 WL 1427789, at *11 n.8, *12 (11th Cir. 2012)*. Thus the standard applied by the Eleventh Circuit is identical to the scope of the patent test applied by the Second Circuit to which we now turn.

4. Second Circuit — *In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187 (2d Cir. 2006)*

The Second Circuit's decision of *In re Tamoxifen Citrate Antitrust Litigation* arose out of an agreement settling a patent infringement suit over the drug tamoxifen, then the most widely prescribed drug for the treatment of breast cancer. *466 F.3d 187, 190 (2d Cir. 2006)*, *cert. denied*, *551 U.S. 1144, 127 S. Ct. 3001, 168 L. Ed. 2d 726 (2007)*. That settlement was reached while the patent case was on appeal after the district court had ruled the patent invalid. *Id*. The settlement called **[**33]** for the name brand manufacturer to grant the generic manufacturer a license to sell an unbranded version of tamoxifen and make a reverse payment of $21 million to the generic manufacturer. The settlement was contingent on obtaining a vacatur of the district court's judgment holding the patent to be invalid, which was subsequently obtained. *Id*.

Affirming the district court's dismissal of antitrust plaintiffs' claims, the Second Circuit applied a presumption of patent validity and held that "there is no injury to the market cognizable under existing ***antitrust law***, as long as competition is restrained only within the scope of the patent." *Id. at 213* (internal citations and quotation marks omitted). The only exceptions to this rule, the court held, occur where there is evidence that the patent was procured by fraud or that the enforcement **[*213]** suit was objectively baseless. *Id*. This test is commonly referred to as the "scope of the patent test" or the "*Tamoxifen* test." The Second Circuit conceded that there was a potentially troubling result of such a rule in that "[t]he less sound the patent or the less clear the infringement, and therefore the less justified the monopoly enjoyed by the patent **[**34]** holder, the more a rule permitting settlement

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8 Defendants argue in passing that this **[**31]** court should begin its analysis in this case with a strong presumption in favor of following the Eleventh Circuit's decision in *Schering-Plough*. However, none of the cases cited by defendants employs such a presumption; rather, they stand for the unsurprising proposition that ***HN6***[] this court will follow the decisions of its sister courts where it finds them persuasive. *See, e.g., Ramadan v. Chase Manhattan Corp., 229 F.3d 194, 197-203 (3d Cir. 2000)* (following the rulings of other courts of appeal on similar facts but conducting an independent analysis). As explained below, we do not find the Eleventh Circuit's decision in *Schering-Plough* persuasive, and thus decline to follow it.

9 The Eleventh Circuit subsequently applied, without further significant explication, the scope of the patent test announced in *Valley Drug* and *Schering-Plough* in another case, *Andrx Pharmaceuticals, Inc. v. Elan Corporation, PLC, 421 F.3d 1227 (11th Cir. 2005)*.

is likely to benefit the patent holder by allowing it to retain the patent." *Id. at 211*. The court determined, however, that this risk was counterbalanced by the judicial preference for settlement. *Id*.

In reaching this conclusion, the Second Circuit concluded that "the Hatch-Waxman Act created an environment that encourages [reverse payments]" because, unlike traditional infringement suits where the patent holder can negotiate by agreeing to forego the infringement damages it expects to recover, there usually are no infringement damages in Hatch-Waxman suits. *Id. at 206*. The Second Circuit thus reasoned that the "reverse payments" common in Hatch-Waxman suits are less troubling because they take the place of infringement damages that the patent holder might have otherwise waived in order to reach a settlement. *Id*.

Judge Pooler dissented from the decision in *Tamoxifen*, contending that the scope of the patent rule applied by the majority "is not soundly grounded in Supreme Court precedent and is insufficiently protective of the consumer interests safeguarded by the Hatch-Waxman Act and the antitrust laws." *Id. at 224* (Pooler, J., dissenting). **[**35]** Judge Pooler argued, *inter alia*, that judicial reevaluation of patent validity is a public good that reverse payment settlements undercut, *id. at 225-26*, and suggested that the proper antitrust standard is one of reasonableness considering all the circumstances affecting a restrictive agreement including (1) the strength of the patent as it appeared at the time of settlement, (2) the amount of the reverse payment, (3) the amount the generic manufacturer would have made during its 180-day exclusivity period, and (4) any ancillary anti-competitive effects of the agreement. *Id. at 228*.

In a subsequent reverse payment case, *Arkansas Carpenters Health & Welfare Fund v. Bayer AG*, the Second Circuit applied the *Tamoxifen* standard and rejected an antitrust challenge to a Hatch-Waxman settlement involving a reverse payment. *604 F.3d 98 (2d Cir. 2010)*, *cert. denied*, *562 U.S. 1280, 131 S. Ct. 1606, 179 L. Ed. 2d 517 (2011)*. However, the judges on the *Arkansas Carpenters* panel made clear that they thought that *Tamoxifen* was wrongly **[***1507]** decided and invited appellants to petition for rehearing en banc. *Id. at 108-10*. Among other things, the *Arkansas Carpenters* court noted its concern about evidence suggesting that the number of reverse **[**36]** payment settlements had increased dramatically in the wake of the *Tamoxifen* decision. *Id. at 109*. Rehearing en banc was subsequently denied over a dissent from Judge Pooler. *Ark. Carpenters Health & Welfare Fund v. Bayer AG, 625 F.3d 779 (2d Cir. 2010)*.

5. Federal Circuit — *In re Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323 (Fed. Cir. 2008)*

In *In re Ciprofloxacin Hydrochloride Antitrust Litigation* the Federal Circuit considered a case related to those confronted by the Second Circuit in *Arkansas Carpenters. 544 F.3d 1323 (Fed. Cir. 2008)*, *cert. denied*, *557 U.S. 920, 129 S. Ct. 2828, 174 L. Ed. 2d 553 (2009)*.[10] The Federal **[*214]** Circuit applied the scope of the patent test explicated in *Tamoxifen* and other cases, stating, "[t]he essence of the inquiry is whether the agreements restrict competition beyond the exclusionary zone of the patent." *Id. at 1336*. The court further "agree[d] with the Second and Eleventh Circuits . . . that, in the absence of evidence of fraud before the PTO or sham litigation, the court need not consider the validity of the patent in the antitrust analysis of a settlement agreement involving a reverse payment." *Id*.

D. Analysis

HN7[] While the first two courts of appeal to address the issue of reverse payments subjected those agreements to antitrust scrutiny, later courts have gravitated toward the scope of the patent test under which reverse payments are permitted so long as (1) the exclusion does not exceed the patent's scope, (2) the patent holder's claim of infringement was not objectively baseless, and (3) the patent was not procured by fraud on the PTO. The scope of the patent test was applied by the Special Master in this case and has been applied by at least one other district court in this circuit. *See King Drug Co. of Florence, Inc. v. Cephalon, Inc., 702 F. Supp. 2d 514, 528-29, 533 (E.D.*

[10] That case was severed by the Second Circuit and transferred to the Federal **[**37]** Circuit because it involved a claim arising out of patent law. *See* Order, No. 05-2863 (2d Cir. Nov. 7, 2007).

Pa. 2010) (applying scope of the patent test but denying defendants' motion to dismiss where plaintiffs pleaded facts supporting their claim that the underlying patent suit was objectively baseless). As a practical matter, the scope of the patent test does not subject reverse payment agreements to any antitrust scrutiny. As the antitrust defendants concede, no court applying the scope of the patent **[**38]** test has ever permitted a reverse payment antitrust case to go to trial.

After consideration of the arguments of counsel, the conflicting decisions in the other circuits, the Report of the Special Master, and our own reading, we cannot agree with those courts that apply the scope of the patent test. In our view, that test improperly restricts the application of ***antitrust law*** and is contrary to the policies underlying the Hatch-Waxman Act and a long line of Supreme Court precedent on patent litigation and competition.

First, we take issue with the scope of the patent test's almost unrebuttable presumption of patent validity. This presumption assumes away the question being litigated in the underlying patent suit, enforcing a presumption that the patent holder would have prevailed. We can identify no significant support for such a policy. ***HN8***[] While persons challenging the validity of a patent in litigation bear the burden of defeating a presumption of validity, this presumption is intended merely as a procedural device and is not a substantive right of the patent holder. *See* *Stratoflex, Inc. v. Aeroquip Corp., 713 F.2d 1530, 1534 (Fed. Cir. 1983)* ("The presumption, like all legal presumptions, **[**39]** is a procedural device, not substantive law."). Moreover, the effectively conclusive presumption that a patent holder is entitled to exclude competitors is particularly misguided with respect to agreements — like those here — where the underlying suit concerned patent infringement rather than patent validity: ***HN9***[] In infringement cases it is the patent holder who bears the burden of showing infringement. *See* *Egyptian Goddess, Inc. v. Swisa, Inc., 543 F.3d 665, 679 (Fed. Cir. 2008)*.

Rather than adopt an unrebuttable presumption of patent validity, we believe ***HN10***[] **[*215]** courts must be mindful of the fact that "[a] patent, in the last analysis, simply represents a legal conclusion reached by the Patent Office." *Lear, Inc. v. Adkins, 395 U.S. 653, 670, 89 S. Ct. 1902, 23 L. Ed. 2d 610 (1969)*. Many patents issued by the PTO are later found to be invalid or not infringed, and a 2002 study conducted by the FTC concluded that, in Hatch-Waxman challenges made under paragraph IV, the generic challenger prevailed **[***1508]** seventy-three percent of the time. *See* FTC, *Generic Drug Entry Prior to Patent Expiration* 16 (2002), *available at* *http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf;* Kimberly A. Moore, *Judges, Juries, and Patent Cases — An Empirical* ***[**40]*** *Peek Inside the Black Box*, *99 Mich. L. Rev. 365, 385 (2000)* (noting that between 1983 and 1999 the alleged infringer prevailed in forty-two percent of patent cases that reached trial).[11] These figures add force to the likelihood — conceded by the *Tamoxifen* majority — that reverse payments enable the holder of a patent that the holder knows is weak to buy its way out of both competition with the challenging competitor and possible invalidation of the patent. *466 F.3d at 211* ("The less sound the patent or the less clear the infringement, and therefore the less justified the monopoly enjoyed by the patent holder, the more a rule permitting settlement is likely to benefit the patent holder by allowing it to retain the patent.").

Moreover, we question the assumption underlying the view of the Second Circuit and other courts that subsequent challenges by other generic manufacturers will suffice to eliminate weak patents preserved through a reverse payment to the initial challenger. *Cf., e.g., id. at 211-12*. We note that the initial generic challenger is necessarily the most motivated because, unlike all subsequent challengers, it stands to benefit from the 180-day exclusivity period of *21 U.S.C. § 355(j)(5)(B)(iv)*. Additionally, as the experience of at least one court in this Circuit confirms, the high profit margins of a monopolist drug manufacturer may enable it to pay off a whole series of challengers rather than suffer the possible loss of its patent through litigation. *See* *King Drug Co. of Florence, Inc., 702 F. Supp. 2d at 521-22* (drug manufacturer settled infringement suits by four generic firms, which agreed to delay market entry "in

[11] The Pharmaceutical Research and Manufacturers of America points to a more recent study concluding that, in the years from 2000 to 2009, generics prevailed in slightly less than half of their challenges. RBC Capital Mkts., *Pharmaceuticals: Analyzing Litigation Success Rates* 4 (2010), *available at* *http://www.amlawdaily.typepad.com/pharmareport.pdf*. Even if the industry's own figures are accepted, they show that a substantial fraction of Hatch-Waxman patent challenges **[**41]** succeed on the merits. Moreover, the study cited by the industry further states that "when you take into account patent settlements and cases that were dropped, the success rate for generics jumps to 76%, substantially in favor of challenging patents." *Id*.

exchange for significant **[**42]** payments . . . for various licensing agreements, supply agreements and research and development deals").

This practical analysis is supported by a long line of Supreme Court cases recognizing that ***HN11***[] valid patents are a limited exception to a general rule of the free exploitation of ideas. It follows that the public interest supports judicial testing and elimination of weak patents. *See* *Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 100-01, 113 S. Ct. 1967, 124 L. Ed. 2d 1 (1993)* (explaining the "importance to the public at large of resolving questions of patent validity" and noting the danger of "grant[ing] monopoly privileges to the holders of invalid patents"); *Bonito Boats, Inc. v. Thundercraft Boats, Inc.,* ***[*216]*** *489 U.S. 141, 146, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989)* (noting that the patent laws embody "a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy"); *United States v. Masonite Corp., 316 U.S. 265, 277, 62 S. Ct. 1070, 86 L. Ed. 1461, 1942 Dec. Comm'r Pat. 777 (1942)* (a patent "affords no immunity for a monopoly not fairly or plainly within the grant"); *id. at 280* (patents are to be "strictly construed" because they are "privileges restrictive **[**43]** of a free economy"); *Pope Mfg. Co. v. Gormully, 144 U.S. 224, 234, 12 S. Ct. 632, 36 L. Ed. 414, 1892 Dec. Comm'r Pat. 343 (1892)* ("It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly.").

That reasoning underlies the decision of the Supreme Court in *Edward Katzinger Co. v Chicago Metallic Manufacturing Co*., where the Court considered whether a patent licensor could be contractually estopped from challenging the validity of the patent under a licensing agreement that also contained a price fixing term. *329 U.S. 394, 67 S. Ct. 416, 91 L. Ed. 374 (1947)*. The Court reasoned that ***HN12***[] if the patent was invalid, the price fixing provision would violate federal ***antitrust law*** and that, as such, the licensor could not be estopped from challenging the patent. *Id. at 399, 401-02*. In reaching this conclusion the Court emphasized "the broad public interest in freeing our competitive economy from the trade restraints which might be imposed by price-fixing agreements stemming from narrow or invalid patents." *Id. at 400* (citing *Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 177, 63 S. Ct. 172, 87 L. Ed. 165, 1943 Dec. Comm'r Pat. 765 (1942))*. The Court additionally stated: "It is the public interest which is **[**44]** dominant in the patent system and . . . the right to challenge [a patent] is not only a private right **[***1509]** to the individual, but it is founded on public policy which is promoted by his making the defence, and contravened by his refusal to make it." *Id. at 401* (internal citations and quotation marks omitted).

This logic is persuasive with respect to the situation at bar because reverse payments permit the sharing of monopoly rents between would-be competitors without any assurance that the underlying patent is valid. *See also* *United States v. Studiengesellschaft Kohle, m.b.H., 670 F.2d 1122, 1136, 216 U.S. App. D.C. 303 (D.C. Cir. 1981)* (suggesting an agreement might be anticompetitive if it "give[s] potential competitors incentives to remain in cartels rather than turning to another product, inventing around the patent, or challenging its validity"). It appears that these aspects of the Supreme Court's general patent jurisprudence had been overlooked by the Special Master and others adopting the scope of the patent test.

We caution that our decision today is limited to reverse payments between patent holders and would be generic competitors in the pharmaceutical industry. As the Supreme Court has made clear, ***HN13***[] "antitrust **[**45]** analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies." *Verizon Commc'ns. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411-12, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*; *see also* IA Phillip E. Areeda & Herbert Hovenkamp ***Antitrust Law***, ¶ 240d, 289 (3d ed. 2006) ("[T]he presence of regulation in some instances limits the antitrust role and in some instances simply changes it or even enlarges it."). The Supreme Court's admonition is particularly relevant in an **[*217]** industry, like the pharmaceutical industry, that is subject to extensive regulation in which Congress has balanced the protection of intellectual property and the need for competition. Specifically, ***HN14***[] in passing the Hatch-Waxman Act, Congress drew a careful line between patent protection and the need to provide incentives for competition in the pharmaceutical industry. *See* 130 Cong. Rec. 24425 (Sept. 6, 1984) (statement of Rep. Waxman underscoring the "fundamental balance of the bill"); H.R. Rep. No. 98-857, pt. 2, at 30 (1984) (emphasizing that the bill achieves "what the Congress has traditionally done in the area of intellectual property law[:] balance the need to stimulate **[**46]** innovation against the goal of furthering the public interest"), *reprinted in* 1984 U.S.C.C.A.N. 2686,

2715. The line that Congress drew between these competing objectives strongly supports the application of rule of reason scrutiny of reverse payment settlements in the pharmaceutical industry.

HN15[] The goal of the Hatch-Waxman Act is to increase the availability of low cost generic drugs. H.R. Rep. No. 98-857, pt. 1, at 14, *reprinted in* 1984 U.S.C.C.A.N. 2647, 2647. One method Congress employed was to encourage litigated challenges by generic manufacturers against the holders of weak or narrow patents. *See* *21 U.S.C. § 355(j)(5)(B)(iv)* (establishing 180-day exclusivity period as reward for successfully challenging a patent); S. Rep. No. 107-167, at 4 (2002) ("Under Hatch-Waxman, manufacturers of generic drugs are encouraged to challenge weak or invalid patents on brand name drugs so consumers can enjoy lower drug prices."). That goal is undermined by application of the scope of the patent test which entitles the patent holder to pay its potential generic competitors not to compete. As one commentator has noted, this approach nominally protects intellectual property, not on the strength of **[**47]** a patent holder's legal rights, but on the strength of its wallet. *See* Hemphill, *Paying for Delay, supra* at 1614 ("In the Hatch-Waxman Act . . . the promotion and delay of litigation are central preoccupations of the regulatory regime. An open-ended permission for innovators to set innovation policy by self-help [through reverse payments] is less plausible, as Congress has taken explicit steps to fill those gaps.") As the Second Circuit acknowledged in its *Tamoxifen* decision, the principal beneficiaries of such an approach will be name brand manufacturers with weak or narrow patents that are unlikely to prevail in court. *See* *466 F.3d at 211*. Thus while such a rule might be good policy from the perspective of name brand and generic pharmaceutical producers, it is bad policy from the perspective of the consumer, precisely the constituency Congress was seeking to protect.

In rejecting the scope of the patent test, we are cognizant that such a test encourages settlement, an objective our decisions generally support. *See, e.g., Ehrheart v. Verizon Wireless, 609 F.3d 590, 595 (3d Cir. 2010)* ("Settlement agreements are to be encouraged because they promote the amicable resolution of disputes **[**48]** and lighten the increasing load of litigation faced by the federal courts."). However, ***HN16***[] the judicial preference for settlement, while generally laudable, should not displace countervailing public policy objectives or, in this case, Congress's determination — which is evident from the structure of the Hatch- **[***1510]** Waxman Act and the statements in the legislative record — that litigated patent challenges are necessary to protect consumers from unjustified monopolies by name brand drug manufacturers. We also emphasize that nothing in the rule of reason test that we adopt here limits the ability of the parties to reach settlements based on a negotiated entry date for marketing **[*218]** of the generic drug: the only settlements subject to antitrust scrutiny are those involving a reverse payment from the name brand manufacturer to the generic challenger. Data analyzed by the FTC suggest that this will leave the vast majority of pharmaceutical patent settlements unaffected. *See* FTC, Bureau of Competition, *Agreements Filed with the Federal Trade Commission under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003: Overview of Agreements Filed in FY 2010*, 2 (2011) (showing that nearly **[**49]** seventy-five percent of Hatch-Waxman Act infringement suits that settled in 2010 did so without reverse payments), *available at* *http://www.ftc.gov/os/2011/05/1105mmagreements.pdf*.

For all of these reasons ***HN17***[] we reject the scope of the patent test. In its place we will direct the District Court to apply a quick look rule of reason analysis based on the economic realities of the reverse payment settlement rather than the labels applied by the settling parties. Specifically, the finder of fact must treat any payment from a patent holder to a generic patent challenger who agrees to delay entry into the market as *prima facie* evidence of an unreasonable restraint of trade, which could be rebutted by showing that the payment (1) was for a purpose other than delayed entry or (2) offers some pro-competitive benefit.

In holding that a reverse payment is *prima facie* evidence of an unreasonable restraint of trade, we follow the approach suggested by the DC Circuit in *Andrx* and embrace that court's common sense conclusion that "[a] payment flowing from the innovator to the challenging generic firm may suggest strongly the anticompetitive intent of the parties entering the agreement . . . ." *256 F.3d at 809* **[**50]** (internal quotation marks and citation omitted).

We agree, moreover, with the FTC that ***HN18***[] there is no need to consider the merits of the underlying patent suit because "[a]bsent proof of other offsetting consideration, it is logical to conclude that the *quid pro quo* for the payment was an agreement by the generic to defer entry beyond the date that represents an otherwise reasonable litigation compromise." *In re Schering-Plough Corp., Final Order, 136 F.T.C. at 988*. Of course, a patent holder may attempt to rebut plaintiff's *prima facie* case of an unreasonable restraint of trade by arguing that there is in fact no reverse payment because any money that changed hands was for something other than a delay in market entry. Alternatively, the patent holder may attempt to rebut the *prima facie* case by demonstrating that the reverse payment offers a competitive benefit that could not have been achieved in the absence of a reverse payment. This second possible defense attempts to account for the — probably rare — situations where a reverse payment increases competition. For example, a modest cash payment that enables a cash-starved generic manufacturer to avoid bankruptcy and begin marketing a **[**51]** generic drug might have an overall effect of increasing the amount of competition in the market. For the reasons set forth, we will reverse the judgment of the District Court and remand for further proceedings in accordance with the foregoing.

IV. THE CLASS CERTIFICATION ISSUE (Appeal No. 10-4571)

A. Procedural Background

The other issue before us on this appeal concerns plaintiffs' effort to certify a class of persons who purchased K-Dur directly from Schering between November 20, 1998 and September 1, 2001 and subsequently purchased a generic version of K-Dur. As identified by the parties' experts, the class **[*219]** consists of forty-four wholesalers and retailers. The Special Master recommended granting plaintiffs' motion to certify the class. The District Court adopted the Special Master's Report and Recommendation and formally certified the class.

Defendants sought interlocutory review of the District Court's order under *Federal Rule of Civil Procedure 23(f)*. While that petition was pending, the District Court ruled on the cross motions for summary judgment and entered final judgment in defendants' favor. Plaintiffs filed a notice of appeal, and defendants filed a cross appeal, which this **[**52]** court dismissed as untimely. *See* Order, *In re K-Dur Antitrust Litig*., No. 10-2727 (3d Cir. Nov. 24, 2010). However, this court accepted defendants' *Rule 23(f)* petition, *see* Order, *In re K-Dur Antitrust Litig*., No. 09-8006 (3d Cir. **[***1511]** Nov. 16, 2010), and we therefore have jurisdiction pursuant to *28 U.S.C. § 1292(e)*.[12]

B. Standard of Review

HN20[] This court reviews class certification orders "for abuse of discretion, which occurs if the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 312 (3d Cir. 2008)* **[**53]** (internal quotation marks and citation omitted).

C. Defendants' Arguments

HN21[] In order to certify a class under *Rule 23(b)(3)*, a plaintiff must satisfy both the general class action prerequisites — numerosity, commonality, typicality, and adequacy of representation — and the additional requirements of predominance and superiority. *Fed. R. Civ. P. 23(a)*, *(b)(3)*. The Special Master, in a report adopted in full by the District Court, discussed the class requirements in detail; defendants challenge only a few of those findings. Defendants assert that (1) plaintiffs cannot use common evidence to prove that the class members suffered an actual injury from defendants' conduct because showing actual injury means demonstrating lost profits

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[12] Plaintiffs argue that because defendants' cross appeal was dismissed as untimely defendants' 23(f) petition should have been dismissed also. ***HN19***[] An appeals court has discretion to consider an interlocutory appeal even after the entry of final judgment. *Cf. In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 788 F.2d 1571, 1573-74 (Temp. Emer. Ct. App. 1986)*. Moreover, in granting defendants' 23(f) petition, this court has already considered the issue of the appropriateness of review, and we see no reason to reconsider the decision to hear this appeal.

damages, which defendants argue necessarily requires individualized assessments, (2) even assuming that overcharges are an acceptable form of injury, the District Court erred in its conclusion that there was common evidence of injury to all class members, and (3) the class should not have been certified because of inherent conflicts between members. Defendants' first two arguments challenge the District Court's finding with respect to the predominance requirement, **[**54]** while the third goes to the adequacy requirement. We address these arguments in order.

1. Predominance Issues

HN22[] In order for the predominance requirement to be satisfied "[i]ssues common to the class must predominate over individual issues." *In re Hydrogen Peroxide, 552 F.3d at 311* (internal citations and quotation marks omitted). Class certification calls for the district court to conduct a "rigorous assessment of the available evidence," *id. at 312*, and is only appropriate in antitrust cases where plaintiffs can show, by a preponderance of the evidence, **[*220]** that proof of the essential elements of the cause of action, including antitrust injury, do not require individual treatment. *Id. at 307, 311*.

It is plaintiffs' thesis that they will prove that class members paid more for K-Dur because of Schering's antitrust violations, and that this constitutes the required antitrust impact. The Special Master accepted this based on Third Circuit law, stating:

> ***HN23***[] The Third Circuit has held that "when an antitrust violation impacts upon a class of persons who do have standing, there is no reason in doctrine why proof of impact cannot be made on a common basis, so long as the common proof adequately demonstrates **[**55]** some damage to each individual."

App. at 7980 (quoting *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454 (3d Cir. 1977))*. Because all of the class members purchased some of the generic versions of K-Dur, plaintiffs have satisfactorily explained their theory of impact.

Plaintiffs proposed to prove antitrust injury through common proof consisting largely of the declarations and report of their expert, Dr. Leitzinger. Dr. Leitzinger offered statistical and economic analyses of the overall brand-name and generic drug market and of the specific entry of generic potassium chloride in the market to show that, but for the challenged reverse payment agreements, "all (or virtually all) members of the proposed class" would have purchased at least some less expensive generic potassium chloride earlier, and therefore suffered an antitrust injury as a result of the delay in generic entry. The Special Master considered Dr. Leitzinger's proposed methodology and the criticisms of it made by defendants' expert, Dr. Rubinfeld, in detail. After slightly narrowing the class definition to accommodate a criticism made by defendants' expert,[13] the Special Master found that plaintiffs had satisfied their burden **[**56]** of showing that antitrust impact may be proven by evidence common to all class members. **[***1512]**

In December 2008, several months after the Special Master's Report and Recommendation, this court issued its decision in *In re Hydrogen Peroxide Antitrust Litigation*, which clarified the standard to be applied when certifying a class of plaintiffs in an antitrust action. *552 F.3d 305*. In that case, we held that ***HN24***[] the preponderance requirement demands more than a mere threshold showing by a party seeking to certify a class and that, in considering a motion for class certification, a district court is required to resolve any factual or legal disputes necessary to determine whether a plaintiff will be able to show antitrust injury for all plaintiffs with common evidence. *Id. at 316-18*.

a. Whether Lost Profits Are the Relevant Antitrust Injury

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[13] Specifically, the Special Master excluded from the class direct purchasers who did not purchase a generic version of K-Dur after generic entry.

Defendants argue first that the predominance requirement of *Rule 23(b)(3)* is not satisfied because, in order to prove actual injury from delayed generic entry, plaintiffs must produce evidence of lost profits, which necessarily **[**57]** requires an individual assessment for each class member. Defendants contend specifically that some of the wholesalers lost substantial sales volumes after generic entry, and that, for such wholesalers, generic entry caused a decrease in profits.

Defendants' lost profits argument is unavailing because it is simply a version of the so-called "passing-on defense" that was rejected by the Supreme Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corporation.* ***[*221]*** *392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. In that case, the Supreme Court held that demonstrating ***HN25***[] antitrust injury does not require a showing of lost profits. *Id. at 494*. Rather, the Supreme Court ruled that a plaintiff suffers an antitrust injury where it is overcharged for a product, regardless of whether it can show lost profits. *Id. at 492-95*. In reaching this conclusion, the Court noted that requiring plaintiffs to show lost profits was too burdensome on both courts and litigants and would undercut the effectiveness of private antitrust suits as an enforcement mechanism. *Id. at 492-94*; *see also* *Bogosian, 561 F.2d at 456* (noting that a lost-profits inquiry would be "enormously complicated, posing a tremendous burden on the presentation of plaintiffs' **[**58]** case" and that "it is precisely for this reason that the Supreme Court eliminated the 'passing-on defense' in *Hanover Shoe*").

Defendants argue that the *Hanover Shoe* rule should not apply here because that case involved an overcharge for an identical product whereas this one involves two different products, a name brand drug with a higher price and a lower priced generic drug. However, defendants cite no authority distinguishing *Hanover Shoe* on that basis, and their own expert conceded that the generic supplement that Schering began manufacturing after Upsher entered the market was made in the same plant as K-Dur and chemically identical to K-Dur. Moreover, in *In re Warfarin Sodium Antitrust Litigation*, this court affirmed class certification where plaintiffs sought overcharges — not lost profits — stemming from anti-competitive behavior that hindered their access to generic pharmaceuticals. *391 F.3d 516, 532 (3d Cir. 2004)*.

In sum, defendants' contention that plaintiffs are required to show lost profits in order to demonstrate antitrust injury is without support in law or the facts of this case. As such, we reject it.

b. Whether There Was Common Evidence of Injury to All Class Members

Defendants **[**59]** argue that because of discrepancies in the pricing of K-Dur and variations in purchaser behavior, plaintiffs cannot prove injury to all class members by common evidence, even if lost profits are not required to show antitrust injury. They contend further that the District Court applied the wrong standard in evaluating plaintiffs' evidence that antitrust injury could be proven by common evidence.

In support of their argument that antitrust injury requires an individualized assessment for each class member, defendants point to two places where purportedly conflicting evidence demonstrates the need for individualized assessment of antitrust harm. Defendants point out that they did not sell K-Dur to all customers at a single list price; rather, the price paid varied considerably among class members. Additionally, defendants argue that, for certain customers at certain times, Schering offered rebates which caused further price variation among customers. Defendants contend that these pricing variations caused several class members to have zero or negative damages under the formula applied by plaintiffs' expert. Finally, defendants point out that not all class members purchased generic potassium **[**60]** chloride as soon as it became available and argue that, in light of this variation in purchase timing, plaintiffs need to make an individualized showing that each plaintiff **[***1513]** would have purchased a generic product earlier if one had been available.

[*222] We do not read *Hydrogen Peroxide* as precluding a class because of variations in purchasing by a very small percentage of those who purchased K-Dur. As the Special Master recognized, defendants conceded "that 45 of the proposed Class members purchased <u>some</u> amount of generic K-Dur." App. at 7984 (emphasis in original). He noted that defendants' arguments "relate to the quantum of damages, rather than the fact of injury." *Id*. Indeed, in *Hydrogen Peroxide* itself, we focused on what was really at issue — that ***HN26***[] for certification plaintiff need not prove antitrust injury actually occurred.

> Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather **[**61]** than individual to its members.

552 F.3d at 311-12. To the extent that there were minor variations, they can be handled at trial in the context of damages.

With regard to both the price-variation and purchase-timing issues, the Special Master conducted an exceedingly thorough review of plaintiffs' proposal for demonstrating antitrust impact through common evidence and determined that defendants' objections were without support. Critically, the Special Master recognized his obligation to "probe beyond the pleadings" and to conduct a "rigorous analysis" of the available evidence. App. at 7960 (internal citations and quotation marks omitted).

Our review confirms that the Special Master applied the appropriate standard. In contrast to *Hydrogen Peroxide*, where the court found that there was "no tendency for prices . . . to move together," *552 F.3d at 314* (internal quotation marks omitted), plaintiffs in this case presented evidence, credited by the Special Master, of significant, industry-wide price drops after generic entry. Such evidence of an industry-wide price drop after generic entry supports the Special Master's rejection of defendants' arguments about limited price variations and purchase-timing **[**62]** variations between plaintiffs.

First, concerning the price-variation argument, the Special Master carefully considered the conflicting opinions of plaintiffs' and defendants' experts and credited the theories of plaintiffs' expert over that of defendants. The Special Master concluded that "Plaintiffs have satisfied their burden of adducing sufficient evidence and a plausible theory to convince me that impact may be proven by evidence common to all class members." App. at 7988 (internal citations and quotation marks omitted). Our review of the record confirms that plaintiffs presented a comprehensive and detailed means of proving impact through common means, notwithstanding some very limited pricing variation, and that the Special Master conducted an appropriately searching evaluation of this evidence.

With regard to defendants' argument about variations in the timing of the purchase of generic K-Dur, the Special Master explicitly rejected that argument and concluded that "[e]vidence that all (or virtually all) class members substituted a lower priced generic for some of their K-Dur 20 purchases gives rise to the inference that they would have similarly done in the but-for world." App. at 7984. **[**63]** This, combined with plaintiffs' theory of damages, means that impact could be proven on a class-wide basis via common evidence. Here again, the Special Master conducted a thorough evaluation of the available evidence and resolved all significant disputes between conflicting evidence as required **[*223]** under the standard set forth in *Hydrogen Peroxide*.

2. Adequacy Issue — Whether the Class Faces Inherent Conflicts

Defendants next contend that the District Court erred in certifying a class because the class faces inherent conflicts that preclude adequacy of representation. ***HN27***[] "The inquiry that a court should make regarding the adequacy of representation requisite of *Rule 23(a)(4)* is to determine that the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously, . . . and that there is no conflict between the individual's claims and those asserted on behalf of the class." *In re Cmty. Bank of N. Va., 622 F.3d 275, 291 (3d Cir. 2010)* (quoting *Hassine v. Jeffes, 846 F.2d 169, 179 (3d Cir. 1988))*. Only a fundamental conflict will defeat adequacy of representation. *See, e.g., id. at 303* (adequacy defeated by "obvious and fundamental intra-class conflict **[**64]** of interest"); *Ward v. Dixie Nat. Life Ins. Co., 595 F.3d 164, 180 (4th Cir. 2010)*. **[***1514]**

Defendants contend that three members of the class, all national wholesalers, were net beneficiaries of the absence of generic competition in the potassium chloride supplement market because once generics came on the market those class members saw decreased sales volumes and lower per-pill profits. Defendants argue that, because these three class members have financial incentives to delay generic entry, there is an inherent conflict between them and the rest of the class.

The case law on defendants' argument reveals a split in authority. A large number of district courts, including some in this Circuit, have rejected defendants' argument. *See, e.g., Teva Pharms USA, Inc. v. Abbott Labs., 252 F.R.D. 213, 226-27 (D. Del. 2008)* (Robinson, J.); *Meijer, Inc. v. Abbott Labs., 251 F.R.D. 431, 435 (N.D. Cal. 2008)*; *but see Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1190 (11th Cir. 2003)*.[14]

We reject the *Valley Drug* decision for two reasons. First, requiring plaintiffs to show that no class member benefitted **[**65]** from the challenged conduct in the form of greater profits is contrary to the Supreme Court's decision in *Hanover Shoe*. In *Hanover Shoe*, the Supreme Court permitted antitrust plaintiffs to seek overcharge damages rather than lost profits damages precisely because proving lost profits was too complicated and burdensome. *392 U.S. at 493*; *Bogosian, 561 F.2d at 456*. The same logic applies equally, if not more strongly, in the class certification setting because under defendants' proposed approach, plaintiffs would not only have to assess their own lost profits but also those of potential class members. Moreover, because *Hanover Shoe* sets the amount of the overcharge as plaintiffs' damages, all of the class members have the same financial incentive for purposes of the litigation — *i.e*. proving that they were overcharged and recovering damages based on that overcharge. *See* 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1768 (3d ed. 2005) (***HN28***[] "[A] potential conflict between the representatives and some class members should not preclude the use of the class-action device if the parties appear united in interest against an outsider at the beginning of **[**66]** the case."). Defendants have not pointed to any plausible scenario in which the class members might seek conflicting forms of relief. For **[*224]** these reasons, we conclude that defendants' conflict argument fails.

D. Conclusion — Class Certification Issues

In sum, with respect to the class certification issues, we reject defendants' arguments and will affirm the District Court's determination approving maintenance of the class action.

End of Document

[14] This is a different appeal than *Valley Drug, 344 F.3d 1294 (11th Cir. 2003)*, discussed *supra*.

In re Processed Egg Prods. Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

July 16, 2012, Decided; July 16, 2012, Filed

MDL No. 2002; 08-md-02002

Reporter

284 F.R.D. 249 *; 2012 U.S. Dist. LEXIS 98301 **; 2012-2 Trade Cas. (CCH) P77,975

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION; THIS DOCUMENT APPLIES TO: ALL DIRECT PURCHASER PLAINTIFF ACTIONS

Subsequent History: Settled by, Motion granted by *In re Processed Egg Prods. Antitrust Litig., 284 F.R.D. 278, 2012 U.S. Dist. LEXIS 98302 (E.D. Pa., 2012)*

Prior History: *In re Processed Egg Prods. Antitrust Litig., 2012 U.S. Dist. LEXIS 57846 (E.D. Pa., Apr. 24, 2012)*

Core Terms

settlement, Notice, egg, class action, class member, discovery, factors, parties, settlement agreement, Plaintiffs', damages, products, Subclasses, purchasers, Shell, risks, cooperation, antitrust, approving, predominance, final approval, weigh, proposed settlement, attorney's fees, expenses, class certification, Producer, entities, settlement amount, Consolidated

Counsel: **[**1]** For SANDRA A. JESKIE, Special Master: SANDRA A. JESKIE, LEAD ATTORNEY, DUANE, MORRIS LLP, PHILADELPHIA, PA.

Judges: GENE E.K. PRATTER, United States District Judge.

Opinion by: GENE E.K. PRATTER

Opinion

[*251] **MEMORANDUM**

GENE E.K. PRATTER, J.

Direct Purchaser Plaintiffs move the Court for final approval of a proposed settlement agreement between the Plaintiffs and Defendants Moark, LLC, Norco Ranch, Inc., and **[*252]** Land O'Lakes, Inc. (collectively, "Moark"). [1] Under the proposed Moark Settlement, Plaintiffs will release Moark from all pending claims in exchange for monetary consideration as well as information and documents. For the reasons set forth below, the Court grants the motion for final approval of the Moark Settlement.

[1] Plaintiffs filed a Motion for Final Approval of the Class Action Settlement Between Plaintiffs and Defendants Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc. (Doc. No. 465) (hereinafter, "Mot."). They also submitted filings supplementing this Motion. (Doc. Nos. 483, 484, and 690).

I. Factual Background[2]

This litigation embraces numerous consolidated and coordinated actions based upon allegations of a conspiracy in violation of the Sherman Act among egg producers and trade groups to manipulate the supply of eggs and egg products and thereby affect the domestic prices of those goods. *See In re Processed Egg Prods. Antitrust Litig., 588 F. Supp. 2d 1366, 1367 (J.P.M.L. 2008)*. The plaintiffs are direct purchasers (such as grocery stores, commercial food manufacturers, restaurants, other food service providers, and other entities who purchase directly from Defendants or other egg producers) and indirect purchasers (individual consumers who purchased **[**3]** from other parties along the distribution chain) of shell eggs, egg products, or both. The direct purchaser plaintiffs are categorized as "Direct Purchaser Plaintiffs" who have brought a consolidated class action against Defendants, and "Direct Action Plaintiffs" who are pursuing individual actions against Defendants.

A. Direct Purchaser Plaintiffs' Suit

The moving Plaintiffs are Direct Purchaser Plaintiffs who accuse defendant egg producers, including Moark, and certain trade groups, of violating *Section 1* of the Sherman Act and seek injunctive relief, treble damages, attorneys' fees and costs. They have demanded a jury trial. These Plaintiffs filed a consolidated class action complaint which they have amended. The allegations of the consolidated complaint superseded or replaced all of the previously-filed individual and consolidated complaints.

The most recent iteration of the Plaintiffs' claim is the Second Consolidated Amended Class Action Complaint which prompted extensive motion practice. [3] The culmination of this motion activity resulted in the Court dismissing without prejudice claims brought against individual Defendants Hillandale-Gettysburg, L.P., Hillandale Farms, Inc., and **[**4]** Hillandale Farms East, Inc. and United Egg Association. *See* Sept. 26, 2011 Mem. and Order, *821 F. Supp. 2d 709* (Doc. Nos. 562 and 563). The Court also dismissed without prejudice claims against all Defendants for damages barred by the four-year statute of limitations. *See* Nov. 30, 2011 Opinion and Order, *2011 U.S. Dist. LEXIS 139995, 2011 WL 5980001* (Doc. Nos. 593 and 594). [4]

As a result of these rulings, Plaintiffs presently proceed on the core of their Section 1 **[*253]** Sherman Act claims against Defendants. At the time the parties' filed their motions to dismiss, the Court partially lifted the stay of discovery previously entered at the outset of this litigation. Lifting the stay permitted the parties to exchange requests for production of documents and confer as to various aspects of a discovery plan. *See* Order (Doc. No. 320); Fees Mot., Ex. 1, Asher Decl. ¶¶ 21-22 (Doc. No. 493-2) (hereinafter, "Asher Decl."). Following the Court's rulings on the motions to dismiss the Second Consolidated Amended Class Action Complaint, the parties requested

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[2] The factual background discussed here is drawn from the exhibits and materials submitted in relation to the Motion *sub judice*, the hearing on the Motion, and the overall record of this case. The Court **[**2]** also considered the Plaintiffs' Motion for Final Approval of the Sparboe Settlement (Doc. No. 443) (hereinafter, "Sparboe Final Approval Mot."), and the pending Plaintiffs' Motion for an Award of Attorneys' Fees and for Reimbursement of Expenses (Doc. No. 493) (hereinafter, "Fees Mot."), in which Plaintiffs seek attorneys' fees and reimbursement of expenses relating to the litigation to be paid from the Moark Settlement. As to the motion for fees, the Court does not address here the substantive arguments, which will be addressed separately.

[3] Land O'Lakes Inc. filed an individual motion to dismiss this complaint (Doc. No. 239) and joined Moark, LLC and Norco Ranch, Inc., as well as several other Defendants, in certain joint motions to dismiss the complaint. The individual motion and the joint motions respect to Moark were withdrawn with subject to reinstatement if the proposed Moark Settlement is not finally approved. *See* Stipulation (Doc. No. 338). Although they had joined several joint motions to dismiss, Moark, LLC and Norco Ranch, Inc. also filed an answer to the complaint. *See* Answer (Doc. No. 245).

[4] Plaintiffs have filed a motion seeking leave to file a Third Consolidated Amended Class Action Complaint that seeks, *inter alia*, to revive claims against Defendants Hillandale-Gettysburg, L.P., Hillandale Farms, Inc., and Hillandale Farms East, Inc. and to amend claims of fraudulent **[**5]** concealment and tolling of the statute of limitations. Opposition briefing has been filed, and the Court will address that motion separately.

a further partial lifting of the discovery stay. The Court entered Orders further partially lifting the discovery stay, commencing the discovery period, and setting forth various discovery deadlines and parameters concerning, *inter alia*, document production, interrogatories, depositions, non-party discovery, class certification, and class certification experts. *See* Case Mgmt. Orders **[**6]** Nos. 18 and 19 (Doc. Nos. 656 and 676).

B. Sparboe Settlement

Following the earlier partial lift of discovery that permitted the parties to exchange requests for production of documents and meet and confer as to certain matters, Defendant Sparboe Farms, Inc. and Plaintiffs entered into a settlement agreement ("Sparboe Settlement"), the terms of which provided that Sparboe would produce certain documents and make certain witnesses available to Plaintiffs. In turn, Plaintiffs used the information that they obtained from Sparboe to draft their Second Consolidated Amended Class Action Complaint. *See* Mot., Ex. 1, Bernstein Decl. ¶ 4 (hereinafter, "Bernstein Decl."); Asher Decl. ¶ 11; Sparboe Final Approval Mot., Ex. A, Hausfeld Decl. ¶ 18 (hereinafter, "Hausfeld Decl."). The Court preliminarily approved the Sparboe Settlement and held a final fairness hearing. *See* Order on Preliminary Approval of Sparboe Settlement (Doc. No. 214); Sparboe Final Approval Hr'g Tr. (Doc. No. 463). In a separate Memorandum and Order issued this same date, the Court is granting the Plaintiffs' motion for final approval of the Sparboe Settlement.

C. Moark Settlement Negotiations and Preliminary Approval

Subsequent **[**7]** to the Sparboe Settlement, Moark's counsel reportedly contacted Interim Co-Lead Counsel for Plaintiffs [5] about a potential settlement, and the parties had a meeting during which Moark provided Plaintiffs with their sales data and other financial information. *See* Bernstein Decl. ¶¶ 8, 9. Some five months later, the parties began to engage in settlement negotiations. *See id.* ¶ 10.

Over the course of the ensuing three months, the parties negotiated through telephone conferences and in-person meetings on multiple occasions. *See id.* ¶¶ 11, 12. They discussed potential settlement terms, including possible settlement amounts and the extent of Moark's cooperation, and exchanged information, **[**8]** such as sales data for the alleged class period. *See id.* At the conclusion of these efforts, the parties reached an agreement and executed the Moark Settlement documents. *See id.* ¶ 13. [6]

The parties submitted the proposed settlement to the Court for preliminary approval. Following a hearing, the Court entered an Order preliminarily approving the proposed Moark agreement and preliminarily certifying the class and subclasses for settlement purposes. *See* Order on Preliminary Approval of Settlement with Moark, LLC, Norco **[*254]** Ranch, Inc., and Land O'Lakes Inc. (Doc. No. 387) (hereinafter, "Moark Preliminary Approval Order"). The Order also stayed the litigation against Moark pending further order of the Court. *Id.* In a separate Order, the Court approved **[**9]** the form of notice of the Moark Settlement in conjunction with a separate form of notice for the Sparboe Settlement. *See* Order Approving Dissemination of Notice of Settlements Between Direct Purchaser Plaintiffs and (i) Defendant Sparboe Farms, Inc. and (ii) Defendants Moark, LLC, Norco Ranch, Inc. and Land O'Lakes, Inc. (Doc. No. 388) (hereinafter, "Notice Approval Order").

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[5] In Case Management Order No. 1, the Court approved the following law firms to serve as Interim Co-Lead Counsel: Weinstein Kitchenoff & Asher LLC; Hausfeld LLP; Bernstein Liebhard LLP; and Susman Godfrey LLP. It appears there are additional counsel that Interim Co-Lead Counsel have directed to work on this case. *See* Fees Mot. at 1. Thus, reference herein to "Interim Co-Lead Counsel" may also encompass the efforts of other counsel who represent Plaintiffs and acted at the direction of Interim Co-Lead Counsel.

[6] Eleven days following the execution of the Moark Settlement, the parties executed a First Addendum to Settlement Agreement Between Direct Purchaser Plaintiffs and Defendants Moark, LLC, Norco Ranch, Inc. and Land O'Lakes, Inc. Mot., Ex. 1B (Doc. No. 465-4). The Addendum extended the date that obliged Moark to transfer the Settlement Amount to an escrow account from ten days following the execution date of the Moark Settlement to sixteen days. *Id.*

Plaintiffs filed the motion *sub judice*, and the Court held the final fairness hearing on the Moark Settlement as required by *Fed. R. Civ. P. 23(e)(2)*. *See* Moark Final Approval Hr'g Tr. (Doc. No. 688) (hereinafter, "Final Hr'g Tr."). No objections were filed to the proposed Moark Agreement. No objectors appeared at the fairness hearing. Plaintiffs filed supplemental briefing and materials in support of their motion for final approval. Following the hearing, the Court withheld ruling on the motion until the notice period required pursuant to *28 U.S.C. § 1715(d)* under the Class Action Fairness Act ("CAFA") had elapsed. After the expiration of the notice period, Plaintiffs filed a motion for approval of attorneys' fees, which the Court will address apart from this Memorandum.

II. Proposed Moark Settlement Agreement[7]

The proposed Settlement Class for settlement purposes under the Moark Settlement is defined as:

> All persons and entities that purchased eggs, including Shell Eggs and Egg Products, produced from caged birds in the United States directly from any Producer, including any Defendant, during the Class Period from January 1, 2000 through the date when notice of the Court's entry of an order preliminarily approving this settlement and certifying a Class for settlement purposes is first published.
>
> > a.) Shell Egg SubClass
> >
> > All individuals and entities that purchased Shell Eggs produced from caged birds in the United States directly from any Producer including any Defendant, during the Class Period from January 1, 2000 through the date when notice of the Court's entry of an order preliminarily approving this settlement and certifying a Class for settlement purposes is first published, excluding individuals and entities that purchased only "specialty" Shell Eggs (certified organic, nutritionally enhanced, cage-free, free-range, **[**11]** and vegetarian-fed types) and "hatching" Shell Eggs (used by poultry breeders to produce breeder stock or growing stock for laying hens or meat).
> >
> > b.) Egg Products SubClass
> >
> > All individuals and entities that purchased Egg Products produced from Shell Eggs that came from caged birds in the United States directly from any Producer, including any Defendant, during the Class Period from January 1, 2000 through the date when notice of the Court's entry of an order preliminarily approving this settlement and certifying a Class for settlement purposes is first published, excluding individuals and entities that purchased only "specialty" Egg Products (certified organic, nutritionally enhanced, cage-free, free-range, and vegetarian-fed types).
>
> Excluded from the Class and SubClasses are Producers, and their respective parents, subsidiaries and affiliates, all government entities, as well as the Court and staff to whom this case is assigned, and any member of the Court's or staff's immediate family.

Mot., Ex. A, Settlement Agreement Between Direct Purchaser Plaintiffs and Defendants Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc. ¶ 19 (hereinafter, "Moark Settlement Agreement"). As mentioned **[**12]** earlier, the Court preliminarily certified the Settlement Class for settlement purposes under *Fed. R. Civ. P. 23(b)(3)*. *See* Moark Preliminary **[*255]** Approval Order. The agreement's principal terms require Moark to pay the Settlement Amount of twenty-five million dollars ($25,000,000). *See* Moark Settlement Agreement ¶¶ 15, 33. The Settlement Amount has been deposited into an interest-bearing escrow account. *See* Bernstein Decl. ¶ 15; Fees Mot. at 2. Any interest, net realized gains and other earnings accrued on the Settlement Amount are part of the funds available for disbursement to the Class and Subclass Members. *See* Moark Settlement Agreement ¶ 33; Moark Settlement Agreement, Ex. A, Escrow Agreement, Schedule A, at 1-4 (Doc. No. 690-1) (hereinafter, "Escrow Agreement").

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[7] The **[**10]** terms used in this Order that are defined in the Moark Settlement Agreement are, unless otherwise defined herein, used in this Order consistent with the definitions of the agreement.

According to the Notice of the Moark Settlement, which is discussed in more detail, *infra*, the Settlement Amount, with any interest earned, and less administrative expenses, escrow expenses, taxes, and attorneys' fees, will be distributed on a *pro rata* basis to the settlement class members who timely and properly submit a valid Claim Form, which is a form documenting a member's claim for damages. *See* Mot., Ex. 2.1, Notice of Moark Settlement at 3-4 **[**13]** (Doc. No. 465-8) (hereinafter, "Moark Notice"); *see also* Mot. at Ex. 2.1, Moark Claim Form (hereinafter, "Claim Form"); Escrow Agreement at 3-4. The *pro rata* share is based upon the dollar amount of a Class Members' direct purchases of shell egg and egg products in the United States from any producer, including Defendants, during the period designated in the Agreement. *See* Notice at 3; Claim Form at 1. The Claims Notice provided that "[b]ecause the alleged overcharge is only a portion of the price paid for eggs and egg products, your recovery will be less than the total amount you paid." Notice at 3. [8]

Additionally, pursuant to the agreement, Moark will cooperate with the Plaintiffs' preparation for and prosecution of their class action. *See* Moark Settlement Agreement ¶ 39. The Agreement details the extent of Moark's cooperation in terms **[**14]** of production of certain non-privileged documents and ensuring the availability of current Moark directors, officers, and employees to give non-privileged testimony through interviews, depositions, declarations and affidavits, and appearance at trial. *See id.* Moark also agrees to assist Plaintiffs in arranging for non-privileged testimony from former directors, officers, and employees. *See id.* ¶ 39(b).

In consideration, Plaintiffs agree that they "shall not . . . seek to recover against [Moark] for any of the Released Claims." *Id.* ¶ 25. Under the Agreement, "Released Claims" are defined as any and all claims arising out of injuries or damages that occurred "from the beginning of time to the date when notice of the Court's entry of an order preliminarily approving this Agreement is first published" and that resulted from the conduct asserted in the Plaintiffs' suit. *See id.* The Agreement delineates the conduct asserted by the Plaintiffs' suit as: "(i) any agreement or understanding between or among two or more Producers of eggs, including any Defendants, including any entities or individuals that may later be added as a defendant to the Action, (ii) the reduction or restraint of supply, **[**15]** the reduction of or restrictions on production capacity, or (ii) the pricing, selling, discounting, marketing, or distributing of Shell Eggs and Egg Products in the United States or elsewhere." *Id.* The Agreement sets forth non-exclusive examples of Released Claims by providing that such claims "includ[e] but [are] not limited to any conduct alleged, and causes of action asserted, or that could have been alleged or asserted, whether or not concealed or hidden, in the Complaints filed in the Action, which in whole or in part arise from or are related to the facts and/or actions described in the Complaints, including under any federal or state antirust, unfair competition, unfair practices, price discrimination, unitary pricing, trade practice, consumer protection, fraud, RICO, civil conspiracy law, or similar laws, including without limitation, the Sherman Antitrust Act, *15 U.S.C. § 1 et seq.*" *Id.* Plaintiffs also agree to waive *California Civil Code Section 1542* **[*256]** and similar provisions in other states. *Id.* ¶ 26. Additionally, Plaintiffs agree to waive and release "all defenses, rights, and benefits that [Plaintiffs] may have or that may have been derived from the provisions of applicable **[**16]** law which, absent such waiver, may limit the extent or effect of the release" of the aforementioned claims. *Id.* ¶ 27. The release excludes "claims relating to payment disputes, physical harm, defective product or bodily injury . . . and do[es] not include any Non-Settling Defendant." *Id.* ¶ 28.

The settlement proposes an opt-out provision which sets forth the procedures through which possible class members could opt out of the settlement. *Id.* ¶ 22; *see also* Moark Notice at 1, 5-6. Class members had 75 days from the postmark date that the notice of the settlement was mailed by first-class mail to the final postmark date designated in the Claims Notice to return an exclusion request. *See* Moark Notice at 1, 5-6. Class Members had 127 days from the postmark date that the notice of the settlement was mailed by first-class mail to the final postmark date designated in the Claims Notice to return a completed Claim Form to make a claim for benefits. *See id.* at 3-4.

Finally, the parties set forth certain provisions in their agreement concerning attorneys' fees, specifically:

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[8] The agreement provided that Settlement Fund may be reduced if "class members whose sales equal 7.5% or more of the total US egg sales" opt out of the Moark Settlement. Moark Notice at 3. However, this reduction provision is inapplicable because the condition that would otherwise trigger that provision did not occur. *See* Final Hr'g Tr. at 35:10-35:20.

> Class Counsel may seek an award of attorneys' fees and reasonable litigation expenses approved by the Court, to be paid out **[**17]** of the Settlement Amount after the Final Approval of the Agreement. Moark Defendants agree not to object to Class Counsel's petition to the Court for payment of attorneys' fees, costs, and expenses from the Settlement Amount. The Moark Defendants shall have no obligation to pay any fees or expenses from Class Counsel.

Moark Settlement Agreement ¶ 35.

III. Notice

Notice of the Moark Settlement was disseminated to possible members of the Settlement Class through a variety of means ranging from direct mailings, publications, press releases, a website and a toll-free information and request telephone line. *See* Mot., Ex. 2, Affidavit of Jennifer M. Keough re: Notice and Settlement Administration ¶¶ 5-6 (Doc. No. 465-7) (hereinafter, "Keough Aff."); *see also* Moark Settlement Agreement ¶ 21. The Notice explained that any possible Class Members wishing to be excluded from or to object to the terms of the Moark Settlement Agreement should postmark their exclusion requests or objections no later than a specific date that was 104 days before the final fairness hearing on the Moark Settlement. *See* Moark Notice at 1, 5-6. A maximum of $350,000 of the Settlement Amount was authorized to be used for **[**18]** costs of notice. *See* Moark Settlement Agreement ¶ 45. Ultimately, $170,000 was spent on notice expenses with respect to the Moark Settlement Agreement. *See* Final Hr'g Tr. at 30:21-30-23. No other information has been provided to the Court concerning whether other administrative costs and expenses were (or were not) incurred.

The Claims Administrator received 905 Claim forms by the time of the hearing for final approval of the settlement; 881 of those Claim Forms met the deadline set forth for filing such forms and 24 Claim Forms did not. *See* Final Hr'g Tr. 14:4-14:6. [9] The Claims Administrator received no objections to the settlement and received 150 requests for exclusion from the class. *See id.* at 14:7-14:9. Some of those parties who opted-out of the class have filed their own complaints against Defendants, including Moark, such as Direct Action Plaintiffs Giant Eagle Inc., Winn-Dixie Stores, Inc., Roundy's Supermarkets, Inc., C&S Wholesale Grocers, Inc., and H.J. Heinz Company, L.P., as well as plaintiffs in a state court action proceeding in Kansas. *See* Am. Compl. (Doc. No. 623) (Giant Eagle Inc.); Second Am. Compl. (Doc. No. 622) (Winn-Dixie Stores, Inc., Roundy's **[*257]** Supermarkets, **[**19]** Inc., C&S Wholesale Grocers, Inc., and H.J. Heinz Company, L.P.), Dec. 19, 2011 Mem. and Order, *836 F. Supp. 2d 290, 2011 U.S. Dist. LEXIS 146258, 2011 WL 6396462, at *5 n.8* (Doc. Nos. 601 and 602) (explaining that six direct purchasers opted out of the Sparboe and Moark Settlements and filed an action against Defendants in Kansas state court, which, after being removed to federal court by Defendants, was remanded to state court); Direct Action Plaintiff Status Report (Doc. No. 457). [10] Interim Co-Lead Counsel has represented that the "potential Class is composed of

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[9] The Plaintiff's Motion stated that 894 Claim Forms had been submitted. *See* Keough Aff. ¶ 16. However, because the Plaintiffs provided updated numbers during their presentation in the final fairness hearing, the Court references those numbers here. Plaintiffs intend to make recommendations as to the treatment of late Claims Forms in a plan of allocation that will be submitted for the Court's approval.

[10] The Direct Action Plaintiff Status Report states that "[a]ll of the Direct Action Plaintiffs except Giant Eagle have remained in the Moark class **[**20]** settlement based on the statements in the Moark Class Settlement Agreement and Notice that remaining in that settlement class "does not prejudice their rights to exclude themselves from any other past, present or future settlement class or certified litigation class" in this case. To be clear, only Giant Eagle has opted out of the Moark settlement class." *Id.* at 2. This statement applies only to the presently pending Direct Action Plaintiff cases brought by The Kroger Co. and co-plaintiffs (Civil Action No. 10-7605 (E.D. Pa.)), Supervalu Inc. (Civil Action No. 10-6736 (E.D. Pa.)), Publix Super Markets, Inc. (Civil Action No. 10-6737 (E.D. Pa.)), and Giant Eagle, Inc. (Civil Action No. 10-1698 (W.D. Pa.)).

The statement does not apply to the pending Direct Action Plaintiff cases brought by Kraft Foods Global, Inc. and its co-plaintiffs (Civil Action No. 11-8808 (E.D. Pa.), and Winn-Dixie Stores, Inc. (Civil Action No. 11-0510 (E.D. Pa.). Both of these cases were filed after the Status Report. However, because Kraft Foods Global, Inc. and its co-plaintiffs' names do not appear on the list of names of those parties who filed requests for exclusion from the Moark Settlement, Exhibit 4 to **[**21]** the Plaintiffs' Motion (Doc. No. 465-10), it appears that this group of Direct Action Plaintiffs did not opt-out of the Moark Settlement. However, the names of thousands of entities nationwide, many of which are sophisticated companies with their own in-house legal counsel." Fees Mot. at 12.

The Claims Administrator mailed Notice and Claim Forms to 13,211 direct purchasers of shell eggs and egg products, whose names and addresses were obtained from various electronic data files that contained potential Class Member names and addresses from 17 named egg producer Defendants that were given to the Claims Administrator at the direction of the Court. *See* Keough Aff. ¶ 7, 9; Notice Approval Order ¶ 3. Eighty-three (83) Notice and Claim Forms, returned by the U.S. Postal Service with forwarding address information, were re-mailed. *See id.* ¶ 12. In contrast, twenty-three hundred thirty-three (2,333) Notice and **[**22]** Claim Forms were returned without forwarding address information and, according to Interim Co-Lead Counsel, could not be re-mailed. *See id.* [11]

Additionally, during the notice period a Summary Notice was published in several publications with a total circulation of over 2,316,000. *See id.* ¶ 11. The Summary Notice was published in a monthly issue of fifteen (15) industry journals thought to be likely to reach potential purchasers of shell eggs and egg products. *See id.* Those publications are: *PetFoodIndustry, Restaurant Business, Convenience Store News, Hotel F&B, Nation's Restaurant News, Food Service Director, Progressive Grocer, Food Manufacturing, Supermarket News, Stores, Egg Industry Magazine, Modern Baking, Baking Buyer, Food Processing*, and *Long Term Living. See id.*

The Summary Notice was also published for one day in the *Wall Street Journal. See id.* That same day, the Claims Administrator distributed a press **[**23]** release for the Moark Settlement, as well as a separate release about the Sparboe Settlement, to approximately 1,000 journalists in the restaurant and food industries through the US1 Newsline on the PR Newswire. *See id.* ¶ 13. The press releases resulted in some 335 articles that reported on the two settlements. *See id.*

A publicly-available website specifically devoted to the Moark and Sparboe Settlements **[*258]** was established. *See id.* ¶ 14. The website makes available for review and downloading the Notice Packet, the Moark Settlement Agreement, and various Court orders and filings relating to the Moark Settlement. *See id.* In the first 148 days of operation, the website received 4,820 "visits." *See id.*

The Claims Administrator and Plaintiffs established a toll-free 24-hour telephone number and call center for potential Class Members to obtain information about the settlement and to request the Notice and Claim Form. *See id.* ¶ 15. The automated number received 549 calls, and 95 callers requested and received a Notice Packet during the first 148 days of operation. *See id.*

Additionally, Moark served notice of the settlement to federal and state officials of the settlement as required by 28 U.S.C. § 1715(d) **[**24]** under CAFA. *See* Mot. at 9. No federal or state officials filed objections to the Moark Settlement, nor requested a hearing following the issuance of the CAFA notice. The statutory period elapsed prior to the date of this Memorandum and accompanying Order. [12]

Winn-Dixie Stores, Inc. and its co-plaintiffs do appear on that list, and it appears they have opted out of the Settlement. *See* Keough Aff. ¶ 17.

Moark and Winn-Dixie Stores, Inc., Roundy's Supermarkets, Inc., C&S Wholesale Grocers, Inc., and H.J. Heinz Company, L.P. recently reported reaching a settlement of the claims against Moak and submitted a stipulation of dismissal that the Court is approving this same date.

[11] The Court recognizes that the statistics provided here slightly differ with the equivalent statistics that the Plaintiffs provided in connection with their motion for approval of the Sparboe Settlement. However, the Court deems these minor differences to be inconsequential.

[12] Although Moark served notice of the settlement to the appropriate officials, it did not do so promptly after the Agreement was filed, as required by 28 U.S.C. § 1715(b). Mot. at 9. Section 1715(b) provides: "Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the

Following approval of the settlement, Plaintiffs intend to submit for the Court's approval a plan of allocation relating to the Claims Administration process for evaluating the procedure for processing individual claims under the settlement, the allocation of the Settlement Fund distributions, administrative costs and expenses, and so forth. *See* Mot. at 1 n.1. The Claims Notice provided that the "Court retains the power to approve or reject, in part or in full, any individual claim of a class member based on equitable grounds." Moark Notice at 3. The Notice also stated that the Settlement Amount "may be reduced by court-ordered attorneys' fees and reimbursement of litigation expenses, including administration of the Settlement, as approved by the Court" and reduced "by the expense of providing notice to the Class." *Id.*

The **[**27]** Claims Notice also explained that "Class Counsel will apply to the Court for an award from the Settlement Funds of attorneys' fees and for reimbursement of litigation costs and expenses incurred, including fees and costs expended while providing Notice to the Class and while administering the Settlement Fund (including the plan of allocation)." *Id.* at 4. The Notice stated that Interim Co-Lead Counsel intends to apply for attorneys' fees "in an amount not to exceed thirty percent of $25 million as well as the costs and expenses incurred." *Id.*

[*259] **IV. Discussion**

Federal Rule of Civil Procedure 23 provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." *Fed. R. Civ. P. 23(e)*. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

> (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> (3) The parties seeking approval must file a statement identifying any **[**28]** agreement made in connection with the proposal.
>
> (4) If the class action was previously certified under *Rule 23(b)(3)*, the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
> (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection maybe withdrawn only with the court's approval.

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proposed settlement . . . ." Under *Section 1715(d)*, an order granting final approval of a settlement agreement may not take place earlier than ninety days after the appropriate federal and state officials have been served with notice.

Plaintiffs advised the Court about the timing of the CAFA notice requirement on the Moark and Sparboe Settlements, and requested the Court proceed with the final approval hearing on the Moark Settlement **[**25]** as scheduled and to hold its decision on the Plaintiffs' motion for final approval in abeyance until the ninety-day expiration date passed without any objections or requests for hearings being received from any relevant authority pursuant to *28 U.S.C. § 1715(d)*. *See* Mot. at 9. Over ninety days have elapsed since Moark served the appropriate state or federal officials with the CAFA notice, and there have been no requests for hearings or objections to the settlement made. It follows that, although the notice requirements under CAFA have not been fully met on a technical basis, the substance of the requirements have been satisfied insofar as giving federal and state officials sufficient notice and opportunity to be heard concerning the Moark Settlement. *See* *D.S. ex rel. S.S. v. New York City Dep't of Educ., 255 F.R.D. 59, 80 (E.D.N.Y. 2008)* (approving the settlement on a provisional basis until the CAFA notice deadline passes and no federal or state official requests a hearing); *Kay Co. v. Equitable Prod. Co., No. 06 Civ. 00612, 2010 U.S. Dist. LEXIS 41892, 2010 WL 1734869, at *4 (S.D. W.Va. Apr. 28, 2010)* ("Since more than 100 days have passed since service was perfected and since there have been no adverse comments **[**26]** from any of the aforesaid State or Federal officials, the Court FINDS that compliance with CAFA is satisfactory."). *But see* *True v. Am. Honda Motor Co., 749 F. Supp. 2d 1052, 1083 (C.D. Cal.2010)* (determining that its authority to approve a settlement was "questionable" when the defendant gave CAFA notice only ten days prior to the final settlement approval hearing).

Id. The "[f]actual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of *Rule 23*." *In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 257-58 (3d Cir. 2009)* (quoting *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008))*. "The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 299 (3d Cir. 1998)* (quoting *Girsh v. Jepson, 521 F.2d 153, 156 (3d Cir. 1975))*.

A. [**29] Class Certification

Where, as here, the Court has not already certified a class prior to evaluating a settlement, the Court initially must determine whether the proposed settlement classes satisfy the requirements of *Federal Rule of Civil Procedure 23(a)* and *(b)*. *See* *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*; *see also* *In re Pet Food Prods. Liab. Litig., 629 F.3d 333, 341 (3d Cir. 2010)* ("[A] district court first must determine that the requirements for class certification under *Rule 23(a)* and *(b)* are met."). The Third Circuit Court of Appeals recently summarized the demands of *Rule 23* as follows:

> *Rule 23(a)* contains four threshold requirements, which every putative class must satisfy:
>
> > (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.
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> *Fed. R. Civ. P. 23(a)*; *see also* *Amchem, 521 U.S. at 613*. Upon finding each of these prerequisites satisfied, a district court must then determine that the **[**30]** proposed class fits within one of the categories of class actions enumerated in *Rule 23(b)*.
>
> As mentioned, *Rule 23(b)(2)* authorizes class actions seeking injunctive relief in instances where the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." *Fed. R. Civ. P. 23(b)(2)*; *see* *In re Comm. Bank of N. Va. (Comm. Bank I), 418 F.3d 277, 302 n.14 (2005)*. Separately, certification pursuant to *Rule 23(b)(3)* seeking monetary compensation is permitted where (1) "questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*; *see* *Collins v. E.I. DuPont de Nemours & Co., 34 F.3d 172, 180 (3d Cir. 1994)*. These twin **[*260]** requirements are commonly referred to as predominance and superiority.

Sullivan v. DB Invs., Inc., 667 F.3d 273, 296 (3d Cir. 2011) (en banc).

1. *Federal Rule of Civil Procedure 23(a)*

First, under *Rule 23(a)*, the Court determines that the Class Members are ascertainable from **[**31]** objective criteria, such as various electronic data files that contained names and addresses of customers that purchased shell eggs or egg products produced from caged birds in the United States, which were provided by 17 named egg producer Defendants, and that the Class Members thus ascertained are so numerous that their joinder before the Court would be impracticable. Plaintiffs "need not precisely enumerate the potential size of the proposed class, nor [are] plaintiff[s] required to demonstrate that joinder would be impossible." *Cannon v. Cherry Hill Toyota, Inc., 184 F.R.D. 540, 543 (D.N.J. 1999)* (citation omitted); *see also* 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1762 (3d ed. 2005) ("'[I]mpracticable' does not mean 'impossible.' The representatives only need to show that it is extremely difficult or inconvenient to join all the members of the class."); 1 A. Conte & H. Newberg, *Class Actions* § 3:14 (5th ed. 2011) ("Plaintiffs bear the burden of demonstrating that joinder is impracticable, but *impracticable* does not mean *impossible*."). "[G]enerally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first **[**32]** prong of *Rule 23(a)* has been met." *Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001)* (citation omitted). Here, thousands of direct purchasers of shell eggs and egg products located across the United States were identified, based upon information provided by 17 named Defendants, as proposed members of the Settlement Class, and 905 Claim Forms were submitted to the Claims Administrator. This information certainly demonstrates that a class of this size makes individual joinder of all members impracticable and that the numerosity requirement is satisfied.

Second, the commonality requirement is satisfied insofar as Plaintiffs have alleged one or more questions of fact and law common throughout the Class. The commonality prerequisite does not require that all members of the prospective class share identical claims. *Hassine v. Jeffes, 846 F.2d 169, 176-77 (3d Cir. 1988)* (relying on *Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985))*. Rather, "[t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)*. Also, class members can assert **[**33]** such a single common complaint if they demonstrate that all class members are subject to the same harm. *Id.* [13]

As is also further discussed in regards to the superiority requirement under *Rule 23(b)(3)*, *infra*, the Plaintiffs' claims here are based upon Moark's alleged conduct during the period in question, which Plaintiffs contend constituted an agreement to and furtherance of an unlawful conspiracy to manipulate the supply and prices of domestic eggs and egg products in violation of *Section 1* of the Sherman Act. *See generally* Sept. 26, 2011 Mem., *821 F. Supp. 2d at 713-15* (discussing the specific alleged conduct of Defendants generally in **[**34]** furtherance of alleged conspiracy). Additionally, Plaintiffs allegedly were subjected to the same type of harm by directly purchasing eggs and egg products at artificially inflated prices due to the alleged conspiracy. Because the class members' claims arise from the same nucleus of operative facts and involve the same legal theories against Moark, the Court finds that the commonality prong under *Rule 23(a)(2)* is met.

Third, the Court finds that the claims of the named Plaintiffs—companies, corporations, **[*261]** and businesses that purchased shell eggs, egg products, or both, from one or more of the Defendants—are typical of the claims of the Class Members and the respective Subclass members. "If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183-84 (3d Cir. 2001)*. The Third Circuit Court of Appeals has recognized that the "jurisprudence 'assures that a claim framed as a violative practice can support a class action embracing a variety of injuries so long as those injuries can all be linked to the practice.'" **[**35]** *Id. at 184* (quoting *Baby Neal, 43 F.3d at 63*). In this action, the claims of the class representatives are aligned with those of the Class Members, and members of the Subclasses, inasmuch as the claims of the representatives arise out of the same alleged misconduct of the Defendants and core facts and events. Further, the representative Plaintiffs' claims and the absent Class Members' claims rely on the same legal theories and arise from the same alleged "conspiracy" and "illegal agreement" by Defendants. Moreover, named Plaintiffs, like all putative Class Members, allegedly have suffered the same injury—namely, economic damages arising from alleged artificially-inflated purchase prices—as a result of the Defendants' alleged anticompetitive conduct.

Fourth, the final prerequisite under *Rule 23(a)*, the adequacy of the representative parties requirement, "has two components: (1) concerning the experience and performance of class counsel; and (2) concerning the interests and incentives of the representative plaintiffs." *Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170, 182 (3d Cir. 2012)* (citing *Comm. Bank I, 418 F.3d at 303*). Essentially, the inquiry into the adequacy of the representative **[**36]** parties examines whether "the putative named plaintiff has the ability and the incentive to represent the

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[13] The Supreme Court recently explained: "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, *84 N.Y.U. L. Rev. 97, 132 (2009)*)

claims of the class vigorously, that he or she has obtained adequate counsel, and that there is no conflict between the individual's claims and those asserted on behalf of the class." Hassine, 846 F.2d 169 at 179 (citations omitted); *see also* Dewey, 681 F.3d at 182 (recognizing that "the linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class"). In other words, "Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." Amchem, 521 U.S. at 625. If any conflicts "undercut the representative plaintiffs' ability to adequately represent the class" they are "fundamental," such that class representation is structurally faulty and Rule 23(a)(4) cannot be satisfied. Dewey, 681 F.3d at 184-85.

The Court determines that the representative Plaintiffs indeed will fairly and adequately protect the interests of the Settlement Class. Here, the interests of the representative Plaintiffs are consistent with those of the Class Members, and respective Subclass **[**37]** members, and there appear to be no conflicts between or among these groups. As discussed, the representative Plaintiffs were damaged as a result of the Defendants' allegedly unlawful conduct, including Moark's alleged conduct, and the named Plaintiffs would have had to prove the same wrongdoing as the putative Class Members to establish the Defendants' (and Moark's) liability. Moreover, all representative Plaintiffs and Class Members have present claims (and no future claims) and have suffered economic damages. Furthermore, there is no apparent conflict among Class Members, or Subclasses, with respect to the allocations for distribution of the Settlement Amount because such allocations are based upon a *pro rata* share determined by purchases of shell eggs and egg products from any producer, including any Defendant, in the United States during the period designated in the Agreement. The representative and putative Class Members have a common interest in Moark's cooperation in assisting with the prosecution of the class claims against the non-settling Defendants. It follows that the representative Plaintiffs' interests are directly aligned with those of other members of the Class and **[**38]** Subclasses.

Additionally, the representative Plaintiffs have been, have the incentive, and appear to be capable of continuing to be active participants in both the prosecution and the settlement **[*262]** of this suit against Moark, if the case had continued, and against the remaining Defendants. To assist them, Plaintiffs have retained attorneys who are highly qualified, experienced, and able to conduct this litigation. The Court analyzes the capabilities and performance of Interim Co-Lead Counsel under Rule 23(a)(4) based upon the factors set forth in Rule 23(g). *See* Sheinberg v. Sorensen, 606 F.3d 130, 132 (3d Cir. 2010) ("Although questions concerning the adequacy of class counsel were traditionally analyzed under the aegis of the adequate representation requirement of Rule 23(a)(4) of the Federal Rules of Civil Procedure, those questions have, since 2003, been governed by Rule 23(g)." (citing Fed. R. Civ. P. 23(g), advisory comm. note (2003))).

Here, the Court concludes that Interim Co-Lead Counsel satisfies Rule 23(g). Rule 23(g) requires consideration of four factors: "the work counsel has done in identifying or investigating potential claims in the action," "counsel's experience in handling **[**39]** class actions, other complex litigation, and "the types of claims asserted in the action," "counsel's knowledge of the applicable law," and "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv). The Court "must also ensure that '[c]lass counsel [will] fairly and adequately represent the interests of the class.'" Sheinberg, 606 F.3d at 132-33 (quoting Fed. R. Civ. P. 23(g)(4)). [14]

Interim Co-Lead Counsel have extensive documented experience in complex class action litigation, including those based upon violations of ***antitrust law***, and are well-respected law firms in the plaintiffs' class action bar who have demonstrated considerable dedication and ability thus far in this litigation. Interim Co-Lead Counsel have capably managed this suit on behalf of Plaintiffs since the Court formally appointed them to that role. Their work has **[**40]** included the consolidation of the individual cases, negotiating the Moark and Sparboe Settlements, handling the motion to dismiss stage, and preparing for and commencing discovery. In sum, Interim Co-Lead Counsel's work

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[14] The Court may also consider other possibly relevant information as to the adequacy of counsel, such as proposed terms for attorneys' fees and nontaxable costs and "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B), (C).

on behalf of the Plaintiffs has been extensive and involved the dedication of substantial resources and energy. Interim Co-Lead Counsel's work thus far in this suit and prior experience demonstrate that these attorneys have fairly and adequately represented the interests of the Moark Settlement Class, and Subclasses, and will continue to do so.

Accordingly, the Court finds that four threshold requirements of *Rule 23(a)* have been satisfied.

2. *Federal Rule of Civil Procedure 23(b)*

Having determined that the requirements of *Rule 23(a)* are met, the Court next must consider whether the requirements of at least one subsection of *Rule 23(b)* are met. Here, Plaintiffs are seeking certification under *Rule 23(b)(3)*. *See also* Pls.' Mem. of Law on Prelim. Approval of Moark Settlement at 24 (Doc. No. 349). *Rule 23(b)(3)* permits class actions where "the court finds that the questions of law or fact common to Class members predominate over any questions affecting only individual members, **[**41]** and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. These requirements are commonly separated into the so-called "predominance" and "superiority" requirements. *See* *Ins. Brokerage, 579 F.3d at 257-58*.

a. Predominance

To evaluate the predominance requirement, a court must determine whether common questions of law or fact predominate over any questions affecting only individual members. *See* *Hydrogen Peroxide, 552 F.3d at 311-12*. "*Rule 23(b)(3)*'s predominance requirement imposes a more rigorous obligation [than *Rule 23(a)(2)*'s commonality element] upon a reviewing court to ensure that issues common to the class predominate over those affecting only individual class members. *Sullivan, 667 F.3d at 297* (quoting **[*263]** *Ins. Broker., 579 F.3d at 266*). As such, the Third Circuit Court of Appeals "consider[s] the *Rule 23(a)* commonality requirement to be incorporated into the more stringent *Rule 23(b)(3)* predominance requirement, and therefore deem[s] it appropriate to 'analyze the two factors together, with particular focus on the predominance requirement.'" *Id.* Third Circuit precedent "provides that the focus **[**42]** of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Id.*

"Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Amchem, 521 U.S. at 625*. This is because these types of claims typically arise from an alleged common course of conduct on the part of the defendant, and depend upon common proof of liability, such as evidence of the defendants' conduct. *See, e.g.,* *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 528 (3d Cir. 2004)* (questions of fact and law are common to the class because the claims at issue and proof of liability depend upon the defendants' alleged conduct). Furthermore, that Plaintiffs have allegedly suffered "purely an economic injury"—in contrast to a physical injury—such overpayment for a product on account of the Defendants', and more specifically, Moark's, alleged anticompetitive conduct can "further support[] a finding of commonality and predominance because there are little or no individual proof problems in this case otherwise commonly associated with physical injury claims." *Id.*

Indeed, **[**43]** this same rationale leads the Court to conclude here that the common issues of Class Members predominate over any individual issues as to their antitrust claim against Moark. The task at hand requires the Court to "examine the elements of plaintiffs' claim through the prism of *Rule 23*." *Hydrogen Peroxide, 552 F.3d at 311* (internal quotation marks omitted). Here, the Plaintiffs' claim arises under *Section 1* of the Sherman Act. "To establish a violation of *Section 1*, a plaintiff must prove: (1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action." *Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir. 2005)*.

The reasoning in *In re Insurance Brokerage Antitrust Litigation* is applicable here. In *Insurance Brokerage*, our Court of Appeals concluded that "[b]ecause each of the elements of a Sherman Act violation involves common questions of law and fact, . . . common questions predominate over individual ones with respect to the federal antitrust claim." *579 F.3d at 269*. The Court determined that **[**44]** since "the first and third elements of a Sherman Act violation focus on the conduct of the defendants, we find that common questions abound with respect to whether the defendants engaged in illegal, concerted action." *Id. at 268*. This is true in this case, because the common questions relevant to these elements include, *inter alia*, whether Moark and the other Defendants agreed to the alleged conspiracy to manipulate the supply and prices of domestic eggs and egg products in violation of *Section 1* of the Sherman Act, and whether the alleged conspirators' conduct amounted to an illegal restraint of trade. Furthermore, with respect to the second element of the Plaintiffs' Section 1 claim, there are at the very least the common questions relating to whether the alleged conspirators' actions reduced the supply of and increased prices for domestic eggs and egg products.

Also, like *Insurance Brokerage*, here, the fourth element of the Sherman Act claim "focuses on whether the plaintiffs were injured by the defendants' conduct," and as a result "it may still involve common questions of law and fact if proof of injury can be established on a class-wide basis." *Id. at 268*. As the Court of Appeals **[**45]** recognized, "for purposes of class certification pursuant to *Rule 23(b)(3)*, 'the task for plaintiffs . . . is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.'" *Id.* (citing *Hydrogen Peroxide, 552 F.3d at 311-12*. The issue here is whether the Class Members were proximately injured by the conduct **[*264]** of Moark and other Defendants, which is a question that is capable of proof common to the class members. Thus, even though the amount of damage that each plaintiff allegedly suffered could not necessarily be established by common proof, nonetheless, "the element of antitrust injury-that is, the fact of damages-is susceptible to common proof." *Id.* The reasoning in *Insurance Brokerage* applies here:

> [W]e are not as concerned with "formulat[ing] some prediction" as to how this element of a Sherman Act violation would "play out" at trial, *552 F.3d at 311* (internal quotation marks omitted), "for the proposal is that there be no trial," *Amchem, 521 U.S. at 620*, and instead our inquiry into the element of antitrust injury is solely for the purpose of ensuring that issues common to the class **[**46]** predominate over individual ones. As the foregoing analysis demonstrates, common questions exist even with respect to the element of antitrust injury and therefore any individual issues do not overwhelm the common ones.

Id.

Furthermore, the Court does not find that the use of Subclasses of direct purchasers of eggs and direct purchasers of egg products alters any of the foregoing analysis because the claims with respect to each Subclass rely upon the same alleged conduct of Moark and other Defendants, common proof of such conduct, and economic harm of overpayment for the respective products resulting from such conduct. Accordingly, the Court concludes that the predominance requirement is satisfied here because each element of the Plaintiffs' federal antitrust violation involves common questions of law and fact, and these common questions predominate over individual issues.

b. Superiority

To meet the superiority requirement, Plaintiffs must show that a class action, rather than individual litigation or other available methods of adjudication, is the best method for achieving a fair and efficient adjudication of the controversy. *See* *Newton, 259 F.3d at 191*. Several factors are relevant to **[**47]** the superiority inquiry: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *Fed. R. Civ. P. 23(b)(3)*. In effect, "[t]he superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *Prudential, 148 F.3d at 316* (internal quotations omitted).

The Court makes no determination at this time concerning the manageability of the Plaintiffs' suit as a class action if this action were to go to trial in a single forum or, to the extent this possibility remains, be remanded to the various transferor courts. "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. R. Civ. P. 23(b)(3)(D), for the proposal is that there **[**48]** be no trial." *Amchem, 521 U.S. at 620*.

In considering the other relevant factors, the Court finds that the Class, and Subclasses, satisfy the superiority requirements of *Rule 23(b)(3)*. Here, there is a potentially large number of class members—perhaps numbering over 13,000—who as a whole are geographically widely disbursed. *See* Pls.' Mem. of Law on Prelim. Approval of Moark Settlement at 14. These factors represent a potentially crushing strain on and inefficient application of judicial resources if the putative class members' claims were prosecuted individually. Furthermore, when "each consumer has a very small claim in relation to the cost of prosecuting a lawsuit. . . , a class action facilitates spreading of the litigation costs among the numerous injured parties and encourages private enforcement of the statutes." *Warfarin, 391 F.3d at 534*. Under the present circumstances, a class action device enables individual direct purchasers to pursue their claims in an economically feasible manner, with greater efficacy **[*265]** in achieving enforcement and deterrence goals, and with greater bargaining power for settlement purposes. [15]

Putative Class Members were free to opt out of the settlement to pursue their own claims individually if they so chose, and some of the direct purchasers who opted out of the Moark Settlement, namely, a subset of the Direct Action Plaintiffs, indeed have filed individual actions that name Moark as a defendant and that have been consolidated or coordinated in this multi-district litigation. Another case brought by opt out parties against Moark for its alleged conduct is pending in Kansas state court as a result of a ruling of this Court. *See* Dec. 19, 2011 Mem., *2011 U.S. Dist. LEXIS 146258, 2011 WL 6396462*, (Doc. No. 601). That there are only two pending Direct Action Plaintiff suits and one **[**51]** state court suit pending against Moark based upon its alleged antitrust conduct suggests that few Class Members have significant individual claims, or interest in bringing their claims separately, and that there is a lack of interest in the individual prosecution of claims among Class Members on the whole. *See id.*

For these reasons, a class action resolution in the manner proposed in the Moark Settlement would be superior to other available methods for a fair and efficient adjudication of the case against Moark.

3. Conclusion as to Class Certification for Settlement Purposes

Because the Court concludes that all of the *Rule 23(a)* and *(b)(3)* requirements have been met, the Court certifies the Class, and Subclasses, as defined above for settlement purposes.

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[15] For these same reasons, to the extent that consideration of *Rule 23(b)(3)(C)* **[**49]** is pertinent here, and, for now, without regard to the remand mechanisms for an MDL action, it would be preferable to adjudicate these claims in one judicial proceeding and in one forum as a class action. *See Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands Corp., 478 F.2d 540, 543, 10 V.I. 575 (3d Cir. 1973)* ("The 'superiority requirement' was intended to refer to the preferability of adjudicating claims of multiple-parties in one judicial proceeding and in one forum, rather than forcing each plaintiff to proceed by separate suit, and possibly requiring a defendant to answer suits growing out of one incident in geographically separated courts."). *See generally* *Fed. R. Civ. P. 23(b)(2)* 1966 note ("Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought."). However, as one commentator has discussed, in light of *28 U.S.C. § 1407*, as a general matter, "[t]his factor should . . . be of little or no significance in resolving the superiority issue." Newberg, *supra*, §4:31. Indeed, **[**50]** this factor appears to have limited bearing under the present circumstances because the United States Judicial Panel on Multidistrict Litigation previously considered, pursuant to *28 U.S.C. § 1407*, the desirability of centralizing the various initially-filed direct purchaser class action suits in this particular forum, *see In re Processed Egg Prods. Antitrust Litig., 588 F. Supp. 2d 1366, 1367 (J.P.M.L. 2008)*, and a consolidated class action complaint was filed which superseded all previously-filed direct purchaser complaints.

B. Notice

"In the class action context, the district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class." *Prudential, 148 F.3d at 306*. *Fed. R. Civ. P. 23* sets forth two provisions concerning notice to class members.

First, *Fed. R. Civ. P. 23(c)(2)(B)* **[**52]** requires that class members be given the best notice practicable under the circumstances, including individual notice to all potential class members identifiable through reasonable effort. This notice is to be given to all potential members of a *Rule 23(b)(3)* class. *Prudential, 148 F.3d at 326*. Specifically, the Rule provides that such notice

> must, in clear, concise and plain language, state: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues or defenses; (iv) the class member's right to enter an appearance by an attorney; (v) the class member's right to be excluded from the class; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of settlement on class members.

Fed. R. Civ. P. 23(c)(2)(B).

Second, *Rule 23(e)* requires all members of the class be notified of the terms of any **[*266]** proposed settlement. *Fed. R. Civ. P. 23(e)*. This "notice is designed to summarize the litigation and the settlement" and "to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation." *Prudential, 148 F.3d at 327* (quoting 2 Newberg, *supra*, § 8.32 at **[**53]** 8-109).

Here, the Notice of the Moark Settlement contained the information required by *Rules 23(c)(2)* and *23(e)*. The Notice appropriately detailed the nature of the action, the Class claims, the definition of the Class and Subclasses, the terms of the proposed settlement agreement, and the class members' right to object or request exclusion from the settlement and the timing and manner for doing so. The Notice also informed Class Members of their opportunity to be heard at the fairness hearing and to enter an appearance through an attorney, and stated that the settlement would be binding on Class Members who did not opt out of it.

Furthermore, the extent of the Plaintiffs' efforts to notify potential Class Members is adequate. The Notice was mailed to potential Class Members individually based upon consumer information provided by Moark. *See Larson v. AT&T Mobility LLC, No. 10-1285, 687 F.3d 109, 2012 U.S. App. LEXIS 13292, 2012 WL 2478376, at *9 (3d Cir. June 29, 2012)* (recognizing that "'individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of *Rule 23*. . . . Accordingly, each class member who can be identified through **[**54]** reasonable effort must be notified. . . .'" (quoting *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974))*). In addition, the parties published a notice of the settlement on the same day in several appropriate publications, and distributed a press release concerning the Moark Settlement to approximately 1,000 journalists in the restaurant and food industries, which resulted in some 335 articles that reported on both the Moark and Sparboe Settlements. *See Zimmer Paper Prods., Inc. v. Berger & Montague, P.C., 758 F.2d 86, 90 (3d Cir.1985)* ("It is well settled that in the usual situation first-class mail and publication in the press fully satisfy the notice requirement of both *Fed. R. Civ. P. 23* and the *due process clause*.").

Accordingly, the Court determines that the notice provided to the putative Class Members constitutes adequate notice in satisfaction of the demands of *Rule 23*.

C. Fair, Reasonable, and Adequate

To grant final approval, the Court must conclude that the proposed settlement is fair, reasonable and adequate. *Ins. Brokerage, 579 F.3d at 258*; *Fed. R. Civ. P. 23(e)(2)*. Trial courts generally are afforded broad discretion in determining whether to approve a proposed class **[**55]** action settlement. *Eichenholtz v. Brennan, 52 F.3d 478, 482 (3d Cir. 1995)*. [16]

Although no opposition has been filed to the Motion and no objectors have contested the settlement, pursuant to *Rule 23(e)*, the Court has the duty of protecting absentee class members, and the Court executes this duty by independently "assuring the settlement represents adequate compensation for the release of the class claims." *Prudential, 148 F.3d at 316-317*. [17] Indeed, **[*267]** certain requirements of *Rule 23* "demand undiluted, even heightened, attention in the settlement context." *Amchem, 521 U.S. at 620*. Cognizant of this duty, the Court evaluates the fairness, reasonableness, and adequacy of the Moark Settlement **[**56]** as follows.

1. Initial Presumption of Fairness

Based upon the record, the Court concludes that an initial presumption of fairness attaches to the Settlement. The Third Circuit Court of Appeals has "directed a district court to apply an initial presumption of fairness when reviewing a proposed settlement where: '(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'" *Warfarin, 391 F.3d at 535* (citing *In re Cendant Corp. Litig., 264 F.3d 201, 232 n.18 (3d Cir. 2001))*.

These criteria have been met here. The proposed class settlement was negotiated at arm's length over the course of four months by the Plaintiffs' Interim Co-Lead Counsel and Moark's counsel. As further discussed, *infra*, although no formal discovery was conducted in this case during the time of the Moark Settlement negotiations or agreement, Plaintiffs' Interim Co-Lead Counsel conducted informal discovery, including, *inter alia*, independently **[**59]** investigating the merits prior to filing the complaint (with additional investigation prior to filing amended

[16] The Third Circuit Court of Appeals recognizes that "[g]reat weight is accorded [the] views [of the trial judge] because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly." *Walsh v. Great Atlantic & Pacific Tea Co., Inc., 726 F.2d 956, 965 (3d Cir. 1983)* (quoting *Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 34 (3d Cir. 1971))*.

[17] The *Manual for Complex Litigation* observes that the "task is demanding because the adversariness of litigation is often lost after the agreement to settle." David F. Herr, *The Manual for Complex Litigation* § 21.61, at 487 (4th ed. 2011). Indeed, the observation that "'[c]ourts applying [a multifactor] test [ ] often recite the litany and engage in pro forma analyses, but their hearts are not in it,'" could be an equally a propos statement for those parties advancing unopposed motions for final settlement approval. *Ehrheart v. Verizon Wireless, 609 F.3d 590, 605 n.10 (3d Cir. 2010)* (dissenting, Smith, J.) (quoting *Jonathan R. Macey & Geoffrey P. Miller, Judicial Review of Class Action Settlements*, *1 J. of Legal Analysis 167, 172* (2009)).

Here, there is an absence of any objectors or any adversarial challenge to the Motion at bar, which appears to account for the dearth of any arguments criticizing, exposing, or meaningfully addressing possible flaws or drawbacks to the settlement agreement appearing in the record. Nonetheless, the Court recognizes that although the final settlement approval process may have lacked an edgy or adversarial demeanor, this does not necessarily **[**57]** bear on whether the settlement negotiation process was adversarial and resulted in a fair, reasonable, and adequate settlement. This is because the focus here is on the settlement agreement, and "[w]hether or not there are objectors or opponents to the proposed settlement, the court must make an independent analysis of the settlement terms." Herr, *supra*, at 488. Furthermore, the Court notes that, in response to the Court's inquiries for additional facts and development of the record, Interim Co-Lead Counsel fully and appropriately cooperated in the Court's efforts to consider and analyze the proposed settlement.

Nonetheless, in the event that any other partial or complete settlements are reached in the future of this case, or in this multi-district litigation generally, all parties' counsel are well-advised to, again, continue to be responsive and attentive to the Court's inquiries as to settlement agreements during the various approval processes, and also to anticipate and be cognizant of what appropriate, specific information the Court needs—particularly in light of recent case law developments—in order to perform the *fact intensive* inquiry required for executing its duty to protect **[**58]** absentee class members. After all, the burden lies with the movants to demonstrate that the settlement is fair, reasonable, and adequate.

complaints) and exercising opportunities to review records provided by Sparboe, all of which enabled counsel to have sufficient background in the facts of the case, including Moark's alleged role in it. As previously discussed, Interim Co-Lead Counsel are extremely experienced in class action litigation, and specifically, similar antitrust litigation. Furthermore, no member of the purported class objected to the settlement.

Given that the Court finds that the four factors are sufficiently met, the presumption of fairness applies to the settlement.

2. Standards for Determining Fairness of Proposed Settlement

The Third Circuit Court of Appeals has set forth nine factors, known as the *Girsh* factors, to be considered when determining the fairness of a proposed settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through **[**60]** trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation . . .

Girsh, 521 F.2d at 157 (internal quotations and punctuation marks omitted); *Prudential, 148 F.3d at 317*. "The settling parties bear **[*268]** the burden of providing that the *Girsh* factors weigh in favour of approval of the settlement." *Pet Food, 629 F.3d at 350* (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995))*.

In *In re Prudential Insurance Company of America Sales Practice Litigation Agent Actions*, the Third Circuit Court of Appeals also identified additional non-exclusive factors for courts to consider for a "thoroughgoing analysis of settlement terms." *See Pet Food, 629 F.3d at 350*. Those factors, known as the *Prudential* factors, include:

> [T]he maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and **[**61]** other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provision for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

See Prudential, 148 F.3d at 323. [18] While the Court must make findings as to the *Girsh* factors to approve a settlement as fair, reasonable, and adequate, the *Prudential* factors are illustrative of additional factors that may be useful even though they are not essential or inexorable depending upon the specific circumstances.

Although there is an overriding public interest in settling class actions, **[**62]** district courts should apply "an even more rigorous, heightened standard in cases where settlement negotiations precede class certification, and approval for settlement and class certification are sought simultaneously." *Pet Food, 629 F.3d at 350* (internal quotations omitted). "This heightened standard is designed to ensure that class counsel has demonstrated 'sustained advocacy' throughout the course of the proceedings and has protected the interests of all class members." *Prudential, 148 F.3d at 317*.

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[18] The Court of Appeals invites individualized analysis by noting that "[o]ther related factors . . . also may be relevant to this inquiry." *Prudential, 148 F. 3d at 323 n.73*.

Thus, the Court is required to make an independent analysis of the settlement to determine whether it is fair, reasonable, and adequate by independently evaluating all of the *Girsh* factors (and the *Prudential* factors, as appropriate), recognizing that the Court cannot substitute the parties' assurances or conclusory statements for its independent analysis of the settlement terms. *Pet Food, 629 F.3d at 351*. Accordingly, the Court "may find it necessary to drill down into the case and into the agreement to make an independent 'scrupulous' analysis of the settlement terms" and affirmatively seek out information to the extent that the parties have either not supplied it or have provided only **[**63]** conclusory statements. *See id.*

3. Discussion of *Girsh* and *Prudential* Factors

The Court's analysis of the *Girsh* factors, and the *Prudential* factors, as appropriate, leads to the conclusion that the relevant considerations weigh in favor of a finding of fairness under *Rule 23(e)*.

a. The Complexity, Expense and Likely Duration of the Litigation

The first *Girsh* factor, which evaluates the complexity, expenses and likely duration of the litigation, "captures the probable costs, in both time and money, of continued litigation." *Warfarin, 391 F.3d at 536* (citation omitted). At the outset, the Court appreciates that antitrust suits, like this one, are often complex actions to prosecute. *See In re Linerboard Antitrust Litig.,, 292 F. Supp. 2d 631, 639 (E.D. Pa. 2003)*. Furthermore, given that the settlement agreement occurred at an early stage of this litigation, prior to the active commencement of discovery, Plaintiffs have avoided such expense and **[*269]** delay as may have attached to these settling Defendants. *See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558-59, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (recognizing that "antitrust discovery can be expensive"). Discovery in this case against Moark would entail—which would demand reasonably **[**64]** the same and similar discovery that will occur as to the remaining Defendants in this suit—considerable expenditures of financial resources and hours of attorney time relating to discovery for liability and damages, including extensive electronic discovery and scores of witness depositions, experts, class certification, further pre-trial motions, and potentially a trial on the merits. The Court determines that such an undertaking "would not only further prolong the litigation but also reduce the value of any recovery to the class." *Warfarin, 391 F.3d at 536*. Accordingly, this factor weighs in favor of the Moark Settlement.

b. The Reaction of the Class to the Settlement

"In an effort to measure the class's own reaction to the settlement's terms directly, courts look to the number and vociferousness of the objectors." *Gen. Motors, 55 F.3d at 812*. Considering this factor from a somewhat different angle, the Third Circuit Court of Appeals has recognized the practical conclusion that it is generally appropriate to assume that "silence constitutes tacit consent to the agreement" in the class settlement context. *See Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1313 n.15 (3d Cir. 1993)*. By using **[**65]** these considerations as a gauge of class reaction to the Moark Settlement, the Court determines that the class reaction here favors settlement. Indeed, there were no objections filed to the Settlement and thus no negative feedback to the settlement. Moreover, as Interim Co-Lead Counsel has represented, many of the Class Members are sophisticated entities with their own in-house counsel, and ostensibly have the resources and ability to assess the settlement agreement beyond the average layperson or enterprise.

Moreover, there were only 150 requests for exclusion from the Class, which is 1.14% of the Notice addressees, or virtually *di minimis* in light of the over 13,200 Notices of settlement that were sent (as well as published notices and press releases about the settlement). Additionally, 150 opt-outs is low in comparison to the 905 Claims Forms that were returned. [19] Furthermore, as Interim Co-Lead Counsel discussed at the final fairness hearing, many of the 150 requests for exclusion come from entities or subsidiaries organizationally related to other opt-out filers, and so "the approximate number of individual parties that have excluded [themselves from the settlement] resembles **[**66]** more like approximately 74 [parties] as opposed to 150." Final Hr'g Tr. at 12:2-12:4. [20] As such, this factor weighs in favor of the proposed settlement's fairness and adequacy. *See* Cendant Corp., 264 F.3d at 234-35 (recognizing that low number of objectors and opt-outs strongly favors settlement and that "[t]he vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement").

[*270] *c. The Stage of the Proceedings and the Amount of Discovery Completed*

This *Girsh* factor requires the Court to evaluate whether Plaintiffs have an "adequate appreciation of the merits of the case before negotiating" settlement. *Prudential, 148 F.3d at 319* (quoting *Gen. Motors, 55 F.3d at 813*). "To ensure that a proposed settlement is the product of informed negotiations, there should be an inquiry into the type and amount of discovery the parties have undertaken." *Id.* The Third Circuit Court of Appeals has recognized that, even if a settlement occurs in an early stage of litigation, there are means for class counsel **[**68]** to apprise themselves of the merits of the litigation, such as "conduct[ing] significant independent discovery or investigations to develop the merits of their case (as opposed to supporting the value of the settlement)" or retaining their own experts or interviewing witnesses. *See* *Gen. Motors, 55 F.3d at 814*.

Here, the Court is satisfied that Interim Co-Lead Counsel had adequate knowledge of the litigation and informed negotiations. [21] First, Interim Co-Lead Counsel has represented to the Court that they "conducted extensive investigations into the case in preparation for filing of the complaint." Sparboe Final Approval Mot. at 17-18; *see also* Hausfeld Decl. ¶ 5 ("Plaintiffs entered the negotiations with Sparboe with a significant amount of knowledge of Defendants' antitrust conspiracy, as a result of months of investigations into the conspiracy conducted by the numerous experienced law firms representing them."); Asher Decl. ¶ 6 (recounting that the counsel's investigations included research into the egg industry, egg trade associations, such as United Egg Producers ("UEP"), UEP's animal welfare programs, the economics underlying the alleged conspiracy, and the legal issues relating **[**69]** to the conspiracy). [22]

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[19] Although the response rate to the Notice of Settlement (as measured by the number of Claim Forms returned in relation to number of Notices distributed) is low, the Court does not draw any inferences of negative class reaction to the settlement from this response rate. *Cf.* *Zimmer Paper Products, Inc. v. Berger & Montague, P.C., 758 F.2d 86, 92-93 (3d Cir. 1985)* (recognizing that an ostensibly low response rate may not in fact be low in light of other similar settlements). As previously discussed, the Court has determined that Class Members had adequate notice and opportunity to submit claims, opt out, or file objections. Furthermore, by comparison there were an additional **[**67]** 222 Class Members who only requested exclusion from the Sparboe Settlement. *See* Keogh Aff. ¶ 17.

[20] Interim Co-Lead Counsel has represented that several of the parties that opted out of the settlement, and that have now filed suits as Direct Action Plaintiffs, were in contact with counsel prior to the filing of this class action suit and so "Plaintiffs and [those parties" knew exactly what [the suit] was about. So . . . everyone was well familiar with what the settlement was, what the terms of settlement were, and what the litigation was about." *See* Final Hr'g Tr. at 42:19-43:2.

[21] As to this *Girsh* factor, the Plaintiffs' Motion argues that this factor weighs in favor of final approval because of "the cooperation that will be provided by Moark as a result of this Settlement." Mot. at 17. Because this factor requires assessment of the adequacy of counsel's knowledge and appreciation for the merits *before* settlement negotiations to ensure those negotiations are informed, the Court does not find this particular *post hoc* argument dispositive of whether Interim Co-Lead Counsel was adequately informed entering into and during settlement negotiations.

[22] The Court recognizes that once experienced litigators, such as Interim Co-Lead Counsel, have acquired certain knowledge or insights about the litigation, such information will continue to inform Counsel's understanding of the case and appreciation of the merits. Accordingly, the Court determines it is appropriate to cross-reference here its observations and findings made in its

Second, although virtually all formal discovery was stayed in this case **[**70]** until after the execution of the Sparboe and Moark Agreements, Interim Co-Lead Counsel pursued informal discovery prior to negotiating settlement with Sparboe which enabled counsel to obtain the information that Plaintiffs needed concerning the merits of the case. *See* Prudential, 148 F.3d at 319 (recognizing that informal discovery methods can support adequate appreciation of the merits). Indeed, Interim Co-Lead Counsel has attested that they benefited from information exchanged during negotiations preceding the Sparboe settlement "including the production of hundreds of pages of highly pertinent documents, prior to entering the Settlement Agreement" and an interview with a Sparboe employee. *See* Sparboe Final Approval Mot. at 18; Hausfeld Decl. ¶¶ 7, 10, 12, 13. The information disclosed in that process pertained to the egg industry and specific conduct of the remaining Defendants. Asher Decl. ¶ 11. Interim Co-Lead Counsel represented that the documents Sparboe produced preceding and during the course of settlement negotiations, "support Plaintiffs' allegations that there was a conspiracy to reduce egg supply through various means." Hausfeld Decl. ¶ 14.

Indeed, Plaintiffs apparently **[**71]** used the information acquired from the Sparboe negotiations in drafting their Second Consolidated Amended Class Action Complaint. *See* Sparboe Final Approval Mot. at 2 ("As a result of Sparboe's significant cooperation, Plaintiffs were able to file the now-operative Complaint, unprecedented in size and detail, explaining, in over 500 paragraphs and 140 **[*271]** pages, the intricate workings of Defendants' conspiracy, as well as the statements made, meetings held and actions taken in furtherance thereof."). According to Plaintiffs, "Moark produced transactional data and over 3,200 other documents to [Plaintiffs]. Those materials contained general descriptions of times, places and corporate participants relating to the conspiracy, as well as details regarding [United Egg Producer]'s participation in the conspiracy for the entire length of the class period." Final Hr'g Tr. at 15:13-15:18. [23]

Third, prior to the commencement of the Moark Settlement negotiations, Moark, LLC and Norco Ranch, Inc. had answered the Second Consolidated Amended Class Action Complaint and set forth their affirmative defenses. Land O'Lakes, Inc. had moved for a Rule 12(b)(6) dismissal. These pleadings and motion provided Interim Co-Lead Counsel with an additional platform from which to ascertain Moark's positions on the case and thereby to evaluate the merits of the litigation.

Based upon **[**73]** the foregoing, the Court is satisfied that Interim Co-Lead Counsel, as highly experienced antitrust litigators, were in such a position prior to negotiating and entering into the Moark Settlement that they had an adequate understanding and appreciation of the strengths and weaknesses of the Plaintiffs' case. Accordingly, the Court determines this factor weighs in favor of settlement.

d. Risks of Establishing Liability, Damages, and Maintaining the Class Action Through Trial

These three *Girsh* factors concern the risks of establishing liability, damages, and maintaining a class action through trial. The factors require the Court to "survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefits of an immediate settlement." Warfarin, 391 F.3d at 537. The inquiry requires balancing "the likelihood of success and the potential damage award if the case were

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separate Memorandum concerning final approval of the Sparboe Settlement as it is relevant to the Court's independent assessment of this *Girsh* factor.

[23] Additionally, Moark "provided sales data and other financial information" in advance of settlement negotiations "that permitted Plaintiffs to accurately estimate the range of damages that could be proven at trial." Bernstein Decl. ¶ 9. This particular information exchange appears primarily to have assisted **[**72]** Interim Co-Lead Counsel in supporting the value of the settlement. *See, e.g., id.* ¶ 16 (framing the settlement amount in terms of Moark egg sales, net profits, and availability of "reliable data"); Mot. at 11-12 ("The Settlement Agreement was only entered into after careful review of Moark's sales figures, net profits and market share during the damages period, and balanced them against the likely expense of litigating claims against Moark through trial."). However, this does not appear to be the only result of the information exchange because such information also would have furthered counsel's appreciation for the merits of the case as well as establishing damages and identification of potential class members.

taken to trial against the benefits of immediate settlement." *Prudential, 148 F.3d at 319*. For example, the Court assesses the risks of establishing liability to "examine what the potential rewards (or downside) of litigation might have been had class counsel decided to **[**74]** litigate the claims rather than settle them." *Gen. Motors, 55 F.3d at 814*. As another example, the inquiry into establishing damages "attempts to measure the expected value of litigating the action rather than settling it at the current time." *Id. at 816*.

In cases of settlements with only a subset of defendants to the suit, as is the case here:

> [g]iven that the litigation might continue against other defendants, the parties may be reluctant to disclose fully and candidly their assessment of the proposed settlement's strengths and weaknesses that led them to settle separately. The adequacy of the settlement depends in part on the relative exposure and resources of other parties. An informed evaluation is extremely difficult if discovery is incomplete or has been conducted against only a few of the defendants.

Herr, *supra*, § 21.651, at 505. Thus, the Court understands why Plaintiffs decline to provide a detailed assessment of any risks perceived in establishing liability and damages, and instead emphasize that the Court should consider Interim Co-Lead Counsel's estimation of the probability of success in assessing these factors. *See* Mot. at 18-19 & n.8. Indeed, the Court gives credence **[**75]** to **[*272]** counsel's representation that although "they believe [Plaintiffs] will prevail at trial, they recognize that antitrust cases, like all complex litigation against large companies with highly talented defense counsel, have inherent risks." *Id.* at 18-19. The record demonstrates that counsel have significant experience in antitrust cases such as this one which ought to enable them to appreciate the strengths and weakness of the case and the risks of maintaining the action through trial.

Furthermore, antitrust class action litigation is complex, and, especially at its early stages, inherently rife with risk and unpredictability in terms of ultimately prevailing to establish liability and damages and achieve class certification. The Court finds that this suit presents no exception. The bulk of discovery, dispositive motion practice, expert discovery, class certification, and trial are on the horizon of this case with the attendant expense and uncertainties. Thus, there is a genuine risk of not prevailing in establishing class certification, liability, or damages. As all experienced litigators and jurists know, that a jury will be the ultimate fact-finder at trial presents further risks **[**76]** and uncertainties.

The motion practice that has already transpired is indicative of the future risk that Plaintiffs face in prosecuting their case against Moark. The parties have already engaged in extensive motion practice concerning the Second Consolidated Amended Class Action Complaint, which initially included Land O'Lakes, Inc.'s individual motion to dismiss before it was withdrawn subject to final approval of the Moark Settlement. The Plaintiffs' pending motion for leave to file a Third Consolidated Amended Class Action has been challenged in part by one group of defendants as to the claims against them individually.

Based on the detailed allegations in the Second Consolidated Amended Class Action Complaint, Plaintiffs appear to have evidence to support their theory that Defendants conspired to reduce the supply of eggs and egg products, and thereby increase prices. *See* *Fed. R. Civ. P. 11(b)* (concerning representations to the Court in pleadings). Nonetheless, even assuming Plaintiffs could establish their theory of an overarching conspiracy at trial, their success in establishing liability and damages as to individual defendants, such as Moark, is by no means assured.

Through the **[**77]** Sparboe Settlement, Plaintiffs may have secured cooperation in prosecuting their case, which, according to Interim Co-Lead Counsel, "significantly reduces the risks associated with discovery." *See* Sparboe Final Approval Mot. at 20. Nonetheless, such cooperation is no guarantee to success in proving liability and damages in this complex litigation, and Plaintiffs still must show that Defendants individually agreed to join the alleged conspiracy. Indeed, the other Defendants' individual motions to dismiss raised issues concerning whether they individually actually joined the conspiracy. Furthermore, Defendants jointly challenged at the motion to dismiss stage whether Plaintiffs could recover damages outside the statute of limitations. These issues remain live subjects for discovery and additional dispositive motion practice, and any trial on these issues would be protracted and involve a significant amount of testimony and documentary evidence, particularly given the time period at issue, which spans almost a decade, and the number of parties involved.

In **[**78]** addition to challenging the Plaintiffs' complaints, Defendants also have demonstrated an intent to vigorously defend against this suit—including by raising privilege issues relating to the Sparboe Settlement, *see, e.g.*, Order (Doc. No. 361); Order (Doc. No. 403), and other discovery-related issues, *see, e.g.*, Conf. Tr. (Doc. No. 591); Conf. Tr. (Doc. No. 675); Case Mgmt Order Nos. 16 to 19 (Doc. Nos. 604, 626, 656, and 676). Furthermore, Defendants have indicated during the course of these proceedings, particularly during the development of a discovery plan, that they intend to advance defenses, such as an agricultural cooperative immunity defense under the Capper-Volstead Act and a defense involving standard-setting conduct, that will present difficult factual and legal issues for the parties, creating their own brand and quantity of uncertainty for the Plaintiffs' case. *See, e.g.*, Case Mgmt Order No. 19. The parties also contemplate expert discovery on damages, which likely will result in competing expert opinions representing very **[*273]** different damage estimates that will present further ambiguity as to resolution on damages as to each Defendant. *See, e.g.*, Conf. Tr. (Doc. No. 675).

It **[**79]** is entirely likely that Plaintiffs would face similar, if not identical, legal challenges and uncertainties in their claims again Moark. Moark's counsel has represented that Moark would otherwise vigorously defend itself against the Plaintiffs' claims, but for reaching a settlement agreement. Indeed, according to counsel, "the Moark employees feel as though they have never done anything unlawful. They have never engaged in any price fixing. And [insofar that they may cooperate with Plaintiffs pursuant to the Moark Settlement] they will not come into any interview or deposition saying that they had ever done anything wrong." Final Hr'g Tr. at 43:9-43:16.

Finally, Plaintiffs not only face the risk that they will not succeed in establishing liability and damages, but also the risks associated with certifying and maintain a class. *See* *Warfarin, 391 F. 3d at 537*. Indeed "'the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action.'" *Id.* (quoting *Gen. Motors, 55 F.3d at 817*). "The value of a class action depends largely on the certification of the class because, not only does the aggregation of the claims enlarge the **[**80]** value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits." *Gen. Motors, 55 F.3d at 817*. Thus, this *Girsh* "factor measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial," recognizing that a "district court retains the authority to decertify or modify a class at any time during the litigation if it proves to be unmanageable." *Id.* (citing *Prudential, 148 F.3d at 321*).

Many, if not all, Defendants no doubt will vigorously oppose class certification. As Interim Co-Lead Counsel has recognized, Moark, if it remained in this litigation, would join those defense efforts in this respect. *See* Mot. at 20 ("Interim Counsel acknowledges that had Moark not settled, it would have joined the non-settling Defendants in contesting class certification."). The Court of Appeals for the Third Circuit has recognized: "There will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." *Prudential, 148 F.3d at 321*. [24] Thus, there are inherent difficulties in bringing a class action to trial **[**81]** that apply here.

Because Plaintiffs would face genuine risks and uncertainties in establishing liability and damages against Moark, and in obtaining and maintaining class certification, should the claims against Moark continue without settlement, these three factors weigh in favor of settlement.

e. The Ability of the Defendant to Withstand a Greater Judgment

This factor "is concerned with whether the defendants could withstand a judgment for an amount significantly greater than the Settlement." *Cendant, 264 F.3d at 240*. Thus, the Court must consider here whether Moark could withstand a judgment for an amount significantly greater than $25 million and the costs associated with the proposed cooperation.

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[24] Based on this observation, the Court of Appeals has questioned the significance of this factor in "settlement-only" class actions following the Supreme Court's decision in *Amchem. See* *Prudential, 148 F.3d at 321*.

The limited evidence in the record suggests that Moark would be able to withstand a greater judgment. Indeed, the "$25,000,000 Settlement Amount represents almost 1% of total Moark egg sales during the class period and almost 28% of Moark's cumulative net profits in the egg division **[**82]** for the last six years." Bernstein Decl. ¶ 16. "For the full time period in which reliable data was available (2002-2008), Moark's total shell egg sales to non-defendants from 2002-2008 were approximately $2,456,200,000. Moark's net profits from shell eggs and egg products were approximately $90,516,000." *Id.* There is no evidence concerning the financial or other possible impacts a greater judgment amount would have on Moark. *See, e.g.,* **[*274]** *Cendant, 264 F.3d at 240-41* (discussing the possibility of bankruptcy for a settling defendant).

Furthermore, the Plaintiffs' arguments tacitly suggest that Moark could withstand a larger judgment. They argue that even if Moark could withstand a larger judgment, it is "not an obstacle to approving the Settlement." Mot. at 20.

Thus, the record suggests that Moark could pay substantially more than the consideration set forth in the Settlement terms. Accordingly, this factor does not weigh in favor of approval.

f. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation

"The last two *Girsh* factors ask whether the settlement is reasonable in light of the best possible recovery and the risks the **[**83]** parties would face if the case went to trial." *Prudential, 148 F.3d at 322*. In other words, the Court evaluates "whether the settlement represents a good value for a weak case or a poor value for a strong case. The factors test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *Warfarin, 391 F.3d at 538* (citing *Prudential, 148 F.3d at 322*).

Here, the Court evaluates the settlement in light of its monetary and nonmonetary consideration. Ordinarily, "[i]n order to assess the reasonableness of a proposed settlement seeking monetary relief, 'the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement.'" *Prudential, 148 F.3d at 322*. (citing *Gen. Motors, 55 F.3d at 806*). [25] "Settlements involving nonmonetary provisions for class members . . . deserve careful scrutiny to ensure that these provisions have actual value to the class," which can be accomplished through a *Rule 23(e)* analysis. *Fed. R. Civ. P. 23(h)* advisory committee note **[**84]** (2003). "Despite the difficulties they pose to measurement, nonpecuniary benefits . . . may support a settlement." *Bolger, 2 F.3d at 1311*.

As this settlement is structured to provide both monetary and nonmonetary consideration, it is difficult to determine accurately the actual total value of the proposed settlement. The traditional calculus for ascertaining the value of monetary settlements under Third Circuit law is inappropriate under these circumstances because it would not entirely capture the value of the relief afforded by this settlement. *Cf.* ***[**85]*** *Prudential, 148 F.3d at 323* (recognizing that "both the structure of the settlement and the uncapped nature of the relief provided make it difficult to determine accurately the actual value of the settlement" and as such, "the traditional calculus suggested by the *Manual for Complex Litigation 2d* and adopted by this Court in *G.M. Trucks* [*Gen. Motors*] cannot be applied to this case"). [26]

The Court determines that the $25 million monetary relief in conjunction with the additional, valuable consideration of Moark's agreement to cooperate with Plaintiffs is reasonable both in light of the best possible recovery against

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[25] The Third Circuit Court of Appeals expects that "settling parties . . . should . . . provide[] information to determine the range of reasonableness of the [settlement] allocation 'in light of the best possible recovery,' and 'in light of all the attendant risks of litigation.'" *Pet Food, 629 F.3d at 354* (citations omitted). The Court further explains that "'[t]his figure should generate a range of reasonableness (based on size of the proposed award and the uncertainty inherent in these estimates) within which a district court approving (or rejecting) a settlement will not be set aside.' Precise value determinations are not required.'" *Id.*

[26] Plaintiffs have not proffered any evidence for the record concerning such a present value analysis.

Moark and in light of the risks the parties would face if the case went to trial against Moark. Certainly, calculating the best possible recovery against Moark for the class in the aggregate is "exceedingly speculative" **[**86]** at this point in time given the previously-discussed risks of establishing liability and damages associated with this complex litigation, even when considering that **[*275]** treble damages are technically available for recovery under the Plaintiffs' Sherman Act claim.

At the same time, the Court recognizes that Moark's agreement to cooperate with Plaintiffs throughout the course of pre-trial proceedings and trial is valuable consideration in light of the risks in proceeding with this suit against the remaining Defendants. [27] Interim Co-Lead Counsel has attested that "[o]ne such benefit [of Moark's cooperation] is information regarding the conspiracy and Defendant UEP's participation in it for the length of the Class Period" and the provision of "important information and witnesses that bolster Plaintiffs' claims against the non-settling Defendants will be made available to Plaintiffs without the time and expense involved in pursuing formal discovery." Bernstein Decl. at ¶ 18. Indeed, Moark produced some 3,200 documents with transactional data to Plaintiffs already, as well as making available employees for Plaintiffs to interview. *Id.* Granted, it seems that much of this non-privileged information **[**87]** would otherwise be available eventually through discovery as required under the federal rules, if Moark remained in this suit. Nonetheless, such cooperation reduces costs and time associated with formal discovery. Indeed, the Moark Settlement likely has short-circuited at least some of the expense and delay of future discovery by securing Moark's cooperation and removing the Moark forces from those who would contest or complicate Plaintiffs' discovery efforts. Additionally, Plaintiffs gain a clear tactical advantage in obtaining such information through non-traditional discovery mechanisms, including, by way of example, the advantage of having this information to formulate strategy in taking discovery from the remaining Defendants, specific tailoring the scope and focus of discovery, and so forth. Finally, Plaintiffs have represented to the Court that Moark has helped Interim Co-Lead Counsel in resolving privilege issues relating to the Sparboe Settlement. Final Hr'g Tr. at 15:19-16:3.

While the value of this **[**88]** cooperation is certainly of tangible value, it is not entirely without compare. First, Sparboe, too, has agreed to cooperate with Plaintiffs—albeit the information that Sparboe purportedly can provide pertains to a shorter time period than Moark's information. Second, Moark's cooperation does not appear to assure that Plaintiffs will have conclusive evidence in support of their claims against the remaining Defendants. Moark's counsel represented concerning the nature of Moark's cooperation as follows: "No one will come in and say there was this giant conspiracy and people conspired and were all sitting in a room conspiring. [B]ut they will say exactly what happened, when it happened and who did what. Whatever that means. It means whatever it is." Final Hr'g Tr. at 43:9-43:16. Indeed, Moark is a named Defendant in other cases in this litigation for the Indirect Purchaser Plaintiffs and Direct Action Plaintiff Giant Eagle Inc., Winn-Dixie Stores, Inc., Roundy's Supermarkets, Inc., C&S Wholesale Grocers, Inc., and H.J. Heinz Company, L.P., and the Moark Settlement does not impact those plaintiffs' claims against which Moark must continue to defend.

Nonetheless, when considering these two **[**89]** *Girsh* factors in light of the record *in toto*, the Court is persuaded that the $25 million settlement amount and Moark's cooperation confer real and substantial benefits upon the Class. The Court further concludes that the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial against Moark. These factors weigh in favor of approval of the settlement.

g. Prudential *Factors*

The relevant *Prudential* factors weigh in favor of approving the Moark Settlement, or, at worst, are neutral factors. First, the Court has already addressed the impact that the limited extent of discovery on the merits thus far has on this litigation and other factors that bear on the ability to assess the **[*276]** probable outcome of a trial on the merits of liability and individual damages.

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[27] The Court does not comment on whether the information and facts that Moark may provide would be established, or even admissible, at trial, based upon counsel's representations.

Second, the settlement agreement allows putative class members the right to opt out of the settlement. Indeed, some parties exercised this right by filing requests for exclusion. Furthermore, the Notice Packet included both a Notice of the Moark Settlement and a Notice of the Sparboe Settlement, thereby simultaneously notified class members of the Sparboe Settlement and **[**90]** enabling class members to assess the adequacy of the two settlements in conjunction with one another and as to the whole suit.

Third, the results achieved by the settlement for the Class and Subclasses are immediate, concrete, and realized without the costs and delays associated with extensive discovery and other later stages of litigation. Moark's cooperation pursuant to the settlement aids the Plaintiffs in prosecuting and resolving their claims against the other Defendants. Indeed, Interim Co-Lead Counsel describe the Moark Settlement (in conjunction with the Sparboe Settlement) as an "icebreaker" settlement, which is a term used to describe "the first settlement in the litigation—and [a settlement that] should increase the likelihood of future settlements." *Linerboard, 292 F. Supp. 2d at 643*. By contrast, it is unclear, given the aforementioned risks and uncertainties, *supra*, whether Direct Action Plaintiffs who are individually prosecuting their claims apart from the Class, or other parties who opted-out of the Moark Settlement, will be successful in their claims against Moark and the other Defendants, and whether that result will be immeasurably better than the result for class **[**91]** members under the settlement agreement and as to the entire suit. For the same reasons, it is unclear whether those opt-out parties might achieve better settlements than the class to resolve similar claims against Moark.

Fourth, the Moark Settlement only releases Class Members' claims against Moark for claims arising out of injuries or damages that occurred "from the beginning of time to the date when notice of the Court's entry of an order preliminarily approving this Agreement is first published" *and* that resulted from the conduct asserted in the Plaintiffs' suit. As such, future claims for injuries or damages against Moark arising outside this time period but resulting from the alleged conduct giving rise to the class claims are not barred. The Release does not apply to those parties who opted-out of the Moark Settlement, such as Direct Action Plaintiffs Giant Eagle Inc., Winn-Dixie Stores, Inc., Roundy's Supermarkets, Inc., C&S Wholesale Grocers, Inc., and H.J. Heinz Company, L.P.

Fifth, all segments of the class are being treated equally relative to the monetary relief under the Moark Settlement. The distribution of the Settlement Amount, after administrative costs and expenses **[**92]** and counsel fees, is a *pro rata* share proportionate to the dollar amount of a class members' direct purchases of shell egg and egg products in the United States during the period designated in the Agreement. There is no differentiation among class members in terms of subclasses or class representatives.

The Moark Settlement sets forth a method for calculating the distribution for recovery by Class Members based upon *pro rata* allocations, which appears to conform with a common formula used in class actions:

> [A] common formula in class actions for damages is to distribute the net settlement fund after payment of counsel fees and expenses, ratably among class claimants according to the amount of their recognized transactions during the relevant time period. A typical requirement is for recognized loss to be established by the filing of proofs of claim, or statements of intention to prove claims, based on a specified value of transactions involved. . . . [I]n antitrust class actions, a proof of claim form may be utilized in disseminating the settlement proceeds among class members."

Newberg, supra, § 12.35. Although the record demonstrates that the distribution allocation will be based upon **[**93]** *pro rata* shares after costs and expenses and that the amount of recovery "will be less than the total amount you paid" for the eggs and egg products, given that the recovery represents "overcharge," Notice at 5, Plaintiffs have not submitted a formal plan of allocation with the settlement agreement concerning the procedure for processing individual claims under the settlement, **[*277]** addressing administrative costs and fees for the settlement, and so forth. "The plan of allocation is usually submitted with the settlement agreement for consideration at the settlement hearing, though it may be deferred until a later date with court approval." Newberg, *supra*, § 12.35. Here, Plaintiffs have represented they intend to separately apply to the Court to approve a final plan of allocation following settlement approval. [28]

Sixth, the Moark Settlement's provision for the possible award of attorneys' fees and costs from the Settlement Amount is a neutral factor at this time. The Court cannot ascertain based upon the Agreement, which merely provides that Plaintiffs may seek attorneys' fees, whether such unspecified fees and costs impact the fairness, reasonableness, and adequacy of the settlement. [29] As a general matter, that the parties have agreed the attorneys' fees and costs may be awarded from the Settlement Amount would not weigh against approving the settlement. *Cf.* Newberg, *supra*, § 12:3 ("The defendants in a class action settlement may properly agree to pay the plaintiffs' attorneys' fees and expenses . . . . Such an agreement may take the form of an agreement to pay reasonable fees, to be subsequently determined by the court . . . ."). The Settlement Agreement specifically provides that "Class Counsel may seek an award of attorneys' fees and reasonable litigation expenses approved by the Court, to be paid out of the Settlement Amount after the Final Approval of the Agreement." Moark Settlement ¶ 35. The Notice of Settlement expands upon the agreement's language, **[**95]** stating that "Class Counsel will apply to the Court for an award from the Settlement Fund of attorneys' fees and for reimbursement of litigation costs and expenses incurred, including fees and costs expended while providing Notice to the Class and while administering the Settlement Fund (including the plan of allocation)." Notice at 4. The Notice also stated that the application would be for an award "in an amount not to exceed thirty percent of $25 million as well as the costs and expenses incurred." *Id.* Because, here, the Moark Settlement Agreement provides that the attorneys' fees and expenses ultimately will be determined upon approval of the Court, which will require the assessment of the reasonableness of any such fees and expenses sought pursuant to *Fed. R. Civ. P. 23(h)* (and *Fed. R. Civ. P. 54(d)(2)*), the Moark Settlement's provisions concerning attorneys' fees and expenses do not raise issues at this time that would weigh against approving the settlement.

h. Summary of Girsh *and* Prudential *Factors*

Upon considering the Moark Settlement Agreement in light of all of the *Girsh* and the relevant *Prudential* factors, the Court is satisfied that the settlement is fair, reasonable, and adequate. As discussed, a few of the factors are neutral or weigh against settlement approval. However, all of the factors considered in determining the fairness of a settlement "are a guide; an unfavorable conclusion regarding one or more factors does not automatically render the settlement unfair." 2 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 6:8 (6th ed. 2010); *see also* *Ehrheart, 609 F.3d at 605* **[**97]** (dissenting, Smith, J.) (quoting same). Accordingly, not every factor need weigh in favor of settlement in order for the settlement **[*278]** to be approved by the Court. *See* *Cendant, 264 F. 3d at 242-43* (affirming a final settlement approval when not all factors weighed in favor of approval). Because, on balance, the factors as considered above weigh in favor of settlement, the Court concludes that approval of the settlement is appropriate pursuant to *Fed. R. Civ. P. 23(e)*.

V. Conclusion

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[28] *See generally* ***In re Ikon Office Solutions, Inc., Secs. Litig., 194 F.R.D. 166, 184 (E.D. Pa. 2000)*** ("Approval of a plan of allocation of a settlement fund in a class action is 'governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate.' " (quoting *In re Computron Software, Inc., 6 F. Supp. 2d 313, 321 (D.N.J. 1998))*; **[**94]** Newberg, *supra*, § 12.35 (same).

[29] As discussed earlier, following the final fairness hearing Plaintiffs filed a Motion for an Award of Attorneys' Fees and for Reimbursement of Expenses, in which Plaintiffs seek specific amounts for attorneys' fees and reimbursement **[**96]** of expenses relating to the litigation to be paid from the Moark Settlement. The Court intends to address this Motion separately, and does not consider here the substantive arguments presented in that Motion in relation to considering whether the Moark Settlement is fair, reasonable, and adequate. After all, the Court's inquiry as to this *Prudential* factor focuses on whether the settlement agreement's *provision* for attorneys' fees are reasonable, and that provision only sets forth that attorneys' fees and expenses are subject to Court approval.

For the foregoing reasons, the Court determines that the Class and Subclasses meet the certification requirements of *Rule 23* for settlement purposes, and concludes that the proposed settlement agreement is fair, reasonable, and adequate. Accordingly, the Court grants the Plaintiffs' motion for final approval of the class action settlement with Defendants Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc.

An Order consistent with this Memorandum follows.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

ORDER GRANTING FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT BETWEEN DIRECT PURCHASER PLAINTIFFS AND DEFENDANTS MOARK, LLC, NORCO RANCH, INC., AND LAND O'LAKES, INC.

AND NOW, this 16th **[**98]** day of July, 2012, upon consideration of the Motion for Final Approval of the Class Action Settlement Between Plaintiffs and Defendants Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc. (Doc. No. 465), and following a final fairness hearing, in accordance with *Federal Rule of Civil Procedure 23*, it is hereby **ORDERED** that the Motion (Doc. No. 465) is **GRANTED** as outlined in this Order and the accompanying Memorandum.

Based on the Court's review of the proposed Settlement Agreement Between Direct Purchaser Plaintiffs and Defendants Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc. ("Settlement Agreement"), and the entire record of this case, and having conducted a final fairness hearing on the matter, the Court determines as follows:

1. The Court has jurisdiction over the subject matter of this action.

2. Terms used in this Order that are defined in the Settlement Agreement, unless otherwise defined herein, have the same meanings in this Order as in the Settlement Agreement.

3. The following Settlement Class, as defined in the Settlement Agreement, which was conditionally certified in the Court's Order granting preliminary approval of this settlement, is certified for settlement purposes **[**99]** only as follows:

> All persons and entities that purchased eggs, including Shell Eggs and Egg Products, produced from caged birds in the United States directly from any Producer, including any Defendant, during the Class Period from January 1, 2000 through the date when notice of the Court's entry of an order preliminarily approving this settlement and certifying a Class for settlement purposes is first published.
>
> > a.) Shell Egg SubClass
> > All individuals and entities that purchased Shell Eggs produced from caged birds in the United States directly from any Producer including any Defendant, during the Class Period from January 1, 2000 through the date when notice of the Court's entry of an order preliminarily approving this settlement and certifying a Class for settlement purposes is first published, excluding individuals and entities that purchased only "specialty" Shell Eggs (certified organic, nutritionally enhanced, cage-free, free-range, and vegetarian-fed types) and "hatching" Shell Eggs (used by poultry breeders to produce breeder stock or growing stock for laying hens or meat).
> >
> > b.) Egg Products SubClass

> All individuals and entities that purchased Egg Products produced from Shell Eggs **[**100]** that came from caged birds in the United States directly from any Producer, including any Defendant, during the Class Period from January 1, 2000 through the date when notice of the Court's entry of an order preliminarily approving this settlement and certifying a Class for settlement purposes is first published, excluding individuals and entities that purchased only "specialty" Egg Products (certified organic, nutritionally enhanced, cage-free, free-range, and vegetarian-fed types).

Excluded from the Class and SubClasses are Producers, and their respective parents, subsidiaries and affiliates, all government entities, as well as the Court and staff to whom this case is assigned, and any member of the Court's or staff's immediate family.

4. The Court finds, as discussed more thoroughly in the accompanying Memorandum, that the Settlement Class satisfies the applicable prerequisites for class action treatment under *Federal Rule of Civil Procedure 23(a)* and *(b)*. The Settlement Class is so numerous that joinder of all members is not practicable, there are questions of law and fact common to the Settlement Class, the claims of the Class Representatives are typical of the claims of the Settlement **[**101]** Class, and the Class Representatives will fairly and adequately protect the interests of the Settlement Class. For purposes of this settlement, questions of law and fact common to the members of the Settlement Class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

5. Notice of the Settlement Agreement to the Settlement Class required by *Rule 23(e) of the Federal Rules of Civil Procedure* has been provided in accordance with the Court's Orders granting preliminary approval of this settlement and notice of this settlement, and such Notice has been given in an adequate and sufficient manner; constitutes the best notice practicable under the circumstances; and satisfies *Federal Rules of Civil Procedure 23(c)(2)(B)* and *23(e)* and due process.

6. Defendants have filed notification of this settlement with the appropriate federal and state officials pursuant to the Class Action Fairness Act of 2005 ("CAFA"), *28 U.S.C. § 1715*.

7. As discussed more thoroughly in the accompanying Memorandum, the Court finds that the Settlement Agreement is sufficiently fair, reasonable **[**102]** and adequate to the Settlement Class pursuant to *Federal Rule of Civil Procedure 23(e)*. Specifically, the Court finds that the settlement meets the standard for an initial presumption of fairness. Additionally, the Court's analysis of the factors set forth in *Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975)*, and factors set forth in *In re Prudential Insurance Co. American Sales Practice Litigation Agent Actions, 148 F.3d 283 (3d Cir. 1998)*, as appropriate, leads to the conclusion that the relevant considerations weigh in favor of finding the settlement is fair, reasonable and adequate under *Federal Rule of Civil Procedure 23(e)*.

9. The Settlement Agreement is finally approved pursuant to *Federal Rule of Civil Procedure 23(e)* of the Federal Rules of Civil Procedure as fair, reasonable, and adequate, and the parties are directed to consummate the Settlement Agreement in accordance with its terms.

10. The United States District Court for the Eastern District of Pennsylvania shall retain jurisdiction over the implementation, enforcement, and performance of this Settlement Agreement, and shall have exclusive jurisdiction over any suit, action, motion, proceeding, or dispute arising out of or **[**103]** relating to this Settlement Agreement or the applicability of this Settlement Agreement that cannot be resolved by negotiation and agreement by Plaintiffs and Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc. This Settlement Agreement shall be governed by and interpreted according to the substantive laws of the Commonwealth of Pennsylvania without regard to its choice of law or conflict of laws principles. Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc. submit to the jurisdiction in the Eastern District of Pennsylvania only for the purposes of this Settlement Agreement and the implementation, enforcement and performance thereof. Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc. otherwise retain all defenses to the Court's exercise of personal jurisdiction over Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

LexisNexis

In re Processed Egg Prods. Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

July 16, 2012, Decided; July 16, 2012, Filed

MDL No. 2002; 08-md-02002

Reporter

284 F.R.D. 278 *; 2012 U.S. Dist. LEXIS 98302 **; 2012-2 Trade Cas. (CCH) P78,126; 2012 WL 2885918

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION. THIS DOCUMENT APPLIES TO: ALL DIRECT PURCHASER PLAINTIFF ACTIONS

Subsequent History: Motion denied by, Motion granted by, in part, Motion denied by, in part *In re Processed Egg Prods. Antitrust Litig., 2012 U.S. Dist. LEXIS 143601 (E.D. Pa., Oct. 3, 2012)*

Prior History: *In re Processed Egg Prods. Antitrust Litig., 284 F.R.D. 249, 2012 U.S. Dist. LEXIS 98301 (E.D. Pa., July 16, 2012)*

Core Terms

settlement, egg, Notice, class action, class member, discovery, factors, Plaintiffs', parties, settlement agreement, damages, cooperation, Subclasses, risks, purchasers, products, antitrust, Consolidated, predominance, documents, shell, weigh, class certification, terms, proposed settlement, merits, negotiations, Defendants', entities, producer

Counsel: **[**1]** For IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION, IN RE: IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION.

For SANDRA A. JESKIE, Special Master: SANDRA A. JESKIE, LEAD ATTORNEY, DUANE, MORRIS LLP, PHILADELPHIA, PA.

Judges: GENE E.K. PRATTER, United States District Judge.

Opinion by: GENE E.K. PRATTER

Opinion

[*281] **MEMORANDUM**

GENE E.K. PRATTER, J.

Direct Purchaser Plaintiffs move the Court for final approval of a proposed settlement agreement between the Plaintiffs and Defendant Sparboe Farms, Inc. ("Sparboe"). [1] Under the proposed Sparboe Settlement, Plaintiffs will release Sparboe from all pending claims in exchange for cooperation in prosecuting the Plaintiffs' claims against the

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[1] Plaintiffs filed a Motion for Final Approval of Settlement Agreement with Sparboe Farms, Inc. (Doc. No. 443) (hereinafter, "Mot."). They also submitted filings supplementing this Motion. (Doc. Nos. 483 and 485).

remaining Defendants, such cooperation being in the form of documents and witness testimony. For the reasons set forth below, the Court grants the motion for final approval of the Sparboe Settlement.

I. Factual and Procedural Background[2]

This litigation embraces numerous consolidated and coordinated actions based upon allegations of a conspiracy in violation of the Sherman Act among egg producers and trade groups to manipulate the supply of eggs and egg products and thereby affect the domestic prices of those goods. *See* In re Processed Egg Prods. Antitrust Litig., 588 F. Supp. 2d 1366, 1367 (J.P.M.L. 2008). The plaintiffs are direct purchasers (such as grocery stores, commercial food manufacturers, restaurants, other food service providers, and other entities who purchase directly from Defendants or other egg producers) and indirect purchasers (individual consumers who purchased from other parties along the distribution chain) of shell eggs, egg products, or both. The direct purchaser plaintiffs are categorized as "Direct Purchaser Plaintiffs" who have brought a consolidated class action against Defendants, **[**3]** and "Direct Action Plaintiffs" who are pursuing individual actions against Defendants.

A. Direct Purchaser Plaintiffs' Suit

The moving Plaintiffs are Direct Purchaser Plaintiffs who accuse defendant egg producers, including Sparboe, and certain trade groups, of violating Section 1 of the Sherman Act and seek injunctive relief, treble damages, attorneys' fees and costs. They have demanded a jury trial. These Plaintiffs filed a consolidated class action complaint, which **[*282]** they have amended. The allegations of the consolidated complaint superseded or replaced all of the previously-filed individual and consolidated complaints.

The most recent iteration of the Plaintiffs' claim is the Second Consolidated Amended Class Action Complaint (Doc. No. 291) which prompted extensive motion practice. The culmination of this motion activity resulted in the Court dismissing without prejudice claims brought against individual Defendants Hillandale-Gettysburg, L.P., Hillandale Farms, Inc., and Hillandale Farms East, Inc. and United Egg Association. *See* Sept. 26, 2011 Mem. and Order, 821 F. Supp. 2d 709 (Doc. Nos. 562 and 563). The Court also dismissed without prejudice claims against all Defendants for damages **[**4]** barred by the four-year statute of limitations. *See* Nov. 30, 2011 Opinion and Order, 2011 U.S. Dist. LEXIS 139995, 2011 WL 5980001 (Doc. Nos. 593 and 594). [3]

As a result of these rulings, Plaintiffs presently proceed on the core of their Section 1 Sherman Act claims against Defendants. At the time the parties' filed their motions to dismiss, the Court partially lifted the stay of discovery previously entered at the outset of this litigation. Lifting the stay permitted the parties to exchange requests for production of documents and confer as to various aspects of a discovery plan. *See* Order (Doc. No. 320); Pls.' Mot. for an Award of Attorneys' Fees and for Reimbursement of Expenses (Doc. No. 493) (hereinafter, "Fees Mot."), Ex. 1, Asher Decl. ¶¶ 21-22 (Doc. No. 493-2) (hereinafter, "Asher Decl."). **[**5]** Following the Court's rulings on the motions to dismiss the Second Consolidated Amended Class Action Complaint, the parties requested a further partial lifting of the discovery stay. The Court entered Orders further partially lifting the discovery stay, commencing the discovery period, and setting forth various discovery deadlines and parameters concerning, *inter alia*, document

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[2] The background discussed here is drawn from the exhibits and materials submitted in relation **[**2]** to the Motion *sub judice*, the hearing on the Motion, and the overall record of this case, including the Plaintiffs' Motion for Final Approval of the Class Action Settlement Between Plaintiffs and Defendants Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc. (Doc. No. 465) (hereinafter, "Moark Final Approval Mot.").

[3] Plaintiffs have filed a motion seeking leave to file a Third Consolidated Amended Class Action Complaint that seeks, *inter alia*, to revive claims against Defendants Hillandale-Gettysburg, L.P., Hillandale Farms, Inc., and Hillandale Farms East, Inc. and to amend claims of fraudulent concealment and tolling of the statute of limitations. Opposition briefing has been filed, and the Court will address that motion separately.

production, interrogatories, depositions, non-party discovery, class certification, and class certification experts. *See* Case Mgmt. Orders Nos. 18 and 19 (Doc. Nos. 656 and 676).

B. Sparboe Settlement Negotiations

Sparboe was named as a Defendant in the Consolidated Amended Class Action Complaint (Doc. No. 41). Less than two months after the Consolidated Amended Class Action Complaint was filed, Interim Co-Lead Counsel [4] and Sparboe's counsel began engaging in settlement negotiations. Mot., Ex. A, Hausfeld Decl. ¶ 8 (Doc. No. 443-2) (hereinafter, "Hausfeld Decl."). Spanning three months, these negotiations included numerous telephone conferences and four in-person meetings. *Id.* ¶¶ 6, 7. The negotiations centered upon Sparboe cooperating with Plaintiffs in the prosecution of the claims against the other Defendants **[**6]** by providing to Plaintiffs information in the form of documents and witness testimony. *Id.* ¶¶ 8-9.

Sparboe made an initial proffer to Interim Co-Lead Counsel in Washington, D.C. "regarding what Sparboe's information would show and how it would assist Plaintiffs' in the prosecution of their case." *Id.* ¶ 9. A month later, Sparboe "proffered both hundreds of pages of documents and live witness testimony from Sparboe employee Wayne Carlson in Minneapolis" to Plaintiffs. *Id.* ¶ 10. Plaintiffs have represented that Interim Co-Lead Counsel was "not initially convinced that they should enter into a settlement agreement" at that time, and Interim Co-Lead Counsel and Sparboe's counsel held **[**7]** several telephone conferences concerning the nature of Sparboe's cooperation. *Id.* ¶ 11.

[*283] Following these conferences, Sparboe then proffered "hundreds of pages of additional documents, as well as identifying several executives and current and former Sparboe employees who could offer testimony in the case that may corroborate the information contained in the documents, as well as provide additional information." *Id.* ¶ 12. Shortly thereafter, Sparboe's counsel proffered documents and "additional descriptions of expected witness testimony." *Id.* ¶ 13.

In addition to the proffers concerning documents and witness testimony, at some point during negotiations Interim Co-Lead Counsel made a demand for monetary compensation that "was based on what an econometric analysis would have produced with regard to the production of transaction data and then an analysis of the market and the transaction data as it related to Sparboe with the traditional approach as well of having Sparboe, if it were the first [party to settle], have a discount off its actual damages." Prelim. Hr'g Tr. at 7:16-21. (Doc. No. 198). Sparboe consistently maintained the position that it would not agree to a settlement that provided **[**8]** direct monetary compensation to the Class Members. *See* Prelim. Hr'g Tr. at 7:12-14; *id.* at 7:22-23.

Based upon the conferences and proffers, Interim Co-Lead Counsel concluded that Sparboe's cooperation in advance of discovery would provide information that would supplement and enhance the information that Interim Co-Lead Counsel previously had uncovered through their own independent investigation prior to filing the First Consolidated Amended Complaint. *See* Hausfeld Decl.¶ 14; Mot. at 3. Thereafter, the parties reached an agreement and executed the Sparboe Settlement Agreement. Hausfeld Decl. ¶ 15.

The day after the parties executed the Agreement, Sparboe produced documents to Interim Co-Lead Counsel for inspection and review in Minneapolis, Minnesota. *Id.* ¶ 16. In the next months, Sparboe made available for interviews four witnesses, who, according to Interim Co-Lead Counsel, "provided invaluable information about Defendants' conspiracy." *Id.* ¶ 17. Based upon the information that Interim Co-Lead Counsel obtained from Sparboe, they prepared the Second Consolidated Amended Class Action Complaint. *Id.* ¶ 18. Sparboe is not

[4] In Case Management Order No. 1, the Court approved the following law firms to serve as Interim Co-Lead Counsel: Weinstein Kitchenoff & Asher LLC; Hausfeld LLP; Bernstein Liebhard LLP; and Susman Godfrey LLP. It appears there are additional counsel that Interim Co-Lead Counsel have directed to work on this case. *See* Fees Mot. at 1. Thus, reference herein to "Interim Co-Lead Counsel" may also encompass the efforts of other counsel who represent Plaintiffs and acted at the direction of Interim Co-Lead Counsel.

presently named in this Complaint. *See* Second Consol. Am. Class **[**9]** Action Compl. ¶ 3. [5] Presumably, Sparboe's absence is the result of the pending settlement. The following discussion of the nature of the case presupposes Sparboe would indeed occupy in the claims going forward the role it was assigned in the claims initially if the settlement had not been achieved.

The Court preliminarily approved the Sparboe Settlement and certified the Class and Subclasses for settlement purposes following a hearing. *See* Order on Preliminary Approval of Sparboe Settlement (Doc. No. 214). In the same Order, the Court stayed the Plaintiffs' suit against Sparboe pending further Order of the Court. *See id.* at ¶ E.1. In a separate Order, the Court **[**10]** also approved the form of notice of the Sparboe Settlement. *See* Order Approving Dissemination of Notice of Settlements Between Direct Purchaser Plaintiffs and (i) Defendant Sparboe Farms, Inc. and (ii) Defendants Moark, LLC, Norco Ranch, Inc. and Land O'Lakes, Inc. (Doc. No. 388) (hereinafter, "Notice Approval Order").

Following the notice period established by the Court, Plaintiffs filed the motion *sub judice*, and the Court held the final fairness hearing on the Sparboe Settlement as required by *Fed. R. Civ. P. 23(e)(2)*. *See* Sparboe Final Approval Hr'g Tr. (Doc. No. 463) (hereinafter, "Final Hr'g Tr."). No objections were filed to the proposed Sparboe Agreement. No objectors appeared at the fairness hearing. Plaintiffs filed supplemental **[*284]** briefing and materials in support of their motion for final approval. Following the hearing, the Court withheld ruling on the motion until the notice period required pursuant to *28 U.S.C. § 1715(d)* under the Class Action Fairness Act ("CAFA") had elapsed.

C. Moark Settlement

As further background, following the Sparboe Settlement, Defendants Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc. (collectively, "Moark") entered into a settlement agreement. **[**11]** Following a hearing, the Court entered Orders preliminarily approving that agreement and the form of notice. *See* Order on Preliminary Approval of Settlement with Moark, LLC, Norco Ranch, Inc., and Land O'Lakes Inc. (Doc. No. 387); Notice Approval Order. Following the notice period, Plaintiffs filed a motion seeking final approval of the Moark Settlement, and the Court held a final fairness hearing. *See* Moark Final Approval Hr'g Tr. (Doc. No. 688) (hereinafter, "Moark Final Hr'g Tr."). In a separate Memorandum and Order issued this same date, the Court is granting the Plaintiffs' motion for final approval of the Moark Settlement.

II. Proposed Sparboe Settlement Agreement[6]

The proposed Settlement Class for settlement purposes under the Sparboe Settlement is defined as:

> All persons and entities that purchased eggs, including shell eggs and egg products, produced from caged birds in the United States directly from any producer during the Class Period from January 1, 2000 through the present.
>
> > a.) Shell Egg **[**12]** Subclass
> > All individuals and entities that purchased shell eggs produced from caged birds in the United States directly from any during the Class Period from January 1, 2000 through the present.

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[5] Paragraph 3 of the Second Consolidated Amended Class Action Complaint states:

> Plaintiffs entered into a Settlement Agreement with Sparboe Farms, Inc. ("Sparboe"), a formerly named Defendant, which this Court has preliminarily approved. As part of that Settlement Agreement, Sparboe agreed to cooperate with Plaintiffs and provide documents and information related to the allegations in Plaintiffs' initial Complaint. Plaintiffs have incorporated much of that information into this Second Consolidated Amended Class Action Complaint.

[6] The terms used in this Order that are defined in the Sparboe Settlement Agreement are, unless otherwise defined herein, used in this Order consistent with the definitions of the agreement.

b.) Egg Products Subclass

All individuals and entities that purchased egg products produced from shell eggs that came from caged birds in the United States directly from any producer during the Class Period from January 1, 2000 through the present.

Excluded from the class and subclasses are the Defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, all government entities, as well as the Court and staff to whom this case is assigned, and any member of the Court's or staff's immediate family. Also excluded from the Class and Subclasses are purchases of "specialty" shell egg or egg products (such as "organic," "free-range" or "cage-free") and purchases of hatching eggs (used by poultry breeders to produce breeder stock or growing stock for laying hens or meat).

Mot., Ex. A, Settlement Agreement Between Direct Purchaser Plaintiffs and Sparboe Farms, Inc. ¶ 11 (hereinafter, "Sparboe Settlement Agreement"). [7] As mentioned earlier, the Court preliminarily certified **[**13]** the Settlement Class for settlement purposes under Fed. R. Civ. P. 23(b)(3). *See* Order on Preliminary Approval of Sparboe Settlement. The agreement's principal terms require Sparboe to cooperate with the Plaintiffs' preparation **[*285]** for and prosecution of their class action. *See* Moark Settlement Agreement ¶ 23. The Agreement details the extent of Sparboe's cooperation in terms of "making documents related to the claims asserted in this action available for review and making witnesses with knowledge related to the claims asserted in this action available for informal interviews and, as necessary, consultation with Plaintiffs' Counsel." *Id.* "Sparboe Farms agree[d] to provide discovery to Plaintiffs in the pending Action as if Sparboe Farms were a party subject to all rules for discovery." *Id.* Sparboe agreed to "use its best efforts to produce interviewees . . . who are current or former directors, officers, or employees of Sparboe Farms for deposition at the time discovery in this Action commences . . . and make those person available for trial testimony." *Id.* ¶ 23(a).

In consideration, Plaintiffs and their counsel "agree not to assert that Sparboe Farms waived its attorney-client privilege, work product immunity or any other privilege or protection with respect to information or documents **[**15]** provided or identified" to Plaintiffs pursuant to the Agreement. *Id.* ¶ 24.

Furthermore, Plaintiffs agree that they "shall not . . . seek to recover against [Sparboe] for any of the Released Claims." *Id.* ¶ 17. Under the Agreement, "Released Claims" are defined as any and all claims arising out of injuries or damages that occurred "from the beginning of time to the date of this Agreement" and that arose out of or resulted from "conduct concerning any agreement among Defendants, the reduction or restraint of supply, the reduction of or restrictions on production capacity, or the pricing, selling, discounting, marketing, or distributing of Shell Eggs and Processed Egg Products in the United States or elsewhere. *Id.* The Agreement sets forth non-exclusive examples of Released Claims by providing that such claims "includ[e] but [are] not limited to any conduct alleged, and causes of action asserted, or that could have been alleged or asserted, whether or not concealed or hidden, in the Complaints filed in the Action . . . , which arise from or are predicated on the facts and/or actions described in the Complaints under any federal, state, or foreign antirust, unfair competition, unfair practices, **[**16]** price discrimination, unitary pricing, trade practice, consumer protection, fraud, RICO, civil conspiracy law, or

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[7] In the Agreement, "Class Period" is defined as "the period from and including January 1, 2000 up to and including the date **[**14]** when Notice of the Court's entry of an order preliminarily approving this settlement and certifying a class for settlement purposes is first published." *Id.* ¶ 5. Thus, the Class Period for the Sparboe Settlement is from January 1, 2000 through October 23, 2009.

This actual Class Period contrasts with the end date for the Class Period listed in the Notice of the Sparboe Settlement, which is stated as July 15, 2010. *See* Mot., Ex. 2.A., Notice of Sparboe Settlement at 2 (Doc. No. 443-6) (hereinafter, "Sparboe Notice"). It appears that the date listed in the Sparboe Notice is an inadvertent typo. July 15, 2010 is the end date of the class period for the Moark Settlement (and the date on which the Court preliminarily approved the Moark Settlement and the notices of the Sparboe and Moark Settlements). *See* Order on Preliminary Approval of Settlement with Moark, LLC, Norco Ranch, Inc., and Land O'Lakes Inc.; Notice Approval Order; Mot., Ex. 2.A., Notice of Moark Settlement at 2.

similar laws, including, without limitation, the Sherman Antitrust Act, *15 U.S.C. § 1 et seq.*" *Id.* Plaintiffs also agree to waive *California Civil Code Section 1542* and similar provisions in other states. *Id.* ¶ 17(a). Additionally, Plaintiffs agree to waive and release "any and all defenses, rights, and benefits that [Plaintiffs] may have or that may be derived from the provisions of applicable law which, absent such waiver, may limit the extent or effect of the release" set forth in the Agreement. *Id.* ¶ 18. The release excludes "claims relating to payment disputes, physical harm, defective product or bodily injury . . . and do[es] not include any Non-Settling Defendant." *Id.* ¶ 19.

The settlement proposes an opt-out provision which sets forth the procedures through which possible class members could opt out of the settlement. *Id.* ¶ 14; *see also* Sparboe Notice at 1, 4. Class members had 75 days from the postmark date that the notice of the settlement was mailed by first-class mail to the final postmark date designated in the Claims Notice to return an exclusion request or **[**17]** submit an objection to the Settlement. *See* Sparboe Notice at 1, 3, 4; Mot., Ex. 2, Affidavit of Jennifer M. Keough re: Notice and Settlement Administration ¶¶ 9, 17 (Doc. No. 443-5) (hereinafter, "Keough Aff.").

Finally, the Agreement delineates Sparboe's agreement to reimburse Plaintiffs up to a maximum of $350,000.00 towards the cost of notice of the Settlement." Sparboe Settlement Agreement ¶ 28. However, this provision is subject to several provisos, one of which provides that "[i]n the event Plaintiffs enter into a cash settlement with any Non-Settling Defendant and receive preliminary approval of that settlement prior to the issuance of notice under this Agreement (such that the settlement notices can be combined), Plaintiffs shall apply those settlement funds towards the cost of notice, thus reducing or eliminating Sparboe Farms' obligation to reimburse Plaintiffs for the notice costs of this Agreement." *Id.* ¶ 29.

[*286] **III. Notice of Sparboe Settlement**

Notice of the Sparboe Settlement was disseminated to possible members of the Settlement Class through a variety of means ranging from direct mailings, publications, press releases, a website and a toll-free information and request telephone **[**18]** line. *See* Keough Aff. ¶¶ 5-6; *see also* Sparboe Settlement Agreement ¶ 13. The Notice explained that any possible Class Members wishing to be excluded from or to object to the terms of the Sparboe Settlement Agreement should postmark their exclusion requests or objections no later than a specific date that was 58 days before the final fairness hearing on the Sparboe Settlement. *See* Sparboe Notice at 1, 3-4. Notices of the Moark and Sparboe Settlements were jointly distributed to the putative Class members, and $170,000 was spent on notice expenses with respect to the Sparboe Settlement Agreement. *See* Moark Final Hr'g Tr. at 31:3-31-23. No other information has been provided to the Court concerning whether other administrative costs and expenses were (or were not) incurred in relation to the Sparboe Settlement.

The Claims Administrator received no objections to the Sparboe Settlement and received 364 requests for exclusion from the Sparboe Settlement Class. *See* Keough Aff. ¶ 17. Some of those parties who opted-out of the class have filed their own complaints against Defendants, including Sparboe, such as Direct Action Plaintiffs Giant Eagle, Inc., Winn-Dixie Stores, Inc., Roundy's Supermarkets, **[**19]** Inc., C&S Wholesale Grocers, Inc., H.J. Heinz Company, L.P., Publix Super Markets, Inc., Kraft Foods Global, Inc., The Kellogg Company, General Mills, Inc., and Nestle USA, Inc., The Kroger Co., The Great Atlantic & Pacific Tea Co., Inc., Hy-Vee, Inc., H.E. Butt Grocery Co., Conopco, Inc., Safeway Inc., Albertsons LLC, and Walgreen Co., and Supervalu, Inc., as well as plaintiffs in a state court action proceeding in Kansas. [8] Interim Co-Lead Counsel has represented that the potential Class for the

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[8] *See* Am. Compl. (Doc. No. 623) (Giant Eagle, Inc.); Second Am. Compl.(Doc. No. 622) (Winn-Dixie Stores, Inc., Roundy's Supermarkets, Inc., C&S Wholesale Grocers, Inc., and H.J. Heinz Company, L.P.); Am. Compl. (Doc. No. 621) (Publix Super Markets, Inc.); First Am. Compl. (Doc. No. 624) (Kraft Foods Global, Inc., The Kellogg Company, General Mills, Inc., and Nestle USA, **[**20]** Inc.); Am. Compl. (Doc. No. 619) (The Kroger Co., The Great Atlantic & Pacific Tea Co., Inc., Hy-Vee, Inc., H.E. Butt Grocery Co. and Conopco, Inc., Safeway Inc., Albertsons LLC, and Walgreen Co.); Am. Compl. (Doc. No. 620) (Supervalu, Inc.); Dec. 19, 2011 Mem. and Order, *836 F. Supp. 2d 290, 2011 U.S. Dist. LEXIS 146258, 2011 WL 6396462, at *5 n.8* (Doc. Nos. 601 and 602) (explaining that six direct purchasers opted out of the Sparboe and Moark Settlements and filed an action

Moark Settlement "is composed of thousands of entities nationwide, many of which are sophisticated companies with their own in-house legal counsel," Fees Mot. at 12, a descriptor which the Court recognizes can be applied to the Sparboe Settlement Class, given that both settlements' classes are defined virtually identically.

The Claims Administrator mailed Notice and Claim Forms to 13,211 direct purchasers of shell eggs and egg products, whose names and addresses were obtained from various electronic data files that contained potential Class Member names and addresses from 17 named egg producer Defendants that were given to the Claims Administrator at the direction of the Court. *See* Keough Aff. ¶ 7, 9; Notice Approval Order ¶ 3. Eighty-three (83) Notice and Claim Forms, returned by the U.S. Postal Service with forwarding address information, were re-mailed. *See id.* ¶ 12. In contrast, twenty-three hundred **[*287]** thirty-nine (2,339) Notice and Claim Forms were returned without forwarding address information and, according to Interim Co-Lead Counsel, could not be re-mailed. *See* ***[**22]*** *id.* [9]

Additionally, during the notice period a Summary Notice was published in several publications with a total circulation of over 2,316,000. *See id.* ¶ 11. The Summary Notice was published in a monthly issue of fifteen (15) industry journals thought to be likely to reach potential purchasers of shell eggs and egg products. *See id.* Those publications are: *PetFood Industry, Restaurant Business, Convenience Store News, Hotel F&B, Nation's Restaurant News, Food Service Director, Progressive Grocer, Food Manufacturing, Supermarket News, Stores, Egg Industry Magazine, Modern Baking, Baking Buyer, Food Processing*, and *Long Term Living. See id.*

The Summary Notice was also published for one day in the *Wall Street Journal. See id.* That same day, the Claims Administrator distributed a press release for the Sparboe Settlement, as well as a separate release about the Moark Settlement, to approximately 1,000 journalists in the **[**23]** restaurant and food industries through the US1 Newsline on the PR Newswire. *See id.* ¶ 13. The press releases resulted in some 335 articles that reported on the two settlements. *See id.*

A publicly-available website specifically devoted to the Sparboe and Moark Settlements was established. *See id.* ¶ 14. The website makes available for review and downloading the Notice Packet, the Sparboe Settlement Agreement, and various Court orders and filings relating to the Sparboe Settlement. *See id.* In the first 106 days of operation, the website received 2,821 "visits." *See id.*

The Claims Administrator and Plaintiffs established a toll-free 24-hour telephone number and call center for potential Class Members to obtain information about the settlement and to request the Notice and Claim Form. *See id.* ¶ 15. The automated number received 328 calls, and 61 callers requested and received a Notice Packet during the first 106 days of operation. *See id.*

Additionally, Sparboe served notice of the settlement to federal and state officials of the settlement pursuant to *28 U.S.C. § 1715(d)* under CAFA. *See* Final Hr'g Tr. at 26:23-26:24, 38:1-38:6. No federal or state officials filed

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against Defendants in Kansas state court, which, after being removed to federal court by Defendants, was remanded to state court); Direct Action Plaintiff Status Report (Doc. No. 457).

The Direct Action Plaintiff Status Report states that "[a]ll of the Direct Action Plaintiffs . . . have opted out of the Sparboe class settlement and will play no role in the fairness hearing." *Id.* at 2. This statement applies only to the presently pending Direct Action Plaintiff cases brought by The Kroger Co. and co-plaintiffs (Civil Action No. 10-7605 (E.D. Pa.)), Supervalu Inc. (Civil Action No. 10-6736 (E.D. Pa.)), Publix Super Markets, Inc. (Civil Action No. 10-6737 (E.D. Pa.)), and Giant Eagle, Inc. (Civil Action No. 10-1698 (W.D. Pa.)).

The statement does not apply to the **[**21]** pending Direct Action Plaintiff cases brought by Kraft Foods Global, Inc. and its co-plaintiffs (Civil Action No. 11-8808 (E.D. Pa.)), and Winn-Dixie Stores, Inc. (Civil Action No. 11-0510 (E.D. Pa.)). Both of these cases were filed after the Status Report. However, it appears that Kraft Foods Global, Inc. and its co-plaintiffs, and Winn-Dixie Stores, Inc. and its co-plaintiffs, have opted out of the Sparboe Settlement. *See* Keough Aff. ¶ 17.

[9] The Court recognizes that the statistics provided here slightly differ with the equivalent statistics that the Plaintiffs provided in connection with their motion for approval of the Moark Settlement. However, the Court deems these minor differences to be inconsequential.

objections to the Sparboe **[**24]** Settlement, nor requested a hearing following the issuance of the CAFA notice. The statutory period elapsed prior to the date of this Memorandum and accompanying Order. [10]

[*288] **IV. Discussion**

Federal Rule of Civil Procedure 23 provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

> (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
> (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
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> (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier **[**27]** opportunity to request exclusion but did not do so.
> (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Id. The "[f]actual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23." In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 257-58 (3d Cir. 2009) (quoting In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008)). "The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 299 (3d Cir. 1998) (quoting Girsh v. Jepson, 521 F.2d 153, 156 (3d Cir. 1975)).

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[10] Although Sparboe served notice of the settlement to the appropriate officials, it did not do so promptly after the Agreement was filed, as required by 28 U.S.C. § 1715(b). Mot. at 7. Section 1715(b) provides: "Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement . . . ." Under Section 1715(d), an order granting final approval of a settlement agreement may not take place earlier than ninety days after the appropriate federal and state officials have been served with notice.

Plaintiffs advised the Court about the timing of the CAFA notice requirement on the Sparboe and Moark Settlements, and requested the Court proceed with the final approval hearing on the Sparboe Settlement as scheduled and to hold its decision on the Plaintiffs' motion for final approval **[**25]** in abeyance until the ninety-day expiration date passed without any objections or requests for hearings being received from any relevant authority pursuant to 28 U.S.C. § 1715(d). *See* Mot. at 7. Over ninety days have elapsed since Sparboe served the appropriate state or federal officials with the CAFA notice, and there have been no requests for hearings or objections to the settlement. It follows that, although the notice requirements under CAFA have not been fully met on a technical basis, the substance of the requirements have been satisfied insofar as giving federal and state officials sufficient notice and opportunity to be heard concerning the Sparboe Settlement. *See* D.S. ex rel. S.S. v. New York City Dep't of Educ., 255 F.R.D. 59, 80 (E.D.N.Y. 2008) (approving the settlement on a provisional basis until the CAFA notice deadline passes and no federal or state official requests a hearing); Kay Co. v. Equitable Prod. Co., No. 06 Civ. 00612, 2010 U.S. Dist. LEXIS 41892, 2010 WL 1734869, at *4 (S.D. W.Va. Apr. 28, 2010) ("Since more than 100 days have passed since service was perfected and since there have been no adverse comments from any of the aforesaid State or Federal officials, the Court FINDS that compliance **[**26]** with CAFA is satisfactory."). *But see* True v. Am. Honda Motor Co., 749 F. Supp. 2d 1052, 1083 (C.D. Cal. 2010) (determining that its authority to approve a settlement was "questionable" when the defendant gave CAFA notice only ten days prior to the final settlement approval hearing).

A. Class Certification

Where, as here, the Court has not already certified a class prior to evaluating a settlement, the Court initially must determine whether the proposed settlement classes satisfy the requirements of *Federal Rule of Civil Procedure 23(a)* **[**28]** and *(b)*. *See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*; *see also In re Pet Food Prods. Liab. Litig., 629 F.3d 333, 341 (3d Cir. 2010)* ("[A] district court first must determine that the requirements for class certification under *Rule 23(a)* and *(b)* are met."). The Third Circuit Court of Appeals recently summarized the demands of *Rule 23* as follows:

> *Rule 23(a)* contains four threshold requirements, which every putative class must satisfy:
>
> > (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> *Fed. R. Civ. P. 23(a)*; *see also Amchem, 521 U.S. at 613*. Upon finding each of these prerequisites satisfied, a district court must then determine that the proposed class fits within one of the categories of class actions enumerated in *Rule 23(b)*.
>
> As mentioned, *Rule 23(b)(2)* authorizes class actions seeking injunctive relief in instances where the defendant "has acted or refused to act on grounds that apply **[**29]** generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." *Fed. R. Civ. P. 23(b)(2)*; *see In re Comm. Bank of N. Va. (Comm. Bank I), 418 F.3d 277, 302 n.14 (2005)*. Separately, certification pursuant to *Rule 23(b)(3)* seeking monetary compensation is permitted where (1) "questions of law or fact common to class members predominate **[*289]** over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*; *see Collins v. E.I. DuPont de Nemours & Co., 34 F.3d 172, 180 (3d Cir. 1994)*. These twin requirements are commonly referred to as predominance and superiority.

Sullivan v. DB Invs., Inc., 667 F.3d 273, 296 (3d Cir. 2011) (en banc).

1. *Federal Rule of Civil Procedure 23(a)*

First, under *Rule 23(a)*, the Court determines that the Class Members are ascertainable from objective criteria, such as various electronic data files that contained names and addresses of customers that purchased shell eggs or egg products produced from caged birds in the United States, which were provided by 17 named egg producer Defendants, and **[**30]** that the Class Members thus ascertained are so numerous that their joinder before the Court would be impracticable. Plaintiffs "need not precisely enumerate the potential size of the proposed class, nor [are] plaintiff[s] required to demonstrate that joinder would be impossible." *Cannon v. Cherry Hill Toyota, Inc., 184 F.R.D. 540, 543 (D.N.J. 1999)* (citation omitted); *see also* 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1762 (3d ed. 2005) ("'[I]mpracticable' does not mean 'impossible.' The representatives only need to show that it is extremely difficult or inconvenient to join all the members of the class."); 1 A. Conte & H. Newberg, *Class Actions* § 3:14 (5th ed. 2011) ("Plaintiffs bear the burden of demonstrating that joinder is impracticable, but *impracticable* does not mean *impossible.*"). "[G]enerally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of *Rule 23(a)* has been met." *Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001)* (citation omitted). Here, thousands of direct purchasers of shell eggs and egg products located across the United States were identified, based upon consumer information **[**31]** provided by 17 named Defendants, as proposed members of the Settlement Class. This information certainly demonstrates that a class of this size makes individual joinder of all members impracticable and that the numerosity requirement is satisfied.

Second, the commonality requirement is satisfied insofar as Plaintiffs have alleged one or more questions of fact and law common throughout the Class. The commonality prerequisite does not require that all members of the prospective class share identical claims. *Hassine v. Jeffes, 846 F.2d 169, 176-77 (3d Cir. 1988)* (relying on *Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985))*. Rather, "[t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)*. Also, class members can assert such a single common complaint if they demonstrate that all class members are subject to the same harm. *Id.* [11]

As is also further discussed in regards to the superiority requirement under *Rule 23(b)(3)*, *infra*, the Plaintiffs' claims against Sparboe are based upon its alleged conduct during the period in question, which Plaintiffs contend constituted an agreement to and furtherance of an unlawful conspiracy to manipulate the supply and prices of domestic eggs and egg products in violation of *Section 1* of the Sherman Act. *See generally* Sept. 26, 2011 Mem., *821 F. Supp. 2d at 713-15* (discussing the specific alleged conduct of Defendants generally in furtherance of alleged conspiracy). [12] Additionally, Plaintiffs **[*290]** allegedly were subjected to the same type of harm by directly purchasing eggs and egg products at artificially inflated prices due to the alleged conspiracy. Because the class members' claims arise from the same nucleus of operative facts and involve **[**33]** the same legal theories against Sparboe, the Court finds that the commonality prong under *Rule 23(a)(2)* is met.

Third, the Court finds that the claims of the named Plaintiffs—companies, corporations, and businesses that purchased shell eggs, egg products, or both, from one or more of the Defendants—are typical of the claims of the Class Members and the respective Subclass members. "If the claims of the named plaintiffs **[**34]** and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183-84 (3d Cir. 2001)*. The Third Circuit Court of Appeals has recognized that the "jurisprudence 'assures that a claim framed as a violative practice can support a class action embracing a variety of injuries so long as those injuries can all be linked to the practice.'" *Id. at 184* (quoting *Baby Neal, 43 F.3d at 63*). In this action, the claims of the class representatives are aligned with those of the Class Members, and members of the Subclasses, inasmuch as the claims of the representatives arise out of the same alleged misconduct of the Defendants and core facts and events. Further, the representative Plaintiffs' claims and the absent Class Members' claims rely on the same legal theories and arise from the same alleged "conspiracy" and "illegal agreement" by Defendants. Moreover, named Plaintiffs, like all putative Class Members, allegedly have suffered the same injury-namely, economic damages arising from alleged artificially-inflated purchase prices-as a result of the Defendants' **[**35]** alleged anticompetitive conduct.

Fourth, the final prerequisite under *Rule 23(a)*, the adequacy of the representative parties requirement, "has two components: (1) concerning the experience and performance of class counsel; and (2) concerning the interests and incentives of the representative plaintiffs." *Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170, 182 (3d Cir. 2012)* (citing *Comm. Bank I, 418 F.3d at 303*). Essentially, the inquiry into the adequacy of the representative parties examines whether "the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously, that he or she has obtained adequate counsel, and that there is no conflict between the

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[11] The Supreme Court recently explained: "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common **[**32]** answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, *84 N.Y.U. L. Rev. 97, 132 (2009)*).

[12] For purposes of this Motion and in considering the Plaintiffs' claims against Sparboe, the Court considers Sparboe as a named Defendant in this suit even though it is not named as a defendant in the operative pleading, the Second Consolidated Amended Class Action Complaint. The Court recognizes that the Order preliminarily approving the Sparboe Settlement stayed the suit against Sparboe and was entered prior to the filing of the Second Consolidated Amended Class Action Complaint. As explained above, the Court determines that if Sparboe had been named as a defendant in the Second Consolidated Amended, the claims against it would not have substantively differed from the essence of the claims against it asserted in the First Consolidated Amended Class Action Complaint.

individual's claims and those asserted on behalf of the class." *Hassine, 846 F.2d 169 at 179* (citations omitted); *see also* *Dewey, 681 F.3d at 182* (recognizing that "the linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class"). In other words, "*Rule 23(a)(4)* serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem, 521 U.S. at 625*. If any conflicts **[**36]** "undercut the representative plaintiffs' ability to adequately represent the class" they are "fundamental," such that class representation is structurally faulty and *Rule 23(a)(4)* cannot be satisfied. *Dewey, 681 F.3d at 184-85*.

The Court determines that the representative Plaintiffs indeed will fairly and adequately protect the interests of the Settlement Class. Here, the interests of the representative Plaintiffs are consistent with those of the Class members, and respective Subclass members, and there appear to be no conflicts between or among these groups. As discussed, the representative Plaintiffs were damaged as a result of the Defendants' allegedly unlawful conduct, including Sparboe's alleged conduct, and the named Plaintiffs would have had to prove the same wrongdoing as the putative Class Members to establish the Defendants' (and Sparboe's) liability. Moreover, all representative Plaintiffs **[*291]** and Class Members have present claims (and no future claims) and have suffered economic damages. Furthermore, there is no apparent conflict among Class Members, or Subclasses, with respect to the allocations for distribution of monetary consideration because the Agreement does not set forth **[**37]** such consideration. The representative and putative Class Members have a common interest in Sparboe's cooperation in assisting with the prosecution of the class claims against the non-settling Defendants. [13] It follows that the representative Plaintiffs' interests are directly aligned with those of other members of the Class and Subclasses.

Additionally, the representative Plaintiffs have been, have the incentive, and appear to be capable of continuing to be active participants in both the prosecution and the settlement of this suit against Sparboe, if the case had continued, and against the remaining Defendants. To assist them, Plaintiffs have retained attorneys who are highly qualified, experienced, and able to conduct this litigation. The Court analyzes the capabilities and performance of Interim Co-Lead Counsel under *Rule 23(a)(4)* based upon the factors set forth in *Rule 23(g)*. *See* *Sheinberg v. Sorensen, 606 F.3d 130, 132 (3d Cir. 2010)* ("Although questions concerning the adequacy of class counsel were traditionally analyzed under the aegis of the adequate representation requirement of *Rule 23(a)(4) of the Federal Rules of Civil Procedure*, those questions have, since 2003, been governed by *Rule 23(g)*." (citing *Fed. R. Civ. P. 23(g)* note (2003))).

Here, the Court concludes that Interim Co-Lead Counsel satisfies *Rule 23(g)*. *Rule 23(g)* requires consideration of four factors: **[**39]** "the work counsel has done in identifying or investigating potential claims in the action," "counsel's experience in handling class actions, other complex litigation, and "the types of claims asserted in the action," "counsel's knowledge of the applicable law," and "the resources that counsel will commit to representing the class." *Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv)*. The Court "must also ensure that '[c]lass counsel [will] fairly and adequately represent the interests of the class.'" *Sheinberg, 606 F.3d at 132-33* (quoting *Fed. R. Civ. P. 23(g)(4)*). [14]

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[13] The possible diversity among the Class members in terms of financial resources—for example, a national corporate entity as compared to the proprietor of a neighborhood restaurant—and the implications of that diversity was discussed during the preliminary approval hearing. In particular, the possibility was raised that a class member with less financial resources might find a monetary settlement with Sparboe more beneficial than a class member with greater financial resources. In response, Interim Co-Lead Counsel explained that all Class members equally benefit from advancing the entire suit against the remaining Defendants which would enable them to obtain the "aggregate damages" the Class members would be entitled to, and that, indeed, a Class member with less financial resources might obtain greater benefit from Sparboe's cooperation than a larger **[**38]** producer in this nonmonetary consideration when considered in light of the relative scale of the costs of bringing this suit. Prelim. Hr'g Tr. 22:7-22:13.

[14] The Court may also consider other possibly relevant information as to the adequacy of counsel, such as proposed terms for attorneys' fees and nontaxable costs and "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." *Fed. R. Civ. P. 23(g)(1)(B)*, *(C)*.

Interim Co-Lead Counsel have extensive documented experience in complex class action litigation, including those based upon violations of ***antitrust law***, and are well-respected law firms in the plaintiffs' class action bar who have demonstrated considerable dedication and ability thus far in this litigation. Interim Co-Lead Counsel **[**40]** have capably managed this suit on behalf of Plaintiffs since the Court formally appointed them to that role. Their work has included the consolidation of the individual cases, negotiating the Sparboe and Moark Settlements, handling the motion to dismiss stage, and preparing for and commencing discovery. In sum, Interim Co-Lead Counsel's work on behalf of the Plaintiffs has been extensive and involved the dedication of substantial resources and energy. Interim Co-Lead Counsel's work thus far in this suit and prior experience demonstrate that these attorneys have fairly and adequately represented the interests of the Sparboe Settlement Class, and Subclasses, and will continue to do so.

Accordingly, the Court finds that four threshold requirements of *Rule 23(a)* have been satisfied.

[*292] 2. *Federal Rule of Civil Procedure 23(b)*

Having determined that the requirements of *Rule 23(a)* are met, the Court next must consider whether the requirements of at least one subsection of *Rule 23(b)* are met. Here, Plaintiffs are seeking certification under *Rule 23(b)(3)*. *See also* Pls.' Mem. of Law on Prelim. Approval of Sparboe Settlement at 24 (Doc. No. 172). *Rule 23(b)(3)* permits class actions where "the court **[**41]** finds that the questions of law or fact common to Class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. These requirements are commonly separated into the so-called "predominance" and "superiority" requirements. *See Ins. Brokerage, 579 F.3d at 257-58*.

a. Predominance

To evaluate the predominance requirement, a court must determine whether common questions of law or fact predominate over any questions affecting only individual members. *See Hydrogen Peroxide, 552 F.3d at 311-12*. "*Rule 23(b)(3)*'s predominance requirement imposes a more rigorous obligation [than *Rule 23(a)(2)*'s commonality element] upon a reviewing court to ensure that issues common to the class predominate over those affecting only individual class members. *Sullivan, 667 F.3d at 297* (quoting *Ins. Broker., 579 F.3d at 266*). As such, the Third Circuit Court of Appeals "consider[s] the *Rule 23(a)* commonality requirement to be incorporated into the more stringent *Rule 23(b)(3)* predominance requirement, and therefore deem[s] it appropriate to 'analyze the **[**42]** two factors together, with particular focus on the predominance requirement.'" *Id.* (quoting *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 528 (3d Cir. 2004))*. Third Circuit precedent "provides that the focus of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Id.*

"Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Amchem, 521 U.S. at 625*. This is because these types of claims typically arise from an alleged common course of conduct on the part of the defendant, and depend upon common proof of liability, such as evidence of the defendants' conduct. *See, e.g., Warfarin, 391 F.3d at 528* (questions of fact and law are common to the class because the claims at issue and proof of liability depend upon the defendants' alleged conduct). Furthermore, that Plaintiffs have allegedly suffered "purely an economic injury"—in contrast to a physical injury—such overpayment for a product on account of the Defendants', and more specifically, Sparboe's, alleged anticompetitive conduct can "further support[] a finding **[**43]** of commonality and predominance because there are little or no individual proof problems in this case otherwise commonly associated with physical injury claims." *Id. at 529*.

Indeed, this same rationale leads the Court to conclude here that the common issues of Class Members predominate over any individual issues as to their antitrust claim against Sparboe. The task at hand requires the Court to "examine the elements of plaintiffs' claim through the prism of *Rule 23*." *Hydrogen Peroxide, 552 F.3d at 311* (internal quotation marks omitted). Here, the Plaintiffs' claim arises under *Section 1* of the Sherman Act. "To establish a violation of *Section 1*, a plaintiff must prove: (1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action." *Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir. 2005)*.

The reasoning in *In re Insurance Brokerage Antitrust Litigation* is applicable here. In *Insurance Brokerage*, our Court of Appeals concluded that "[b]ecause each of the elements of a Sherman Act violation involves **[**44]** common questions of law and fact, . . . common questions predominate over individual ones with respect to the federal antitrust claim." *579 F.3d at 269*. The Court determined that since "the first and third elements **[*293]** of a Sherman Act violation focus on the conduct of the defendants, we find that common questions abound with respect to whether the defendants engaged in illegal, concerted action." *Id. at 268*. This is true in this case, because the common questions relevant to these elements include, *inter alia*, whether Sparboe and the other Defendants agreed to the alleged conspiracy to manipulate the supply and prices of domestic eggs and egg products in violation of *Section 1* of the Sherman Act, and whether the alleged conspirators' conduct amounted to an illegal restraint of trade. Furthermore, with respect to the second element of the Plaintiffs' Section 1 claim, there are at the very least the common questions relating to whether the alleged conspirators' actions reduced the supply of and increased prices for domestic eggs and egg products.

Also, like *Insurance Brokerage*, here, the fourth element of the Sherman Act claim "focuses on whether the plaintiffs were injured by the defendants' **[**45]** conduct," and as a result "it may still involve common questions of law and fact if proof of injury can be established on a class-wide basis." *Id. at 269*. As the Court of Appeals recognized, "for purposes of class certification pursuant to *Rule 23(b)(3)*, 'the task for plaintiffs . . . is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.'" *Id.* (citing *Hydrogen Peroxide, 552 F.3d at 311-12*. The issue here is whether the Class Members were proximately injured by the conduct of Sparboe and other Defendants, which is a question that is capable of proof common to the class members. Thus, even though the amount of damage that each plaintiff allegedly suffered could not necessarily be established by common proof, nonetheless, "the element of antitrust injury—that is, the fact of damages—is susceptible to common proof." *Id.* The reasoning in *Insurance Brokerage* applies here:

> [W]e are not as concerned with "formulat[ing] some prediction" as to how this element of a Sherman Act violation would "play out" at trial, *[Hydrogen Peroxide,] 552 F.3d at 311* (internal quotation marks omitted), **[**46]** "for the proposal is that there be no trial," *Amchem, 521 U.S. at 620*, and instead our inquiry into the element of antitrust injury is solely for the purpose of ensuring that issues common to the class predominate over individual ones. As the foregoing analysis demonstrates, common questions exist even with respect to the element of antitrust injury and therefore any individual issues do not overwhelm the common ones.

Id.

Furthermore, the Court does not find that the use of Subclasses of direct purchasers of eggs and direct purchasers of egg products alters any of the foregoing analysis because the claims with respect to each Subclass rely upon the same alleged conduct of Sparboe and other Defendants, common proof of such conduct, and economic harm of overpayment for the respective products resulting from such conduct. Accordingly, the Court concludes that the predominance requirement is satisfied here because each element of the Plaintiffs' federal antitrust violation involves common questions of law and fact, and these common questions predominate over individual issues.

b. Superiority

To meet the superiority requirement, Plaintiffs must show that a class action, rather than individual **[**47]** litigation or other available methods of adjudication, is the best method for achieving a fair and efficient adjudication of the controversy. *See Newton, 259 F.3d at 191*. Several factors are relevant to the superiority inquiry: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *Fed. R. Civ. P. 23(b)(3)*. In effect, "[t]he superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." **[*294]** *Prudential, 148 F.3d at 316* (internal quotations omitted).

The Court makes no determination at this time concerning the manageability of the Plaintiffs' suit as a class action if this action were to go to trial in a single forum or, to the extent this possibility remains, be remanded to the various transferor courts. "Confronted with a request for settlement-only **[**48]** class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see Fed. R. Civ. P. 23(b)(3)(D)*, for the proposal is that there be no trial." *Amchem, 521 U.S. at 620*.

In considering the other relevant factors, the Court finds that the Class, and Subclasses, satisfy the superiority requirements of *Rule 23(b)(3)*. Here, there is a potentially large number of class members—perhaps numbering over 13,000—who as a whole are geographically widely disbursed. *See* Pls.' Mem. of Law on Prelim. Approval of Sparboe Settlement at 20. These factors represent a potentially crushing strain on and inefficient application of judicial resources if the putative class members' claims were prosecuted individually. Furthermore, when "each consumer has a very small claim in relation to the cost of prosecuting a lawsuit. . . , a class action facilitates spreading of the litigation costs among the numerous injured parties and encourages private enforcement of the statutes." *Warfarin, 391 F.3d at 534*. Under the present circumstances, a class action device enables individual direct purchasers to pursue their claims in an economically feasible manner, **[**49]** with greater efficacy in achieving enforcement and deterrence goals, and with greater bargaining power for settlement purposes. [15]

Putative Class Members were free to opt out of the settlement to pursue their own claims individually if they so chose, and some of the direct purchasers who opted out of the Sparboe Settlement, namely, Direct Action Plaintiffs, indeed have filed individual actions that name Sparboe as a defendant and that have been consolidated or coordinated in this multi-district litigation. Another case brought by opt-out parties against Sparboe for its alleged conduct **[**51]** is pending in Kansas state court as a result of a ruling of this Court. *See* Dec. 19, 2011 Mem., *2011 U.S. Dist. LEXIS 146258, 2011 WL 6396462* (Doc. No. 601). That there are only six pending Direct Action Plaintiff suits and one state court suit pending against Sparboe based upon its alleged antitrust conduct suggests that few Class Members have significant individual claims, or interest in bringing their claims separately, and that there is a lack of interest in the individual prosecution of claims among Class Members on the whole. *See id.*

For these reasons, a class action resolution in the manner proposed in the Sparboe Settlement would be superior to other available methods for a fair and efficient adjudication of the case against Sparboe.

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[15] For these same reasons, to the extent that consideration of *Rule 23(b)(3)(C)* is pertinent here, and, for now, without regard to the remand mechanisms for an MDL action, it would be preferable to adjudicate these claims in one judicial proceeding and in one forum as a class action. *See Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands Corp., 478 F.2d 540, 543, 10 V.I. 575 (3d Cir. 1973)* ("The 'superiority requirement' was intended to refer to the preferability of adjudicating claims of multiple-parties in one judicial proceeding and in one forum, rather than forcing each plaintiff to proceed by separate suit, and possibly requiring a defendant to answer suits growing out of one incident in geographically separated courts."). *See generally Fed. R. Civ. P. 23(b)(2)* note (1966) ("Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought."). However, as **[**50]** one commentator has discussed, in light of *28 U.S.C. § 1407*, as a general matter, "[t]his factor should . . . be of little or no significance in resolving the superiority issue." Newberg, *supra*, §4:31. Indeed, this factor appears to have limited bearing under the present circumstances because the United States Judicial Panel on Multidistrict Litigation previously considered, pursuant to *28 U.S.C. § 1407*, the desirability of centralizing the various initially-filed direct purchaser class action suits in this particular forum, *see In re Processed Egg Prods. Antitrust Litig., 588 F. Supp. 2d 1366, 1367 (J.P.M.L. 2008)*, and a consolidated class action complaint was filed which superseded all previously-filed direct purchaser complaints.

3. Conclusion as to Class Certification for Settlement Purposes

Because the Court concludes that all of the *Rule 23(a)* and *(b)(3)* requirements have **[*295]** been met, the Court certifies the Class, and Subclasses, as defined above for settlement purposes.

B. Notice

"In the class action context, the district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard **[**52]** or the opportunity to exclude themselves from the class." *Prudential, 148 F.3d at 306*. *Fed. R. Civ. P. 23* sets forth two provisions concerning notice to class members.

First, *Fed. R. Civ. P. 23(c)(2)(B)* requires that class members be given the best notice practicable under the circumstances, including individual notice to all potential class members identifiable through reasonable effort. This notice is to be given to all potential members of a *Rule 23(b)(3)* class. *Prudential, 148 F.3d at 326*. Specifically, the Rule provides that such notice

> must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under *Rule 23(c)(3)*.

Fed. R. Civ. P. 23(c)(2)(B).

Second, *Rule 23(e)* requires all members of the class be notified of the terms of any proposed settlement. *Fed. R. Civ. P. 23(e)*. **[**53]** This "notice is designed to summarize the litigation and the settlement" and "to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation." *Prudential, 148 F.3d at 327* (quoting 2 Newberg, *supra*, § 8.32 at 8-109).

Here, the Notice of the Sparboe Settlement contained the information required by *Rules 23(c)(2)* and *23(e)*. The Notice appropriately detailed the nature of the action, the Class claims, the definition of the Class and Subclasses, [16] the terms of the proposed settlement agreement, and the class members' right to object or request exclusion from the settlement and the timing and manner for doing so. The Notice also informed Class Members of their opportunity to be heard at the fairness hearing and to enter an appearance through an attorney, and stated that the settlement would be binding on Class Members who did not opt out of it.

Furthermore, the extent of the Plaintiffs' efforts to notify potential Class Members is adequate. The Notice was mailed to potential Class Members individually based upon consumer information provided by Sparboe and the other Defendants. *See* *Larson v. AT&T Mobility LLC, No. 10-1285, 687 F.3d 109, 2012 U.S. App. LEXIS 13292, 2012 WL 2478376, at *9 (3d Cir. June 29, 2012)* (recognizing that "'individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of *Rule 23*. . . . Accordingly, each class member who can be identified through reasonable effort must be notified.'"

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[16] As discussed earlier, the Notice of the Sparboe Settlement appears to contain an inadvertent typo as to the end date for the Class Period. However, because the actual Class Period was set forth in the Settlement Agreement, which was made available for the putative **[**54]** Class Members' examination, and because the Notice as disseminated defined the Class broader, rather than narrower, than the actual Class definition, the Court does not find the oversight sufficient to have prevented putative class members from failing to understand the Settlement Agreement terms or prevent them from opportunity to opt out or object to the Agreement. It follows that the Court does not find that the existence of this typo requires additional notice to new class members as to the Class Period.

(quoting *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974))*. **[**55]** In addition, the parties published a notice of the settlement on the same day in several appropriate publications, and distributed a press release concerning the Sparboe Settlement to approximately 1,000 journalists in the restaurant and food industries, which resulted in some 335 articles that reported on both the Sparboe and Moark Settlements. *See Zimmer Paper Prods., Inc. v. Berger & Montague, P.C., 758 F.2d 86, 90 (3d Cir. 1985)* **[*296]** ("It is well settled that in the usual situation first-class mail and publication in the press fully satisfy the notice requirement of both *Fed. R. Civ. P. 23* and the *due process clause*.").

Accordingly, the Court determines that the notice provided to the putative Class Members constitutes adequate notice in satisfaction of the demands of *Rule 23*.

C. Fair, Reasonable, and Adequate

To grant final approval, the Court must conclude that the proposed settlement is fair, reasonable and adequate. *Ins. Brokerage, 579 F.3d at 258*; *Fed. R. Civ. P. 23(e)(2)*. Trial courts generally are afforded broad discretion in determining whether to approve a proposed class action settlement. *Eichenholtz v. Brennan, 52 F.3d 478, 482 (3d Cir. 1995)*. [17]

Although no opposition has been filed to the Motion and no objectors have contested the settlement, pursuant to *Rule 23(e)*, the Court has the duty of protecting absentee class members, and the Court executes this duty by independently "assuring the settlement represents adequate compensation for the release of the class claims." *Prudential, 148 F.3d at 316-17*. [18] Indeed, certain requirements of *Rule 23* "demand undiluted, even heightened, attention in the settlement context." *Amchem, 521 U.S. at 620*. Cognizant of this duty, the Court evaluates the fairness, reasonableness, and adequacy of the Sparboe Settlement as follows.

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[17] The Third Circuit Court of **[**56]** Appeals recognizes that "[g]reat weight is accorded [the] views [of the trial judge] because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly." *Walsh v. Great Atlantic & Pacific Tea Co., Inc., 726 F.2d 956, 965 (3d Cir. 1983)* (quoting *Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 34 (3d Cir. 1971))*.

[18] The *Manual for Complex Litigation* observes that the "task is demanding because the adversariness **[**57]** of litigation is often lost after the agreement to settle." David F. Herr, *The Manual for Complex Litigation* § 21.61, at 487 (4th ed. 2011). Indeed, the observation that "'[c]ourts applying [a multifactor] test [ ] often recite the litany and engage in pro forma analyses, but their hearts are not in it,'" could be an equally a propos statement for those parties advancing unopposed motions for final settlement approval. *Ehrheart v. Verizon Wireless, 609 F.3d 590, 605 n.10 (3d Cir. 2010)* (dissenting, Smith, J.) (quoting *Jonathan R. Macey & Geoffrey P. Miller, Judicial Review of Class Action Settlements*, 1 J. of Legal Analysis 167, 172 (2009)).

Here, there is an absence of any objectors or any adversarial challenge to the Motion at bar, which appears to account for the dearth of any arguments criticizing, exposing, or meaningfully addressing possible flaws or drawbacks to the settlement agreement appearing in the record. Nonetheless, the Court recognizes that although the final settlement approval process may have lacked an edgy or adversarial demeanor, this does not necessarily bear on whether the settlement negotiation process was adversarial and resulted in a fair, reasonable, and adequate **[**58]** settlement. This is because the focus here is on the settlement agreement, and "[w]hether or not there are objectors or opponents to the proposed settlement, the court must make an independent analysis of the settlement terms." Herr, *supra*, at 488. Furthermore, the Court notes that, in response to the Court's inquiries for additional facts and development of the record, Interim Co-Lead Counsel fully and appropriately cooperated in the Court's efforts to consider and analyze the proposed settlement.

Nonetheless, in the event that any other partial or complete settlements are reached in the future of this case, or in this multi-district litigation generally, all parties' counsel are well-advised, again, to continue to be responsive and attentive to the Court's inquiries as to settlement agreements during the various approval processes, and also to anticipate and be cognizant of what appropriate, specific information the Court needs—particularly in light of recent case law developments—in order to perform the *fact intensive* inquiry required for executing its duty to protect absentee class members. After all, the burden lies with the movants to demonstrate that the settlement is fair, reasonable, **[**59]** and adequate.

1. Initial Presumption of Fairness

Based upon the record, the Court concludes that an initial presumption of fairness attaches to the Settlement. The Third Circuit Court of Appeals has "directed a district court to apply an initial presumption of fairness when reviewing a proposed settlement where: '(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'" *Warfarin, 391 F.3d at 535* (citing **[*297]** *In re Cendant Corp. Litig., 264 F.3d 201, 232 n.18 (3d Cir. 2001))*.

These criteria have been met here. The proposed class settlement was negotiated at arm's length over the course of four months by the Plaintiffs' Interim Co-Lead Counsel and Sparboe's counsel. As further discussed, *infra*, although no formal discovery was conducted in this case during the time of the Sparboe Settlement negotiations or agreement, Plaintiffs' Interim Co-Lead Counsel conducted informal discovery, including, *inter alia*, independently investigating the merits prior to filing the complaint, which enabled counsel to have sufficient background in **[**60]** the facts of the case, including Sparboe's alleged role in it. As previously discussed, Interim Co-Lead Counsel are extremely experienced in class action litigation, and specifically, similar antitrust litigation. Furthermore, no member of the purported class objected to the settlement.

Given that the Court finds that the four factors are sufficiently met, the presumption of fairness applies to the settlement.

2. Standards for Determining Fairness of Proposed Settlement

The Third Circuit Court of Appeals has set forth nine factors, known as the *Girsh* factors, to be considered when determining the fairness of a proposed settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery **[**61]** in light of all the attendant risks of litigation . . . .

Girsh, 521 F.2d at 157 (internal quotations and punctuation marks omitted); *Prudential, 148 F.3d at 317*. "The settling parties bear the burden of providing that the *Girsh* factors weigh in favor of approval of the settlement." *Pet Food, 629 F.3d at 350* (citing *In re General Motors Corp. PickUp Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995))*.

In *In re Prudential Insurance Company of America Sales Practice Litigation Agent Actions*, the Third Circuit Court of Appeals also identified additional non-exclusive factors for courts to consider for a "thoroughgoing analysis of a settlement's terms." *See* *Pet Food, 629 F.3d at 350*. Those factors, known as the *Prudential* factors, include:

> [T]he maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results **[**62]** achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provision for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

See Prudential, 148 F.3d at 323. [19] While the Court must make findings as to the *Girsh* factors to approve a settlement as fair, reasonable, and adequate, the *Prudential* factors are illustrative of additional factors that may be useful even though they are not essential or inexorable depending upon the specific circumstances.

Although there is an overriding public interest in settling class actions, district courts should apply "an even more rigorous, heightened standard in cases where settlement negotiations precede class certification, and approval for settlement and class certification **[*298]** are sought simultaneously." Pet Food, 629 F.3d at 350 **[**63]** (internal quotations omitted). "This heightened standard is designed to ensure that class counsel has demonstrated 'sustained advocacy' throughout the course of the proceedings and has protected the interests of all class members." Prudential, 148 F.3d at 317.

Thus, the Court is required to make an independent analysis of the settlement to determine whether it is fair, reasonable, and adequate by independently evaluating all of the *Girsh* factors (and the *Prudential* factors, as appropriate), recognizing that the Court cannot substitute the parties' assurances or conclusory statements for its independent analysis of the settlement terms. Pet Food, 629 F.3d at 351. Accordingly, the Court "may find it necessary to drill down into the case and into the agreement to make an independent 'scrupulous' analysis of the settlement terms" and affirmatively seek out information to the extent that the parties have either not supplied it or have provided only conclusory statements. *See id.*

3. Discussion of *Girsh* and *Prudential* Factors

The Court's analysis of the Girsh factors, and the Prudential factors, as appropriate, leads to the conclusion that the relevant considerations weigh in favor of a finding **[**64]** of fairness under Rule 23(e).

a. The Complexity, Expense and Likely Duration of the Litigation

The first *Girsh* factor, which evaluates the complexity, expenses and likely duration of the litigation, "captures the probable costs, in both time and money, of continued litigation." Warfarin, 391 F.3d at 535-36 (citation omitted). At the outset, the Court appreciates that antitrust suits, like this one, are often complex actions to prosecute. *See* In re Linerboard Antitrust Litig., 292 F. Supp. 2d 631, 639 (E.D. Pa. 2003). Furthermore, given that the settlement agreement occurred at an early stage of this litigation, prior to the active commencement of discovery, Plaintiffs have avoided such expense and delay as may have attached to these settling Defendants. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558-59, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (recognizing that "antitrust discovery can be expensive"). Discovery in this case against Sparboe would entail—which would demand reasonably the same and similar discovery that will occur as to the remaining Defendants in this suit—considerable expenditures of financial resources and hours of attorney time relating to discovery for liability and damages, including extensive electronic **[**65]** discovery and scores of witness depositions, experts, class certification, further pre-trial motions, and potentially a trial on the merits. The Court determines that such an undertaking "would not only further prolong the litigation but also reduce the value of any recovery to the class." Warfarin, 391 F.3d at 536. Accordingly, this factor weighs in favor of the Sparboe Settlement.

b. The Reaction of the Class to the Settlement

"In an effort to measure the class's own reaction to the settlement's terms directly, courts look to the number and vociferousness of the objectors." Gen. Motors, 55 F.3d at 812. Considering this factor from a somewhat different angle, the Third Circuit Court of Appeals has recognized the practical conclusion that it is generally appropriate to

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[19] The Court of Appeals invites individualized analysis by noting that "[o]ther related factors . . . also may be relevant to this inquiry." Prudential, 148 F. 3d at 323 n.73.

assume that "silence constitutes tacit consent to the agreement" in the class settlement context. *See* Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1313 n.15 (3d Cir. 1993). By using these considerations as a gauge of class reaction to the Sparboe Settlement, the Court determines that the class reaction here favors settlement. Indeed, there were no objections filed to the Settlement and thus no negative feedback to the settlement. **[**66]** Moreover, as Interim Co-Lead Counsel has represented, many of the Class Members are sophisticated entities with their own in-house counsel, and ostensibly have the resources and ability to assess the settlement agreement beyond the average layperson or enterprise.

Moreover, there were only 364 requests for exclusion from the Class, which is 2.76% of the Notice addressees, or virtually *di minimis* in light of the over 13,200 Notices of **[*299]** settlement that were sent (as well as published notices and press releases about the settlement). Furthermore, many of the 364 requests for exclusion come from entities or subsidiaries organizationally related to other opt-out filers, and so the Court understands that the number of distinct, independent parties who have excluded themselves likely is less than 364 in number. Keogh Aff. ¶ 17. As such, this factor weighs in favor of the proposed settlement's fairness and adequacy. *See* Cendant Corp., 264 F.3d at 234-35 (recognizing that low number of objectors and opt-outs strongly favors settlement and that "[t]he vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong **[**67]** presumption that this factor weighs in favor of the Settlement").

c. The Stage of the Proceedings and the Amount of Discovery Completed

This *Girsh* factor requires the Court to evaluate whether Plaintiffs had an "adequate appreciation of the merits of the case before negotiating" settlement. Prudential, 148 F.3d at 319 (quoting Gen. Motors, 55 F.3d at 813). "To ensure that a proposed settlement is the product of informed negotiations, there should be an inquiry into the type and amount of discovery the parties have undertaken." *Id.* The Third Circuit Court of Appeals has recognized that, even if a settlement occurs in an early stage of litigation, there are means for class counsel to apprise themselves of the merits of the litigation, such as "conduct[ing] significant independent discovery or investigations to develop the merits of their case (as opposed to supporting the value of the settlement)" or retaining their own experts or interviewing witnesses. *See* Gen. Motors, 55 F.3d at 814.

Here, the Court is satisfied that Interim Co-Lead Counsel had adequate knowledge of the litigation and informed negotiations. Interim Co-Lead Counsel has represented to the Court that they "conducted extensive **[**68]** investigations into the case in preparation for filing of the complaint." Mot. at 17-18; *see also* Mot., Ex. A, Hausfeld Decl. ¶ 5 ("Plaintiffs entered the negotiations with Sparboe with a significant amount of knowledge of Defendants' antitrust conspiracy, as a result of months of investigations into the conspiracy conducted by the numerous experienced law firms representing them."); Asher Decl. ¶ 6 (recounting that the counsel's investigations included research into the egg industry, egg trade associations, such as United Egg Producer ("UEP"), UEP's animal welfare programs, the economics underlying the alleged conspiracy, and the legal issues relating to the conspiracy). *See* Prudential, 148 F.3d at 319 (recognizing that informal discovery methods can support adequate appreciation of the merits).

Several Defendants filed motions to dismiss the Consolidated Amended Class Action Complaint in the midst of the negotiations for the Sparboe Settlement. Indeed, the Court granted Sparboe an extension of the deadline to respond to that very pleading. *See* Order (Doc. No. 98) (granting Defendant Sparboe Farms, Inc.'s Motion to Extend Defendant Sparboe's Time to Respond to Direct Purchasers' Consolidated **[**69]** Amended Class Action Complaint and to Extend Subsequent Deadlines (Docket No. 90)). These motions provided Interim Co-Lead Counsel with an additional platform from which to ascertain Sparboe's and the other Defendants' positions on the case and thereby to evaluate further the merits of the litigation.

As a result, the Court is satisfied that Interim Co-Lead Counsel, as highly experienced antitrust litigators, were in such a position prior to negotiating and entering into the Sparboe Settlement that they had an adequate understanding and appreciation of strengths and weaknesses of the Plaintiffs' case. Accordingly, the Court determines this factor weighs in favor of settlement.

d. Risks of Establishing Liability, Damages, and Maintaining the Class Action Through Trial

These three *Girsh* factors concern the risks of establishing liability, damages, and maintaining a class action through trial. The factors require the Court to "survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefits of an immediate **[*300]** settlement." *Warfarin, 391 F.3d at 537*. The inquiry requires balancing "the likelihood of success and the potential damage **[**70]** award if the case were taken to trial against the benefits of immediate settlement." *Prudential, 148 F.3d at 319*. For example, the Court assesses the risks of establishing liability to "examine what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them." *Gen. Motors, 55 F.3d at 814*. As another example, the inquiry into establishing damages "attempts to measure the expected value of litigating the action rather than settling it at the current time." *Id. at 816*.

In cases of settlements with only a subset of defendants to the suit, as is the case here:

> [g]iven that the litigation might continue against other defendants, the parties may be reluctant to disclose fully and candidly their assessment of the proposed settlement's strengths and weaknesses that led them to settle separately. The adequacy of the settlement depends in part on the relative exposure and resources of other parties. An informed evaluation is extremely difficult if discovery is incomplete or has been conducted against only a few of the defendants.

Herr, *supra*, § 21.651, at 505. Thus, the Court understands why Plaintiffs decline to provide **[**71]** a detailed assessment of any risks perceived in establishing liability and damages, and instead emphasize that the Court should consider Interim Co-Lead Counsel's estimation of the probability of success in assessing these factors. *See* Mot. at 18-19 & n.5. Indeed, the Court gives credence to counsel's representation that although "they believe [Plaintiffs] will prevail at trial, they recognize that antitrust cases, like all complex litigation against large companies with highly talented defense counsel, have inherent risks." *Id.* at 19. The record demonstrates that counsel have significant experience in antitrust cases such as this one which ought to enable them to appreciate the strengths and weakness of the case and the risks of maintaining the action through trial.

Furthermore, antitrust class action litigation is complex, and, especially at its early stages, inherently rife with risk and unpredictability in terms of ultimately prevailing to establish liability and damages and achieve class certification. The Court finds that this suit presents no exception. Indeed, this settlement was executed prior to the amendment of the Consolidated Amended Class Action Complaint and the extensive **[**72]** motion to dismiss practice that followed. At present, the bulk of discovery, dispositive motion practice, expert discovery, class certification, and trial are on the horizon of this case with the attendant expense and uncertainties. Thus, there is a genuine risk of not prevailing in establishing class certification, liability, or damages. As all experienced litigators and jurists know, that a jury will be the ultimate fact-finder at trial presents further risks and uncertainties.

The motion practice that has already transpired is indicative of the future risk that Plaintiffs face in prosecuting their case against Sparboe. Plaintiffs have already engaged with several of the other Defendants in extensive motion practice concerning the Second Consolidated Amended Class Action Complaint. The Plaintiffs' pending motion for leave to file a Third Consolidated Amended Class Action has been challenged in part by one group of defendants as to the claims against them individually. Moreover, Sparboe itself has filed motions to dismiss the six complaints brought by Direct Action Plaintiffs as to the individual claims against it. *See* Docket Nos. 635-637, 639-643, and 645.

Based on the detailed allegations **[**73]** in the Second Consolidated Amended Class Action Complaint, Plaintiffs appear to have evidence to support their theory that Defendants conspired to reduce the supply of eggs and egg products, and thereby increase prices. *See Fed. R. Civ. P. 11(b)* (concerning representations to the Court in pleadings). Nonetheless, even assuming Plaintiffs could establish their theory of an overarching conspiracy at trial, their success in establishing liability and damages as to individual defendants, such as Sparboe, is by no means assured.

Through the Sparboe Settlement, Plaintiffs may have secured cooperation in prosecuting their case, which, according to Interim Co-Lead Counsel, "significantly reduces the **[*301]** risks associated with discovery." *See* Mot. at 20. Nonetheless, such cooperation is no guarantee to success in proving liability and damages in this complex litigation, and Plaintiffs still must show that Defendants individually agreed to join the alleged conspiracy. Indeed, the other Defendants' individual motions to dismiss raised issues concerning whether they individually actually joined the conspiracy. Furthermore, Defendants jointly challenged at the motion to dismiss stage whether Plaintiffs **[**74]** could recover damages outside the statute of limitations. These issues remain live subjects for discovery and additional dispositive motion practice, and any trial on these issues would be protracted and involve a significant amount of testimony and documentary evidence, particularly given the time period at issue, which spans almost a decade, and the number of parties involved.

In addition to challenging the Plaintiffs' complaints, Defendants also have demonstrated an intent to vigorously defend against this suit—including by raising privilege issues relating to the Sparboe Settlement, *see, e.g.*, Order (Doc. No. 361); Order (Doc. No. 403), and other discovery-related issues, *see, e.g.*, Conf. Tr. (Doc. No. 591); Conf. Tr. (Doc. No. 675); Case Mgmt Order Nos. 16 to 19 (Doc. Nos. 604, 626, 656, and 676). Furthermore, Defendants have indicated during the course of these proceedings, particularly during the development of a discovery plan, that they intend to advance defenses, such as an agricultural cooperative immunity defense under the Capper-Volstead Act and a defense involving standard-setting conduct, that will present difficult factual and legal issues for the parties, creating their **[**75]** own brand and quantity of uncertainty for the Plaintiffs' case. *See, e.g.*, Case Mgmt Order No. 19. The parties also contemplate expert discovery on damages, which likely will result in competing expert opinions representing very different damage estimates that will present further ambiguity as to resolution on damages as to each Defendant. *See, e.g.,* Conf. Tr. (Doc. No. 675).

It is entirely likely that Plaintiffs would face similar, if not identical, legal challenges and uncertainties in their claims again Sparboe. Indeed, as mentioned above, Sparboe has filed motions to dismiss the individual claims asserted against it in the six Direct Action Plaintiffs' complaints, and has joined the Defendants' joint motion to dismiss the Direct Action Plaintiffs' complaints for recovery of damages outside the statute of limitations period.

Finally, Plaintiffs not only face the risk that they will not succeed in establishing liability and damages, but also the risks associated with certifying and maintain a class. *See* *Warfarin, 391 F. 3d at 537*. Indeed "'the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action.'" *Id.* (quoting **[**76]** *Gen. Motors, 55 F.3d at 817*). "The value of a class action depends largely on the certification of the class because, not only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits." *Gen. Motors, 55 F.3d at 817*. Thus, this *Girsh* "factor measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial," recognizing that a "district court retains the authority to decertify or modify a class at any time during the litigation if it proves to be unmanageable." *Warfarin, 391 F.3d at 537* (citing *Prudential, 148 F.3d at 321*).

Many, if not all, Defendants no doubt will vigorously oppose class certification. If Sparboe remained in this litigation, in all likelihood it would join those defense efforts in this respect just as it has joined the joint defense in the suits brought by the Direct Action Plaintiffs. The Court of Appeals for the Third Circuit has recognized: "There will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." *Prudential, 148 F.3d at 321*. **[**77]** [20] Thus, there are inherent difficulties in bringing a class action to trial that apply here.

[*302] Because the Plaintiffs would face genuine risks and uncertainties in establishing liability and damages against Sparboe, and in obtaining and maintaining class certification, should the claims against Sparboe continue without settlement, these three factors weigh in favor of settlement.

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[20] Based on this observation, the Court of Appeals has questioned the significance of this factor in "settlement-only" class actions following the Supreme Court's decision in *Amchem. See* *Prudential, 148 F.3d at 321*.

e. The Ability of the Defendant to Withstand a Greater Judgment

This factor "is concerned with whether the defendants could withstand a judgment for an amount significantly greater than the Settlement." *Cendant, 264 F.3d at 240*. Thus, the Court must consider here whether Sparboe could withstand a judgment for an amount significantly greater than the costs associated with the proposed cooperation.

The limited evidence in the record suggests that Sparboe would be able to withstand a greater judgment, namely some sort of monetary payment. Indeed, in the Consolidated Amended Class Action Complaint, Sparboe **[**78]** is alleged to be the fifth largest shell egg marketer and producer in the United States. *See* Consol. Am. Class Action Compl. at ¶ 85. There is no evidence concerning the financial or other possible impacts a greater judgment amount would have on Sparboe. *See, e.g., Cendant, 264 F.3d at 240-41* (discussing the possibility of bankruptcy for a settling defendant).

Furthermore, the Plaintiffs' arguments tacitly suggest that Sparboe could withstand a larger judgment. They argue that "[t]his factor deserves little weight, especially in light of the risks of continued litigation against remaining Defendants without the cooperation obtained from Sparboe." Mot. at 21.

Thus, the record suggests that Sparboe could pay monetary consideration as opposed to only providing the nonmonetary consideration set forth in the Settlement terms. Accordingly, this factor does not weigh in favor of approval.

f. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation

"The last two *Girsh* factors ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial." *Prudential, 148 F.3d at 322*. **[**79]** In other words, the Court evaluates "whether the settlement represents a good value for a weak case or a poor value for a strong case. The factors test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *Warfarin, 391 F.3d at 538* (citing *Prudential, 148 F.3d at 322*).

Here, the Court evaluates the settlement in light of its nonmonetary consideration—namely, Sparboe's cooperation in the prosecution of the Plaintiffs' case against the other remaining Defendants by providing documents and witness testimony. "Settlements involving nonmonetary provisions for class members . . . deserve careful scrutiny to ensure that these provisions have actual value to the class," which can be accomplished through a *Rule 23(e)* analysis. *Fed. R. Civ. P. 23(h)* note (2003). "Despite the difficulties they pose to measurement, nonpecuniary benefits . . . may support a settlement." *Bolger, 2 F.3d at 1311*. [21]

As this settlement is structured, it is difficult to determine accurately the actual value of the proposed settlement. Nonetheless, the Court determines that Sparboe's conferral of the nonpecuniary benefits to class members that is proposed under the settlement is valuable consideration, and reasonable both in light of the best possible recovery against Sparboe and in light of the risks the parties would face if the case went to trial against Sparboe. Certainly, calculating the best possible recovery against Sparboe for the class in the aggregate is "exceedingly speculative" at this point in time given the **[*303]** previously-discussed risks of establishing liability and damages associated with this complex litigation, even when considering that treble damages are technically available for recovery under the Plaintiffs' Sherman Act claim.

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[21] By contrast, ordinarily, "[i]n order to assess the reasonableness of a proposed settlement seeking monetary relief, 'the present value of the damages plaintiffs would likely recover if **[**80]** successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement.'" *Prudential, 148 F.3d at 322*. (citing *Gen. Motors, 55 F.3d at 806*).

According to Interim Co-Lead Counsel, in cooperating with Plaintiffs, Sparboe

> guide[s] [Plaintiffs] through not only the nature of the industry and the market, **[**81]** but as well the workings of the UEP and the relationship of all of the defendants to the UEP and to the market. They're able to tell us how the domestic market or with regard to the export market and how the supply in both markets effected price domestically. They will be able to tell us others who were of like mind with them that the program was an effort to control supply and increase price. They will be able to identify those entities-those persons for us or those companies as well as others within other portions of the market that would have testimony that would be beneficial to the class which we otherwise would not know clearly for quite some time into the litigation.

Prelim. Hr'g Tr. at 17:22-18:10. Furthermore, "Sparboe produced documents from its in-house counsel that it may have otherwise withheld had Sparboe litigated this case." Hausfeld Decl. ¶ 14. Indeed, "[t]he information Sparboe disclosed to Plaintiffs-both in documents and witness interviews-in some instances included communications between Sparboe's officers and attorneys and UEP's officers and attorneys." Oct. 19, 2011 Mem. Op., *278 F.R.D. 112, 116* (Rice, J.) (Doc. No. 585).

At the same time, the Court recognizes **[**82]** that Sparboe's agreement to cooperate with Plaintiffs throughout the course of pre-trial proceedings and trial is valuable consideration in light of the risks in proceeding with this suit against the remaining Defendants. [22]

At the Court's hearing on preliminary approval of the settlement, Interim Co-Lead Counsel noted Sparboe did not have an interest in offering any monetary consideration even though there was a demand for such consideration. Counsel explained that this case's unique attributes create greater value for a defendant's cooperation: "In a majority of antitrust cases who are on behalf of classes, there is either a government investigation that precedes the filing of the complaint or a government indictment or even a guilty plea. There is none of that here." Prelim. Hr'g Tr. at 8:12-8:15.

Interim Co-Lead Counsel also noted that the pleading standards as set forth in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929*, and its progeny raise the value of cooperation in that the information provided by Sparboe **[**83]** comes in advance of discovery. *Id.* at 9:17-9:25, 10:1-10:5. There is greater efficiency in the Plaintiffs proceeding with their case with Sparboe's cooperation then with monetary consideration from an early settlement. Obtaining such information also assists in "lay[ing] out for [Plaintiffs,] with greater clarity and the force of having witnesses and documents[,] what this case is about[,] so that [Plaintiffs] can move it more expeditiously as opposed to going through a protracted process even on an expedited basis of discovery one defendant at a time with possible motion and practice in between." *Id.* at 12:11-12:16.

Granted, the Court observes that much of Sparboe's information provided under the Settlement Agreement would otherwise be available eventually through discovery as required under the federal rules, if Sparboe remained in this suit. Nonetheless, Sparboe's cooperation reduces costs and time associated with formal discovery. Plaintiffs are saved expenses by avoiding motion practice to obtain documents and having more focused depositions on subjects relevant to the claims' merits. *Id.* at 13:24-25, 14:1-8. Moreover, the Sparboe Settlement likely has short-circuited at least **[**84]** some of the expense and delay of future discovery by securing Sparboe's cooperation and removing the Sparboe forces from those who would contest or complicate Plaintiffs' discovery efforts. Plaintiffs also gain a clear tactical advantage in obtaining Sparboe's information through **[*304]** non-traditional discovery mechanisms, including, by way of example, the advantage of having this information to formulate strategy in taking discovery from the remaining Defendants, specific tailoring the scope and focus of discovery.

Furthermore, the settlement prevents Plaintiffs from having to defend against Sparboe, which has indicated that it may raise defenses involving service of process, venue, and personal jurisdiction, and abandonment of the conspiracy. *Id.* at 15:8-12, 17:13-17. Interim Co-Lead Counsel also indicated that on average Plaintiffs could save on average $100,000 to $200,000 for each motion. *Id.* at 15:19-15:20.

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[22] The Court does not comment on whether the information and facts that Sparboe may provide would be established, or even admissible, at trial, based upon counsel's representations.

The Court recognizes that a nonpecuniary settlement presents certain concerns because it may merely be a means of expediting the receipt of attorneys fees, and thereby is of dubious value to the class members. *Cf. Bolger, 2 F.3d at 1318* ("Although nonmonetary relief is adequate consideration **[**85]** for settling a derivative or class action, the risks of concealment and collusion are not insignificant. Derivative actions may settle for cosmetic changes and no tangible relief to the corporation in exchange for large attorneys' fees."); *Gen. Motors, 55 F.3d at 778* (rejecting settlement where each class member would receive a $1,000 coupon towards a new truck but attorneys requested fees of $ 9.5 million). However, the Court determines that such a concern is not present here because the Settlement Agreement does not set forth provisions concerning the collection of attorneys' fees relating to the settlement, and Interim Co-Lead Counsel has represented they do not intend to seek fees resulting from this Settlement Agreement.

While the value of this cooperation is certainly of tangible value, it is not entirely without compare. Moark, too, has agreed to cooperate with Plaintiffs with information that purportedly pertains to a longer time period than Sparboe's information. *See* Second Consol. Am. Class Action Compl. ¶ 240 (alleging that "Sparboe ended its participation in both the UEP Certified Program and exports made through USEM that reduced domestic egg supply" sometime shortly after **[**86]** July 2003). Second, Sparboe's cooperation does not appear to assure that Plaintiffs will have conclusive evidence in support of their claims against the remaining Defendants. Indeed, Sparboe is a named Defendant in other cases in this litigation for the Direct Action Plaintiffs, and the Sparboe Settlement does not impact those plaintiffs' claims against which Sparboe must continue to defend.

Nonetheless, when considering these two *Girsh* factors in light of the record *in toto*, the Court is persuaded that Sparboe's cooperation confers real and substantial benefits upon the Class. The Court further concludes that the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial against Sparboe. These factors weigh in favor of approval of the settlement.

g. Prudential Factors

The relevant *Prudential* factors weigh in favor of approving the Sparboe Settlement, or, at worst, are neutral factors. First, the Court has already addressed the impact that the limited extent of discovery on the merits thus far has on this litigation and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability **[**87]** and individual damages.

Second, the settlement agreement allows putative class members the right to opt out of the settlement. Indeed, some parties exercised this right by filing requests for exclusion. Furthermore, the Notice Packet included both a Notice of the Sparboe Settlement and a Notice of the Moark Settlement, thereby simultaneously notified class members of the Moark Settlement and enabling class members to assess the adequacy of the two settlements in conjunction with one another and as to the whole suit.

Third, the results achieved by the settlement for the Class and Subclasses are immediate, concrete, and realized without the costs and delays associated with extensive discovery and other later stages of litigation. Sparboe's cooperation pursuant to the settlement aids the Plaintiffs in prosecuting and resolving their claims against the other Defendants. Indeed, Interim Co-Lead Counsel **[*305]** describe the Sparboe Settlement as an "ice-breaker" settlement, which is a term used to describe "the first settlement in the litigation—and [a settlement that] should increase the likelihood of future settlements." *Linerboard, 292 F. Supp. 2d at 643*. By contrast, it is unclear, given the aforementioned **[**88]** risks and uncertainties, *supra*, whether Direct Action Plaintiffs who are individually prosecuting their claims apart from the Class, or other parties who opted-out of the Sparboe Settlement, will be successful in their claims against Moark and the other Defendants, and whether that result will be immeasurably better than the result for class members under the settlement agreement and as to the entire suit. For the same reasons, it is unclear whether those opt-out parties might achieve better settlements than the class to resolve similar claims against Sparboe.

Fourth, the Sparboe Settlement only releases Class Members' claims against Sparboe for claims arising out of injuries or damages that occurred "from the beginning of time to the date of th[e] Agreement" *and* that resulted from the conduct asserted in the Plaintiffs' suit. As such, future claims for injuries or damages against Sparboe arising outside this time period but resulting from the alleged conduct giving rise to the class claims are not barred. Moreover, the Release does not apply to those parties who opted-out of the Sparboe Settlement, such as Direct Action Plaintiffs.

Fifth, all segments of the class are being treated **[**89]** equally relative to the consideration under the Sparboe Settlement. Sparboe is conferring its cooperation upon all class members. There is no differentiation among class members in terms of Subclasses or class representatives in terms of the information received.

h. Summary of Girsh *and* Prudential *Factors*

Upon considering the Sparboe Settlement Agreement in light of all of the *Girsh* and the relevant *Prudential* factors, the Court is satisfied that the settlement is fair, reasonable, and adequate. As discussed, a few of the factors are neutral or weigh against settlement approval. However, all of the factors considered in determining the fairness of a settlement "are a guide; an unfavorable conclusion regarding one or more factors does not automatically render the settlement unfair." 2 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 6:8 (6th ed. 2010); *see also* *Ehrheart, 609 F.3d at 605* (dissenting, Smith, J.) (quoting same). Accordingly, not every factor need weigh in favor of settlement in order for the settlement to be approved by the Court. *See* *Cendant, 264 F. 3d at 242-43* (affirming a final settlement approval when not all factors weighed in favor of approval). **[**90]** Because, on balance, the factors as considered above weigh in favor of settlement, the Court concludes that approval of the settlement is appropriate pursuant to *Fed. R. Civ. P. 23(e)*.

V. Conclusion

For the foregoing reasons, the Court determines that the Class and Subclasses meet the certification requirements of *Rule 23* for settlement purposes, and concludes that the proposed settlement agreement is fair, reasonable, and adequate. Accordingly, the Court grants the Plaintiffs' motion for final approval of the class action settlement with Defendant Sparboe Farms, Inc.

An Order consistent with this Memorandum follows.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

ORDER GRANTING FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT BETWEEN DIRECT PURCHASER PLAINTIFFS AND DEFENDANT SPARBOE FARMS, INC.

AND NOW, this 16th day of July, 2012, upon consideration of the Motion for Final Approval of Settlement Agreement with Sparboe Farms, Inc. (Doc. No. 443), and following a final fairness hearing, in accordance with *Federal Rule of Civil Procedure 23*, it is hereby **ORDERED** that the Motion (Doc. No. 443) is **GRANTED** **[**91]** as outlined in this Order and the accompanying Memorandum.

Based on the Court's review of the proposed Settlement Agreement Between Direct Purchaser Plaintiffs and Sparboe Farms, Inc. ("Settlement Agreement"), and the entire record of this case, and having conducted a final fairness hearing on the matter, the Court determines as follows:

1. The Court has jurisdiction over the subject matter of this action.

2. Terms used in this Order that are defined in the Settlement Agreement, unless otherwise defined herein, have the same meanings in this Order as in the Settlement Agreement.

3. The following Settlement Class, as defined in the Settlement Agreement, which was conditionally certified in the Court's Order granting preliminary approval of this settlement, is certified for settlement purposes only as follows [23]:

> All persons and entities that purchased eggs, including shell eggs and egg products, produced from caged birds in the United States directly from any producer during the Class Period from January 1, 2000 through the present.
>
> a.) Shell Egg SubClass
>
> All individuals and entities that purchased shell eggs produced from caged birds in the United States directly from any producer during the **[**92]** Class Period from January 1, 2000 through the present.
>
> b.) Egg Products SubClass
>
> All individuals and entities that purchased egg products produced from shell eggs that came from caged birds in the United States directly from any producer during the Class Period from January 1, 2000 through the present.
>
> Excluded from the class and subclasses are the Defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, all government entities, as well as the Court and staff to whom this case is assigned, and any member of the Court's or staff's immediate family. Also excluded from the Class and Subclasses are purchases of "specialty" shell egg or egg products (such as "organic," "freerange"or "cage-free") and purchases of hatching eggs (used by poultry breeders to produce breeder stock or growing stock for laying hens or meat).

4. The Court finds, as discussed more thoroughly in the accompanying Memorandum, that the Settlement Class satisfies the applicable prerequisites for class action treatment under *Federal Rule of Civil Procedure 23(a)* and *(b)*. The Settlement Class is so numerous that joinder of all members is not practicable, there are questions of law and fact common to the Settlement Class, the claims of the Class Representatives are typical of the claims of the Settlement Class, and the Class Representatives will fairly and adequately protect the interests of the Settlement Class. For purposes of this settlement, questions of law and fact common to the members of the Settlement Class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

5. Notice of the Settlement Agreement to the Settlement Class required by *Rule 23(e) of the Federal Rules of Civil Procedure* has been provided in accordance with the Court's Orders granting preliminary approval of this settlement and notice of this settlement, and such Notice has been given in an adequate and sufficient **[**94]** manner; constitutes the best notice practicable under the circumstances; and satisfies *Federal Rules of Civil Procedure 23(c)(2)(B)* and *23(e)* and due process.

6. Defendants have filed notification of this settlement with the appropriate federal and state officials pursuant to the Class Action Fairness Act of 2005 ("CAFA"), *28 U.S.C. § 1715*.

7. As discussed more thoroughly in the accompanying Memorandum, the Court finds that the Settlement Agreement is sufficiently fair, reasonable and adequate to the Settlement Class pursuant to *Federal Rule of Civil Procedure 23(e)*. Specifically, the Court finds that the settlement meets the standard for an initial presumption of fairness. Additionally, the Court's analysis of the factors set forth in *Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975)*, and factors set forth in *In re Prudential Insurance Co. American Sales Practice Litigation Agent Actions, 148 F.3d*

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[23] "Class Period" is defined as "the period from and including January 1, 2000 up to and including the date when Notice of the Court's entry of an order preliminarily approving this settlement and certifying a class for settlement purposes is first published." Thus, the Class Period for the Settlement Agreement is from January 1, 2000 through **[**93]** October 23, 2009.

283 (3d Cir. 1998), as appropriate, leads to the conclusion that the relevant considerations weigh in favor of finding the settlement is fair, reasonable and adequate under Federal Rule of Civil Procedure 23(e).

8. The Settlement Agreement is finally approved pursuant to Federal Rule of Civil Procedure 23(e) **[**95]** of the Federal Rules of Civil Procedure as fair, reasonable, and adequate, and the parties are directed to consummate the Settlement Agreement in accordance with its terms.

9. The United States District Court for the Eastern District of Pennsylvania shall retain jurisdiction over the implementation, enforcement, and performance of this Settlement Agreement, and shall have exclusive jurisdiction over any suit, action, motion, proceeding, or dispute arising out of or relating to this Settlement Agreement or the applicability of this Agreement that cannot be resolved by negotiation and agreement by Plaintiffs and Sparboe Farms, Inc. This Settlement Agreement shall be governed by and interpreted according to the substantive laws of the Commonwealth of Pennsylvania without regard to its choice of law or conflict of laws principles. Sparboe Farms, Inc. submits to the jurisdiction in the Eastern District of Pennsylvania only for the purposes of this Settlement Agreement and the implementation, enforcement and performance thereof. Sparboe Farms, Inc. otherwise retains all defenses to the Court's exercise of personal jurisdiction over Sparboe Farms, Inc..

BY THE COURT:

/s/ Gene E.K. Pratter

[96]** GENE E.K. PRATTER

United States District Judge

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Novell, Inc. v. Microsoft Corp.

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

July 16, 2012, Decided; July 16, 2012, Filed

Civil No. 2:04-cv-01045-JFM

Reporter

2012 U.S. Dist. LEXIS 98710 *; 2012-2 Trade Cas. (CCH) P77,979; 2012 WL 2913234

NOVELL, INC. v. MICROSOFT CORP.

Subsequent History: Affirmed by, Motion granted by *Novell, Inc. v. Microsoft Corp., 2013 U.S. App. LEXIS 19463 (10th Cir. Utah, Sept. 23, 2013)*

Prior History: *Novell, Inc. v. Microsoft Corp., 429 Fed. Appx. 254, 2011 U.S. App. LEXIS 9062 (4th Cir. Md., 2011)*
United States v. Microsoft Corp., 253 F.3d 34, 346 U.S. App. D.C. 330, 2001 U.S. App. LEXIS 14324 (2001)

Core Terms

APIs, operating system, namespace, withdraw, middleware, no evidence, monopoly, argues, products, Sherman Act, email, reasons, exposed, beta, word processing, developers, dialog, anticompetitive, full-featured, competitors, customized, software, barrier, damages, markets, spreadsheet, programs, functionality, manufacturing, monopolize

Counsel: **[*1]** For Novell, Plaintiff: Adam Proujansky, James Robertson Martin, Paul R. Taskier, LEAD ATTORNEYS, PRO HAC VICE, DICKSTEIN SHAPIRO, WASHINGTON, DC; Alex E. Hassid, Andrew E. Smith, Erin Wilcox Burns, Jason D. Wallach, Miriam R. Vishio, LEAD ATTORNEYS, PRO HAC VICE, DICKSTEIN SHAPIRO LLP (DC), WASHINGTON, DC; Jeffrey M. Johnson, LEAD ATTORNEY, R. Bruce Holcomb, DICKSTEIN SHAPIRO LLP, WASHINGTON, DC; John E. Schmidtlein, LEAD ATTORNEY, PRO HAC VICE, WILLIAMS & CONNOLLY (DC), WASHINGTON, DC; Max D. Wheeler, LEAD ATTORNEY, Maralyn M. English, Stanley J. Preston, SNOW CHRISTENSEN & MARTINEAU, SALT LAKE CITY, UT; David L. Engelhardt, Milton A. Marquis, DICKSTEIN SHAPIRO LLP, WASHINGTON, DC.

For Microsoft, Defendant: Adam S. Paris, LEAD ATTORNEY, PRO HAC VICE, SULLIVAN & CROMWELL, LOS ANGELES, CA; David B. Tulchin, Qian A. Gao, Sharon L. Nelles, LEAD ATTORNEYS, PRO HAC VICE, SULLIVAN & CROMWELL (NY), NEW YORK, NY; James S. Jardine, Justin T. Toth, LEAD ATTORNEYS, John W. Mackay, Mark M. Bettilyon, Mark W. Pugsley, RAY QUINNEY & NEBEKER (SLC), SALT LAKE CITY, UT; Joseph J. Reilly, LEAD ATTORNEY, SULLIVAN & CROMWELL, WASHINGTON, DC; M. David Possick, LEAD ATTORNEY, PRO HAC VICE, SULLIVAN & CROMWELL, **[*2]** NEW YORK, NY; Thomas W. Burt, LEAD ATTORNEY, MICROSOFT CORPORATION, REDMOND, WA; Jennifer L. Murray, SULLIVAN & CROMWELL, NEW YORK, NY; Steven L. Holley, PRO HAC VICE, SULLIVAN & CROMWELL, NEW YORK, NY.

Judges: J. Frederick Motz, United States District Judge.

Opinion by: J. Frederick Motz

Opinion

Novell, Inc. instituted this action against Microsoft under § 4 of the Clayton Act, 15 U.S.C. § 15, alleging violations of the Sherman Act, 15 U.S.C §§ 1-2. [1] Initially, Novell asserted three sets of claims: (1) that Microsoft violated § 2 of the Sherman Act and caused antitrust injury to Novell by unlawfully monopolizing and attempting to monopolize the software *applications* market; (2) that Microsoft violated § 2 of the Sherman Act and caused antitrust injury to Novell by unlawfully maintaining its monopoly in the *operating systems* market; and (3) that Microsoft violated § 1 of the Sherman Act and caused antitrust injury to Novell by engaging in exclusionary agreements in unreasonable restraint of trade. Novell has abandoned the third claim, *see* Novell, Inc. v. Microsoft Corp., 429 Fed. Appx. 254, 258 n.7 (4th Cir. 2011), and the Fourth Circuit affirmed a ruling I made that Novell's monopolization and attempted monopolization **[*3]** claims in the applications market are barred by limitations. *See* Novell, Inc. v. Microsoft Corp., No. MDL 1332, No. 05-cv-1087(JFM), 2005 U.S. Dist. LEXIS 11520, 2005 WL 1398643, at *5 (D. Md. June 10, 2005), *aff'd*, 505 F.3d 302, 322 (4th Cir. 2007). [2] Thus, the only remaining claim is the second: that Microsoft violated § 2 of the Sherman Act and caused antitrust injury to Novell by maintaining its monopoly in the *operating systems* market. For this claim, Novell advanced two somewhat different theories: the "franchise theory" and the "middleware theory." [3]

That claim was tried to a jury. After an approximately eight-week trial, the jury hung and was unable to return a verdict. [4] Now pending is Microsoft's motion under Fed. R. Civ. P. 50(b) for judgment as a matter of law. Although Novell presented evidence from which a jury could have found that Microsoft engaged in aggressive conduct, perhaps to monopolize or attempt to monopolize the applications market, it did not present evidence sufficient for a

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[1] This case was brought in the wake of the 1998 government antitrust enforcement action against Microsoft. That action ultimately resulted in a ruling, supported by factual findings made by Judge Thomas Penfield Jackson, that Microsoft violated § 2 of the Sherman Act by monopolizing and attempting to monopolize the operating systems market. *See* United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000), *aff'd in part*, 253 F.3d 34, 346 U.S. App. D.C. 330 (D.C. Cir. 2001). Novell's claim that it was injured by virtue of Microsoft's monopolization of the operating systems market was tolled while the government action was pending because it overlapped with the government's claim **[*4]** in that action. Some of Judge Jackson's factual findings in the government case have been granted collateral estoppel effect in this action. (*See* Oct. 4 Court Correspondence, ECF No. 163; Trial Tr. at 143-57, 167-97, Oct. 18 & Nov. 14, 2011). In this Opinion, I refer to Judge Jackson's findings as Factual Finding ¶ __.

[2] The Fourth Circuit had jurisdiction to review the limitations question because this action had been transferred to the District of Maryland for resolution of pretrial issues pursuant to the Multidistrict Litigation Act. *See* 28 U.S.C. § 1407. I served as the trial judge in the action under an intercircuit assignment to the District of Utah, the district in which the case was filed. In the District of Maryland pretrial proceedings, the case number for this action was No. 05-cv-1087-JFM. In the District of Utah, its case number is No. 2:04-cv-01045-JFM. ECF references in this Opinion are to the Utah docket.

[3] I discuss these theories in section V.B. In the government case, Judge Jackson defined "middleware" as software that "relies on the interfaces provided by the underlying operating system while simultaneously exposing its own APIs to developers." Finding of Fact ¶ 28. **[*5]** The D.C. Circuit accepted this definition, writing that middleware simply refers to "software products that expose their own APIs." Microsoft, 253 F.3d at 53. The products Novell developed that it alleges constitute middleware are PerfectFit (the shared code written into WordPerfect and PerfectOffice), AppWare (which was included in PerfectOffice), and OpenDoc.

[4] After the jury hung, I interviewed the jurors and permitted counsel to do so as well. It appears undisputed that eleven of the twelve jurors would have returned a verdict in favor of Novell on the issue **[*6]** of liability. However, in light of what jurors said after the trial, it would be entirely speculative to assess the amount of damages the jury would have awarded had it not hung on the issue of liability. It might have taken into account in awarding damages not only weaknesses in Novell's damages claim but weaknesses in its liability claim as well. In any event, the fact that a majority of the jurors would have returned a verdict of liability in favor of Novell does not relieve me of the responsibility to rule on independent claims or on Microsoft's Rule 50(b) motion. *See* Noonan v. Midland Capital Corp., 453 F.2d 459, 463 (2d Cir. 1972) ("If the position of some jurors favoring plaintiff is enough [to prevent a judge from granting a Rule 50(b) motion], there could never be a judgment for insufficiency of the evidence notwithstanding a verdict."); Stewart v. Walbridge, Aldinger Co., 882 F. Supp. 1441, 1443 (D. Del. 1995) ("[T]he fact that the jury was unable to reach a unanimous verdict does not in any way affect this Court's duty to rule on the [Rule 50(b)] motion.").

jury to find that Microsoft committed any acts that violated *§ 2* in maintaining its monopoly in the operating systems market. Therefore, Microsoft's Rule 50 motion will be granted. [5]

I.

In the mid-1990s, Microsoft, which for many years had possessed a monopoly in the PC operating systems market, was developing a new operating system. This operating system became known as Windows 95 and was released for sale to the public on August 24, 1995. [6] Microsoft also sold a word processing application, Word, and a spreadsheet application, Excel. Beginning in 1990, Microsoft marketed these two applications together in an office productivity suite, Office. (Gibb, Trial Tr. at 823, Oct. 26, 2011; Frankenberg, Trial Tr. at 1080, Nov. 7, 2011).

WordPerfect, a word processing application, was originally developed by WordPerfect Corporation, a company located in Orem, Utah. WordPerfect competed with Word and was particularly popular with customers who used character-based DOS operating systems. In the mid-1980s and early 1990s, WordPerfect was the acknowledged "king of the hill" on the DOS platform. (Peterson, Trial Tr. at 4667, Dec. 7, 2011; *see* Middleton, Trial Tr. at 4178 (Dec. 13, 2008 Video Dep.), Dec. 5, 2011). Although **[*9]** Microsoft manufactured and sold a character-based operating system known as MS-DOS, as early as 1984 it began concentrating on an alternative type of operating system, known as a graphic user interface ("GUI") system. (Gates, Trial Tr. at 2709, 2713, Nov. 21, 2011). As Microsoft developed Windows, its GUI-based operating system, Bill Gates, the Chief Executive Officer of Microsoft, attempted to persuade Pete Peterson, then a principal of WordPerfect, to write for Windows. [7] (Peterson, Trial Tr. at 4708-09, Dec. 7, 2011). WordPerfect, however, was reluctant to devote significant resources to developing applications to run on Windows because Peterson "was not going to put any effort into producing a product that would put another penny in Bill Gates' pocket." (Bushman, Trial Tr. at 3152-53, Nov. 28, 2011). In May 1990, Microsoft released Windows 3.0. WordPerfect did not release a Windows 3.0—compatible WordPerfect program until eighteen months later, in November 1991. (Middleton, Trial Tr. at 4187 (Dec. 13, 2008 Video Dep.), Dec. 5, 2011)

Novell announced its intent to purchase WordPerfect on March 21, 1994 and completed the purchase on June 24, 1994. At the same time, Novell purchased Quattro Pro, a spreadsheet application that had been developed by Borland, Inc., a company located in Scotts Valley, California. (Frankenberg, Trial Tr. at 1080, Nov. 7, 2011). Robert Frankenberg, who was the Chief Executive Officer of Novell after its purchase of WordPerfect and Quattro Pro, saw that GUI operating systems were the wave of the future, and he was more inclined than Peterson to work with Microsoft and to develop versions of its applications for Windows. (*Id.* at 1040). The WordPerfect products for Windows had generally not been well received by the market, and Frankenberg recognized the need to improve those products. In November 1994, Novell released WordPerfect 6.1 for Windows, which met with favorable

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[5] This Opinion does not contain extensive citations to Tenth Circuit ***antitrust law*** because I have concluded that the **[*7]** facts governing my ruling are so case specific that the proper disposition of the Rule 50 motion requires close examination of the evidence in this case rather than comparison of this case to others. I note, however, my holding entirely accords with the Tenth Circuit's view that, as a general matter, a tough-minded business decision that adversely affects competition does not constitute an *ipso facto* violation of the Sherman Act. *See* *Christy Sports, LLC v. Deer Valley Resort Co., 555 F.3d 1188, 1198 (10th Cir. 2009)*.

[6] Windows 95 was launched at a gala event at Microsoft's corporate headquarters. Gary Gibb, who managed the development of the **[*8]** versions of Novell's office productivity applications for Windows 95, attended the event. He testified that he was displeased because he was not invited into the tent where Jay Leno, a television personality, was serving as the master of ceremonies. It was apparent to Gibb that Microsoft was using the event to market not only Windows 95 but also Microsoft's own office productivity applications, which ran on Windows 95. (Gibb, Trial Tr. at 818, Oct. 26, 2011). Gibb's perception of the event reflects that in 1995, Novell was concerned that what Microsoft was attempting to do was to use Windows 95 to increase its share of the applications market, not to maintain its monopoly in the operating systems market.

[7] At the same time, some executives at Microsoft encouraged developers to write for another operating system, OS/2, rather than for Windows. (*See* Peterson, **[*10]** Trial Tr. at 4708, Dec. 7, 2011). Novell relies upon this evidence to infer that Microsoft, in pursuit of monopoly power, was talking from both sides of its mouth.

industry reviews. (*See* Pl.'s Exs. 239 & 241). Frankenberg also saw the need for Novell to market an office productivity suite, and in late December 1994 WordPerfect **[*11]** successfully released a Windows-compatible suite, PerfectOffice 3.0. [8] (Frankenberg, Trial Tr. at 1012, Nov. 7, 2011). Although Frankenberg recognized that Microsoft had "a huge head start" in the suite market, in January of 1994 approximately 74% of users had yet to choose among the available suite products. (*Id.* at 1008-09, 1063; Pl.'s Ex. 412 at 2).

On June 10, 1994, shortly before Novell finalized its purchase of WordPerfect Corporation and Quattro Pro, Microsoft provided independent software vendors ("ISVs"), including WordPerfect, with the Milestone 6 beta version of Windows 95. (*See* Harral, Trial Tr. at 434-35, Oct. 24, 2011). Novell was extremely enthusiastic about Windows 95 when it was released in beta form to ISVs. Frankenberg testified that Windows 95 was a significant step forward and that Novell was "very excited and very interested" in **[*12]** it. (Frankenberg, Trial Tr. at 1225-26, Nov. 8, 2011). He further testified that Novell's business strategy was to "take advantage of the capabilities in Windows 95." (*Id.* at 1226). The testimony of other Novell witnesses was to the same effect. (Harral, Trial Tr. at 253-54, 256-57, Oct. 20, 2011; Richardson, Trial Tr. at 607, Oct. 25, 2011; Gibb, Trial Tr. at 788, Oct. 26, 2011; Noll, Trial Tr. at 1911, Nov. 15, 2011).

On October 3, 1994, Microsoft withdrew support for the part of this beta version making namespace extension application programming interfaces ("APIs") accessible to ISVs. (*See* Pl.'s Ex. 1). Prior to the hearing on the Rule 50 motion, Novell contended that the act of withdrawing support for the namespace extension APIs was itself an unlawful act because beta versions of a release cannot be modified except to fix bugs discovered during the course of the beta process. Novell did not, however, press this argument at the Rule 50 hearing. Its reason for not doing so is clear. Although one Novell software developer, Adam Harral, did so suggest, (Harral, Trial Tr. at 303, Oct. 20, 2011), all of the other evidence was to the contrary. Microsoft's licensing agreement with WordPerfect/Novell **[*13]** provided that the beta version "may be substantially modified prior to first commercial shipment," and that WordPerfect "assume[d] the entire risk with respect to the use of the beta." (Def.'s Ex. 18 at 1 ¶ 2; Def.'s Ex. 19 ¶ 2). Moreover, numerous witnesses, including Frankenberg and other persons who during the relevant time frame had been employed by Novell, testified that they understood the beta versions of Windows 95 "could change" and "might change" prior to commercial release. (Frankenberg, Trial Tr. at 1201, 1204-05, 1209, Nov. 8, 2011; Larsen, Trial Tr. at 3603, 3654-58, Nov. 30, 2011). Novell's expert witnesses likewise agreed with this proposition. (Alepin, Trial Tr. at 1555-56, Nov. 10, 2011; Noll, Trial Tr. at 1878, Nov. 15, 2011).

The parties dispute the reasons that Microsoft decided, on October 3, 1994, to withdraw support for the namespace extension APIs. Microsoft argues it had legitimate "stability" and "robustness" concerns, particularly because, as Novell's own technical expert, Ronald Alepin, conceded, an ISV that wrote a bad program using the namespace extension APIs could cause Windows 95 to crash. (Alepin, Trial Tr. at 1601-02, Nov. 10, 2011; *see* Gates, Trial **[*14]** Tr. at 2781-82, Nov. 21, 2011). Moreover, according to Microsoft, there was an internal debate at Microsoft between the Windows team and another team, working on what was known as the "Cairo Shell," about the design of the namespace extension APIs. (Gates, Trial Tr. at 2792-93, Nov. 21, 2011; Muglia, Trial Tr. at 3385-90, 3397-3400, Nov. 29, 2011; Nakajima, Trial Tr. at 3763-64, 3768-71, Dec. 1, 2011; Belfiore, Trial Tr. at 4269-71, 4278-80, Dec. 5, 2011). Finally, Microsoft contends that the namespace extension APIs did not provide the functionalities Gates had contemplated. (Gates, Trial Tr. at 2786-87, 2800-04, Nov. 21, 2011; Pl.'s Ex. 1).

Novell argues that all of the reasons Microsoft articulated for the October 3, 1994 decision were pretextual, and that, as revealed in an internal email Gates authored, the real reason for withdrawing support for the namespace extension APIs was to provide a competitive advantage to Microsoft's own office productivity suite, Office. (*See* Pl.'s Ex. 1). In the October 3, 1994 email announcing the withdrawal decision, Gates stated: "I have decided that we should not publish these extensions. We should wait until we have a way to do a high level of **[*15]** integration that

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[8] PerfectOffice 3.0 did not achieve a sizeable market share. (*See* Noll, Trial Tr. at 1915, Nov. 15, 2011). However, this may well have been due to the fact that many consumers were not buying new applications during 1994 and the first seven months of 1995 because they were awaiting the release of Windows 95 and applications written to it.

will be harder for the likes of Notes [a Lotus product], WordPerfect to achieve, and which will give Office a real advantage." (*Id.*). [9]

According to Novell, Gates's decision to withdraw support for the namespace extension APIs was consistent with a plan that had been discussed and adopted by Microsoft executives in June 1993, at a retreat at Gates's estate on Hood Canal. That plan called for Windows 95 to be shipped with limited extensibility, reserving for Microsoft's applications the functionality that the namespace extension APIs provided. (*See* Pl.'s Ex. 61). The plan's purpose was to give Microsoft's applications "a very significant lead over [Microsoft's] competitors, and make [Microsoft's] competitors' products look 'old.'" (*Id.* at MS 00971223). Microsoft was concerned that if the extensibility were not withheld from ISVs, Word and Excel would have to "battle against their competitors on even turf. Given that Lotus and WordPerfect have largely caught up, [Word and Excel] almost certainly lose ground — if not in market share, then in margins." (Pl.'s Ex. 62 at MX 1389851). **[*17]** [10]

After Microsoft withdrew support for the namespace extension APIs in October 1994, Novell was confronted with three options: (1) to continue to write its own programs using the namespace extension APIs that were no longer supported by Microsoft but were still accessible to ISVs in possession of the beta version; (2) to use Microsoft's common file open dialog (instead of the namespace extension APIs), which remained available to ISVs after the withdrawal of support for the namespace extension APIs; or (3) to write its own customized file open dialog. (*See* Harral, Trial Tr. at 342-44, Oct. 20, 2011). Although it explored the first option, Novell concluded that it could not use the previously released documentation **[*18]** for the namespace extension APIs because Microsoft was no longer providing any assistance for writing programs based upon those APIs. (*Id.* at 345-46). Novell also concluded that the second option was unsatisfactory because to use it would "impose[] the standards of the operating system" on developers. (*Id.* at 271). Specifically, using Microsoft's common file open dialog would have caused Novell to stop providing features that it had provided to its customers in the past, thereby "disenfranchis[ing] [its] customer base." (Harral, Trial Tr. at 504, Oct. 24, 2011; Richardson, Trial Tr. at 629-30, Oct. 25, 2011; *see* Gibb, Trial Tr. at 891, Oct. 26, 2011). Therefore, in January 1995 Novell stopped trying to reproduce the lost functionality and chose the third option, beginning to write its own customized file open dialog by having two developers, Harral and Richardson, work around the clock, sometimes in excess of 80 hours per week, under Gibb's supervision. (*See* Harral, Trial Tr. at 350-54, Oct. 20, 2011).

When Gates decided to withdraw support for the namespace extension APIs, some Microsoft executives were concerned that the decision would not be well received by ISVs. In that regard, **[*19]** Brad Silverberg wrote an email to other Microsoft executives, including Gates, on October 5, 1994, predicting there would be a "firestorm of protests" from ISVs, including WordPerfect, that were using the shell extensions. (Pl.'s Ex. 220 at MX 5103184). However, shortly before Silverberg's email was written, Brad Struss, who headed the Windows 95 team for Microsoft's Development Relations Group and worked closely with Novell, reported that Novell "ha[d] not begun any work on IShellFolder, IShellView, etc.," i.e. the namespace extensions. (Def.'s Ex. 17 at MX 6109491). Struss's

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[9] There is additional evidence that by October 1994 Gates was concerned about competition from Lotus and Novell. For example, Gates wrote an email, after watching a demonstration of Novell's new technology at a conference held in Scottsdale, Arizona on September 20, 1994, stating that "Novell [was] a lot more aware of how the world [was] changing than I thought they were." (Pl.'s Ex. 222; *see* Pl.'s Exs. 17, 31-33, 54, 72, 88, 91, 127, 201). There also was evidence that other executives at Microsoft perceived Novell's products to constitute middleware threats to Microsoft's operating system. Brad Silverberg, a senior Microsoft executive, wrote in an email dated June 15, 1993 that "our competitors are going to do everything they can to fragment windows, they will build their own middleware to claim api ownership." (Pl.'s Ex. 54 at MS 0185884). Likewise, John Ludwig of Microsoft wrote an internal email in which he stated, *inter alia*, that "our worst nightmare is novell/lotus being successful at establishing their 'middleware' as a standard. **[*16]** [O]urs ought to be ubiquitously available to forestall this. [O]ur huge advantage vis-à-vis novell is our end-user franchise, we shouldn't cast aside this advantage." (*Id.; see* Pl.'s Exs. 32 at MS 7079459, 33 at MS 5011635, 44 at MS 7080466-67).

[10] As Novell's counsel acknowledged in closing argument, the Hood Canal plan was never implemented in light of the fact that Excel, Word, and Office did not use the functionality provided by the namespace extension APIs. (Trial Tr. at 5324-25, Dec. 13, 2011). However, Novell contends the Hood Canal plan is relevant in casting light upon the reason for Gates's decision to withdraw support for the namespace extension APIs on October 3, 1994. That contention is not unreasonable.

email also included the results of a survey Microsoft conducted of major ISVs to ascertain if ISVs in fact were using the namespace extension APIs. (*Id.*). On October 12, 1994, after the decision to withdraw support for the namespace extension APIs was made, Struss advised Microsoft executives by email that Microsoft was "notifying ISVs about the namespace api changes." (Def.'s Ex. 3 at MX 6055840). He reported that "WP [WordPerfect] . . . appear[s] to be OK with this." (*Id.*). Struss also testified at trial that he told others at Microsoft "what [he] knew to be true or what had been communicated to [him] from **[*20]** WordPerfect, which is that they were not using it and they were not dependent upon it." (Struss, Trial Tr. at 3270, Nov. 28, 2011).

Novell presented no witness to rebut this testimony or to contradict what was said in the October 12 email. There also is no evidence in the record that Novell ever complained to Microsoft about Microsoft's decision to withdraw support for the namespace extension APIs. Further, there is no evidence that any top-level executive at Novell was involved in the decision-making process concerning the choice of the third option, i.e., writing of customized code for WordPerfect. Frankenberg testified that any action that could jeopardize the timely release of WordPerfect or Quattro Pro would have been referred to some or all of four senior executives: Ad Rietveld, Executive Vice President of the Novell Applications Group; Dave Moon, Senior Vice President of the Business Applications Group; Mark Calkins, Vice President and General Manager of the Business Applications Group; and Glenn Mella, Vice President of Marketing. (Frankenberg, Trial Tr. at 1140-42, 1179-80, Nov. 7-8, 2011). Moreover, Frankenberg agreed that in any business or organization faced with an important **[*21]** decision, a formal memorandum would normally be presented to the senior executives laying out the concerns, issues, and considerations facing that business and making some strategic or tactical choice. (*Id.* at 1181, Nov. 8, 2011). Novell presented no evidence that any such memorandum was ever written, and Frankenberg testified that he knew of no evidence that Calkins, Mella, Moon, or Rietveld were presented with a decision about how to respond to Gates's decision to withdraw support for the namespace extension APIs. (*Id.* at 1181-82). [11] Instead, Novell assigned responsibility for supervising the writing of code for a custom file open dialog for WordPerfect and Quattro Pro to Gibb, a middle manager, who, in turn, assigned the responsibility for writing the code to Harral and Richardson.

Microsoft sought commitments from several of the most important ISVs to ship their Window 95—compatible applications within 90 days of the release of Windows 95. (*See* Pl.'s Ex. 148). Frederick Warren-Boulton, Novell's economic expert, testified that if Novell's product was shipped according to that timeframe, the application would have been **[*22]** "in pretty good shape," and that his damage calculations are based on the assumption that Novell could have released their product according to the agreement, but for the alleged anticompetitive conduct. (Warren-Boulton, Trial Tr. at 2417-24, Nov. 17, 2011).

According to Novell, because it took one year for Novell to write its customized file open dialog, Novell was unable to meet that timetable. (Novell Mem. Opp'n Rule 50 Mot. ("Novell Opp'n") at 69, ECF No. 501). Microsoft strongly disputes this assertion. It argues Quattro Pro—the spreadsheet component of PerfectOffice—was not ready to be released to manufacturing until well into 1996, and that this explains the delay in Novell's marketing of PerfectOffice. (*See* Microsoft Mem. Supp. Rule 50 Mot. ("Microsoft Mem.") at 48, ECF No. 494). An internal Novell memorandum indicated that although in late 1994 Novell had been considering a September 30, 1995, release date for PerfectOffice for Windows 95, the Quattro Pro team then "believe[d] this [was] barely achievable with all their resources and with no additional functionality." (Def.'s Ex. 211). On March 1, 1995, Bruce Brereton, Novell's Vice President of the Business Applications Unit, **[*23]** wrote in an email that because Quattro Pro believed that "December 30 is a more realistic date," Novell had decided to "move . . . the Storm [PerfectOffice for Windows 95] RTM [release to manufacturer] date back by one month (to December 30) and have put WP on the same time-line as Storm." (Def.'s Ex. 221).

In light of Brereton's email, Frankenberg testified that as of March 1, 1995 the plan became to get PerfectOffice out, i.e., released to manufacturing, on December 30, 1995. (Frankenberg, Trial Tr. at 1220-21, Nov. 8, 2011). In March 1995 a "markets requirement report" prepared by the applications group ranked "Quattro Pro delivering late" as the highest "overall risk" for the PerfectOffice development project. (Def.'s Ex. 223 at 41). David LeFevre, who was then an employee of Novell (he subsequently became an employee of Microsoft), testified that he attended daily

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[11] Rietveld, Calkins, Moon, and Mella did not testify at trial.

meetings in 1995 with Gibb and others where the matters discussed included "all the different product challenges" of releasing PerfectOffice in a timely manner. (LeFevre, Trial Tr. at 4037, Dec. 2, 2011). According to LeFevre, "the product that was causing the biggest problem was Quattro Pro." (*Id.* at 4045-47).

Karl Ford, **[*24]** then the lead developer for the user interface in WordPerfect for Windows 95, also attended regularly scheduled meetings in 1995, and he learned that "the schedule" was at risk because of Quattro Pro. (Ford, Trial Tr. at 3691-92, 3699-3700, Nov. 30, 2011). The problem of having Quattro Pro ready to be released to manufacturing became even more severe toward the end of 1995, when many developers left Quattro Pro for other employment in Silicon Valley, the area where Scotts Valley—home of Quattro Pro—was located. (*See* Def.'s Ex. 230). On December 23, 1995, four months after the release of Windows 95, Brereton wrote an email to Frankenberg and others reporting that "this past Thursday/Friday about 15 additional people [at Quattro Pro] submitted their resignations," leaving the Quattro Pro development team in Scotts Valley, California with "just 2 people." (*Id.*). In January 1996, Nolan Larsen, an executive of Novell, traveled to Scotts Valley and found that it "was kind of a train wreck" and that "[t]hose people who had not resigned were kind of walking around a little bit shell shocked. So it was — it was very chaotic." (Larsen, Trial Tr. at 3620, Nov. 30, 2011). Larsen and LeFevre testified **[*25]** that Quattro Pro was not ready to be shipped by March 1996. (*Id.* at 3624-25; LeFevre, Trial Tr. at 4062-63, Dec. 2, 2011).

Gibb, however, testified that Quattro Pro was not "critical path" because the delay in the development of shared code on which Harral and Richardson were working was the only issue holding up the release. (Gibb, Trial Tr. at 804-07, Oct. 26, 2011). Ultimately, Quattro Pro and PerfectOffice were not released until May 1996, after the sale to Corel Corporation in March 1996. As described in section III, *infra*, according to Novell, this delay prevented WordPerfect and PerfectOffice from obtaining a sizeable share of the Windows 95-compatible word processing and suite markets. This, in turn, Novell argues, prevented Novell products from becoming successful "middleware," which could have been an effective competitor with Windows 95 in the operating systems market.

On November 8, 2004, Novell and Microsoft entered into a settlement agreement under which any claims not pled in Novell's draft complaint in this action, filed Nov. 12, 2004, were released. (*See* Settlement Agreement, Holley Decl. Supp. Microsoft Mem., Ex. A, ECF No. 497). The complaint in this action asserted **[*26]** claims for damages suffered by Novell's "lost sales of office productivity applications and a diminution in value of Novell's assets, reputation and goodwill in amounts to be proven at trial." (Compl. ¶ 155). The complaint further alleged, in the prayer for relief, that Microsoft maintained its monopoly in three specific markets, the operating systems market, the word processing applications market, and the spreadsheet applications market. (*Id.* at 67).

II.

A Rule 50 motion "test[s] whether there is a legally sufficient evidentiary basis for a reasonable jury to find for the moving party." *Keylon v. City of Albuquerque, 535 F.3d 1210, 1215 (10th Cir. 2008)*. Judgment as a matter of law is appropriate "only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position." *Tyler v. RE/MAX Mountain States, Inc., 232 F.3d 808, 812 (10th Cir. 2008)* (citing *Finley v. United States, 82 F.3d 966, 968 (10th Cir. 1996))*; *see* *Miller v. Auto. Club of N.M., Inc., 420 F.3d 1098, 1131 (10th Cir. 2005)* ("Judgment as a matter of law is only appropriate when 'a party has been fully heard on an issue and there is no legally sufficient evidentiary **[*27]** basis for a reasonable jury to find for that party on that issue.'") (quoting *Fed. R. Civ. P. 50(a)(1)*). All reasonable inferences are drawn in favor of the non-moving party, and the court does not "weigh the evidence, pass on the credibility of witnesses, or substitute [its] conclusions for that of the jury." *Miller v. Eby Realty Grp., LLC, 396 F.3d 1105, 1110 (10th Cir. 2005)*. The decisive question is whether "the plaintiff has arguably proven a legally sufficient claim." *Dillon v. Mountain Coal Co., 569 F.3d 1215, 1219 (10th Cir. 2009)*.

III.

Novell's theory may be briefly stated. According to Novell, Microsoft violated *§ 2* of the Sherman Act when it decided in October 1994 to withdraw support for the namespace extension APIs, a decision that Novell asserts led to Microsoft's maintenance of its monopoly in the *operating systems* market. [12] This decision was made personally by Gates, who was motivated by a desire to provide time for Microsoft to catch up with Novell and Lotus in development of its office productivity applications, Word, Excel, and Office. (*See* Pl.'s Ex. 1). As a result of Microsoft's decision, Novell could no longer use the namespace extension APIs and lost valuable **[*28]** time in developing WordPerfect, Quattro Pro, and PerfectOffice. (*See* Rule 50 Hr'g Tr. at 172-74, ECF No. 507). Novell was not able to put those applications on the market until May 1996. (*See* Warren-Boulton, Trial Tr. at 2090, Nov. 16, 2011). This had the effect of preventing WordPerfect and PerfectOffice from becoming effective competitors with Word and Office in the applications market. Moreover, in the longer run, by preventing Novell's applications from being widely used with Windows 95, the decision to withdraw support for the namespace extension APIs prevented WordPerfect and PerfectOffice (and two other Novell programs, AppWare and OpenDoc) from being accepted in the market as middleware. (*See* Rule 50 Hr'g Tr. at 119-27). If Novell's products had been accepted in the market as middleware, ISVs would have begun to write programs using APIs exposed by the Novell applications, thereby reducing the barrier to entry into the PC operating systems market and threatening Microsoft's monopoly in that market. (*Id.* at 194-96).

Microsoft argues that this theory is unique and unprecedented because it is based upon conduct that occurred in one market, the software *applications* market, to assert a Sherman Act § 2 claim in an entirely different market, the *operating systems* market. (*See id.* at 6). That alone, according to Microsoft, is fatal to Novell's claim. (*Id.*). Novell counters that although Microsoft, through Gates, was motivated by a desire to disadvantage Novell's applications in favor of Microsoft's own applications, its conduct was intentional, and a jury could appropriately find that its conduct had anticompetitive effects in the operating systems market. (*Id.* at 165-68). According to Novell, that is sufficient to establish a *§ 2* violation.

I need not decide this issue because, even assuming Novell's argument is correct, its claim nevertheless fails for three separate and independent reasons: (1) Microsoft's conduct was not anticompetitive within the meaning of the Sherman Act; (2) Novell did not present sufficient evidence from which a jury could find that its products would have been successfully developed as middleware; and (3) there is **[*30]** no underlying business reality to the claims. Each of these reasons is examined in section V. Before discussing those issues, however, I will first address two arguments made by Microsoft that I believe lack merit.

IV. [13]

A.

Microsoft argues it has articulated legitimate business reasons for the decision Gates made on October 3, 1994, to withdraw support for the namespace extension APIs and that the fact-finder is not to weigh the factors that led to a particular decision in assessing whether that decision was a violation of antitrust laws. (*See* Microsoft Mem. at 110 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597, 605, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*; *Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, 63 F.3d 1540, 1550 (10th Cir. 1995)))*. The fallacy in that contention is that in this case, the jury was not asked to weigh the factors that Microsoft articulated in support of the October 3, 1994 decision, but rather to decide whether **[*31]** those articulated reasons were pretextual in light of Gates's email suggesting the decision was made to give Microsoft application developers time to catch up with Microsoft's major competitors, Novell and Lotus. Fact-finders are frequently called upon to answer this question of pretext, particularly in the field of employment discrimination law. *See, e.g., Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 153-54, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)* (holding that a plaintiff "introduced enough evidence for a jury to reject [the defendant's explanation]" as pretextual); *Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1243-44 (10th Cir. 2002)* (holding that a jury "could reasonably have

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[12] To repeat, Novell's theory is not that the October 3, 1994 decision had an anticompetitive effect in the *applications* market in violation of *§ 2*. Any claim based **[*29]** upon that theory is, as stated above, barred by limitations.

[13] Microsoft also makes several arguments to the effect that Novell did not present sufficient evidence of damages. These arguments are, however, in large part merely different iterations of other contentions I address in section V.

found" a defendant employer's stated reasons for demoting an employee "were pretextual, potentially entitling him to a finding of discrimination").

Here, although I am granting Microsoft's Rule 50 motion for the reasons stated in section V, I believe the text of Gates's email provides sufficient evidence upon which a jury could find that the reasons for the October 3, 1994 decision to withdraw support for the namespace extensions were pretextual. Therefore, if the only question raised by the Rule 50 motion were whether the jury **[*32]** was asked to weigh the factors that led Microsoft to make the October 3, 1994 decision, I would deny the Rule 50 motion.

B.

As stated in section I, *supra*, on November 8, 2004, Microsoft and Novell entered into a settlement agreement pursuant to which Novell released any and all claims it had against Microsoft with the exception of claims asserted in a draft complaint that became the complaint in this action. In Count I of the complaint (the only count remaining in the case), Novell alleged that as a result of Microsoft's alleged misconduct, it "was damaged by, without limitation, lost sales of office productivity applications and a diminution in the value of Novell's assets, reputation, and goodwill in amounts to be proven at trial." (Compl. ¶ 155). The term "office productivity applications" is defined earlier in the complaint as "word processing and spreadsheet applications." (*Id.* ¶ 24).

Microsoft argues that because the only Novell applications allegedly damaged by Microsoft's alleged misconduct were the word processing application, WordPerfect, and spreadsheet application, Quattro Pro, Novell released Microsoft from any claim that it had for damages to Novell's office productivity **[*33]** suite, PerfectOffice. (*See* Microsoft Mem. at 126-27). Microsoft also points out that the complaint does not refer in any way to the suite market. (*See id*. at 128-30).

In entering into the release—which certainly was a significant business transaction— Microsoft had the right to rely upon the language of the release and the language of the draft complaint referred to in the release. Those documents made no reference whatsoever to PerfectOffice. Moreover, in deciding to enter into the settlement agreement, Microsoft may have considered the omission of any reference to PerfectOffice to be significant because, as the evidence at trial established, by 1994 it was clear that the office suite market stood separate and apart from the word processing and spreadsheet applications markets. (*See* Gibb, Trial Tr. at 823, Oct. 26, 2011; Frankenberg, Trial Tr. at 1080, Nov. 7, 2011). As Frankenberg's testimony highlighted during the trial, Novell as well as Microsoft understood the importance of the suite market in 1994. Frankenberg testified that in 1994 approximately three-quarters of the suite market was open, and Novell was planning to make substantial inroads into it. (*See* Frankenberg, Trial Tr. **[*34]** at 1008-09, 1063, Nov. 7, 2011; Pl.'s Ex. 412 at 2).

Nevertheless, Microsoft's argument fails. The complaint referred not only to damages resulting from lost sales of office productivity applications but also damages resulting from "a diminution in the value of Novell's assets, reputation, and goodwill in amounts to be proven at trial." (Compl. ¶ 155). Novell's damages expert, Frederick Warren-Boulton, did not calculate damages on a product-by-product basis but instead on the basis of the decrease in the sales price paid to Novell by Corel, allegedly caused by Microsoft's withdrawal of support for the namespace extension APIs. (*See* Warren-Boulton, Trial Tr. at 2094-98, Nov. 16, 2011). This decrease in sales price falls well within the "diminution in value" category of damages referred to in the complaint and thus was not released by the agreement entered into November 8, 1994.

V. [14]

I will now discuss the three reasons Microsoft's Rule 50 motion should be granted.

A.

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[14] Some of the facts stated in section I are repeated in sections IV and V in connection with the portions of the legal analysis to which they pertain.

A monopolist is free "to exercise [its] own independent discretion as to **[*35]** parties with whom [it] will deal." Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004); *see* United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919). It is well established that a monopolist generally has no duty to cooperate with its competitors. *See, e.g.,* Trinko, 540 U.S. at 408; Aspen Skiing, 472 U.S. at 600; Image Technical Servs., Inc., v. Eastman Kodak Co., 125 F.3d 1195, 1209 (9th Cir. 1997). In accordance with this principle, Novell's counsel properly conceded during the hearing on Microsoft's Rule 50 motion that it would not have been unlawful for Microsoft to keep the namespace extension APIs to itself and never disclose them to ISVs. (Rule 50 Hr'g Tr. at 191-92). Novell argues, however, that Microsoft's conduct was anticompetitive within the meaning of § 2 of the Sherman Act because when it decided to withdraw support for the namespace extension APIs in October 1994, it intentionally made a decision that had an adverse effect upon competition in the operating systems market. (*See id.* at 165-68).

The distinction Novell seeks to draw is unpersuasive. A decision not to publish the namespace extension APIs in the first place is as "intentional" **[*36]** as a decision to withdraw support for the namespace extension APIs after they have been published. Therefore, the principle that a monopolist generally has no duty to cooperate with a competitor governs unless the act of withdrawing support for the namespace extension APIs was itself anticompetitive. [15]

The decision to withdraw support for the namespace extension APIs therefore did not constitute a violation of § 2 of the Sherman Act unless it was made deceptively for an anticompetitive purpose or unless, by making it, Microsoft terminated a previously existing profitable relationship. [16] *See, e.g.,* Aspen Skiing, 472 U.S. at 599-604; Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1224-25 (10th Cir. 2009); Christy Sports, LLC v. Deer Valley Resort Co., 555 F.3d 1188, 1197 (10th Cir. 2009).

Any deception claim necessarily is based upon the premise that Microsoft withdrew support for the namespace extension APIs because it knew that Novell was using those APIs in the development of its applications and that, by withdrawing support for those APIs, Microsoft knew that Novell would fall behind schedule. There is no evidence to support this premise. [17] First, as just stated, because of the undisputed industry practice, Microsoft had no reason

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[15] Prior to the hearing on the Rule 50 motion, Novell contended that the act of withdrawing support for the namespace extension APIs was itself an unlawful act because beta versions of a release cannot be modified except to fix bugs discovered during the course of the beta process. However, as I noted in section I, *supra*, Novell did not press this contention at the Rule 50 hearing, and it is unsupported by the evidence.

[16] Microsoft **[*37]** argues that while deception may give rise to a common law tort, it cannot, as a matter of law, form the basis for a Sherman Act claim. Although deception usually sounds in tort, *see* Restatement (Second) of Torts § 526 (1977) (defining fraudulent misrepresentation/deceit), I see no reason it could not also give rise to an antitrust claim if the purpose of the deception is to mislead a competitor into taking action (or not taking action) that would substantially change the competitive environment. Microsoft distinguishes cases in which deceptive conduct has given rise to antitrust liability on the grounds that such cases typically involve deception of third parties, not competitors. *See* Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'n, Inc., 108 F.3d 1147, 1151 (9th Cir. 1997); Int'l Travel Arrangers, Inc. v. W. Airlines, 623 F.2d 1255, 1260-63 (8th Cir. 1980). Those cases, however, do not turn on the identity of the party deceived but on whether the challenged conduct in fact harmed competition. *See* Rambus, Inc., v. Fed. Trade Comm'n, 522 F.3d 456, 464, 380 U.S. App. D.C. 431 (D.C. Cir. 2008) ("Deceptive conduct—like any other kind—must have an anticompetitive effect in order **[*38]** to form the basis of a monopolization claim. . . . Cases that recognize deception as exclusionary hinge, therefore, on whether the conduct impaired rivals in a manner tending to bring about or protect a defendant's monopoly power.").

[17] What the evidence, specifically Gates's email announcing the decision to withdraw support for the namespace extension APIs, does suggest is that Microsoft was attempting to buy time for its own office productivity application developers to catch up, so that eventually Microsoft could use the enhanced technology created by Windows 95 as effectively (and potentially, by integration of the applications and the operating system, more effectively) as its major competitors, including Novell. That, however, is quite different from imputing to Microsoft knowledge that Novell needed the namespace extension APIs to develop its own applications. Of course, in fact, as the evidence **[*40]** established, Novell could have used Microsoft's common file open dialog, which remained available to it after support for the namespace extension APIs was withdrawn, to develop its applications.

to believe that Novell was relying upon the documentation for the namespace extension APIs contained in the beta version Microsoft released to ISVs. (*See* Def.'s Ex. 17 at MX 6109491). Second, the evidence establishes that shortly before the decision to withdraw the namespace extension APIs was made, Brad Struss of Microsoft was advised that Novell was not yet using the namespace extension APIs, (*id.*), and that after the decision, he contacted Novell and was notified that "WP . . . appear[s] to **[*39]** be OK with this." (Def.'s Ex. 3 at MX 6055840). Likewise, Struss testified at trial that he told others at Microsoft "what [he] knew to be true or what had been communicated to [him] from WordPerfect, which is that they were not using it and they were not dependent upon it." (Struss, Trial Tr. at 3270, Nov. 28, 2011). Novell did not rebut this evidence in any way, and there is no evidence that Novell made any contemporaneous complaint to anyone at Microsoft about withdrawal of support for the namespace extension APIs.

The claim that Microsoft purposely destroyed a preexisting profitable business relationship is equally flawed. Preliminarily, it should be noted that *Aspen Skiing*, upon which Novell bases its argument, has been characterized by the Supreme Court as being "at or near the outer boundary of § 2 liability." *Trinko, 540 U.S. at 409*. The facts in *Aspen Skiing* were unusual, involving a defendant's exploitation of a situation largely bestowed upon it by Mother Nature. The defendant owned three mountains in a ski resort area and engaged in sharp business practices to prevent the owner of the fourth mountain from competing effectively for skiing business. *See Aspen Skiing, 472 U.S. at 589-95*. In contrast, what Novell is asserting here is that Microsoft could not withdraw from Novell a product that was the result of Microsoft's own ingenuity **[*41]** and that Novell believed would give it optimal advantage in its competition with Microsoft in the applications market.

There is no evidence that Microsoft withdrew support for the namespace extension APIs for the purpose of terminating its relationship with Novell. The final version of Windows 95 made available to all ISVs, including Novell, contained Microsoft's common file open dialog, and Novell never advised Microsoft that this dialog was insufficient for its own purposes. (*See* Harral, Trial Tr. at 502, Oct. 24, 2011; Gibb, Trial Tr. at 847-49, Oct. 26, 2011; Alepin, Trial Tr. at 1604, Nov. 10, 2011). Moreover, after it withdrew support for the namespace extension APIs, Microsoft continued to provide assistance to Novell and never terminated their relationship. (Struss, Trial Tr. at 3253-54, 3259-69, Nov. 28, 2011; Def.'s Ex. 2 at MX 6062581; *see* Frankenberg, Trial Tr. at 1131, Nov. 7 , 2011 (stating that he is "sure" people in the operating system group at Microsoft were trying to help WordPerfect/Novell produce a great application for Windows 95)).

For these reasons, Novell has not created a jury question on the issue of whether Microsoft's conduct was anticompetitive.

B.

The evidence **[*42]** is undisputed that during 1995 Novell's focus was on writing office productivity programs that would run on Windows 95. In Novell's view, Microsoft's new operating system was a "significant step forward" and a "wonderful evolution" in technology. (Harral, Trial Tr. at 253-54, 256-57, Oct. 20, 2011; Frankenberg, Trial Tr. at 1225-26, Nov. 8, 2011; *see* Gibb, Trial Tr. at 788, Oct. 26, 2011; Noll, Trial Tr. at 1911, Nov. 15, 2011). Therefore, as Frankenberg acknowledged, in the short term Microsoft's share of the operating systems market would have increased, not decreased, if it had not withdrawn support for the namespace extension APIs. (*See* Frankenberg, Trial Tr. at 1226-28, Nov. 8, 2011; Noll, Trial Tr. at 1949-50, Nov. 15, 2011). [18]

According to Novell, those programs simply would not be as good as they could have been if Microsoft had continued to make its own technology available to Novell.

[18] Novell argues that Microsoft's willingness to sacrifice the short-term profits it would have earned from increased sales of Windows 95 to customers who would buy the operating system if it ran Novell's applications constituted a classic hallmark of anticompetitive behavior because monopolists are assumed to be rational, and the sacrifice of short-term profits can be explained only by the desire to reap long-term gains by maintaining the monopoly. *See,* ***[*43]*** *e.g., Reazin v. Blue Cross & Blue Shield of Kan., Inc., 635 F. Supp. 1287, 1309 (D. Kan. 1986)*, *aff'd*, *899 F.2d 951 (10th Cir. 1990)*. The flaw in this argument is that there is no evidence that Microsoft sacrificed any short-term profits by withdrawing support for the namespace extension APIs. Novell's own theory is that support for the APIs were withdrawn to prevent a decline of sales of Microsoft's office productivity programs (Word, Excel, and Office) because Novell and Lotus would have been able to put products superior to

Therefore, Novell's theory necessarily is that the anticompetitive effects it alleges did not occur until sometime after 1995. Novell has never specified exactly when those effects did occur. Novell sold WordPerfect to Corel in March 1996, and there is no evidence that by that time there was any operating system on the market comparable to Windows 95 to which Novell planned to write its applications or for which those applications could have been written. That fact, however, may not be dispositive because Novell's damages claim is based upon the alleged diminution in the value of its assets caused by Microsoft's conduct. Presumably, Corel would have paid more for what it bought if by that time Microsoft had not, as Novell **[*45]** alleges, effectively destroyed Novell's applications and prevented them from being cross-platformed to other operating systems then under development. Therefore, I will assume, as Novell implicitly argues, that within a reasonable period of time after Windows 95 was put on the market (say two or three years), another operating system would have come into existence to which Novell's office productivity products could have been written. [19]

In asserting that it could and would have written to an operating system other than Windows 95 within a reasonable period of time after 1995, Novell relies upon two theories: the "franchise theory" and the "middleware theory."

(1)

In advancing the franchise theory, Novell posits that its applications were so popular that if Microsoft had not withdrawn support for the namespace extension APIs, Novell's applications would have flourished in the market, regardless of the operating system on which they ran. There is no evidence **[*47]** to support this theory. In fact, it is contradicted by the record.

First, Novell recognized that Windows 95 was a superior operating system, constituting a "significant step forward." (Frankenberg, Trial Tr. at 1225-26, Nov. 8. 2011). In light of that fact, there is no basis for inferring that office productivity applications Novell developed that did not draw upon the superior functionality of Windows 95 would have been as successful as the applications that ran on Windows 95.

Second, historical data disprove Novell's claim. WordPerfect was extremely popular in the 1980s and early 1990s when it ran on many non-Microsoft operating systems. (Peterson, Trial Tr. at 4667, Dec. 7, 2011; *see* Middleton, Trial Tr. at 4178 (Dec. 13, 2008 Video Dep.), Dec. 5, 2011). However, this popularity did not diminish Microsoft's share of the PC operating systems market, which was approximately 90% during that period. (Noll, Trial Tr. at

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them on the market if support for the namespace extension APIs had not been withdrawn. Thus, assuming that Microsoft's revenues from the sale of Windows 95 might have slightly declined because a limited number of purchasers would not buy Windows 95 unless there were Novell applications made for Windows 95, there is no basis for inferring that the decline of revenues would not have been more than offset by an increase of revenues in the sales of Word, Excel, and Office.

I recognize that this conclusion may appear somewhat disturbing because arguably it rewards Microsoft for unsavory behavior in the applications market. Nevertheless, the reasoning is sound. Although **[*44]** the proposition upon which Novell relies makes eminent sense as a matter of theory, it is based upon a factual inference about how a rational actor would behave, and here the evidence does not support the inference. Moreover, Novell has only itself to blame for the quandary in which it finds itself because it was its own delay in filing this action that resulted in its claims in the applications market being barred by limitations. *See* Novell, 2005 U.S. Dist. LEXIS 11520, 2005 WL 1398643, at *5.

[19] Although I accept this assumption, it is problematic. While the evidence is undisputed that historically WordPerfect had been cross-platformed to various operating systems, (*see* Harral, Trial Tr. at 216, Oct. 20, 2011; Gibb, Trial Tr. at 776-77, 781, Oct. 26, 2011; Frankenberg, Trial Tr. at 994-97, Nov. 7, 2011), this is not an instance in which it can reasonably be said that the past is a prologue of the future, particularly in light of the technological breakthrough that Novell acknowledges Windows 95 achieved. Likewise, although Harral and Gibb testified that looking into the future Novell intended to make the PerfectOffice suite cross-platform after the initial release of PerfectOffice for Windows 95, (Harral, Trial Tr. at 371, Oct. 24, 2011; **[*46]** Gibb, Trial Tr. at 787, Oct. 26, 2011), mere intent and aspiration do not provide sufficient evidence that, in fact, Novell's applications would have been cross-platform. Moreover, although one of Novell's experts testified that Linux "became a full-fledged, commercial product" in 1996, (Noll, Trial Tr. at 1961, Nov. 15, 2011), the version of WordPerfect for Linux that Corel released in the spring of 1996 was an older version of WordPerfect that did not contain the same shared code as the version of WordPerfect developed for Windows 95. (Murphy, Trial Tr. at 4914-16, Dec. 8, 2011). As such, it was inferior to the WordPerfect application that ran on Windows 95. (*Id.*).

1329-30, Nov. 15. 2011; Murphy, Trial Tr. at 4722-23, Dec. 7, 2011; Finding of Fact ¶ 35). On this record, it cannot reasonably be inferred that if in the years after 1995 Novell's applications ran on operating systems other than Windows, that fact would have challenged **[*48]** Microsoft's monopoly in the PC operating systems market.

(2)

Novell's second argument is its middleware theory. For a middleware product to have an impact on competition in the PC operating systems market, the product (1) must be cross-platformed to various operating systems; (2) must be ubiquitous on the "dominant operating system"; and (3) must expose a sufficient number of APIs of its own to entice ISVs to write applications to it rather than to the operating system on which it sits. (*See* Noll, Trial Tr. at 1923-26, Nov. 15, 2011; Finding of Fact ¶ 28). Novell's office productivity applications did not meet any of these requirements.

As to the first requirement, assuming that within a reasonable period of time after 1995 effective operating systems would have come into existence to which Novell's office productivity applications could have been written, there is no basis for inferring that Novell's office productivity applications written for Windows 95 via the namespace extension APIs could have been effectively ported to those systems. This is so because the namespace extension APIs were, as Novell's own technical expert testified, "platform specific" to Windows. (Alepin, Trial Tr. **[*49]** at 1482-83, 1532-33, Nov. 9-10, 2011; *see* Murphy, Trial Tr. at 4783-84, Dec. 7, 2011; Bennett, Trial Tr. at 5023, Dec. 12, 2011 (stating that "namespace extension APIs . . . [were] a unique component of Windows 95")).

As to the second requirement, although the parties agree that the dominant operating system was Windows 95, they disagree as to the meaning of ubiquity. Microsoft contends it means that Novell's software had to run on "all or nearly all PCs running the 'dominant operating system.'" (Microsoft Mem. at 73-75; Microsoft Reply Supp. Rule 50 Mot. at 37-39, ECF No. 503). Novell argues that "something less than that" might be sufficient "by weakening, though not eliminating, the applications barrier to entry." (Novell Opp'n at 90 (quoting Noll, Trial Tr. at 1926, Nov. 15, 2011)). Novell provided no evidence as to what this lesser threshold might be.

In any event, under either definition of ubiquity, the evidence is clear that Novell's office productivity applications would never have been ubiquitous on Windows 95. In 1995, prior to the release of Windows 95, WordPerfect had roughly a 15% share of the Windows-compatible word processing market, and PerfectOffice had less than a **[*50]** 5% share of the Windows-compatible suite market. [20] (*See* Holley Decl. Supp. Microsoft Mem., Exs. G & K, ECF Nos. 495-7, 495-11). WordPerfect's share of the word processing market at the end of 1994 was substantially greater—approximately 36%—if one includes the installed base of PCs using the DOS platform. (*See* Pl.'s Ex. 599A at tbl. 13). However, 36% is only 36%, and it is entirely speculative to assume, as Novell apparently does, that its applications would have increased to a substantially greater number of computers using Windows if Microsoft had not withdrawn support for the namespace extension APIs. [21] This assumption is made even more speculative

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[20] According to Microsoft expert Kevin Murphy, these market share numbers must be further reduced by approximately 50% because office suites or any of their component applications were installed on only one-half of all PCs. (Murphy, Trial Tr. at 4750, Dec. 7, 2011).

[21] Novell's reliance upon the DOS installed **[*51]** base also raises a significant question as to whether Novell assigned the claims asserted in this action to Caldera, Inc. when it sold its DOS business to Caldera. In the Asset Purchase Agreement it made with Caldera, Novell transferred "all of Novell's right, title, and interest in and to any and all claims or causes of action held by Novell at the Closing Date and associated directly or indirectly with any of the DOS Products or Related Technology." (*See* Asset Purchase Agreement, Holley Decl. Supp. Microsoft Mem., Ex. P, at 4-5, ECF No. 495-16). I previously ruled that this assignment encompassed the operating systems monopoly claim asserted in this action because the claim asserted here arose in the operating systems market in which DOS had competed. *See In re Microsoft Corp. Antitrust Litig., 699 F. Supp. 2d 730, 739 (D. Md. 2010)*. The Fourth Circuit reversed my ruling. *See Novell, Inc. v. Microsoft Corp.*, 419 Fed. Ap'x. 254, 261 (4th Cir. 2011). I remain bound by that decision. If the Tenth Circuit finds resolution of the issue to be necessary to its decision on Microsoft's Rule 50 motion, however, it may conclude that the law of the case doctrine does not apply and that it may **[*52]** revisit the Fourth Circuit's ruling because the evidence presented at trial is more extensive than was the evidence in the summary judgment record upon which the Fourth Circuit relied. Specifically, the Tenth Circuit might decide that because, as the record now reflects, Novell's claim depends in large part upon the conversion of its share of the DOS installed base into a

by the fact that an internal Novell memorandum dated April 14, 1995, stated that "only 30% of th[e] WordPerfect for DOS installed base is remaining with WordPerfect as they transition to a Windows word processor." (Def.'s Ex. 224 at 20).

The parties also disagree about the meaning of the third requirement. Microsoft argues that to constitute middleware, an application must "expose a sufficiently broad set of APIs to enable ISVs profitably to develop *full-featured* personal productivity applications that rely solely upon those APIs exposed by the middleware." (Microsoft Mem. at 70 (emphasis added)). Novell, on the other hand, relying upon the testimony of Roger Noll, its antitrust expert, and Ronald Alepin, its technical expert, contends that the third element is satisfied if the application "expose[s] a wide range of APIs and sophisticated functionality to developers." (Novell **[*53]** Opp'n at 28). Novell concedes that if Microsoft's interpretation of the meaning of the third element is correct, Microsoft is entitled to judgment as a matter of law because Novell did not present evidence to show that its software exposed sufficient APIs of its own to allow ISVs to write full-featured personal products applications to it. (Trial Tr. at 5436-37, 5439, Dec. 15, 2011). Thus, on this issue, whether Microsoft is entitled to judgment in its favor on the Rule 50 motion turns on the meaning of the third requirement.

Microsoft's position is based upon the Findings of Fact made in the government case, upon which Novell's claim is founded. Judge Jackson found that "[c]urrently, no middleware product exposes enough APIs to allow independent software vendors ("ISVs") profitably to write full-featured personal productivity applications that rely solely on . . . APIs [of the middleware product itself]." Finding of Fact ¶ 28. In contrast, Novell argues the exposure of APIs that would result in "something less" than the writing of full-featured personal product applications is sufficient to constitute a threat to Microsoft's monopoly. (Novell Opp'n at 89-90). This argument is based **[*54]** on the concept, expressed by Noll, that diminishing, as opposed to nearly eliminating, the barrier to entry that protected Microsoft's monopoly in the PC operating systems market was itself sufficient. (Noll, Trial Tr. at 1926, Nov. 15, 2011). To the extent this testimony is based on the premise that other companies would produce similar middleware that, in combination with Novell's products, would diminish the barrier to entry, there is no evidence such other products existed.

Although in other circumstances conduct directed at reducing a barrier to entry might constitute a violation of *§ 2* of the Sherman Act, under the facts of this case, I find Novell's reasoning to be unpersuasive. The findings made in the government case made clear that Microsoft possessed its monopoly by virtue of what Judge Jackson described as a "chicken-and-egg" problem. As Judge Jackson described:

> The overwhelming majority of consumers will only use a PC operating system for which there already exists a large and varied set of high-quality, full-featured applications, and for which it seems relatively certain that new types of applications and new versions of existing applications will continue to be marketed **[*55]** at pace with those written for other operating systems. Unfortunately for firms whose products do not fit that bill, the porting of applications from one operating system to another is a costly process. Consequently, software developers generally write applications first, and often exclusively, for the operating system that is already used by a dominant share of all PC users. Users do not want to invest in an operating system until it is clear that the system will support generations of applications that will meet their needs, and developers do not want to invest in writing or quickly porting applications for an operating system until it is clear that there will be a sizeable and stable market for it.

Finding of Fact ¶ 30. Other findings made by Judge Jackson are to the same effect. *See* Findings of Fact ¶¶ 36, 37, 39, 40. [22]

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significant share of the Windows market, that claim is "associated directly or indirectly with . . . the DOS Product or Related Technology" and thus was transferred to Caldera.

[22] The barrier to entry issue was eloquently described, from a business point of view, in an email sent on August 17, 1997, by Jeff Raikes, then a Microsoft executive, to Warren Buffett. (Pl.'s Ex. 360 at MS-PCA 1301176). In the email, Raikes wrote of the importance of "widen[ing] the moat," i.e. increasing the barrier to entry, by tying together Microsoft's applications **[*56]** and

In light of these findings, it cannot be reasoned, as Novell argues, that Microsoft's operating systems monopoly would have been threatened by a middleware product that exposed only a limited number of APIs that permitted ISVs to write only a specialized set of applications to it. The barrier to entry that Judge Jackson found in the government case was created by a "chicken-and-egg" problem, and that problem arose because ISVs would write only to programs that supported full-featured personal productivity applications. *See* Finding of Fact ¶ 30. In other words, contrary to what Novell argues in support of what Microsoft has aptly described as its "watered-down version" of the third requirement, Microsoft's monopoly in the PC operating systems market was threatened not by a product that exposed only a limited number of its own APIs but only by a product that exposed sufficient APIs to entice full-featured applications to be written to it. (*See* Microsoft Mem. at 77-78). Otherwise stated, *diminishment* of the barrier to entry is not sufficient because mere diminishment would not have affected the PC operating **[*58]** systems market. In order to constitute a realistic threat to Microsoft's monopoly in that market, *elimination* (or, at least, near elimination) of the barrier to entry through development of full-featured applications using APIs from middleware that ran on operating systems other than Windows was required.

In sum, Novell did not present sufficient evidence from which a reasonable jury could find that its applications could have successfully developed into middleware that threatened Microsoft's monopoly in the operating systems market.

C.

Claims asserted under the Sherman Act, like any other claim asserted in a court, are not cognizable simply because they are theoretically coherent. They must also be based on fact. Here, the absence of any evidence suggesting that the withdrawal of support for Microsoft's namespace extension APIs was the source of any contemporaneous urgency at Novell reflects that the claim Novell asserts is a lawyers' construct and is not based on an underlying business reality. [23]

First, as stated in section I, *supra*, there is no evidence that anyone at Novell made any complaint to anyone at Microsoft who could have reversed the decision to withdraw support for the namespace extension APIs.

Windows. I admitted the email into evidence despite the fact that it was not written until after the events that gave rise to this action on the ground that the jury might find it reflected the views of Microsoft's executives during the relevant time period.

Novell referred to the email at trial and has likewise referred to it in opposing Microsoft's Rule 50 motion. In the event that the Tenth Circuit reverses my ruling that Microsoft's Rule 50 motion should be granted, it would be helpful in the retrial of this case if the Tenth Circuit were to decide whether the Raikes email was properly admitted. It would also be helpful, in the event of a reversal of my *Rule 50* ruling, if the Tenth Circuit resolved a disagreement between the parties as to the proper causation standard. Microsoft contends that the standard that should be applied is whether its decision to withdraw support for the namespace extension APIs "contributed significantly to its continued monopoly power." (Microsoft Mem. at 82). Conversely, Novell contends that the appropriate standard is whether Microsoft's decision was "reasonably capable of contributing significantly" to Microsoft's monopoly power. (Novell Opp'n at **[*57]** 94-95). In reaching my decision, I have not found it necessary to resolve this issue.

[23] This statement is not meant as an unfavorable observation about Novell's counsel. They have skillfully and energetically pursued a claim that I have concluded is not supported by the evidence. **[*59]** It is not, however, frivolous. Likewise, my statement is not intended to reflect badly upon Novell. The evidence presented at trial showed that Novell simply did not believe the deadline of bringing applications to market within 90 days of the release of Windows 95—a deadline that was dictated solely by marketing considerations—was material to the success of Novell's applications. The tradition and culture at WordPerfect had been to develop better products than WordPerfect's competitors, and to depend upon the high quality of those products to achieve market success. Therefore, it is not surprising that Gibb, Harral, and Richardson— who had been employed by WordPerfect prior to its sale to Novell—would have been primarily concerned about delivering the best software applications they could write, even if that entailed some delay. Unfortunately, economic realities, including cost-cutting measures Novell felt compelled to take, were collapsing the world to which they had been accustomed and were destroying Novell's ability to provide hand-tailored products and services to its customers. (Frankenberg, Trial Tr. at 1097-98, Nov. 7, 2011; Bushman, Trial Tr. at 3161-62, Nov. 28, 2011; Acheson, **[*60]** Trial Tr. at 3968, 3972, Dec. 2, 2011; LeFevre, Trial Tr. at 4024-26, Dec. 2, 2011; Def.'s Exs. 15-16).

Second, as also stated in section I, there is no evidence that any top-level executive was involved in the decision-making process concerning the writing of shared code for WordPerfect. Frankenberg testified that any action that could jeopardize the timely release of WordPerfect or Quattro Pro would generally have been referred to some or all of four senior executives. (Frankenberg, Trial Tr. at 1140-42, 1179-80, Nov. 7-8, 2011). Novell presented no evidence that any memorandum was written to those executives, and Frankenberg testified that he knew of no evidence whatsoever that any of the four executives were presented with a decision about how to respond to Gates's decision to withdraw support for the namespace extension APIs. (*Id.* at 1181-82, Nov. 8, 2011). Instead, Novell assigned responsibility for writing shared code for WordPerfect and Quattro Pro to a middle manager, **[*61]** Gibb, who, in turn, assigned the responsibility to only two programmers, Harral and Richardson. However valiant the efforts of Harral and Richardson, if being ready to release WordPerfect, Quattro Pro, and PerfectOffice within 90 days of Microsoft's release of Windows 95 was as critical as Novell now claims it to have been, Novell clearly would have implemented a different development plan.

Third, although Gibb testified that Quattro Pro was "code complete" in time for the release of Quattro Pro and PerfectOffice within 90 days of Microsoft's release of Windows 95, [24] because of the mass exodus of programmers at Novell's facility in Scotts Valley, California, Quattro Pro was not ready for release to manufacturing until 1996. (Gibb, Trial Tr. at 806-09, Oct. 26, 2011; Frankenberg, Trial Tr. at 1145, Nov. 7, 2011; Def.'s Ex. 230).

Fourth, if, as Novell now argues, the 90-day period after the release of Windows 95 was critical to the success of WordPerfect, Quattro Pro, and PerfectOffice, **[*62]** Novell could have released those products using Microsoft's common file open dialog. In fact, Ford and LeFevre testified that they urged Gibb to pursue that option. (Ford, Trial Tr. at 3710-11, Nov. 30, 2011; LeFevre, Trial Tr. at 4041-43, Dec. 2, 2011).

In short, no reasonable jury could find, on the basis of the evidence presented at trial, that Microsoft's withdrawal of support for the namespace extension APIs caused Novell's failure to develop its applications within 90 days of the release of Windows 95.

VI.

For these reasons, Microsoft's Rule 50 motion will be granted. A separate order to that effect is being entered herewith.

Date: July 16, 2012

/s/ J. Frederick Motz

United States District Judge

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[24] Gibb's testimony that Quattro Pro was code complete in time for Quattro Pro and PerfectOffice to be released on schedule is subject to serious question, in light of the facts stated in section I, *supra*.

Animal Sci. Prods. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.)

United States District Court for the Eastern District of New York

July 17, 2012, Decided; July 18, 2012, Filed

06-MD-1738(BMC)(JO); 05-CV-453 (BMC) (JO); 06-CV-988 (BMC) (JO); 06-CV-987 (BMC) (JO); 06-CV-149(BMC)(JO)

Reporter

2012 U.S. Dist. LEXIS 100075 *; 2012-2 Trade Cas. (CCH) P78,101; 2012 WL 2930109

IN RE VITAMIN C ANTITRUST LITIGATION;This document relates to: ANIMAL SCIENCE PRODUCTS, INC., et al., Plaintiffs, vs. HEBEI WELCOME PHARMACEUTICAL CO., LTD., et al., Defendants.DENNIS AUDETTE, on behalf of himself and all others similarly situated, Plaintiff, vs. HEBEI WELCOME PHARMACEUTICAL CO., LTD., et al., Defendants.LINDA PHILION, et al., Plaintiffs, vs. HEBEI WELCOME PHARMACEUTICAL CO., LTD., et al., Defendants.RICHARD KEANE, et al., Plaintiffs, vs. HEBEI WELCOME PHARMACEUTICAL CO., LTD., et al., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part *Animal Sci. Prods. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.), 2012 U.S. Dist. LEXIS 187063 (E.D.N.Y., Aug. 7, 2012)*

Prior History: *Animal Science Prods. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.), 2012 U.S. Dist. LEXIS 77296 (E.D.N.Y., June 1, 2012)*

Core Terms

CPG, vitamin, subsidiary, personal jurisdiction, cases, transaction of business, Pharmaceutical, venue, Clayton Act, manufactures, contacts, long-arm, products, sales, court's jurisdiction, service of process, factors, selling, summary judgment, board meeting, press release, courts, plaintiffs', contracts, purposes, anti trust law, federal court, price-fixing, meetings, genuine

Counsel: **[*1]** For Vitamin C Antitrust Litigation, In Re (1:06-md-01738-BMC-JO): Charles Edgar Tompkins, LEAD ATTORNEY, Hausfeld LLP, Washington, DC; James Quadra, LEAD ATTORNEY, Sylvia Sokol, Moscone, Emblidge & Quadra, LLP, SAN FRANCISCO, CA; Alanna Rutherford, Boies, Schiller & Flexner LLP, New York, NY; Daniel Mason, Joseph W. Bell, Zelle, Hofmann, Voelbel & Mason LLP, San Francisco, CA; Eric B. Fastiff, Joseph R. Saveri, Rebecca Bedwell-Coll, Lieff Cabraser Heimann & Bernstein LLP, San Francisco, CA; Ian P. Otto, Glancy Binkow & Goldberg LLP, San Francisco, CA; Joseph G. Veenstra, Johns, Flaherty & Collins, S.C., La Crosse, WI; Patricia K. Oliver, Liner Yankelevitz Sunshine & Regenstreif LLP, Los Angeles, CA.

For Plaintiff(s) in Civil Action Animal Science vs Hebei, 05-CV-453, Plaintiff (1:06-md-01738-BMC-JO): Alanna Rutherford, Boies, Schiller & Flexner LLP, New York, NY; Shawn L. Raymond, LEAD ATTORNEY, Susman Godfrey L.L.P., Houston, TX; Tanya S. Chutkan, William A. Isaacson, LEAD ATTORNEYS, Brian C. Baker, Boies, Schiller & Flexner LLP, Washington, DC; Benjamin D. Brown, PRO HAC VICE, Cohen, Milstein, Sellers & Toll, P.L.L.C, Washington, DC; Brent W. Landau, Brian A. Ratner, PRO HAC VICE, **[*2]** Hausfeld LLP, Philadelphia, PA; James T. Southwick, Susman Godfrey LLP, Houston, TX; Melinda R. Coolidge, Hausfeld LLP, Washington, DC.

For Plaintiff(s) in Civil Action Cribbs vs Hebei Welcome Pharmaceutical Co. Ltd. 05-CV-6059, Plaintiff (1:06-md-01738-BMC-JO): David E. Kovel, LEAD ATTORNEY, Kirby McInerney LLP, New York, NY; Alanna Rutherford, Boies, Schiller & Flexner LLP, New York, NY; Melinda R. Coolidge, Hausfeld LLP, Washington, DC.

For Plaintiff(s) in Civil Action Keane vs Hebei Welcome Pharmaceutical Co. Ltd. 06-CV-149, Plaintiff (1:06-md-01738-BMC-JO): David Boies, LEAD ATTORNEY, Straus & Boies, LLP, Fairfax, VA; David E. Kovel, LEAD ATTORNEY, Kirby McInerney LLP, New York, NY; Timothy D. Battin, LEAD ATTORNEY, Strauss & Boies, LLP, Fairfax, VA; Alanna Rutherford, Boies, Schiller & Flexner LLP, New York, NY; Melinda R. Coolidge, Hausfeld LLP, Washington, DC.

For Plaintiff(s) in Civil Action Audette vs Hebei Welcome Pharmaceutical Co. Ltd. 06-CV-988, Plaintiff (1:06-md-01738-BMC-JO): David Boies, LEAD ATTORNEY, Straus & Boies, LLP, Fairfax, VA; Kenneth G. Walsh, LEAD ATTORNEY, Kirby McInerney LLP, New York, NY; Timothy D. Battin, LEAD ATTORNEY, Strauss & Boies, LLP, Fairfax, **[*3]** VA; Alanna Rutherford, Boies, Schiller & Flexner LLP, New York, NY; Daniel C. Hedlund, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN; Melinda R. Coolidge, Hausfeld LLP, Washington, DC.

For One or more Plaintiffs in 06-cv-05561, Diana Kitch v. Hebei Welcome Pharmaceutical Co et al, Plaintiff (1:06-md-01738-BMC-JO): Robert W. Coykendall, Tina J. Moore, LEAD ATTORNEYS, Morris, Laing, Evans, Brock & Kennedy, Chtd, --Wichita, Wichita, KS; Alanna Rutherford, Boies, Schiller & Flexner LLP, New York, NY; Melinda R. Coolidge, Hausfeld LLP, Washington, DC.

For Plaintiff(s) in Civil Action Carroll vs. China Pharmaceuticals Group, 07-CV-0226, Plaintiff (1:06-md-01738-BMC-JO): Donald Chidi Amamgbo, LEAD ATTORNEY, Amamgbo & Associates, Oakland, CA; Judith Blackwell, LEAD ATTORNEY, Blackwell & Blackwell, Oakland, CA; Reginald Von Terrell, LEAD ATTORNEY, The Terrell Law Group, Richmond, CA; Alanna Rutherford, Boies, Schiller & Flexner LLP, New York, NY; Melinda R. Coolidge, Hausfeld LLP, Washington, DC.

For Plaintiff(s) in Civil Action Philion vs Hebei Welcome Pharmaceutical Co. Ltd. 06-CV-987, Plaintiff (1:06-md-01738-BMC-JO): R. Alexander Saveri, LEAD ATTORNEY, Saveri & Saveri, Inc., San Francisco, **[*4]** CA; Alanna Rutherford, Boies, Schiller & Flexner LLP, New York, NY; Melinda R. Coolidge, Hausfeld LLP, Washington, DC; Richard Saveri, Saveri & Saveri Inc., San Francisco, CA.

Jabo's Pharmacy, Inc., Plaintiff (1:06-md-01738-BMC-JO), Pro se.

Niall Vignoles, Plaintiff (1:06-md-01738-BMC-JO), Pro se.

Hunt & Behrens, Inc., Plaintiff (1:06-md-01738-BMC-JO), Pro se.

For Defendant(s) in Civil Action Animal Science vs Hebei, 05-CV-453, Defendant (1:06-md-01738-BMC-JO): Dale C. Christensen, LEAD ATTORNEY, Seward & Kissel LLP, New York, NY; Daniel Mason, Joseph W. Bell, Zelle, Hofmann, Voelbel & Mason LLP, San Francisco, CA; James I. Serota, Kenneth Alan Lapatine, LEAD ATTORNEYS, James I. Serota, Greenberg Traurig LLP, New York, NY; Richard Scott Goldstein, Stephen V. Bomse, LEAD ATTORNEYS, Orrick, Herrington & Sutcliffe LLP, New York, NY; Darrell Prescott, Baker & McKenzie LLP, New York, NY; Jiangxiao Hou, Zelle Hofmann Voelbel Mason & Gette LLP, San Francisco, CA.

For Defendant(s) in Civil Action Audette vs Hebei Welcome Pharmaceutical Co. Ltd. 06-CV-988, Defendant (1:06-md-01738-BMC-JO): Annapoorni R. Sankaran, LEAD ATTORNEY, Greenberg Taurig, LLP, Boston, MA.

For Hebei Welcome Pharmaceutical Co. **[*5]** Ltd., Defendant (1:06-md-01738-BMC-JO): Charles Howard Critchlow, LEAD ATTORNEY, Darrell Prescott, Baker & McKenzie, New York, NY.

For Aland (Jiangsu) Nutraceutical Co., Ltd, JSPC America, Inc., Defendants (1:06-md-01738-BMC-JO): Richard Scott Goldstein, Stephen V. Bomse, Steven Robert Newmark, LEAD ATTORNEYS, Catharine Louise Zurbrugg, Orrick, Herrington & Sutcliffe LLP, New York, NY.

For China Pharmaceutical Group Ltd., Weisheng Pharmaceutical Co. Ltd., Defendants (1:06-md-01738-BMC-JO): Daniel Mason, Zelle, Hofmann, Voelbel & Mason LLP, San Francisco, CA.

For Northeast Pharmaceutical Group Co., Ltd., Defendant (1:06-md-01738-BMC-JO): James I. Serota, LEAD ATTORNEY, Greenberg Traurig LLP, New York, NY; Scott Allan Martin, Greenberg Traurig, LLP, New York, NY.

For Ministry of Commerce for the Peoples Republic of China, Amicus (1:06-md-01738-BMC-JO): Joel M. Mitnick, Tracey R. Seraydarian, Sidley Austin LLP, New York, NY.

For Animal Science Products, Inc., Plaintiff (1:05-cv-00453-BMC-JO): Alanna Rutherford, LEAD ATTORNEY, Boies, Schiller & Flexner, New York, NY; Tanya S. Chutkan, William A. Isaacson, LEAD ATTORNEYS, Boies, Schiller & Flexner LLP, Washington, DC; James T. Southwick, Susman **[*6]** Godfrey LLP, Houston, TX; Suyash Agrawal, Susman Godfrey LLP, New York, NY.

For The Ranis Company, Inc., Plaintiff (1:05-cv-00453-BMC-JO): Alanna Rutherford, LEAD ATTORNEY, Boies, Schiller & Flexner, New York, NY; Jennifer Milici, LEAD ATTORNEY, PRO HAC VICE; Tanya S. Chutkan, William A. Isaacson, LEAD ATTORNEYS, Boies, Schiller & Flexner LLP, Washington, DC; James T. Southwick, Susman Godfrey LLP, Houston, TX; Suyash Agrawal, Susman Godfrey LLP, New York, NY.

For Aland (Jiangsu) Nutraceutical Co., Ltd, Defendant (1:05-cv-00453-BMC-JO): Richard Scott Goldstein, LEAD ATTORNEY, Orrick, Herrington & Sutcliffe LLP, New York, NY; Stephen V. Bomse, LEAD ATTORNEY, Heller, Ehrman, White and McAuliffe, San Francisco, CA.

For Northeast Pharmaceutical Group Co. Ltd., Defendant (1:05-cv-00453-BMC-JO): James I. Serota, LEAD ATTORNEY, Greenberg Traurig LLP, New York, NY; Rachel Lois Izower-Fadde, Greenberg Traurig, LLP, New York, NY.

For Weisheng Pharmaceutical Co. Ltd., Defendant (1:05-cv-00453-BMC-JO): Dale C. Christensen, Seward & Kissel LLP, New York, NY; Daniel Mason, Zelle, Hofmann, Voelbel & Mason LLP, San Francisco, CA.

For Shijiazhuang Pharmaceutical (USA) Inc., China Pharmaceutical Group, Ltd., **[*7]** Defendants (1:05-cv-00453-BMC-JO): Dale C. Christensen, Seward & Kissel LLP, New York, NY.

For Dennis Audette, on behalf of himself and all others similarly situated, Plaintiff (1:06-cv-00988-BMC-JO): David Boies, Kenneth G. Walsh, LEAD ATTORNEYS, Straus & Boies, LLP, Bedford Hills, NY; Timothy D. Battin, LEAD ATTORNEY, Strauss & Boies, LLP, Fairfax, VA; Suyash Agrawal, Susman Godfrey LLP, New York, NY.

For Northeast Pharmaceutical Group Co., LTD, Defendant (1:06-cv-00988-BMC-JO): Annapoorni R. Sankaran, Gary R. Greenberg, LEAD ATTORNEYS, Greenberg Taurig, LLP, Boston, MA.

For Linda Philion, Plaintiff (1:06-cv-00987-BMC-JO): Guido Saveri, Richard Saveri, LEAD ATTORNEYS, R. Alexander Saveri, Saveri & Saveri Inc., San Francisco, CA; Suyash Agrawal, Susman Godfrey LLP, New York, NY.

For Melanie Farley, Andrea Gialanella, Chris Gialanella, Plaintiffs (1:06-cv-00987-BMC-JO): Cadio Zirpoli, Guido Saveri, LEAD ATTORNEYS, R. Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Geoffrey C. Rushing, LEAD ATTORNEY, Saveri & Saveri, San Francisco, CA; Michael P. Lehmann, LEAD ATTORNEY, Cohen Milstein Hausfeld & Toll LLP, San Francisco, CA; Jon T. King, The Furth Firm LLP, San Francisco, CA; **[*8]** Suyash Agrawal, Susman Godfrey LLP, New York, NY.

For Hebei Welcome Pharmaceutical Co. Ltd., Defendant (1:06-cv-00987-BMC-JO): Bruce H. Jackson, LEAD ATTORNEY, Baker & McKenzie, San Francisco, CA.

For Northeast Pharmaceutical Group Co. Ltd., Defendant (1:06-cv-00987-BMC-JO): Frank E. Merideth, Jr., LEAD ATTORNEY, Greenberg Traurig LLP, Santa Monica, CA.

For Shijiazhuang Pharmaceutical (USA) Inc., China Pharmaceutical Group, Ltd., Defendants (1:06-cv-00987-BMC-JO): Daniel Mason, LEAD ATTORNEY, Zelle, Hofmann, Voelbel & Mason LLP, San Francisco, CA.

For Aland (Jiangsu) Nutraceutical Co., Ltd, Defendant (1:06-cv-00987-BMC-JO): Stephen V. Bomse, LEAD ATTORNEY, Heller, Ehrman, White and McAuliffe, San Francisco, CA.

For Richard Keane, Karen Haines, Sandra Jeffreys, Laurel Rose, Linda Kohlenberg, Lorene Culler, Dr. Carl Martin, D.V.M., Joseph Macchi, Marvin Schwab, Christine Nelson, Ronald Kaufman, Curt Badger, Follansbee Pharmacy, on behalf of themselves and all others similarly situated in New York, Arizona, Arkansas, the District of Columbia, Florida, Hawaii, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Plaintiffs **[*9]** (1:06-cv-00149-BMC-JO): David E. Kovel, LEAD ATTORNEY, Kirby McInerney LLP, New York, NY; Suyash Agrawal, Susman Godfrey LLP, New York, NY.

Judges: Brian M. Cogan, U.S.D.J.

Opinion by: Brian M. Cogan

Opinion

MEMORANDUM DECISION AND ORDER

COGAN, District Judge.

This case is presently before me on two outstanding motions filed by defendant China Pharmaceutical Group Ltd. ("CPG"). In the first motion, CPG challenges this Court's jurisdiction under *Rule 12(b)(2) of the Federal Rules of Civil Procedure*. In the second motion, CPG seeks summary judgment pursuant to *Rule 56 of the Federal Rules of Civil Procedure*. For the reasons stated below, both motions are denied.

BACKGROUND

The plaintiffs in this action accuse multiple Chinese companies of fixing the prices and limiting the supply of vitamin C exported to the United States from China. This action was originally commenced on January 26, 2005. Related actions were subsequently filed in other districts, and all of these cases were eventually coordinated by the Judicial Panel for Multidistrict Litigation and transferred to this Court for pretrial proceedings. Various cases were consolidated or voluntarily dismissed; only the four above-captioned actions remain.

In Animal Science Products, Inc., *et al*. v. Hebei Welcome Pharmaceutical Co. Ltd., *et al*., 05-CV-453 **[*10]** , the plaintiffs brought strictly federal claims and originally filed the complaint with this Court. In Audette v. Hebei Welcome Pharmaceutical Co. Ltd., *et al*., 06-CV-988, the plaintiffs brought strictly state-law claims under Massachusetts's consumer protection statute. The Audette plaintiffs filed their complaint in Massachusetts state court and the defendants removed the case to federal court in the District of Massachusetts. In Philion v. Hebei Welcome Pharmaceutical Co. Ltd., *et al*., 06-CV-987, the plaintiffs brought federal claims as well as state-law claims under California law. Philion was brought in California state court and removed to federal court in the Northern District of California. Finally, in Keane v. Hebei Welcome Pharmaceutical Co. Ltd., *et al*., 06-CV-988, the plaintiffs brought claims under federal law and various state laws. The Keane complaint was originally filed in this Court.

In all of these cases, the main defendants are four vitamin C manufactures: Jiangshan Pharmaceutical Co. Ltd.; Hebei Welcome Pharmaceutical Co. Ltd.; Northeast Pharmaceutical Co. Ltd.; and Weisheng Pharmaceutical **[*11]** Co. Ltd ("Weisheng"). Plaintiffs also name CPG as a defendant. CPG is a holding company organized under the laws of Hong Kong. Defendant Weisheng is a wholly-owned subsidiary of CPG. It is undisputed that Weisheng manufactures vitamin C and sells it to clients in the United States, including in New York, California, and Massachusetts. Sales contracts between Weisheng and various American buyers indicate that Weisheng sold over $100,000 worth of vitamin C products to a buyer located in the Eastern District of New York; more than $400,000 worth of vitamin C to buyers located in the Southern District of California; and more than $600,000 worth of vitamin C to a buyer located in the District of Massachusetts.

CPG's jurisdictional motion is based primarily on the declaration of Jin Yue, who sits on Weisheng's board of directors and has served as an Executive Director of CPG since 2001. Yue explains that CPG does not have any offices, employees, agents, products for sale, bank accounts, or property in the United States. According to Yue, CPG "has never been engaged in the production, sale, or marketing of vitamin C" and its sole business is to invest in other companies. According to Yue, **[*12]** CPG does not control "the business practices or the daily operations of Weisheng, including with respect to Weisheng's decisions related to production, pricing, marketing and sale of

Weisheng's vitamin C products." Yue also explains that CPG's financial books are separate from Weisheng and that the two companies have never held a joint board meeting or shareholder meeting.

Yue also states that CPG has had virtually no contacts with New York, Massachusetts, California, or the United States as a whole. According to Yue, two CPG employees have travelled briefly to Boston, New York, Los Angeles, and San Francisco, but these business meetings were unrelated to vitamin C marketing or sales.

Plaintiffs' version of the facts, however, paints an entirely different picture of CPG and its relationship to Weisheng. According to plaintiffs, CPG is chiefly in the business of manufacturing vitamin C and selling it to the United States and other countries, albeit through its subsidiaries such as Weisheng. Between 2001 and 2008, nine of Weisheng's eleven directors had also served on CPG's board at one time or another. As Weisheng's sole owner, CPG selects all of Weisheng's directors, none of whom are **[*13]** independent. Weisheng conducts very few board meetings: it held no board meetings in 2001, 2004, 2006, or 2007, and held only one board meeting in 2005.

In public statements, CPG presents itself as a major player in the global vitamin C economy and makes no distinction between CPG and its manufacturer subsidiaries. For example, CPG's press releases state that it "is principally engaged in the manufacture and sale of pharmaceutical products . . . [including] vitamin C," and that the United States is one of its "major markets." The press releases also state that CPG has "increased its market share" in the pharmaceutical industry. To this day, CPG's website advertises that CPG manufactures "drug products include vitamin C" and states that CPG is "one of the largest manufacturers in the world for all of its bulk drug products." CHINA PHARMACEUTICAL GROUP LIMITED, *http://www.cpg.hk/eng/about_cpeic_e.htm* (last visited July 11, 2012). The website also mentions CPG's "production facilities" and lists vitamin C as one of CPG's "major products."

CPG's "Annual Report" from 2003 announced that the company was "building a new production line of vitamin C with an annual capacity of 15,000 tonnes" **[*14]** and predicted that operation of the new production line would commence by the middle of 2003. "By then," according to the Annual Report, "[CPG] will become one of the few largest manufacturers of vitamin C in the world." A March, 2003, press release announced that, "to target sales in overseas high-end pharmaceutical market, the Group will put more effort in seeking US Food and Drug Administration accreditation for the production likes of both bulk and finished drug products."

Aside from these public statements, the facts also demonstrate that CPG has funded the expansion of Weisheng's vitamin C production capacities. At one point, according to Yue, CPG obtained a $500,000,000 loan partially for the purpose of investing in "vitamin C projects." Yue also conceded that CPG paid for a "10,000 ton [vitamin C] expansion project." This project was submitted to CPG's board for Weisheng to gain CPG's approval to use CPG's funds, and Yue testified at deposition that CPG's board discussed the "specific implementation plan" for this expansion project. Finally, in 2003, a "feasibility study report" for a 20,000 ton "vitamin C transformation project" was required to be submitted to CPG's board for **[*15]** approval and CPG's chairman announced, in a press release, CPG's "construction of a new Vitamin C production line."

The facts also suggest that CPG gives general financial support to Weisheng. CPG has taken out several large loans since 2001. According to one of CPG's press releases, at least one large loan was expressly for the purpose of allowing its subsidiaries to "meet their capital expenditure." In 2001, CPG pledged all of Weisheng's equity interest as collateral to secure a $150 million loan facility.

Weisheng's meeting minutes reveal that CPG made an additional trip to the United States that Yue did not mention in his declaration. According to a document entitled "Situation Report on How To Handle the Accounts Receivable Problems Left Over From History," a client in the United States (the "U.S. Pacific Company") owed Weisheng $70,000 for the receipt of partially defective vitamin C products. The document further states that the "leadership concerned at [CPG] repeatedly coordinated this matter, made a special trip to work in the United States, and transferred the whole remaining $70,000 in the US Pacific Company account back to Weisheng."

Although Yue's declaration states that **[*16]** CPG does not interfere with Weisheng's "hiring or compensation" of its employees, Yue admitted at deposition that the compensation of Weisheng's employees is tied to the overall performance of the group of companies owned by CPG, and CPG makes "suggestions" for Weisheng's total payroll. Furthermore, minutes from a 2003 Weisheng board meeting stated that Weisheng's profit distribution plan would be reviewed by CPG.

Plaintiffs argue that CPG subjected itself to jurisdiction in this Court by conspiring to fix the price and control the supply of vitamin C in the United States and by transacting vitamin C-related business in New York, Massachusetts, and California. In the alternative, plaintiffs argue that the activities of Weisheng — which indisputably sells vitamin C in the United States — may be imputed to CPG due to the close relationship between Weisheng and CPG.

DISCUSSION

I. Personal Jurisdiction

On a *Rule 12(b)(2)* motion to dismiss, the plaintiff bears the burden of establishing that the court has personal jurisdiction over the defendant. See *Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 165 (2d Cir. 2005)*. This burden varies in degree depending on the case's procedural **[*17]** posture. Where, as here, the parties have conducted jurisdictional discovery but an evidentiary hearing has not been held, the plaintiff must make a *prima facie* showing that jurisdiction is proper, and this showing "must include an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant." *Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996)* (internal quotation marks omitted). Accordingly, on a *Rule 12(b)(2)* motion, this Court construes "all pleadings and affidavits in the light most favorable to the plaintiff" and resolves "all doubts in the plaintiff's favor." *Penguin Group (USA) Inc. v. American Buddha, 609 F.3d 30, 34 (2d Cir. 2010)*. On the other hand, this Court will not accept either party's legal conclusions as true and will not draw "argumentative inferences" in favor of either party. See *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 59 (2d Cir. 2012)*.

To exercise personal jurisdiction over CPG, this Court must find that three requirements are met. First, plaintiffs' service of process on CPG must have been procedurally proper. See id. Second, the Court must find **[*18]** statutory authority to exercise jurisdiction over CPG. See id. Finally, the Court must decide whether the exercise of jurisdiction comports with the requirements of the *Due Process Clause of the Constitution*. See id.

A. Service of Process

In CPG's moving papers, it asserts that "CPG moves to dismiss the three above-captioned actions against it which are the only actions in [this multidistrict litigation] in which it has been served with process." The only cases in the caption are Animal Science, Audette, and Philion; CPG thus implies that it was not served with process in Keane. However, CPG never explicitly denies that it was served with the Keane complaint and does not discuss service of process at any point in its moving or reply papers. In their opposition papers, plaintiffs do not address any service issues and discuss personal jurisdiction in Keane as though service is presumed to have been proper. CPG did not correct this assumption in its reply brief, which includes Keane in the caption and discusses Keane without arguing that service was inadequate in that case. This Court will therefore assume that the implication contained in CPG's moving papers was an error and that CPG is **[*19]** not contesting service of process.[1]

CPG does not dispute that plaintiffs' service of process was procedurally proper in Animal Science, Audette, and Philion. This requirement is thus satisfied for all four cases.

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[1] At oral argument on July 10, 2012, counsel for Weisheng confirmed the Court's understanding in the following exchange:

> THE COURT: The only thing I didn't understand is whether you are contending that the summons was not properly served.
>
> MR. MASON: No.

B. Statutory Jurisdiction

For the purposes of Animal Science and Keane, plaintiffs assert that this Court's jurisdiction over CPG may be predicated on either the Clayton Act, *15 U.S.C. § 22*, or New York's long-arm statute. Plaintiffs argue that this Court's jurisdiction over CPG may be predicated on Massachusetts's long-arm statute for the purposes of Audette. In Philion, plaintiffs assert that this Court's jurisdiction over CPG may be predicated on either the Clayton Act or California's long-arm statute.

i. Animal Science and Keane

Although the Animal Science and Keane plaintiffs alleged violations of the Sherman Act, the private right of action to pursue antitrust claims is provided by the Clayton Act. See *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc., 507 F.3d 117, 121 (2d Cir. 2007)*. **[*20]** Section 12 of the Clayton Act ("Section 12") states:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22. Courts within the Second Circuit analyze this provision as two separate but interrelated clauses: the words preceding the semicolon provide a basis for venue, and the words following the semicolon provide that if venue is proper pursuant to the venue clause, personal jurisdiction may be established through worldwide service of process. See *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 423 (2d Cir. 2005)*. CPG does not dispute that it was properly served with process. This Court may therefore assert personal jurisdiction over CPG in the Animal Science and Keane cases if venue was proper under the Clayton Act in the district where these cases were filed — the Eastern District of New York.

According to Section 12, venue is proper wherever the defendant "is an inhabitant," "may **[*21]** be found," or "transacts business." The Animal Science and Keane plaintiffs assert that venue was proper in this district because CPG "transacts business" here through CPG's subsidiary, Weisheng. It is undisputed that Weisheng transacted business in this district by selling vitamin C to MTC Industries, a client located on Long Island. Sales contracts between Weisheng and MTC Industries indicate that Weisheng sold 23,000 kilograms (approximately 25 tons) of vitamin C to MTC Industries in four shipments from Tianjin, China, to New York. However, CPG argues that Weisheng's business activities may not be imputed to CPG for the purpose of establishing personal jurisdiction. I disagree.

In the seminal case *United States v. Scophony Corp. of Am., 333 U.S. 795, 68 S. Ct. 855, 92 L. Ed. 1091 (1948)*, the Supreme Court explored the meaning of Section 12's phrase "transacts business." The Scophony Court determined that the phrase supplied a "nontechnical" standard for determining whether an entity transacts business; a "practical and broader business conception of engaging in any substantial business operations." *Id. at 807 & 810*. Applying this standard, the Scophony Court held that a British parent company had **[*22]** transacted business in America because its American subsidiary conducted business here which required the parent company's "constant supervision and intervention." *Id. at 815*. The British parent company argued that it was a separate entity from its subsidiary, but the Court explained that the practice of using an "artful arrangement of agents' authority" to avoid personal jurisdiction in antitrust cases was an "artifice [that] saw its day end . . . with the advent of § 12." *Id. at 808 n. 19*. The Second Circuit has likewise described the phrase "transacts business" in Section 12 as requiring courts to make a "realistic assessment of the nature of the defendant's business and of whether its contacts with the venue district could fairly be said to evidence the 'practical, everyday business or commercial concept of doing business or carrying on business of any substantial character.'" *Daniel, 428 F.3d at 429* (quoting *Scophony, 333 U.S. at 807*).

Under this broad standard outlined by the Supreme Court and the Second Circuit, there is no question that CPG has transacted business in New York within the meaning of Section 12. In determining whether a parent company has transacted business through **[*23]** its subsidiaries for the purposes of Section 12, district courts in the Second Circuit often focus on whether the subsidiary's business transactions are ones that the parent "would have to undertake directly if the subsidiary did not exist to perform them." *In re Tamoxifen Citrate Antitrust Litig., 262 F. Supp. 2d 17, 23 (E.D.N.Y. 2003)*; accord *Waldron v. British Petroleum Co., 149 F. Supp. 830, 835 (S.D.N.Y. 1957)* ("A corporation may be a fiction of the law but there is no reason to carry the fiction to the extreme of saying that a corporation which has wholly owned subsidiaries . . . making sales which ordinarily would be made by a sales department, is in fact not transacting business in that jurisdiction. . . .").

As CPG's website and press releases advertise, CPG is in the business of manufacturing and selling vitamin C through subsidiaries such as Weisheng. The website and press releases do not describe CPG as an investment company or a holding company; instead, these public statements state plainly that CPG itself manufactures and sells vitamin C. CPG notes that some courts have disregarded similar evidence in a jurisdictional challenge, reasoning that an "advertising strategy **[*24]** deciding not to present to its consumers the existence of a parent-subsidiary relationship is not equivalent to a showing that the parent corporation exercises any control over its subsidiary's operational or marketing activities." *J.L.B. Equities, Inc. v. Ocwen Fin. Corp., 131 F. Supp. 2d 544, 550 (S.D.N.Y. 2001)*. This is true. However, the facts in this case indicate that the borders between CPG and Weisheng are as permeable as CPG's promotional materials depict.

For example, CPG and Weisheng have a high rate of crossover of directors; for many years, nine out of eleven Weisheng directors were current or former CPG directors. CPG also selects all of Weisheng's directors and has input into Weisheng's payroll. Corporate formalities at Weisheng also seem scarce; even accepting defendants' representation that "Weisheng is not required to have board meetings annually under Chinese law," it is telling that Weisheng held only one board meeting over a four-year span, and minutes from this sole board meeting show that the only agenda was to change Weisheng's official name. Moreover, accepting the facts in a light most favorable to plaintiffs, as this Court is required to do on a Rule 12 motion, **[*25]** it appears that CPG has directly funded Weisheng's day-to-day activities; built vitamin C production facilities from its own pocket; and has even made a special trip to the United States to collect a debt on behalf of Weisheng. In light of these facts, CPG's conclusory assertion that it "merely holds equity in Weisheng, its investment," cannot be taken at face value.

CPG refers this Court to various cases holding that each of the factors just described — overlapping directors, 100% ownership, and extensive financial support, for example — do not necessarily establish that a parent controls a subsidiary. None of these cases change the outcome in this case, however, because the Supreme Court and the Second Circuit have made clear that none of these individual factors should control the analysis. Instead, the determination of whether CPG may be subjected to jurisdiction in New York based on Weisheng's actions involves a non-technical, comprehensive analysis that focuses on the practical reality of their business relationship. Viewing the facts in a light most favorable to plaintiffs, the practical reality of CPG and Weisheng seems to be that CPG, as advertised on its website, manufactures **[*26]** and sells vitamin C through Weisheng, which acts like a sales department of CPG.

CPG devotes most of its brief to arguing that CPG's control over Weisheng is not great enough to justify treating Weisheng as an "agent" or "mere department" of CPG for the purposes of New York's long-arm statute. It is not necessary to reach this issue, since jurisdiction may be premised on the Clayton Act. But it bears noting that all of the cases CPG cites to support its contention that New York "narrowly" construes agency theories of jurisdiction are irrelevant to the question of whether CPG "transacts business" in New York within the meaning of the Clayton Act's jurisdictional provision. The nature of ***antitrust law*** is not local, and the Clayton Act's jurisdictional grant is correspondingly broad. Since jurisdiction is proper under the Clayton Act in Keane and Animal Science, it would not be appropriate for this Court to narrow its jurisdictional inquiry based on New York's long-arm statute. See, e.g., *In re Auto. Refinishing Paint Antitrust Litig., No. 1462, 2002 U.S. Dist. LEXIS 15099, 2002 WL 31261330, at *7 (E.D.Pa. July 31, 2002)* ("[A]ntitrust cases, especially those involving aliens, may pose problems for any one district **[*27]** court to obtain jurisdiction over all the defendants, if left to state long arm statutes." (internal quotation marks omitted)); *Paper Sys. Inc. v. Mitsubishi Corp., 967 F. Supp. 364, 368 (E.D. Wisc. 1997)* ("If the antitrust laws are to be effective, district courts' jurisdiction must reach the limits of the power of the United States of America. In the case of antitrust laws, it makes no sense to tie a district court's jurisdiction to the state in which it sits; it neither promotes the enforcement of ***antitrust law*** nor the management of litigation.").

Moreover, CPG's reliance on New York cases that require "[p]ervasive control over the subsidiary" to pierce the corporate veil for the purpose of liability are particularly misplaced, since the exercise of jurisdiction is different from reaching a parent for the purpose of liability. See, e.g., *All Star Carts & Vehicles, Inc. v. BFI Canada Income Fund, 596 F. Supp. 2d 630, 637 (E.D.N.Y. 2009)* ("The exercise of [Clayton Act] jurisdiction is simply that, and is not equivalent to piercing the corporate veil for the purpose of imposing liability on the parent entity."). Drawing all inferences in plaintiffs' favor, it appears that the relationship **[*28]** between CPG and Weisheng is such that, if Weisheng did not exist to sell vitamin C directly to American clients, CPG would have to sell the vitamin itself. This is sufficient to establish a statutory basis for jurisdiction under Section 12. See *In re Tamoxifen, 262 F. Supp. 2d at 23*.

ii. Philion

The Philion plaintiffs argue that this Court may assert personal jurisdiction over CPG under the Clayton Act or California's long-arm statute. Plaintiffs note that Weisheng has sold vitamin C in California, and sales contracts indicate that Weisheng has made vitamin C sales to clients based near Los Angeles. When considering whether a defendant "transacts business" within a district for the purpose of establishing venue under Section 12, however, sales within a state are not relevant unless the sale took place within the judicial district where the action was filed. See *Daniel, 428 F.3d at 423*; *15 U.S.C. § 22*. Because Philion was filed in a California state court in San Francisco and removed to federal court in the Northern District of California, Weisheng's sales to clients in Southern California are not relevant to the venue analysis under Section 12. Plaintiffs have alleged no facts showing **[*29]** that Weisheng or CPG made vitamin C sales in Northern California. There is thus no basis for this Court to find that venue was proper under Section 12 when Philion was removed to federal court.

Although this conclusion would end the Section 12 inquiry if Second Circuit law controlled the issue, the Philion plaintiffs are saved by a significant circuit split over Section 12's jurisdictional grant. Although the Second Circuit holds that Section 12's venue clause must be satisfied for personal jurisdiction to be established by worldwide service of process, see *Daniel, 428 F.3d at 423*, the Ninth Circuit disagrees. Philion was filed in the Northern District of California, and this Court's jurisdiction over CPG in that case is therefore dependent on whether the Northern District of California could assert jurisdiction over CPG when Philion was filed. See *Goldlawr, Inc v. Shubert, 175 F. Supp. 793, 795-96 (S.D.N.Y. 1959)* ("If the service purported to be made under [Section 12] was effective to give the [transferor court] personal jurisdiction, such jurisdiction would continue after transfer.") (reversed on other grounds). The parties thus agree that the Ninth Circuit's interpretation of Section 12 **[*30]** governs this Court's jurisdiction over CPG in Philion.

In *Action Embroidery Corp. v. Atlantic Embroidery, Inc., 368 F.3d 1174 (9th Cir. 2004)*, the Ninth Circuit held that Section 12's two clauses — the venue clause and the worldwide service of process clause — are independent and unrelated. Seeing no reason to "blur the basic, historic difference" between venue and personal jurisdiction, the Court concluded that the existence of personal jurisdiction under the Clayton Act does not depend on venue being proper in the court where the action was filed. *Action Embroidery, 368 F.3d at 1179-1180*. Since Section 12 allows nationwide service of process, and "a federal court obtains personal jurisdiction over a defendant if it is able to serve process on him," the Ninth Circuit holds that Section 12 confers a statutory basis for personal jurisdiction over any properly-served defendant. *Id. at 1177*. The reach of this Court's jurisdiction over CPG, for the purpose of the Philion case, is thus limited only by the boundaries of the *Due Process Clause*.

iii. Audette

Because the Audette plaintiffs do not bring federal antitrust claims, the Clayton Act cannot serve as a basis for this Court's jurisdiction **[*31]** over CPG in that action. The Audette plaintiffs thus rely on Massachusetts's long-arm statute. This statute provides that a court may exercise personal jurisdiction over:

> a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's
> (a) transacting any business in [Massachusetts];
> (b) contracting to supply services or things in [Massachusetts];
> (c) causing tortious injury by an act or omission in [Massachusetts];
> (d) causing tortious injury in [Massachusetts] by an act or omission outside [Massachusetts] if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth;. . . .

Mass. Gen. Laws ch. 223A, §3. The Audette plaintiffs argue that this statute reaches CPG because CPG has "by an agent" transacted business in Massachusetts; contracted to supply vitamin C in Massachusetts; and caused tortious injury through the sale of vitamin C at inflated prices.

It is undisputed that Weisheng is subject to personal jurisdiction in Massachusetts because Weisheng contracted to supply vitamin C in Massachusetts. For example, **[*32]** a February, 2005, sales contract between Weisheng and Suzhou-Chem, Inc., indicates that Weisheng sold nearly 200 tons of vitamin C to Suzhou-Chem, which is located in Wellesley, Massachusetts. Suzhou-Chem paid more than $600,000 for this vitamin C, which was shipped from China to the United States.

The First Circuit has made clear that Massachusetts's long-arm statute should be "broadly construed." *Hannon v. Beard, 524 F.3d 275, 280 (1st Cir. 2008)*. In fact, the only limitation on the reach of Massachusetts's long-arm statute is the Constitution. See *Adelson v. Hananel, 652 F.3d 75, 80 (1st Cir. 2011)*. Given this broad reach, Weisheng's massive shipment of vitamin C to a buyer in Massachusetts unquestionably subjected Weisheng to personal jurisdiction in that state. See *Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co., 295 F.3d 59, 64 (1st Cir. 2002)* ("The shipment of large quantities of goods into a state . . . can satisfy the minimum contacts prong of the due process inquiry."); *Hewlett-Packard Co. v. ICL Network Solutions (HK), Ltd., Civil Action No. 05-40153, 2005 U.S. Dist. LEXIS 40293, 2005 WL 3728713, at *4 (D. Mass. Nov. 29, 2005)* ("[E]ven a single business transaction by a defendant, **[*33]** if it creates a substantial connection with the forum, can give rise to personal jurisdiction." (internal quotation marks omitted)).

Although CPG does not dispute that Weisheng is subject to personal jurisdiction under Massachusetts's long-arm statute, CPG asserts that Weisheng's contacts with the state may not be imputed to CPG for the purpose of establishing jurisdiction over CPG. Since Massachusetts's long-arm statute is considered to be "coextensive with the limits allowed by the Constitution," *Adelson, 510 F.3d at 49*, courts frame the analysis of whether a parent may be subjected to personal jurisdiction based on the conduct of its subsidiary as a "minimum contacts" question. See *Donatelli v. Nat'l Hockey League, 893 F.2d 459 (1st Cir. 1990)*. In Donatelli, the First Circuit explained that a subsidiary's contacts with a forum state can be attributed to its parent when the parent "is actually responsible for its subsidiary's decision to undertake instate activities." *Id. at 466*. Although the Court warned that "substance is not to be sacrificed on the altar of form" when analyzing the relationship between a parent and its subsidiary, the Court also held that there is a "presumption **[*34]** of corporate separateness" between a parent and its wholly-owned subsidiary which can only be overridden by "clear evidence" of a "plus factor" which demonstrates the parent's "choice to avail itself of the forum's benefices." *Id. at 466*.

The Donatelli Court listed a few examples of the kind of "plus factor" that could cause a court to attribute a subsidiary's contacts to its parent for jurisdictional purposes: 1.) "when a subsidiary enters the forum state as an agent for the parent"; 2.) "where the parent is exercising unusual hegemony over the subsidiary's operations"; or 3.) "where the subsidiary is a separate entity in name alone." Id.; accord *Ruiz v. Bally Total Fitness Holding Corp., 447 F. Supp. 2d 23, 27 (D. Mass. 2006)*. Some of the factors that district courts have found relevant to this analysis include: 1.) whether the parent is the subsidiary's sole stockholder; 2.) whether there is significant intermingling of corporate officers and directors; 3.) whether the parent appoints officers of the subsidiary independently; 4.) whether the parent has assumed responsibility for the subsidiary's liabilities; 5.) whether the parent was directly involved in development projects on **[*35]** behalf of the subsidiary; 6.) whether the parent publicly held itself out as a company that performed the particular tasks that the subsidiary actually performed; and 7.) whether the subsidiary failed to hold board meetings.[2] See *Ruiz, 447 F. Supp. 2d at 27*; *In re Lernout & Hauspie Sec. Litig., 337 F. Supp. 2d 298, 315 (D. Mass. 2004)*; *Willis v. Am. Permac, Inc., 541 F. Supp. 118, 122 (D. Mass. 1982)*.

For the reasons already discussed, I find that CPG's control over Weisheng amounted to "unusual hegemony" within the meaning of *Donatelli* and was such that Weisheng could be considered CPG's agent. The cases cited by defendants **[*36]** do not alter my conclusion. First, *Andresen v. Diorio, 349 F.3d 8 (1st Cir. 2003)*, is factually distinguishable because the plaintiff in that case made a much weaker factual showing than the Audette plaintiffs have made here. The Andresen plaintiff relied solely on the fact that the parent had a controlling stock interest in the subsidiary; the plaintiff's vague allegation that the parent had "overall financial and policy control"; and "a few news articles" which, according to the Andresen Court, showed "only that [the parent] had employed an interim president who formerly worked for [the subsidiary] and that the parent was generally aware of its subsidiary's business plans." *Id. at 12-13*. The facts put forth by the Audette plaintiffs go much farther to demonstrate the interrelatedness of Weisheng and CPG. Among other factors, the Audette plaintiffs have shown a higher level of interlocking executives and have supported their claims of financial dependence with concrete facts.

Second, *My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614, 233 N.E.2d 748 (1968)*, discusses piercing the corporate veil for the purpose of establishing liability rather than jurisdiction. Although similar **[*37]** factors are considered by courts in either analysis, the level of rigor to be applied to a jurisdictional motion must be lower. This is especially true because plaintiffs in this case seek to assert specific jurisdiction over CPG, rather than general jurisdiction. Specific jurisdiction requires a lesser showing than general jurisdiction. See *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 54 (1st Cir. 2002)* ("[A]s Donatelli states clearly, the standard for general jurisdiction is more strict than the standard for specific jurisdiction."). When considering motions to dismiss for lack of personal jurisdiction, the First Circuit and other courts of appeals consistently eschew formulaic and overly exacting analyses in favor of practical, fairness-based determinations. "Since the essence of personal jurisdiction is to bring responsible parties before the court, a corporation which is actually responsible for its subsidiary's decision to undertake instate activities should, in all fairness, be within the . . . courts' jurisdictional reach." *Donatelli, 893 F.2d at 466*.

C. Due Process

Having found a statutory basis to exert jurisdiction over CPG in all four cases at **[*38]** issue, this Court's next task is to determine whether this exercise of jurisdiction comports with the *Due Process Clause of the Fourteenth Amendment*. The Due Process analysis begins by asking whether the defendant has had enough "minimum contacts" with the forum state to satisfy the Supreme Court's concern, articulated in *International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)*, that the exercise of personal jurisdiction not offend "traditional notions of fair play and substantial justice." See, e.g., *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 127 (2d Cir. 2002)*; *Fiore v. Walden, 657 F.3d 838, 845 (9th Cir. 2011)*; *Adelson, 652 F.3d at 80-81*. There are three central factors that guide the minimum contacts analysis: 1.) whether the defendant purposefully availed itself of the privilege of doing business in the forum and could thus foresee being haled into court there; 2.) whether the plaintiff's claim arises out of the defendant's contacts with the forum; and 3.) whether asserting jurisdiction over the defendant would be fair and reasonable. See *Bank Brussels Lambert, 305 F.3d at 127*; *Fiore, 657 F.3d at 845*; *Adelson, 652 F.3d at 80-81*.

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[2] Although defendants do not cite this case, *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080 (1st Cir. 1992)*, suggests that the corporate form may not be disregarded, for the purposes of a "minimum contacts" analysis, absent a finding of fraudulent intent on the parent's behalf. But this case involved an ERISA plan, and the Court carefully and repeatedly noted that its analysis was tied to the particularities of this statute. Courts within the First Circuit therefore have not adhered to this requirement outside the context of ERISA.

Defendants **[*39]** do not dispute that jurisdiction over CPG comports with the *Due Process Clause* if Weisheng's contacts with New York, Massachusetts, and California can be imputed to CPG. Through Weisheng, CPG purposefully availed itself of the privilege of doing business in New York, California, and Massachusetts by selling tons of vitamin C in these states. Plaintiffs' claims arise directly from these shipments of vitamins, and this Court concludes that it would be fair and reasonable for CPG to come to these states to defend this lawsuit. The *Due Process Clause* thus does not shield CPG from being subject to jurisdiction in this Court.

II. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is warranted where the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A fact is material if it "might affect the outcome of the suit under the governing law." Id.

Once the **[*40]** moving party has met its burden, the opposing party "'must do more than simply show that there is some metaphysical doubt as to the material facts. The nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial*.'" *Caldarola v. Calabrese, 298 F.3d 156, 160 (2d Cir. 2002)* (emphasis in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*. In determining whether genuine issues of material fact exist, I am required to "resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Patterson v. Cnty. of Oneida, 375 F.3d 206, 219 (2d Cir. 2004)*.

CPG's summary judgment motion is based on the dearth of evidence showing that CPG attended price-fixing meetings on its own behalf. In this respect, CPG's motion is similar to the motion for summary judgment that this Court granted on behalf of former defendant JSPC America, Inc. ("JSPCA"). See *In re Vitamin C Antitrust Litig., No. 06-MD-1738, 2011 U.S. Dist. LEXIS 153453 (E.D.N.Y. Dec. 27, 2011)*. However, the facts before the Court on JSPCA's motion were significantly different. **[*41]** In the case of JSPCA, which is a subsidiary of defendant Jiangshan Pharmaceutical Co., Ltd., plaintiffs did not argue that a reasonable jury could hold the parent company derivatively liable for the actions of the subsidiary. To this end, plaintiffs did not put forth evidence that the parent had excessive control over the subsidiary. Instead, plaintiffs' opposition to JSPCA's motion focused on whether the subsidiary's chief executive officer, who attended price-fixing meetings, was acting on behalf of the subsidiary or the parent.

In contrast, plaintiffs argue that CPG can be held liable for the price-fixing activities of Weisheng regardless of whether Weisheng's executives attended price-fixing meetings on behalf of CPG. Under federal law, a parent corporation may be held liable for the antitrust violations of its subsidiary under alter ego principles, see, e.g., *Southern New England Tel. Co. v. Global NAPs Inc., 624 F.3d 123, 139 (2d Cir. 2010)*, or under agency principles. See, e.g., *United States v. Bestfoods, 524 U.S. 51, 62-63, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998)*. The factors relevant to veil-piercing analyses for liability purposes — such as the absence of corporate formalities, overlap between **[*42]** officers and directors, and the subsidiary's financial reliance on the parent — are the same as those that the Court has considered with respect to personal jurisdiction. See *In re Vebeliunas, 332 F.3d 85, 91 n.3 (2d Cir. 2003)* (listing the factors relevant to a veil-piercing analysis in the Second Circuit). For the same reasons that this Court has denied CPG's jurisdictional motion, the Court also finds that the question of whether CPG may be held liable for the price-fixing activities of Weisheng presents a "genuine issue for trial." *Matsushita, 475 U.S. at 586*. CPG's motion for summary judgment must therefore be denied.

CONCLUSION

CPG's [286] motion to dismiss for lack of personal jurisdiction and its motion [387] for summary judgment are denied.

SO ORDERED.

/s/ Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York

July 17, 2012

Katz v. Fid. Nat'l Title Ins. Co.

United States Court of Appeals for the Sixth Circuit

October 7, 2011, Argued; July 17, 2012, Decided; July 17, 2012, Filed

File Name: 12a0219p.06

No. 10-3545

Reporter

685 F.3d 588 *; 2012 U.S. App. LEXIS 14561 **; 2012 FED App. 0219P (6th Cir.) ***; 2012-2 Trade Cas. (CCH) P77,972; 2012 WL 2895100

JORDAN KATZ; GABY HASROUNI; GINA HASROUNI; CRAIG MINTZ; SEAN NIGHTINGALE; MICAH WATTS; CAROL A. RHAMY; KATHERINE A. WIRKUS; ADAM C. FALKNER, Plaintiffs-Appellants, v. FIDELITY NATIONAL TITLE INSURANCE COMPANY, et al., Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 08-00677—Sara E. Lioi, District Judge.

Core Terms

insurers, insurance business, cooperation, McCarran-Ferguson Act, title insurance, rating bureau, title-insurance, antitrust, district court, regulation, rates, Valentine Act, filed-rate, antitrust claim, rate-making, exempt, variable annuity, anti trust law, rate-setting, legislative intent, general provision, provisions, spreading, commerce, antitrust action, rate making, risk-spreading, injunctive, prevails, sections

LexisNexis® Headnotes

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

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

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

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

An appellate court reviews the grant of a motion to dismiss de novo. The appellate court may affirm the district court's dismissal of a plaintiff's claims on any grounds, including grounds not relied upon by the district court. In this analysis, all well-pleaded facts in the complaint are accepted as true, and the appellate court construes the complaint in the light most favorable to the nonmoving party.

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

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

A complaint will survive a motion to dismiss only if it contains enough facts to state a claim to relief that is plausible on its face.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > McCarran-Ferguson Act

HN3[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

See *15 U.S.C.S. § 1012(a)*.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > McCarran-Ferguson Act

HN4[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

See *15 U.S.C.S. § 1012(b)*.

Insurance Law > Industry Practices > General Overview

HN5[] **Insurance Law, Industry Practices**

Title XXXIX of the Ohio Revised Code, *Ohio Rev. Code Ann. §§ 3901.01-3999.99*, regulates insurance. *Ohio Rev. Code Ann. § 3901.01*.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > McCarran-Ferguson Act

HN6[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

The McCarran-Ferguson Act bars a federal antitrust action if title insurance is the business of insurance within the meaning of the Act. *15 U.S.C.S. § 1012(a)-(b)*. There are three criteria relevant in determining whether a particular business or practice is part of the "business of insurance" exempted from the antitrust laws: first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. No single factor in this analysis is dispositive. Rather, a court must analyze allegedly anticompetitive behavior holistically, keeping in mind that the McCarran-Ferguson antitrust exemption is for the business of insurance, not the business of insurers.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > McCarran-Ferguson Act

HN7[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

In the context of the three criteria relevant in determining whether a particular business or practice is part of the "business of insurance" exempted from the antitrust laws by the McCarran-Ferguson Act, the first Pireno factor requires only that a product spread some risk; it does not specify any particular quantity. The amount of risk spread, however, is still relevant: it bears on the first factor's weight in the multifaceted Pireno analysis. There is no dispute that title-insurance policies are priced well above most estimates of the risk involved. Likewise, however, there is no dispute that title-insurance rate-setting is an integral part of the policy relationship between the insurer and the insured; and is limited to entities within the insurance industry. Hence, title-insurance rate-setting satisfies each Pireno criterion. That one factor is weak while others are strong need not change the ultimate conclusion. Rigid insistence on substantial risk-spreading is not required. Rather, courts must examine products or practices with respect to all three criteria. Because title-insurance rate-setting spreads some risk, is a foundational piece of the policy relationship between the insurer and the insured, and has no application outside the context of insurance, it is clearly part of the business of insurance, within the meaning of Pireno.

Insurance Law > Industry Practices > Rate Regulation > General Overview

HN8[] **Industry Practices, Rate Regulation**

Ratemaking is a key part of insurance regulation.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > McCarran-Ferguson Act

HN9[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

In the context of the three criteria relevant in determining whether a particular business or practice is part of the "business of insurance" exempted from the antitrust laws by the McCarran-Ferguson Act, the Pireno Court expressly held that no single criterion was determinative in deciding whether a product qualified as the business of insurance.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > McCarran-Ferguson Act

HN10[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

In the context of the three criteria relevant in determining whether a particular business or practice is part of the "business of insurance" exempted from the antitrust laws by the McCarran-Ferguson Act, the test in Pireno does not quantify any particular amount of risk; it merely calls for a finding of some risk. Under the Pireno test, title insurance qualifies as the business of insurance.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > McCarran-Ferguson Act

HN11[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

Title insurance is the business of insurance within the meaning of the McCarran-Ferguson Act.

Insurance Law > Industry Practices > Rate Regulation > General Overview

HN12[] Industry Practices, Rate Regulation

Ohio Rev. Code Ann. § 3935.06 permits: Cooperation among rating bureaus, or among rating bureaus and insurers, in rate making or in other matters covered by *Ohio Rev. Code Ann. §§ 3935.01 to 3935.17*, inclusive, of the Revised Code provided the filings resulting from such cooperation are subject to all such sections which are applicable to filings generally. The superintendent may review such cooperative activities and practices and if, after a hearing, he finds that any such activity or practice is unfair, unreasonable, or otherwise inconsistent with such sections, he may issue a written order specifying in what respects such activity or practice is unfair, unreasonable, or otherwise inconsistent, and requiring the discontinuance of such activity or practice. *Ohio Rev. Code Ann. § 3935.06*.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN13[] Federal & State Interrelationships, Erie Doctrine

When there is no state caselaw construing a state statute, an appellate court must predict how the state's highest court would interpret the statute.

Governments > Legislation > Interpretation

HN14[] Legislation, Interpretation

In the construction of Ohio statutes the purpose in every instance is to ascertain and give effect to the legislative intent. In order to determine legislative intent it is a cardinal rule of statutory construction that a court must first look to the language of the statute itself. If a statute's language is clear and unambiguous, Ohio courts are required to apply that plain language. If, however, the language is susceptible of more than one reasonable interpretation, the statute is ambiguous. In that case, the court, in determining the intention of the legislature, may consider among other matters: (A) The object sought to be attained; (B) The circumstances under which the statute was enacted; (C) The legislative history; (D) The common law or former statutory provisions, including laws upon the same or similar subjects; (E) The consequences of a particular construction; and (F) The administrative construction of the statute. *Ohio Rev. Code Ann. § 1.49*.

Governments > Legislation > Interpretation

HN15[] Legislation, Interpretation

If two statutes--one general and one specific--are in conflict, they shall be construed so that effect is given to both. If the conflict between the provisions is irreconcilable, the specific provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail. *Ohio Rev. Code Ann. § 1.51*. If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails. *Ohio Rev. Code Ann. § 1.52*.

Governments > Legislation > Interpretation

HN16[] **Legislation, Interpretation**

Where the lawmaking body declares its own intention in the enactment of a particular law, or defines the sense of the words employed, it is within the exercise of its legislative power, and its own construction of its language should be followed.

Insurance Law > Industry Practices > General Overview

HN17[] **Insurance Law, Industry Practices**

See *Ohio Rev. Code Ann. § 3901.01*.

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

Governments > Legislation > Interpretation

Insurance Law > Industry Practices > Rate Regulation > General Overview

Insurance Law > Industry Practices > General Overview

HN18[] **Regulated Practices, Monopolies & Monopolization**

Ohio Rev. Code Ann. § 3901.01 preserves all of the substantive law in Title XXXIX of the Ohio Revised Code, *Ohio Rev. Code Ann. §§ 3901.01-3999.99*, regardless of wording. The legislature clearly intended that combinations of insurers not be subject to antitrust scrutiny under former Ohio Gen. Code § 9592-1; the plain language of *§ 3901.01* preserves insurance law as formerly expressed. The intent of the legislature, then, seems to be that insurers may cooperate in ratemaking activities.

Insurance Law > Industry Practices > Rate Regulation > General Overview

HN19[] **Industry Practices, Rate Regulation**

Ohio Rev. Code Ann. § 3935.10 permits every insurer to exchange information and experience data with insurers in other states and to consult with them with respect to rate making and the application of rating systems. *Ohio Rev. Code Ann. § 3935.10*. That the Code expressly allows both nationwide data pooling and local rating bureaus where insurers pool information with each other suggests that the legislature contemplated widespread collaboration among insurers in the rate-setting context.

Insurance Law > Industry Practices > Rate Regulation > General Overview

HN20[] **Industry Practices, Rate Regulation**

The superintendent may review cooperative activities and practices and if he finds that any such activity or practice is unfair, unreasonable, or otherwise inconsistent with such sections, he may issue a written order requiring the discontinuance of such activity or practice. *Ohio Rev. Code Ann. § 3935.06*. This remedial procedure is consistent with the intent that insurers cooperate. The superintendent's ability to police is a safeguard against abuse.

Insurance Law > Industry Practices > Rate Regulation > General Overview

HN21[] Industry Practices, Rate Regulation

Ohio Rev. Code Ann. § 3935.06 permits cooperation among insurers.

Governments > Legislation > Interpretation

HN22[] Legislation, Interpretation

The Ohio Revised Code's rules of statutory construction provide that, when two statutory provisions are in irreconcilable conflict, the specific provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail. Ohio Rev. Code Ann. § 1.51.

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

Insurance Law > Industry Practices > General Overview

HN23[] Regulated Practices, Monopolies & Monopolization

The Insurance Code acts as an exception to the Valentine Act, Ohio Rev. Code Ann. §§ 1331.01-1353.06. Ohio Rev. Code Ann. §§ 1.51, 1.52.

Counsel: ARGUED: Daniel B. Allanoff, MEREDITH COHEN GREENFOGEL & SKIRNICK, P.C., Philadelphia, PA, for Appellants.

David M. Foster, FULBRIGHT & JAWORSKI L.L.P., Washington, D.C., for Appellees.

ON BRIEF: Daniel B. Allanoff, Bruce K. Cohen, MEREDITH COHEN GREENFOGEL & SKIRNICK, P.C., Philadelphia, PA, Eugene A. Spector, SPECTOR ROSEMAN & KODROFF, P.C., for Appellants.

David M. Foster, FULBRIGHT & JAWORSKI L.L.P., Washington, D.C., Deborah A. Coleman, Arthur M. Kaufman, HAHN LOESER & PARKS LLP, Cleveland, Ohio, Kerin Lyn Kaminski, GIFFEN & KAMINSKI, LLC, Cleveland, Ohio, Russell Kutell, FROST BROWN TODD LLC, Columbus, Ohio, David G. Greene, Kevin J. Walsh, LOCKE LORD BISSELL & LIDDELL LLP, New York, New York, James I. Serota, GREENBERG TRAURIG, LLP, New York, New York, Patricia A. Screen, BROUSE McDOWELL LPA, Cleveland, Ohio, Edward A. Matto, STEPTOE & JOHNSON, PLLC, Columbus, Ohio, for Appellees.

Judges: Before: BOGGS and STRANCH, Circuit Judges; and THAPAR,* District Judge.

Opinion by: BOGGS

Opinion

[*591] [*2]** BOGGS, Circuit Judge. These consolidated cases are eight of at least forty-five lawsuits nationwide, alleging that title-insurance companies and rating bureaus violated state and federal antitrust laws by conspiring to charge inflated rates. *See* In re Title Ins. Real Estate Settlement Procedures Act & Antitrust Litig., 560 F. Supp. 2d

* Hon. Amul R. Thapar, United States District Judge for the Eastern District of Kentucky, sitting by **[**2]** designation.

1374, 1376 (J.P.M.L. 2008) (denying consolidation of twenty-five pending title-insurance antitrust cases; mentioning "at least twenty related actions"). The district court dismissed all of Appellants' claims with prejudice. It held, first, that the filed-rate doctrine foreclosed damages and any injunctive relief that would interfere with an already-filed rate;[1] and, second, that the McCarran-Ferguson Act, along with Title XXXIX of the Ohio Revised Code, barred Appellants' federal and state antitrust actions altogether. We reach the same conclusion through different reasoning. We hold that the McCarran-Ferguson Act and Title XXXIX of the Ohio Revised Code prevent Appellants from maintaining any antitrust action based on Appellees' title-insurance rate filings. As such, the filed-rate doctrine, which limits the antitrust remedies available **[**3]** to private parties, is irrelevant. We therefore affirm the district court's dismissal, with prejudice, of Appellants' complaint.

I

Jordan Katz and eight other named plaintiffs ("Appellants") brought suit on behalf of themselves and all other purchasers of title insurance in Ohio from March 2004 through the present. They alleged that twenty-two title-insurance companies and the **[***3]** Ohio Title Insurance Rating Bureau ("Appellees") violated state and federal antitrust laws by conspiring to set unreasonably high title-insurance rates.[2]

Appellee **[**4]** title-insurance companies filed rates with the Ohio Department of Insurance through a properly licensed rating bureau, the Ohio Title Insurance Rating Bureau ("OTIRB"). Appellants claimed that it was "impossible for the Department of Insurance to review, regulate or supervise the reasonableness of the rates collectively set by defendants because those rates are based principally on undisclosed costs." The "undisclosed costs," Appellants alleged, included "kickbacks, referral fees and other expenses designed to solicit business referrals."[3] They contended that these inducements led to an "increase [in] the prices Ohio title insurance purchasers . . . paid compared to what they would have paid absent defendants' joint illegal conduct." Appellants urge that such an increase in price, resulting from unlawful collaboration, is actionable under § 1 of the Sherman Act, *15 U.S.C. § 1*, and under the Valentine Act, *Ohio Rev. Code §§ 1331.01-1353.06*, Ohio's antitrust statute. **[*592]** They seek both injunctive relief and damages.

Appellees "filed a joint motion to dismiss on the grounds that Plaintiffs' claims were barred by the filed-rate **[**5]** doctrine and by the McCarran-Ferguson Act." The district court referred these motions to a magistrate judge, who issued a Report and Recommendation, suggesting that all claims be dismissed. The magistrate judge did, however, state that Appellants should have "an opportunity to . . . modify the Complaint in order to present a prayer for non-rate-related injunctive relief that might survive the Filed Rate Doctrine."

After considering objections from both parties, the district court issued a Memorandum Opinion. It held, first, that the filed-rate doctrine applied to title insurance, and so foreclosed Appellants' claims for monetary damages, but left open the possibility of injunctive relief that would not interfere with rates already filed. Next, it **[***4]** **[**6]** held that the McCarran-Ferguson Act barred Appellants' federal antitrust claims, and that Appellees' conduct did not violate the Valentine Act because it was permissible under Title XXXIX of the Ohio Revised Code. The district court further concluded that dismissal with prejudice was appropriate because the McCarran-Ferguson Act and Title XXXIX completely foreclosed Appellants' federal and state antitrust claims. Appellants timely appealed.

II

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[1] Although these cases involve the filed-rate doctrine's antitrust implications, the doctrine also applies when rate-payers challenge the rate they have been charged. In that situation, the filed-rate doctrine protects the company. The doctrine requires that the company charge only the rate it filed, prevents it from charging any other rate, and bars private suits based on the properly filed and duly approved rates. *See, e.g.*, *In re Investigation of Nat'l Union Fire Ins. Co., 66 Ohio St. 3d 81, 1993 Ohio 184, 609 N.E.2d 156 (Ohio 1993)*.

[2] Title insurance is "[a]n agreement to indemnify against loss arising from a defect in title to real property." BLACK'S LAW DICTIONARY 819 (8th ed. 2004).

[3] Title XXXIX prohibits such inducements. *See* *Ohio Rev. Code § 3953.26*.

HN1[] We review the grant of a motion to dismiss *de novo.* *Federal-Mogul U.S. Asbestos Pers. Injury Trust v. Cont'l Cas. Co., 666 F.3d 384, 387 (6th Cir. 2011)*. We may "affirm the district court's dismissal of a plaintiff's claims on any grounds, including grounds not relied upon by the district court." *Ibid*. (quoting *Hensley Mfg. v. ProPride, Inc., 579 F.3d 603, 609 (6th Cir. 2009))*. In this analysis, "[a]ll well-pleaded facts in the complaint are accepted as true," *Ind. State Dist. Council of Laborers v. Omnicare, Inc., 583 F.3d 935, 942 (6th Cir. 2009)*, and "we construe the complaint in the light most favorable to the non-moving party." *Federal-Mogul, 666 F.3d at 387*. *HN2*[] A complaint will survive a motion to dismiss only if it "contain[s] . . . enough **[**7]** facts to state a claim to relief that is plausible on its face." *Ibid*. (internal citations and quotations omitted); *see also* *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)*.

III

A

The McCarran-Ferguson Act provides: *HN3*[] "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." *15 U.S.C. § 1012(a)*. Generally, *HN4*[] "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." *Id*. at *§ 1012(b)*. However, "the Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." *Ibid*. *HN5*[] Title XXXIX of the Ohio Revised Code **[***5]** regulates insurance. *See* *Ohio Rev. Code § 3901.01* (creating department of insurance); *id*. at *§§ 3901.01-3999.99*. Accordingly, *HN6*[] the McCarran-Ferguson Act bars Appellants' federal antitrust action if title insurance is "the business of insurance" within the meaning of the Act. *15 U.S.C. § 1012(a)-(b)*.

There are

> **[*593]** three criteria relevant **[**8]** in determining whether a particular business or practice is part of the "business of insurance" exempted from the antitrust laws . . . *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982). No single factor in this analysis is dispositive. *Ibid*. Rather, we must analyze allegedly anti-competitive behavior holistically, keeping in mind that the McCarran-Ferguson antitrust "exemption is for the 'business of insurance,' not the 'business of insurers.'" *Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979)*.

Here, the district court correctly held that title-insurance rate-making was "the business of insurance," within the meaning of the McCarran-Ferguson Act. Appellants below did not dispute the magistrate judge's finding that title insurance met the second and third elements of the *Royal Drug-Pireno* test. Thus, only the first factor, "whether the practice has the effect of **[**9]** transferring or spreading a policyholder's risk," *Pireno, 458 U.S. at 129*, was at issue.

As the court below noted, *HN7*[] the first *Pireno* factor requires only that a product spread some risk; it does not specify any particular quantity. *See* *id. at 129-30*; *SEC v. Variable Annuity Life Ins. Co. of Am., 359 U.S. 65, 71, 79 S. Ct. 618, 3 L. Ed. 2d 640 (1959)* (holding that variable annuity was not the business of insurance because it placed *no* risk of loss on the issuer). The amount of risk spread, however, is still relevant: it bears on the first factor's weight in the multifaceted *Pireno* analysis. The instant case illustrates this point. There is no dispute that title-insurance policies are priced well above most estimates of the risk **[***6]** involved. *See* Appellants' Br. at 28; Appellees' Br. at 38-39. Likewise, however, there is no dispute that title-insurance rate-setting "is an integral part of the policy relationship between the insurer and the insured; and . . . is limited to entities within the insurance industry." *Pireno, 458 U.S. at 129*. Hence, title-insurance rate-setting satisfies each *Pireno* criterion. That one factor is weak while others are strong need not change the ultimate conclusion. Rigid insistence on substantial **[**10]** risk-spreading is not required. Rather, courts must examine products or practices "with respect to all three criteria." *Ibid*. Because title-insurance rate-setting spreads some risk, is a foundational piece of the policy relationship between the insurer and the insured, and has no application outside the context of insurance, it is clearly part of the business of insurance, within the meaning of *Pireno*.

This conclusion is consistent with the policy of the McCarran-Ferguson Act. As the district court observed, ***HN8***[] rate-making is a key part of insurance regulation. In fact, "[t]he floor debates [on the McCarran-Ferguson Act] . . . focused simply on whether cooperative rate making should be exempt [from ***antitrust law***]." *Royal Drug, 440 U.S. at 223*. One of the Act's sponsors, Senator Ferguson, said on the Senate floor: "[W]e cannot have open competition in fixing rates on insurance. If we do, we shall have chaos." *Ibid*. (citing 91 Cong. Rec. 1481 (1945)). Other comments in the floor debates "also indicated a primary concern that cooperative ratemaking would be protected from the antitrust laws." *Ibid*. Even President **[*594]** Franklin Roosevelt indicated that the McCarran-Ferguson Act would allow companies **[**11]** to work together in setting rates when he signed the bill. *Id. at 223-24*. To hold that title-insurance rate-making is not subject to antitrust scrutiny would be to ignore Congress's purpose, and improperly to impose federal oversight on an extensive state regulatory scheme. *Id. at 224* (quoting President Roosevelt's statement in S. Rosenman, The Public Papers and Addresses of Franklin D. Roosevelt, 1944-45 Vol., p. 587 (1950), that "Congress . . . was willing to permit actual regulation of [cooperatively set] rates by affirmative action of the States"). We do not take such a tack. Instead, we hold that the district court was correct to conclude that title insurance is the business of insurance, within the meaning of the McCarran-Ferguson Act.

[*7]** Appellants nevertheless argue that the district court erred. At the outset, they claim that, because the Supreme Court called risk-spreading an "indispensable characteristic of insurance," the first *Pireno* factor is a "threshold requirement[] for application of McCarran-Ferguson Act Immunity." Appellants' Br., at 21-22 (internal citations omitted). Appellants then proceed to argue that title insurance involves so little risk-spreading that it does **[**12]** not have "the effect of transferring or spreading a policyholder's risk," *Pireno, 458 U.S. at 129*; see Appellants' Br. at 21-30, but instead acts as a limited warranty, protecting purchasers from existing defects in title. Appellants' Br. at 22. Because risk-spreading is not the "true nature" of title insurance, they claim, title insurance rates are not the business of insurance within the meaning of the McCarran-Ferguson Act, and they may maintain their federal antitrust claims. *Id*. at 25.

To support this proposition, Appellants cite *Variable Annuity*. There, the Court addressed the question whether variable annuity contracts were the business of insurance within the meaning of the McCarran-Ferguson Act, and thus exempt from reporting requirements under federal securities laws. *See Variable Annuity, 359 U.S. at 73* (Brennan, J., concurring) (labeling the "basic problem involved" as "one of the coverage of two Acts of Congress which concentrated on applying specific forms of regulatory controls to the various ways in which organizations get and administer other people's money"). It held that, while some of the contracts offered did contain "one true insurance feature," *id. at 73 n.15* **[**13]** (maj. op.), variable annuities generally could not be considered part of the 'business of insurance' because they "place[d] *all* the investment risks on the annuitant, *none* on the company." *Id. at 71* (emphasis added).

According to Appellants, *Variable Annuity* establishes that "a court must examine the product [at issue] in order to determine whether it was designed to transfer risk, as in property, casualty and life insurance, or for some other purpose." Appellants' Reply Br. at 19. Further, they argue that the case shows that, when a product contains only a minimal risk-shifting component, it should not be considered the business of insurance. Appellants' Br. at 25-26. Because the title-insurance policies in this case **[***8]** include "at most, 3.4% of premium loss," Appellants' Reply Br. at 21, Appellants urge, they cannot be considered part of the business of insurance, based on *Variable Annuity*.[4]

[4] Appellants also cite *United States v. Title Ins. Rating Bureau of Arizona, 700 F.2d 1247 (9th Cir. 1983)*, and *In re Ticor Title Ins. Co., 112 F.T.C. 344, 1989 WL 1126786 (F.T.C. 1989).* These cases, however, are irrelevant. *Rating Bureau of Arizona* addressed escrow services, and *In re Ticor* involved **[**14]** title search and examination charges. In both cases, the court held that the service provided was not the business of insurance. Neither case, however, involved rate-making, a central component of insurance and insurance regulation.

[*595] Appellants are incorrect at every turn. First, ***HN9***[] the *Pireno* Court expressly held that no single criterion was determinative in deciding whether a product qualified as the business of insurance. *Pireno, 458 U.S. at 129* ("None of these criteria is necessarily determinative in itself."). Appellants' claim that risk-spreading is a threshold requirement, then, is simply contrary to explicit Supreme Court precedent. Second, as the district court pointed out, ***HN10***[] "the test in *Pierno* [sic] . . . does not quantify any particular amount of risk; it merely calls for a finding of some risk." *See In re New Jersey Title Ins. Litig., No. 08-1425, 2010 U.S. Dist. LEXIS 67273, 2010 WL 2710570, at *8 (D.N.J. July 6, 2010)*. If anything, Pireno gives content to *Variable Annuity's* conclusion that "the concept of 'insurance' involves some investment risk-taking on the part of the company." *Variable Annuity, 359 U.S. at 71*. In any event, *Pireno*, not *Variable Annuity*, is this court's guide. Under the Pireno test, **[**15]** title insurance qualifies as the business of insurance. Finally, Appellants "misstate *Variable Annuity's* holding. The *Variable Annuity* Court held that, for purposes of federal statutory exemptions, including the McCarran-Ferguson Act, the concept of insurance involves some investment risk-taking on the part of the company." *In re New Jersey Title Ins. Litig., 2010 U.S. Dist. LEXIS 67273, 2010 WL 2710570, at *8* (internal quotations omitted). The contracts in *Variable Annuity* involved no risk-taking, and therefore were not insurance. Title insurance, by contrast, does involve a risk—small though it may be.

We therefore hold that ***HN11***[] title insurance is the business of insurance within the meaning of the McCarran-Ferguson Act. Thus, Appellants' federal antitrust claims are barred if Ohio law regulates title insurance. Title XXXIX of the Ohio Revised Code does just that. Accordingly, the McCarran-Ferguson Act prevents Appellants from maintaining their federal antitrust claims.

[*9]** B

The McCarran-Ferguson Act bars Appellants' federal antitrust claims because title insurance qualifies as the business of insurance, and "such business is [] regulated by State law." *See 15 U.S.C. § 1012(b)*. The question remains, though, whether Appellees' **[**16]** conduct was permissible under the Ohio Revised Code. The Valentine Act, *Ohio Rev. Code §§ 1331.01-1353.06*, prohibits "a combination of capital, skill, or acts by two or more persons . . . to fix at a standard figure . . . an article or commodity of merchandise, produce, or commerce intended for sale . . . in this state." *Id*. at *§§ 1331.01(B)(4)*, *1331.04*. At the same time, ***HN12***[] *§ 3935.06* permits:

> Co-operation among rating bureaus, or among rating bureaus and insurers, in rate making or in other matters covered by sections 3935.01 to 3935.17, inclusive, of the Revised Code . . . provided the filings resulting from such co-operation are subject to all such sections which are applicable to filings generally. The superintendent may review such co-operative activities and practices and if, after a hearing, he finds that any such activity or practice is unfair, unreasonable, or otherwise inconsistent with such sections, he may issue a written order specifying in what respects such activity or practice is unfair, unreasonable, or otherwise inconsistent, and requiring the **[*596]** discontinuance of such activity or practice.

Id. at *§ 3935.06*. The issue that we must decide, then, is whether the specific language **[**17]** of *§ 3935.06* carves out an exception to the Valentine Act's general prohibition on price-fixing.

In addressing this question, we apply Ohio law. *Rector v. Gen. Motors Corp., 963 F.2d 144, 146 (6th Cir. 1992)*. ***HN13***[] "When there is no state caselaw construing a state statute, we must predict how the state's highest court would interpret the statute." *F.D.I.C. v. Jeff Miller Stables, 573 F.3d 289, 298 (6th Cir. 2009)* (quoting *United States v. Simpson, 520 F.3d 531, 535 (6th Cir. 2008))* (internal alterations omitted).

HN14[] "In the construction of [Ohio] statutes the purpose in every instance is to ascertain and give effect to the legislative intent . . . ." *Carter v. Div. of Water, City of Youngstown, 146 Ohio St. 203, 65 N.E.2d 63, 63 (Ohio 1946)*; *see also Stevens v. Ackman, 91 Ohio St. 3d 182, 2001 Ohio 249, 743 N.E.2d* ***[***10]*** *901, 909 (Ohio 2001)* (citing *Carter, 65 N.E.2d at 63*). "In order to determine legislative intent it is a cardinal rule of statutory construction that a court must first look to the language of the statute itself." *State v. Jordan, 89 Ohio St. 3d 488, 2000 Ohio 225, 733 N.E.2d 601, 605 (Ohio 2000)*. If a statute's language is clear and unambiguous, Ohio courts are "required to apply

[that] plain language." *Jaques v. Manton, 125 Ohio St. 3d 342, 2010 Ohio 1838, 928 N.E.2d 434, 438 (Ohio 2010)*. If, however, **[**18]** "the language is susceptible of more than one reasonable interpretation," *Jordan, 733 N.E.2d at 605*, the statute is ambiguous. In that case,

> the court, in determining the intention of the legislature, may consider among other matters:
>
> (A) The object sought to be attained;
> (B) The circumstances under which the statute was enacted;
> (C) The legislative history;
> (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
> (E) The consequences of a particular construction;
> (F) The administrative construction of the statute.

Ohio Rev. Code § 1.49.

HN15[] If two statutes—one general and one specific—are in conflict, "they shall be construed . . . so that effect is given to both. If the conflict between the provisions is irreconcilable, the [specific] provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail." *Id*. at *§ 1.51*. "If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails." *Id*. at *§ 1.52*; *see also* *List v. Burley Tobacco Growers' Coop. Ass'n, 114 Ohio St. 361, 4 Ohio Law Abs. 194, 151 N.E. 471, 479 (Ohio 1926)* **[**19]** (holding that later-enacted statute permitting cooperation in marketing agricultural products was an exception to the Valentine Act).

Appellants urge that the plain language of *§ 3935.06* resolves this case. Specifically, they contend: "[b]y its express terms, the statute permits cooperation among rating bureaus, or among rating bureaus and insurers—*not among insurers themselves*." Appellants Br. at 19 (emphasis in original). This is one possible interpretation of the statute, which allows "[c]o-operation among rating bureaus, or among rating bureaus and insurers, in rate making **[***11]** or in other matters covered by *sections 3935.01 to 3935.17*, inclusive, of the Revised Code." *Ohio Rev. Code § 3935.06*.

[*597] However, rating bureaus themselves rely on cooperation among insurers. Appellants' own characterization is that "[t]he purpose of a rating bureau is to compile the loss experience of many insurers so that individual insurers and the ODI may benefit from a broader database and better predict future losses." Appellants' Reply Br. at 16. If insurers did not cooperate with each other in this data-swapping exercise, rating bureaus would not exist. Of course, the statute does not specifically authorize **[**20]** collusive rate submissions; this is why "the superintendent may review such co-operative activities and practices." *Ohio Rev. Code § 3935.06*. Still, the Code explicitly provides that rating bureaus are legal. *See ibid*. (providing registration requirements for rating bureaus). As such, it contemplates cooperation among insurers in rate-making. A specific provision authorizing such conduct would be redundant.

Section 3935.06, then, "is susceptible of more than one reasonable interpretation." *Jordan, 733 N.E.2d at 605*. Accordingly, we must turn to extrinsic indicia of legislative intent. *See* *Ohio Rev. Code § 1.49*. As the district court noted, before 1953, when Title XXXIX was enacted, § 9592 of the Ohio General Code governed insurance. At the beginning of that statute, the General Assembly wrote: "[t]he purpose of this act is to promote the public welfare by regulating insurance rates to the end they shall not be excessive, inadequate or discriminatory, and to authorize and regulate cooperative action among insurers in rate making and other matters within the scope of this act." OHIO GEN. CODE § 9592-1 (Eff. Dec. 31, 1947). Insurers would not, of course, be liable under the Valentine Act, **[**21]** given this language. The plain intent of the legislature is to allow what the ***antitrust law*** prohibits: coordinated action among market participants in price-setting. Ohio courts are bound to honor such an expressed legislative intent. *See* *State ex rel. Moore Oil Co. v. Dauben, 99 Ohio St. 406, 124 N.E. 232, 234 (Ohio 1919)* (***HN16***[] "Where the lawmaking body declares its own intention in the enactment of a particular law, or defines the sense of the words employed, it is within the exercise of its legislative power, and its own construction of its language should be followed.").

[*12]** The legislature, though, did not include § 9592-1's statement of purpose in the Revised Code. And while it "specifically stated in *Section 1.24* that it did not intend to change the law as heretofore expressed by the section or sections of the General Code," *State v. Kotapish, 171 Ohio St. 349, 171 N.E.2d 505, 507 (Ohio 1960)* (internal punctuation omitted); *see also Ohio Bank & Sav. Co., 411 F.2d 801, 803 (6th Cir. 1969)* (holding that, in light of *Ohio Rev. Code § 1.24*, the legislature did not intend substantive change in law), that savings clause appears to deal only with numbering and minor grammatical changes.[5] The Ohio Supreme Court has not determined **[**22]** how *§ 1.24* applies when language added or deleted would significantly alter parties' rights and obligations.

We need not resolve this question because *§ 1.24* does not apply to Title XXXIX. *Section 3901.01* provides: ***HN17***[] "it is the intent of the general assembly not to change the law as expressed by Title 39 of the Revised Code." *Id*. at *§ 3901.01*. This specific continuation clause is stronger than the general clause in *§ 1.54*, which replaced *§ 1.24*: it is not limited by its terms to language that is "the same as the **[*598]** prior statute." *Id*. at *§ 1.54*. Rather, ***HN18***[] it preserves all of the substantive law in Title XXXIX, regardless of wording. The legislature clearly intended that combinations of insurers not be subject to antitrust scrutiny under § 9592-1; the plain language of *§ 3901.01* preserves insurance law as formerly expressed. The intent of the legislature, then, seems to be that insurers may cooperate in rate-making activities.

The context of the Insurance Code's **[**23]** enactment and other provisions in the Code confirm this conclusion. Before 1944, the Supreme Court treated the business of insurance as outside of interstate commerce. *See Paul v. Virginia, 75 U.S. 168, 183, 19 L. Ed. 357 (1868)* ("Issuing a policy of insurance is not a transaction of commerce."); *New York Life Ins. Co. v. Cravens, 178 U.S. 389, 401, 20 S. Ct. 962, 44 L. Ed. 1116 (1900)* ("The business of insurance is not commerce."). The States, therefore, were able to regulate insurance as they saw fit. At that time, Ohio exempted insurance from antitrust scrutiny because it was not trade, commerce, or a commodity, within the meaning of the Valentine Act. *See State v. Bovee, 6 Ohio N.P. (n.s.) 337, 17 Ohio Dec. 663 (Ohio Com. Pl. 1907)*.

[*13]** *United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944)*, changed the landscape of insurance regulation. There, the Court held that insurance did qualify as interstate commerce, and thus was subject to the Sherman Act's strictures. In response, Congress passed the McCarran-Ferguson Act. As discussed above, Congress's primary concern was "that cooperative ratemaking efforts be exempt from the antitrust laws." *Royal Drug, 440 U.S. at 221*. However, as President Roosevelt pointed out, "Congress did not intend **[**24]** to permit private rate fixing, which the Antitrust Act forbids, but was willing to permit actual regulation of rates by affirmative action of the States." *Id. at 224* (quoting S. Rosenman, *supra* at 587). Thus, the states had to pass their own laws regulating the business of insurance, lest the Sherman Act apply full-force. *15 U.S.C. § 1012(b)*. In this context, Ohio passed its insurance code, which included § 9592-1. The declaration of intent, then, matches the concerns that animated the McCarran-Ferguson Act—both federal and state legislatures sought to promote cooperation among insurers in rate-making.

Two statutory provisions also support this interpretation. First, ***HN19***[] *§ 3935.10* permits "every insurer . . . [to] exchange information and experience data with . . . insurers . . . in other states and [to] consult with them with respect to rate making and the application of rating systems." *Ohio Rev. Code § 3935.10*. That the Code expressly allows both nationwide data pooling and local rating bureaus where insurers pool information with each other suggests that the legislature contemplated widespread collaboration among insurers in the rate-setting context. Second, ***HN20***[] "[t]he superintendent may **[**25]** review . . . co-operative activities and practices and if . . . he finds that any such activity or practice is unfair, unreasonable, or otherwise inconsistent with such sections, he may issue a written order . . . requiring the discontinuance of such activity or practice." *Id*. at *§ 3935.06*. This remedial procedure is consistent with the intent that insurers cooperate. The superintendent's ability to police is a safeguard against abuse. This power would be unnecessary if private parties could bring antitrust actions against insurers under the Valentine Act.

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[5] *Section 1.54* replaced *§ 1.24*. It provides: "A statute which is reenacted or amended is intended to be a continuation of the prior statute and not a new enactment, so far as it is the same as the prior statute." *Ohio Rev. Code § 1.54*.

Therefore, applying Ohio principles of statutory construction, we hold that ***HN21***[] *§ 3935.06* permits cooperation among insurers. The question that remains is **[*599]** whether such cooperation nevertheless violates the Valentine Act. The answer is a straightforward "no." ***HN22***[] The Ohio **[***14]** Revised Code's rules of statutory construction provide that, when two statutory provisions are in irreconcilable conflict, "the [specific] provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail." *Ohio Rev. Code § 1.51*. The General Assembly adopted the Valentine **[**26]** Act in 1898. 1898 Ohio Laws 143. It passed the Insurance Code in 1947. 1947 Ohio Laws 397. There is no indication that the Valentine Act was ever amended, expressly to displace the provisions of the Insurance Code that allow cooperation. Thus, ***HN23***[] the Insurance Code acts as an exception to the Valentine Act. *See Ohio Rev. Code §§ 1.51*, *1.52*.

Appellants' Ohio antitrust claims, then, are not valid. *Section 3935.06* of the Revised Code permits Appellees' allegedly collusive behavior, and so the Valentine Act does not apply. The district court was correct to dismiss these state-law claims.

IV

Although we resolve this appeal based on the analysis above, we acknowledge that the parties briefed and argued another issue: whether the filed-rate doctrine eliminates Appellants' damages claims, and any injunctive claims that would interfere with an already-filed rate. The court below, like most other courts to consider antitrust challenges to title-insurance rate-setting, addressed this issue. *See, e.g., McCray v. Fidelity Nat'l Title Ins. Co., 682 F.3d 229, 235-42 *8 (3d Cir. 2012)*; *In re New Jersey Title Ins. Litig., 683 F.3d 451, 2012 U.S. App. LEXIS 12057, 2012 WL 2149471, at *2-*7 (3d Cir. June 14, 2012)*; *Dolan v. Fidelity Nat'l Title Ins. Co., 365 F. App'x 271, 273-76 (2d Cir. 2010)*; **[**27]** *Winn v. Alamo Title Ins. Co., 372 F. App'x 461, 461 (5th Cir. 2010)*; *In re Pennsylvania Title Ins. Antitrust Litig., 648 F. Supp. 2d 663, 672-86 (E.D. Pa. 2009)*; *McCray v. Fidelity Nat'l Title Ins. Co., 636 F. Supp. 2d 322, 326-34 (D. Del. 2009)*; *see also Coll v. First Am. Title Ins. Co., 642 F.3d 876, 886-891 (10th Cir. 2011)* (holding that New Mexico filed-rate doctrine barred title insurance rate-setting antitrust claim). The sounder approach, however, is to reject Appellants' claims based only on statutory antitrust exemptions, without reference to the filed-rate doctrine.

[*15]** The filed-rate doctrine prevents private parties from recovering antitrust damages based on a rate properly filed with, and approved by, an appropriate regulatory body.[6] *See Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986)*; *Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922)* (Brandeis, J.). It deals only with private parties' remedies, and does not, itself, remove actors from all antitrust scrutiny. *See Square D, 476 U.S. at 422 n.28* ("[A] critical distinction remains between an absolute immunity from all antitrust scrutiny and a far more limited nonavailability of the private treble-damages **[**28]** remedy."). By contrast, the McCarran-Ferguson Act bars all federal antitrust actions involving "the business of insurance to the extent that such business **[*600]** is . . . regulated by State law," *15 U.S.C. § 1012(b)*, unless the alleged antitrust violation is an "agreement to boycott, coerce, or intimidate, or [an] act of boycott, coercion, or intimidation." *Id*. at *§ 1013(b)*.[7] Title XXXIX of the Ohio Revised Code, which regulates title insurance, allows concerted action in rate-setting. Accordingly, Appellants have no claim under federal or state law. The filed-rate doctrine's limitation on remedy is irrelevant.[8]

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[6] The filed-rate doctrine can also bar injunctive relief, if the injunction that plaintiffs seek is no more than a request for a different rate-making decision, *Dolan, 365 F. App'x. at 276*, or if the injunction would force the court to alter an existing rate. The filed-rate doctrine applies in this scenario because it is designed "to protect the exclusive authority of the agency to accept or challenge [rates]." *Town of Norwood, Mass. v. New England Power Co., 202 F.3d 408, 420 (1st Cir. 2000)* (Boudin, J.).

[7] Appellants concede there is no boycott, coercion, or intimidation here.

[8] The district **[**29]** court's opinion illustrates why it is preferable to address antitrust immunity before the filed-rate doctrine. The opinion below offers a thorough discussion of the filed-rate doctrine, culminating in a holding that Appellants' damages claims had to be dismissed, but their injunctive claims might be permissible, as long as those claims did not interfere with established rates. Later, however, the district court dismissed Appellants' claims with prejudice because "the McCarran-Ferguson Act is a

V

The McCarran-Ferguson Act and Title XXXIX of the Ohio Revised Code are complete bars to Appellants' federal and state antitrust claims. In light of this holding, we need not consider whether the filed-rate doctrine applies in this case. We AFFIRM the judgment of the district court, dismissing **[**30]** Appellants' complaint with prejudice.

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complete bar to Plaintiffs' federal antitrust claim . . . [and] [t]he same logic holds true for Plaintiffs' Valentine Act claim." Allowing Appellants to re-plead either cause of action, it wrote, would "be an exercise in futility." This is true. But it also means that the court's discussion of the filed-rate doctrine was unnecessary: the McCarran-Ferguson Act and the Ohio Insurance Code barred the suit wholesale.

High Tek USA, Inc. v. Heat & Control, Inc.

United States District Court for the Northern District of California

July 18, 2012, Decided; July 18, 2012, Filed

Case No.: 12-CV-00805 YGR

Reporter

2012 U.S. Dist. LEXIS 100538 *; 2012-2 Trade Cas. (CCH) P77,981; 2012 WL 2979051

HIGH TEK USA, INC., Plaintiff, vs. HEAT AND CONTROL, INC. and DOES 1 through 50, inclusive, Defendants.

Prior History: *High Tek USA, Inc. v. Heat & Control, Inc., 2012 U.S. Dist. LEXIS 80772 (N.D. Cal., June 11, 2012)*

Core Terms

alleges, Sherman Act, scales, intentional interference, processing, antitrust, food, promissory estoppel, promise, price discrimination, antitrust claim, cause of action, Robinson-Patman Act, aftermarket, contractual, refurbished, monopolize, contracts, packaging, catalog

Counsel: **[*1]** For High Tek USA, Inc., Plaintiff: Jennifer Randlett Madden, Shaye Nicole Harrington, LEAD ATTORNEYS, Downey Brand LLP, sacramento, CA.

For Heat and Control, Inc., Defendant: Robert Scott Shwarts, Russell P. Cohen, Orrick Herrington & Sutcliffe LLP, San Francisco, CA.

Judges: YVONNE GONZALEZ ROGERS, UNITED STATES DISTRICT COURT JUDGE.

Opinion by: YVONNE GONZALEZ ROGERS

Opinion

ORDER GRANTING IN PART AND DENYING IN PART MOTION OF DEFENDANT HEAT AND CONTROL, INC. TO DISMISS THE COMPLAINT WITH LEAVE TO AMEND

Plaintiff High Tek USA, Inc. ("High Tek") brings this antitrust action against Defendant Heat and Control, Inc. ("H&C") alleging unilateral refusal to deal in the aftermarket for packaging and weighing equipment of food packaging and processing materials. Plaintiff alleges seven causes of action: (1) Violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*; (2) Violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*; (3) Violation of the Robinson-Patman Act, *15 U.S.C. § 13*; and state law claims for (4) Intentional Interference with Contractual Relations; (5) Intentional Interference with Prospective Economic Advantage; (6) Promissory Estoppel; and (7) Unfair, Unlawful and Fraudulent Business Practices in Violation **[*2]** of *California Business and Professions Code § 17200 et seq.*

Defendant has filed a Motion to Dismiss the Complaint on the grounds that this is a garden variety business dispute between a supplier and its former customer that does not implicate federal ***antitrust law***. The Court held oral argument on July 13, 2012.

Having carefully considered the papers submitted, the Complaint, and the argument of counsel, for the reasons set forth below, the Court hereby **GRANTS IN PART** and **DENIES IN PART** the Motion to Dismiss **WITH LEAVE TO AMEND.**

I. BACKGROUND

This case involves access to replacement parts for processing, packaging, and weighing equipment used in food production. The equipment is used to weigh and fill bags, pouches, cans, jars, cartons, cases and trays with a variety of fresh, processed, and frozen foods. H&C is the exclusive North America distributor of scales, equipment and parts manufactured by Ishida Co., Ltd. ("Ishida"). Dkt. No. 1 ("Complaint") ¶ 8. H&C also manufactures food processing and packaging equipment. *Id.* High Tek alleges that its inability to purchase Ishida parts from H&C violates federal antitrust and California state laws.

In 2004, High Tek was founded by two former H&C **[*3]** employees who began servicing food processing and packaging equipment, including scales manufactured by Ishida. *Id.* ¶ 9. In addition to servicing Ishida scales, High Tek sells used scales which it has refurbished and reconditioned. *Id.* ¶ 11. High Tek alleges that its sale of refurbished and reconditioned scales directly competes with H&C's sale of new scales. *Id.* In order to refurbish, recondition, and service Ishida scales, High Tek must purchase Ishida parts from H&C. *Id.* ¶ 12.

Beginning in early 2007, and continuing until December 20, 2011, H&C provided High Tek with a parts account to purchase Ishida parts. *Id.* ¶¶ 14-16. H&C required High Tek to pay a 10-20% markup on all Ishida parts, which is something that other companies who were not in direct competition with H&C were not required to pay. *Id.* ¶ 15. Prior to entering into the parts account, H&C required that High Tek remove language from its catalog that stated something to the effect of "High Tek is the best in the industry." *Id.* ¶ 14. High Tek alleges that it detrimentally relied upon the promise of a long-term parts account and made the requested changes to its catalog. *Id.*

High Tek alleges that on December 20, 2011, soon **[*4]** after H&C and High Tek held tables near each other at an industry trade show, H&C eliminated High Tek's parts accounts without explanation. *Id.* ¶ 16. High Tek then attempted to purchase Ishida parts from Ishida distributors outside of North America and even from Ishida directly, but they all told High Tek that parts could only be purchased in North America from H&C. *Id.* ¶¶ 17-18. High Tek also attempted to purchase parts from third-parties who had initially purchased parts from H&C but H&C thwarted such efforts by threatening the third-parties that they will lose their parts accounts with H&C if they resell parts to High Tek.

High Tek's inability to purchase Ishida parts has halted the company's ability to conduct business. *Id.* ¶ 20. High Tek has contracts, of which H&C is aware, that require it to obtain Ishida parts, but H&C has prevented High Tek from fulfilling its contractual obligations because H&C will not sell it Ishida parts and High Tek has cut off any alternative means to purchase such parts. *Id.* ¶ 20. As a result of H&C's refusal to sell Ishida parts, High Tek has been forced to breach its contracts and turn away business. *Id.* ¶ 20.

II. LEGAL STANDARD

To survive a motion to **[*5]** dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). In the antitrust context, "a court must determine whether an antitrust claim is 'plausible' in light of basic economic principles." *William O. Gilley Enters., Inc. v. Atl. Richfield Co., 588 F.3d 659, 662 (9th Cir. 2009)* (citing *Twombly, supra, 550 U.S. at 556*). Although the court must construe all allegations of material fact in the light most favorable to the plaintiff, "a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, supra, 550 U.S. at 555* (alteration in original). If the allegations in the complaint fail to give rise to a plausible claim for relief, "'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Id. at 558* (citations omitted).

III. DISCUSSION

A. [*6] COUNT I: SECTION 1 SHERMAN ACT — CONTRACT IN RESTRAINT OF TRADE[1]

As to Count I, alleging a violation of *Section 1* of the Sherman Act, High Tek fails to allege sufficiently each of the required elements of the claim. Liability under *Section 1* of the Sherman Act, *15 U.S.C. § 1*, requires a "contract, combination . . ., or conspiracy, in restraint of trade or commerce." *Twombly, supra, 550 U.S. at 548*.

To state a claim for conspiracy under *Section 1* of the Sherman Act, a plaintiff must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove: "'(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several **[*7]** States, or with foreign nations; (3) which actually injures competition.'" *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012)* (quoting *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008))*. "[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality" for purposes of *Section 1* of the Sherman Act. *Twombly, supra, 550 U.S. at 567*.

Here, the Complaint identifies H&C's contract with Ishida, which makes H&C the exclusive North America distributor of Ishida parts, but the Complaint does not allege that either H&C or Ishida entered into the contract for the purpose of harming or restraining commerce. Moreover, as to the third element, the Complaint alleges only the ultimate fact that "the [unspecified] way [H&C] executes those contracts in North America unreasonably restrains trade" without providing any evidentiary fact of injury to competition. *See* Complaint ¶ 25. "[T]o withstand a motion to dismiss, 'a section one claimant may not merely recite the bare legal conclusion that competition has been restrained unreasonably.'" *Brantley, supra, 675 F.3d at 1198* (quoting *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 507-08 (9th Cir. 1989))*.

Based **[*8]** on the foregoing analysis, the Court **GRANTS** the Motion to Dismiss Count I **WITH LEAVE TO AMEND.**

B. COUNT II: *SECTION 2* SHERMAN ACT — ILLEGAL MONOPOLY[2]

As to Count II, alleging a violation of *Section 2* of the Sherman Act, Plaintiff fails to plead facts regarding the relevant product market. *Section 2* of the Sherman Act makes it unlawful to monopolize, attempt to monopolize, or combine or conspire to monopolize.

To state a cause of action for the offense of monopoly under *Section 2* of the Sherman Act, a plaintiff must plead: (1) the relevant market that defendant has monopolized; (2) possession of monopoly power in that market; and (3) willful acquisition or maintenance of that power through competitively unreasonable means, rather than as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*.

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[1] *15 U.S.C. § 1*. Trusts, etc., in restraint of trade illegal; penalty

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . .

[2] *15 U.S.C. § 2*. Monopolizing trade a felony; penalty

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .

Charges of **[*9]** monopolization can only be judged in the framework of the relevant market, which has two dimensions: the "relevant geographic market" and the "relevant product market." *Newcal Indus. v. Ion Office Solution, 513 F.3d 1038, 1044 n.3 (9th Cir. 2008)*. While the parties agree that the relevant geographic market is the United States, they differ on the scope of the "relevant product market." In the Complaint, High Tek alleges that the relevant product market is the purchase of Ishida parts. Complaint ¶ 29. In its Opposition Brief, High Tek adds two additional markets: the aftermarket for refurbished Ishida scales and the aftermarket for servicing Ishida scales. H&C argues that the relevant product market is all food processing scales sold in the United States.

High Tek alleges no facts from which it plausibly could be inferred that the relevant product market is the purchase of Ishida parts (the aftermarket for refurbished Ishida scales and/or the aftermarket for servicing Ishida scales) [3] as opposed to all food processing scales sold in the United States. *See Brown Shoe Co. v. United States, 370 U.S. 294, 325-26, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* ("The outer boundaries of a product market are determined by the reasonable **[*10]** interchangeability of use . . . between the product itself and the substitutes for it."). This infirmity is fatal to its *Section 2* Sherman Act claim. *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)* ("where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist."); *see also Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 180, 126 S. Ct. 860, 163 L. Ed. 2d 663 (2006)* ("Interbrand competition, our opinions affirm, is the 'primary concern of ***antitrust law***.'").

Because High Tek has failed to show a relevant market against **[*11]** which H&C's market power and the alleged anticompetitive effects of its practices can be judged, [4] High Tek has failed to state a *Section 2* Sherman Act claim.

Based on the foregoing analysis, the Court **GRANTS** the Motion to Dismiss Count II **WITH LEAVE TO AMEND.**

C. COUNT III: VIOLATION OF THE ROBINSON-PATMAN ACT, *15 U.S.C. § 13*

As **[*12]** to Count III for violation of the Robinson-Patman Act, High Tek fails to allege each of the required elements of the claim. The Robinson-Patman Act of 1936, *15 U.S.C. § 13*, forbids price discrimination when it is apt to have an anticompetitive effect. To state a claim for a violation of *Section 2(a)* of the Robinson-Patman Act, a plaintiff must plead four elements: (1) the relevant sales were made in interstate commerce; (2) the products sold were of the same grade and quality; (3) that H&C discriminated in price as between High Tek and another purchaser; and (4) the discrimination had a prohibited effect on competition. *See Texaco Inc. v. Hasbrouck, 496 U.S. 543, 556, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990)*. The fourth factor — whether the discrimination had the prohibited effect on competition — requires, *inter alia*, allegations that the price discrimination is between purchasers in direct competition.

The Complaint alleges that "H&C required HIGH TEK to pay a 10-20% markup on all Ishida parts—something other companies who were not in direct competition with H&C were not required to pay." Complaint ¶ 15. Thus, High Tek

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[3] In its Opposition Brief, High Tek attempts to explain why it believes that Ishida parts is the relevant market. For example, it argues that Ishida equipment is the "premium brand," the "gold standard" of weighing and packaging equipment, that Ishida equipment is utilized by a majority of manufacturers and distributors of packaging equipment. Facts not alleged in the Complaint will not prevent dismissal for failure to state a claim. Without deciding whether these additional facts are sufficient to state a *Section 2* Sherman Act claim, the Court will permit High Tek to amend its Complaint to allege additional facts.

[4] The term "monopolize," as used in the federal antitrust laws, means the power either to obtain, or to maintain, the power to remove or exclude competitors from the field of competition in a particular business or industry. Since H&C is the exclusive distributor of Ishida parts, H&C maintains its so-called monopoly power to purchase Ishida parts because of H&C's contract with Ishida to be the exclusive North American distributor for Ishida parts, not because of any of the alleged anticompetitive behavior. Additionally, High Tek's theory, that because it is a competitor that has been harmed, that H&C has harmed competition does not state a claim under the antitrust laws. "[T]he plaintiff here must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself." *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*.

alleges that it was *not* in competition with the purchasers who were allegedly the beneficiaries of **[*13]** the price discrimination. As such, the Complaint alleges a price *difference* but not price *discrimination.* Accordingly, High Tek has failed to state a claim for price discrimination under the Robinson-Patman Act.

Based on the foregoing analysis, the Court **GRANTS** the Motion to Dismiss Count III **WITH LEAVE TO AMEND.**

D. COUNT IV: INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS

As to Counts IV and V for intentional interference with contractual relations and intentional interference with prospective economic advantage, H&C attacks the merits of the claim but does not address the sufficiency of the allegations in the Complaint. The elements for a cause of action for intentional interference with contractual relations and intentional interference with prospective economic advantage essentially are: (1) the existence of a contract *or* other economic relationship between plaintiff and a third party; (2) the defendant's knowledge of the contract *or* relationship; (3) defendant intended to disrupt the contract *or* relationship through wrongful conduct; (4) the conduct did disrupt the contract *or* relationship; and (5) defendant caused damage. *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (Cal. 2003)*; **[*14]** *Quelimane Co. v. Stewart Title Guaranty Co., 19 Cal. 4th 26, 55, 77 Cal. Rptr. 2d 709, 960 P.2d 513 (Cal. 1998)*; *see also*, Judicial Council of California Civil Jury Instructions (2011 Ed.) *sections 2201*, 2202 and the cases cited therein.

H&C argues that its decision not to sell Ishida parts to High Tek was not wrongful and was justified by competition. At oral argument, counsel for H&C argued that no wrongful act is alleged because the Complaint alleges only legitimate business activity. Counsel also argued that the business tort claims are based upon the antitrust allegation; and since the antitrust claims fail, the business tort claims necessarily fail, as well.

To say that no wrongful conduct is alleged simply ignores the allegations in the Complaint. The wrongfulness is apparent from the allegations of fact: High Tek had contracts with its customers that required it to obtain Ishida parts and H&C knowingly prevented High Tek from performing those contracts by refusing to sell Ishida parts and cutting off access to alternate sources from third parties by threatening to terminate their parts account if they deal with High Tek. Complaint ¶ 20. No additional pleading of wrongfulness is required. Additionally, not every **[*15]** business tort violates federal ***antitrust law***. Thus, a failure to state a Sherman Act violation does not necessitate dismissal of the business tort claims.

As to H&C's argument that its acts were justified by reasonable notions of competition, no such "competition" justification appears on the face of the Complaint. [5] H&C may assert, as an affirmative defense, that its actions were in fact justified (by competition or otherwise) in its Answer. [6] However, without facts in the Complaint alleging

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[5] H&C relies on the Restatement of Torts to insinuate that it may interfere with High Tek's contracts with impunity so long as the contracts are terminable at-will. *See* H&C's Br. 17 ("because [the Complaint] concerns a matter involving competition between High Tek and H&C, High Tek has no [tortious interference] claim as to its [at-will] contracts"). The Restatement provides that competition does not justify inducing breach of contract where the contract is not terminable at-will. *See* *Restatement (Second) of Torts § 768*, comm. subs. 2 (1979). This does not mean, **[*16]** as Defendant appears to argue, that interference with an at-will contract is always justified by competition. *See* H&C's Br. 17.

The "competition as justification" defense rests solely on the notion that when a contract is terminable at-will, there is only an expectancy of a continuing contractual relationship and therefore, the termination of contractual relations interferes with future relations for which the plaintiff has no legal assurance. Thus, a defendant may plead, as an affirmative defense, that competition justified its acts in inducing breach. On the other hand, when the contract is not terminable at-will, there is greater definiteness of the legal relationship and the defendant is not justified by the mere fact of competition to induce a breach. Accordingly, competition is not a defense to an intentional interference claim where the contract is for a specific term.

[6] Notably, the first line of the opinion on which Defendant itself relied at oral argument (and which is cited in its briefs) provides that: "The *competition privilege is an affirmative defense* to the tort of interference with prospective economic advantage." *San Francisco Design Ctr. Associates v. Portman Companies, 41 Cal. App. 4th 29, 50 Cal. Rptr. 2d 716 (Cal. Ct. App. 1995)* **[*17]** (emphasis added.)

that H&C's allegedly tortious acts were motivated by competition, the defense of justification is not a basis to dismiss the Complaint.

Accordingly, the Court concludes that H&C has failed to identify a pleading defect in High Tek's intentional interference claims. [7]

Based on the foregoing analysis, the Court **DENIES** the Motion to Dismiss Counts IV and V.

E. COUNT VI: PROMISSORY ESTOPPEL

As to Count VI, High Tek fails to state a claim for promissory estoppel because the Complaint alleges that H&C performed the very promise the High Tek seeks to enforce. The elements for a claim of promissory estoppel are: "'(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.'" *People v. Castillo, 49 Cal. 4th 145, 156 n.10, 109 Cal. Rptr. 3d 346, 230 P.3d 1132 (Cal. 2010)* (quoting **[*18]** *City of Goleta v. Superior Court, 40 Cal. 4th 270, 279, 52 Cal. Rptr. 3d 114, 147 P.3d 1037 (Cal. 2006))*. If the promise sought to be enforced was performed, then the doctrine is inapplicable. *Money Store Inv. Corp. v. S. California Bank, 98 Cal. App. 4th 722, 732, 120 Cal. Rptr. 2d 58 (Cal. Ct. App. 2002)* ("A cause of action for promissory estoppel would be superfluous"). Moreover, because promissory estoppel is an equitable doctrine that provides a substitute for consideration to enforce a promise, if the only claimed reliance is performance of the act bargained for, the doctrine is inapplicable. *See* *Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App. 4th 256, 275, 129 Cal. Rptr. 3d 467 (Cal. Ct. App. 2011)*.

The Complaint alleges that prior to entering into a parts account, H&C required that High Tek remove language from its catalog that stated something to the effect of "High Tek is the best in the industry." Complaint ¶ 14. High Tek alleges that it detrimentally relied upon this promise of a long-term parts account, and made the requested change to its catalog. H&C provided High Tek with a parts account to purchase Ishida parts from early 2007 until December 20, 2011. *Id.* ¶¶ 14-16.

Either adequate consideration was given here, *i.e.*, H&C promised a long-term parts **[*19]** account if High Tek removed certain language from its catalog, or it was rendered moot by H&C's performance of its obligations under the agreement, *i.e.*, H&C granted High Tek a parts account and provided High Tek with Ishida parts for four over years. To the extent that High Tek believes that it was entitled to a longer term contract, to be valid under California law, an agreement not to be performed within a year must be reduced to writing. *See* *Cal. Civ. Code § 1624(a)(1)* (statute of frauds).

Based on the foregoing analysis, the Court **GRANTS** the Motion to Dismiss Count VI **WITH LEAVE TO AMEND.**

F. COUNT VII: UNFAIR, UNLAWFUL AND FRAUDULENT BUSINESS PRACTICES IN VIOLATION OF *CALIFORNIA BUSINESS AND PROFESSIONS CODE §§ 17200 ET SEQ.*

As to Count VII, for violations of California's Unfair Competition Law ("UCL"), *Cal. Bus. Prof. Code. § 17200*, High Tek claims are based upon its federal antitrust claims. California's UCL statute prohibits "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. Prof. Code. § 17200*; *Cel-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (Cal. 1999)*. Because High Tek simply borrows from its federal antitrust claims, and because **[*20]** High Tek has failed to adequately plead its antitrust claims, its

[7] In its Reply brief H&C raises the issue that High Tek has not sufficiently specified the parties with whose relationships H&C has interfered. Reply Br. 13. The Court will not consider an argument raised for the first time in a reply memorandum because Plaintiff did not have an opportunity to address this issue.

UCL claim necessarily fails as well. *See Ingels v. Westwood One Broad. Servs., Inc., 129 Cal. App. 4th 1050, 1060, 28 Cal. Rptr. 3d 933 (Cal. Ct. App. 2005)*.

Based on the foregoing analysis, the Court **GRANTS** the Motion to Dismiss Count VII **WITH LEAVE TO AMEND.**

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART.** Counts I, II, III, VI, and VII are **DISMISSED WITH LEAVE TO AMEND.**

Plaintiff shall have until **August 3, 2012** to file an amended complaint.

This Order Terminates Docket Number 14.

IT IS SO ORDERED.

Date: July 18, 2012

/s/ Yvonne Gonzalez Rogers

YVONNE GONZALEZ ROGERS

UNITED STATES DISTRICT COURT JUDGE

LexisNexis

Hyland v. HomeServices of Am., Inc.

United States District Court for the Western District of Kentucky, Louisville Division

July 18, 2012, Decided; July 18, 2012, Filed

CASE NO. 3:05-CV-612-R

Reporter

2012 U.S. Dist. LEXIS 197949 *

CASEY WILLIAM HYLAND, et al., PLAINTIFFS v. HOMESERVICES OF AMERICA, INC., et al., DEFENDANTS

Subsequent History: Affirmed by *Hyland v. HomeServices of Am., Inc., 771 F.3d 310, 2014 U.S. App. LEXIS 21513 (6th Cir. Ky., Nov. 13, 2014)*

Prior History: *Hyland v. Homeservices of Am., Inc., 2012 U.S. Dist. LEXIS 67028 (W.D. Ky., May 14, 2012)*

Core Terms

broker, commission rate, buyer's, Defendants', conspiracy, listing, pricing, subsidiaries, commissions, conspired, direct evidence, Realtors, charging, Rebate, full commission, Deposition, summary judgment, supra-competitive, Additionally, inducements, self-interest, comments, broker's commission, alleged conspiracy, real estate, transactions, commission policy, competitors, decisions, listing broker

Counsel: **[*1]** For Casey William Hyland, Graham Pullen, Plaintiffs: Christopher Lovell, Gary Jacobson, Imtiaz Siddiqui, Peggy Wedgworth, Ryan Long, LEAD ATTORNEYS, Fred T. Isquith , Jr., Lovell, Stewart, Halebian, Jacobson, LLP, New York, NY; Howard B. Sirota, LEAD ATTORNEY, Sirota & Sirota LLP, New York, NY; Robert W. Bishop, LEAD ATTORNEY, Bishop Friend, PSC, Louisville, KY; Martha M. Eastman, Eastman Law Office, PSC, Louisville, KY; Merrick S. Rayle, Lovell, Stewart, Halebian, Jacobson, LLP, New York, NY.

For Christopher R. Burnette, Plaintiff: Christopher Lovell, Imtiaz Siddiqui, Jody R. Krisiloff, Peggy Wedgworth, LEAD ATTORNEYS, Fred T. Isquith , Jr., Lovell, Stewart, Halebian, Jacobson, LLP, New York, NY; Robert W. Bishop, LEAD ATTORNEY, Bishop Friend, PSC, Louisville, KY; Martha M. Eastman, Eastman Law Office, PSC, Louisville, KY; Merrick S. Rayle, Lovell, Stewart, Halebian, Jacobson, LLP, New York, NY.

For Mystic Burnette, Plaintiff: Christopher Lovell, Jody R. Krisiloff, LEAD ATTORNEYS, Fred T. Isquith, Jr., Lovell, Stewart, Halebian, Jacobson, LLP, New York, NY; Robert W. Bishop, LEAD ATTORNEY, Bishop Friend, PSC, Louisville, KY; Martha M. Eastman, Eastman Law Office, PSC, Louisville, KY; **[*2]** Merrick S. Rayle, Lovell, Stewart, Halebian, Jacobson, LLP, New York, NY.

For Homeservices of America, Inc., Defendant: Karoline E. Jackson, LEAD ATTORNEY, Robert D. MacGill, Brendan W. Miller, Hamish S. Cohen, Matthew Barr, Barnes & Thornburg LLP - Indianapolis, Indianapolis, IN; Scott R. Murphy, LEAD ATTORNEY, Daniel R. Gravelyn, Barnes & Thornburg LLP - Grand Rapids, Grand Rapids, MI; David W. Hemminger, Hemminger Law Office, PSC, Louisville, KY.

For Homeservices of America, Inc., Defendant: Daniel R. Gravelyn, Scott R. Murphy, LEAD ATTORNEYS, Barnes & Thornburg LLP - Grand Rapids, Grand Rapids, MI; David W. Hemminger, LEAD ATTORNEY, Hemminger Law Office, PSC, Louisville, KY; Karoline E. Jackson, Robert D. MacGill, LEAD ATTORNEYS, Brendan W. Miller, Hamish S. Cohen, Barnes & Thornburg LLP - Indianapolis, Indianapolis, IN.

For Semonin Realtors, Rector-Hayden Realtors, Defendants: Daniel R. Gravelyn, Scott R. Murphy, LEAD ATTORNEYS, Barnes & Thornburg LLP - Grand Rapids, Grand Rapids, MI; David W. Hemminger, LEAD

ATTORNEY, Hemminger Law Office, PSC, Louisville, KY; Karoline E. Jackson, Robert D. MacGill, LEAD ATTORNEYS, Brendan W. Miller, Hamish S. Cohen, Barnes & Thornburg LLP - Indianapolis, **[*3]** Indianapolis, IN; Matthew Barr, Barnes & Thornburg LLP - Indianapolis, Indianapolis, IN.

For RE/MAX, Defendant: Salim A. Kafiti, Stephen J. Squeri, LEAD ATTORNEYS, Jones Day - Cleveland, Cleveland, OH.

For Century 21 Real Estate Corp., Defendant: David J. Michalski, Steven A. Goldfarb, LEAD ATTORNEYS, Deborah A. Coleman, Hahn Loeser & Parks LLP, Cleveland, OH; Lindsey Wood Ingram, III, LEAD ATTORNEY, Stoll Keenon Ogden PLLC - Lexington, Lexington, KY.

For Coldwell Banker Real Estate, Corporation, Defendant: David J. Michalski, Deborah A. Coleman, Derek E. Diaz, LEAD ATTORNEYS, Hahn Loeser & Parks LLP, Cleveland, OH; Lindsey Wood Ingram, III, LEAD ATTORNEY, Stoll Keenon Ogden PLLC - Lexington, Lexington, KY; Michael L. Weiner, LEAD ATTORNEY, Dechert LLP - New York, New York, NY; Jeffrey A. Yeager, Hahn Loeser & Parks, LLP - Columbus, Columbus, OH.

For Coldwell Banker McMahan Co., Defendant: Matthew C. Blickensderfer, LEAD ATTORNEY, Grant S. Cowan, Frost Brown Todd LLC - Cincinnati, Cincinnati, OH; Sheryl G. Snyder, LEAD ATTORNEY, Frost Brown Todd LLC - Louisville, Louisville, KY; Michael E. Nitardy, Frost Brown Todd LLC - Florence, Florence, KY.

For Re/Max International Inc., Defendant: **[*4]** Dugan Bliss, LEAD ATTORNEY, Clayton Cole James, Hogan Lovells US LLP-Denver, Denver, CO; Daniel Woodard Redding, Middleton Reutlinger, Louisville, KY; Janet P. Jakubowicz, Bingham Greenebaum Doll LLP - Louisville, Louisville, KY.

For Century 21 Real Estate LLC, formerly known as Century 21 Real Estate Corp., Realogy Corporation, Defendants: David J. Michalski, Steven A. Goldfarb, Derek E. Diaz, Deborah A. Coleman, Steven A. Goldfarb, LEAD ATTORNEYS, Hahn Loeser & Parks LLP, Cleveland, OH; Michael L. Weiner, LEAD ATTORNEY, Dechert LLP - New York, New York, NY; Jeffrey A. Yeager, Hahn Loeser & Parks, LLP - Columbus, Columbus, OH; Lindsey Wood Ingram, III, LEAD ATTORNEY, Stoll Keenon Ogden PLLC - Lexington, Lexington, KY.

For Properties East, Inc., doing business as Re/Max Properties East, Defendant: Michael F. Lawrence, LEAD ATTORNEY, Louisville, KY.

For RE/MAX of Kentucky/Tennessee, Inc, Defendant: John R. Linton, LEAD ATTORNEY, Highland Ranch, CO; Janet P. Jakubowicz, Bingham Greenebaum Doll LLP - Louisville, Louisville, KY.

For Joe Guy Hagan, Material Witness: Robert Estes Stopher, LEAD ATTORNEY, Boehl Stopher & Graves, LLP - Louisville, Louisville, KY.

Judges: Thomas B. Russell, United States **[*5]** District Judge.

Opinion by: Thomas B. Russell

Opinion

MEMORANDUM OPINION (Sealed)

This matter is before the Court upon HomeServices of America's (DN 628), HomeServices of Kentucky's (DN 625), and Coldwell Banker McMahan Company's (DN 633) motions for summary judgment. These matters have been fully briefed and are now ripe for adjudication. For the following reasons, Defendants' motions for summary judgment (DN 628, DN 625, and DN 633) are GRANTED.

I. BACKGROUND

Plaintiffs are sellers of residential real estate in the Commonwealth of Kentucky who paid an allegedly supra-competitive 6% real estate broker commission to one of the defendant real estate companies. Several of the defendants have settled with Plaintiffs and are no longer parties to this action. The remaining Defendants are HomeServices of America, HomeServices of Kentucky, and Coldwell Banker McMahan Company.

Defendant HomeServices of America ("HSA") is a real estate brokerage firm with its principal place of business in Minneapolis, Minnesota. Ronald Peltier Declaration, DN 630-1 at ¶ 3-4. HSA is the parent company to Defendant HomeServices of Kentucky ("HSK"), but does not directly or independently conduct real estate business in Kentucky. *Id.* at **[*6]** ¶ 5-6.

Defendant HSA purchased Paul Semonin Company ("Semonin") in 1999. Brad DeVries Declaration, DN 627-4 at ¶ 3. After that purchase, Semonin continued to do business under its own name in Louisville and Lexington through 2003. *Id.* On April 1, 2003, Defendant HSA purchased Rector Hayden Realtors ("Rector Hayden"). *Id.* at ¶ 4. By 2003, both Semonin and Rector Hayden became owned by HSK. *Id.* Thereafter, HSK has done business in Louisville under the Semonin name and has done business in Lexington under the Rector Hayden name. *Id.*

Defendant McMahan Company, Inc. d/b/a Coldwell Banker McMahan Company ("McMahan Company"), was formed in 1991 as a franchisee of Coldwell Banker Real Estate LLC, which is now owned by Realogy Corporation, previously a defendant in this action. McMahan Depo., DN 633-5 at p. 3; McMahan MSJ Affidavit, DN 633-6 at ¶ 3. McMahan Company grew from two offices in Crestwood and Prospect, Kentucky in 1991 to 12 offices throughout Kentucky and Southern Indiana in 2005. McMahan MSJ Affidavit, DN 633-6 at ¶ 4. Each McMahan Company office has a "managing broker" who is responsible for the overall operation of that office, including marketing, managing expenses, recruiting **[*7]** agents, supervising agents and staff. *Id.* at ¶ 7. Arvel "Jerry" McMahan is the "principal broker" for McMahan Company and is responsible for the company's overall operation. McMahan Depo., DN 633-5 at p. 4; McMahan Affidavit, DN 633-4 at ¶ 4. Mr. McMahan served as a commissioner of the Kentucky Real Estate Commission (KREC) from 1999 to 2007, serving as chairman in 2002 and 2007. McMahan Affidavit, DN 633-4 at ¶ 3.

To better understand Plaintiffs' claim, a basic understanding of the real estate business in Kentucky is helpful. To become a real estate agent in Kentucky, an individual must be licensed by the Commonwealth of Kentucky Real Estate Commission ("KREC"). Second Expert Report of Gary French ("French Report"), DN 639-1 at ¶ 6. Real estate agents often are members of realtors' boards and relators' associations, including the Greater Louisville Association of Realtors (GLAR), the Lexington-Bluegrass Association of Realtors (LB AR), the Kentucky Association of Realtors (KAR), and the National Association of Realtors (NAR). *Id.* at ¶ 12. Ray Rector, the founder of Rector Hayden, was a member of the board of directors for LBAR and KAR and eventually President of the Board of Directors **[*8]** for the LBAR. *Id.* at ¶ 13.

After entering into a listing or selling agreement with a property seller, a listing broker often markets a home by listing it on the Multiple Listing Service (MLS). *Id.* at ¶ 42. A MLS, which is only accessible by licensed brokers and its agents, is a local or regional venture of real estate brokers who pool and disseminate information on homes for sale in their respective geographic areas. *Id.* at ¶ 47. Information in a MLS listing typically includes a detailed description of the home, the asking price, the name of the listing broker, and an offer of compensation to be paid to a cooperating broker or "buyer's broker" who provides a purchaser for the listing. *Id.* at ¶ 48. The MLS allows broker-members and their agents to search the database based on detailed criteria. *Id.* Thus, the MLS is a critical tool in the real estate business.

In 1991, the KREC passed a regulation prohibiting licensed real estate brokers in Kentucky from offering any item or thing of value, including rebates, to induce clients to retain their services ("KREC Rebate Ban"). French Report, DN 639-1 at ¶ 81. In March of 2005, the United States Department of Justice filed suit against the KREC **[*9]** in the Western District of Kentucky alleging that the KREC Rebate Ban violated *Section 1* of the Sherman Act. *Id.* at ¶ 82. That litigation was settled and this Court entered an order on August 4, 2005 requiring the KREC to cease enforcing and abolish the KREC Rebate Ban. *Id.*

In this class action, filed shortly after the KREC Rebate Ban was abolished, Plaintiffs allege that "Defendants combined, conspired and agreed to fix, maintain and inflate real estate broker commissions and associated fees and refuse to compete on the basis of price in transactions in real estate located within the Commonwealth of Kentucky . . ." in violation of *Section 1 of the Sherman Act, 15 U.S.C. § 1*. DN 261 at ¶ 1. Despite a dramatic increase in the price of real estate and a decrease in the costs of providing real estate brokerage service, "certain Defendants, individually and collectively, have charged a real estate broker commission of 6%, have described this 6% fee as the 'standard' or 'typical' fee, and have habitually refused to negotiate a lower fee." *Id.* at ¶¶ 2-3. "To the extent that any negotiation did occur during the class period, the negotiations began with the supra-competitive industry standard 6% commission as a bench mark **[*10]** and produced a fee that was inflated." *Id.* at ¶ 52. Plaintiffs allege that, "[a]s a direct result of Defendants' aforesaid combination, conspiracy and agreement, Plaintiffs and Class Members have paid an inflated commission that was higher than they would have paid to transact in Kentucky real estate in the absence of Defendants' unlawful agreement." *Id.* at ¶ 13.

According to Plaintiffs' expert Dr. Gary French, the alleged conspiracy has two related elements: (1) fixing the buyer's broker commission at 3%; and (2) fixing the listing commission at a minimum of 6%. French Report, DN 639-1 at ¶ 56. According to Dr. French, due to the visibility of the offered buyer's broker commission on the MLS, those listing brokers not offering at least 3% to the buyer's broker could be detected and policed. *Id.* at ¶ 54. If a listing broker did not offer at least 3% to a buyer's broker, then a buyer's broker would not be interested in showing the property. *Id.* at ¶ 55. In his report, Dr. French lists several instances of "steering" buyers away from discounters in Kentucky. Thus, "'when listing brokers are asked to defend their commission requests [usually six percent or higher], most explain that they 'must' **[*11]** offer buyers brokers a co-op commission at the 'going rate,' e.g. three percent, to avoid the harm [that buyer's agents would not show the property].'" *Id.* at ¶ 56. According to Dr. French, the KREC Rebate Ban helped maintain commission rates at the conspiratorial standard during the Class Period by ensuring that Defendants did not cheat on their price-fixing agreement by providing a rebate or discount off of the stated fee. *Id.* at ¶ 104.

On November 7, 2008, this Court partially granted Plaintiffs' motion for class certification and certified a class consisting of "All persons who paid a commission to Defendants and/or their affiliates . . . in connection with the sale of residential real estate (excluding initial sales of newly constructed homes) located in the Commonwealth of Kentucky during the period from October 11, 2001 to October 11, 2005 . . . ."[1] DN 322.

Defendant HSA now moves for summary judgment, arguing that Plaintiffs have produced no evidence that it was a direct and independent participant in the alleged conspiracy as is required for a parent to be liable for its subsidiary's participation in a horizontal price-fixing conspiracy. Defendants HSK and McMahan Company also **[*12]** move for summary judgment, arguing that Plaintiffs have not produced sufficient evidence to support a finding that Defendants agreed to fix real estate commissions at a supra-competitive level in violation of *Section 1* of the Sherman Act.

II. THE UNDERLYING LEGAL CONCEPTS

Section 1 of the Sherman Act provides that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. "The existence of an agreement is the hallmark of a *Section 1* claim." *In re Baby Food Antitrust Litigation, 166 F.3d 112, 117 (3d Cir. 1999)*. Such an agreement may be found when "the conspirators had a unity of purpose of a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*.

In determining whether the concerted action amounts to an unreasonable restraint on trade, courts apply one of two analysis. "Most restraints are evaluated using a 'rule of reason'" under which the "'finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of

[1] The Court denied Plaintiffs' motion to certify a subclass.

factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's **[*13]** history, nature, and effect.'" *In re Cardizem CD Antitrust Litigation, 332 F.3d 896, 906 (6th Cir. 2003)* (quoting *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997))*. However, other restraints "are deemed unlawful *per se* because they have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit." *Id.* (internal quotations omitted). "The per se approach thus applies a conclusive presumption of illegality to certain types of agreements; where it applies, no consideration is given to the intent behind the restraint, to any claimed pro-competitive justifications, or to the restraint's actual effect on competition." *Id.* (internal quotations and citations omitted).

Here, Plaintiffs have alleged a horizontal price-fixing conspiracy, which occurs "where competitors at the same market level agree to fix or control the prices they will charge for their respective goods or services." *United States v. Brown Univ., 5 F.3d 658, 670 (3d Cir. 1993)*. "Horizontal price-fixing . . . [is] ordinarily condemned as a matter of law under an 'illegal per se' approach because the probability that [this] practice[] [is] anticompetitive is so high." *National College Athletic Ass'n v. Board of Regents, 468 U.S. 85, 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. Thus, a *per se* approach applies to this action.

III. SUMMARY JUDGMENT STANDARD IN ANTITRUST CASE

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any **[*14]** material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

"[N]ot every issue of fact or conflicting inference presents a genuine issue of material fact." *Street v. J. C. Bradford & Co., 886 F.2d 1472, 1477 (6th Cir. 1989)*. The test is whether the party bearing the burden of proof has presented a jury question as to each element in the case. *Hartsel v. Keys, 87 F.3d 795, 799 (6th Cir. 1996)*. The plaintiff must present more than a mere scintilla of evidence in support of his position; the plaintiff must present evidence on which the trier of fact could reasonably find for the plaintiff. *See id.* (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*. Mere speculation will not suffice to defeat a motion for summary judgment: "the mere existence of a colorable factual dispute will not defeat a properly supported motion for summary judgment. A genuine dispute between the parties on an issue of material fact must exist to render summary judgment inappropriate." *Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1177 (6th Cir. 1996)*.

In the context of an antitrust case, the Supreme Court has explained that "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. "[C]onduct as consistent with permissible competition as with **[*15]** illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* "To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of *§ 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Id.* (internal quotation marks omitted). This is because mistaken inferences in the context of conduct that is consistent with permissible competition "are especially costly [as] they chill the very conduct the antitrust laws are designed to protect." *Id. at 594*. Thus, Plaintiffs in this case must present evidence which shows that the inference of a conspiracy is reasonable in light of the competing inferences of independent action. *See id.*

IV. ANALYSIS OF THE EVIDENCE OF CONSPIRACY

The Court must now determine whether or not Plaintiffs have presented sufficiently probative evidence to meet the demanding standard of proof in a *§ 1* antitrust case.

a. Direct Evidence

Plaintiffs assert that they have produced direct evidence Defendants conspired to fix prices of real estate commissions in Kentucky. "Direct evidence in a *Section 1* conspiracy must be evidence that is explicit and requires no inferences **[*16]** to establish the proposition or conclusion being asserted." *In re Baby Food Antitrust Litigation, 166 F.3d 112, 118 (3d Cir. 1999)*. Further explaining the sometimes confusing distinction between direct and circumstantial evidence, the Court of Appeals for the Seventh Circuit has explained that direct evidence is "evidence tantamount to an acknowledgment of guilt" while circumstantial evidence includes "everything else *including* ambiguous statements." *In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 662 (7th Cir. 2002)* (emphasis in original).

As direct evidence of a price fixing conspiracy, Plaintiffs rely heavily on a public hearing before the KREC which occurred on November 28, 2000 at the Holiday Inn Hurstboume Lane in Louisville, Kentucky. The purpose of this hearing was to share a survey of inducement laws in other states and to invite comments on the possible repeal of the KREC Rebate Ban. Holiday Inn Transcript, DN 656-13 at p. 14. Both Ray Rector of Rector Hayden and Jerry McMahan of McMahan Company were present and spoke at this hearing. Mr. Rector, who was the fourth person to comment on the KREC Rebate Ban, stated that "When a licensee offers inducements, I question who really pays for them. In my opinion the consumer pays for those inducements in the form of higher fees or a decreased level of service. One **[*17]** of those two things is going to happen I believe . . . So my position is I feel like we should just stay with the law just as it is. *Id.* at p. 26-30.

Mr. McMahan spoke next, and stated in pertinent part as follows:

> I've got two different hats, and the one hat I want to talk to you about first is as a commissioner because I spoke before this group two years ago. I was not a real estate commissioner, and I was speaking as a broker of a company. And since sitting on the commission my views have not changed at all. As a matter of fact, I've gotten more passionate about it because I see what the commissioners are facing on monthly meetings.
>
> Our problem is we're spending too much time at our commissioners' meetings deciding what is an inducement and what's not an inducement. We're spending too much time approving brokers that have got their license in Virginia and running a website throughout the United States and they want to sell properties in Kentucky. They want to list properties in Kentucky, excuse me.
>
> But with the latest convention there's 125 for-sale-by-owner sites that's on the web now that's competing for our business. My competition is not Joe Guy Hagan here in Louisville or Paul Semonin here in **[*18]** Louisville. We go to the same meetings together. Our people are honorable. Our competition is the unknown, and that's the Internet.
>
> You know, people can come across the Internet and take our clients for $499.00 when they can offer them all these services and what have you. There's no contract we can put down to see who the actual agent is. It's someone sitting behind a computer. How do we regulate that? How do we police that?
>
> I think what Buddy said is exactly right. Whether we want to admit it or not there's inducements going on in our companies day in and day out. As a broker I get calls from agents saying, "Can I do this?" What bothers me is the agents that don't call to see if they can do this, the ones that are trying to put that deal together.
>
> In my opinion the most unprofessional thing we can do in this business is cut our commission. I think we ought to be worth what we charge in the services that we offer. However, I think it might be good business if I wanted to offer a home [warranty] to all the buyers that came to my company which gives them extra protection, but I'm not reducing my commission. It's not costing the consumer extra dollars.
>
> . . . I'm being regulated on what I **[*19]** can do to make good business decisions for my company. I don't think that's unprofessional. I think what I'd like to do is have the opportunity to compete against the Joe Guy Hagans, the Paul Semonins, the Rector-Haydens. Let me compete on a good basis with them, and let our business minds flow as to what we can do.
>
> And I don't think inducements in 35 other states says that those states are unprofessional. Thank you.

Id. at p. 30-33. Plaintiffs contend that these comments by Mr. McMahan constituted a "highly improper proposal" and amounted to a pledge not to reduce his commissions.

According to Plaintiffs, because of Mr. McMahan's improper comments regarding commissions, the other real estate brokers present at the public hearing were obligated to protest or make a record of leaving as required by the NAR's antitrust guidelines.[2] DN 656 at p. 15. Instead of doing so, Plaintiffs contend that Doug Myers of Semonin agreed with Mr. McMahan when he later commented in pertinent part as follows:

> My question is how will inducements help the consumer and how will inducements help our profession? I would like to see us equated more with the professionals in our society, the doctors, the lawyers, as opposed to, **[*20]** say, the banks who offer the toaster when you open the account. I'd like to see us do things that elevate our position in society and our image to the public, and I don't see how inducements are going to assist us in doing that.
> . . .
> Much has been said about the Internet and the competition that we see. First off, I am wholeheartedly in favor of competition. I think that competition is good for both us and for the consumer. I'd like to see our competition based on our professional performance, not upon our brokerage fees which along the lines of using — a more professional image I'd like to see is talk about our brokerage fees as opposed to our commission.
> . . .

Id. at p. 38-42. Plaintiffs contend that the comments of Mr. McMahan and Mr. Myers amount to a "meeting of the minds" between McMahan Company and HSK. Plaintiffs further contend that the fact that Rector Hay den had slightly higher commissions during the remainder of the Class Period suffices to supply acceptance by conduct.

As further direct evidence of the alleged conspiracy, Plaintiffs point to a statement written by Todd Smith, the principal broker of MLS Consultants LLC (not a defendant in this action), in response to a KREC survey regarding **[*21]** its Rebate Ban: "[c]ommissions and sales awards are common in all other industries. The bigger wrong being committed by agents and brokers is the informal unspoken price fixing that occurs." French Report, DN 639-1 at ¶ 84. During his deposition, Mr. Smith did not have any specific recollection of why he made that statement, but noted that it was apparently his opinion at the time: "I had the opinion that the majority of people, of brokers were charging a standard commission [that appeared to be 6 to 7%], and that charging a different commission represented a business opportunity for MLS Consultants." Smith Deposition, DN 657-5 at p. 14. He further stated that he did not recall speaking to anyone about price fixing, but "thought it was a large coincidence that everyone charged the same price." *Id.* at p. 15.

Plaintiffs next point to evidence of harassment as direct evidence of the alleged conspiracy. Plaintiffs contend Mr. McMahan's statement at the Holiday Inn KREC public hearing that "the most unprofessional thing we can do in this business is cut our commission" is an example of expressly "haranguing" brokers. Additionally, Plaintiffs point to the affidavit of Barbara Campbell, operator of Campbell Realty **[*22]** in Murray, Kentucky who regularly charged a commission of 4 1/2%, which states that "One of the most glaring examples of how realtors in this area attempted to coerce me into charging 6% commission rates was to contact my clients directly. Realtors in the area would get contact information for my seller clients by looking at the MLS listings. They would then call my clients. They would tell my clients that they, the other realtors in the area, would not show my clients' homes to their buyer clients so long as they continue to do business with Campbell Realty." Yavas Report, DN 639-8 at ¶ 51; Campbell Deposition, DN 657 at p. 70. In her deposition, Ms. Campbell stated that she was "tricked" into signing the affidavit. Campbell Deposition, DN 657 at p. 44. Ms. Campbell then testified that she did not witness those calls herself and that she had never heard of HSK, Rector Hayden, Semonin, or Realogy. *Id.* at p. 72-73. Ms. Campbell further clarified that:

> No, I don't believe they were maintaining a fixed 6% interest rate, because some of them offered 7 at that time. And they were charging 7. I don't ever get to see their commission structures. They don't see my commission

[2] The NAR guideline cited by Plaintiffs states that "A broker who participates in the affairs of an association of Realtors should be alert to discussions at an association meeting relating to commission levels, pricing structures, or marketing practices of other brokers." Ann McDonald Deposition, DN 656-15 at p. 20.

> structures. So I can't tell you **[*23]** what they were trying to do, because I would have to get in their head and you would have to ask them. What my belief was is they were mad at me for charging 4 1/2%, which would stand to reason, because I would be on the other side.

Id. at p. 10-11. Ms. Campbell testified that other realtors did not try to coerce her into charging a 6% commission. *Id.* at p. 11.

Plaintiffs additionally point to statements of other brokers in Kentucky as evidence of harassment. Stephen Gavin, a broker with Home Listing Service, which provided a la carte services for flat fees, testified that a competing agent harassed him about offering only 2% to the buyer's broker and that he subsequently had a potential client steered away from him because "one of the realtors they had interviewed said that we don't pay commissions . . . to the other realtor." Gavin Deposition, DN 657-3 at p. 15-16. However, Mr. Gavin did not remember the name of the agent, the real estate company with which the agent was affiliated, or the year. *Id.* Mr. Gavin eventually changed his policy to offer 3% or more to the buyer's broker. *Id.* Michael Carman, who opened a Help-U-Sell Distinctive Option Realty franchise in Madison County in October 2005, testified that **[*24]** Rick Hayes of Milestone Realty Consultants (which is not a defendant in this case) called him a "scab" because of his business model of flat-fee pricing. Carman Deposition, DN 657-4 at p. 12. He further testified that a "lady" called to confirm that he was only offering 2 1/2% to the buyer's broker on a particular listing and stated that the broker would not allow her to work for 2 1/2%*. Id*. at p. 13. However, Mr. Carman did not remember the agent's name and could only remember that the broker was in Lexington. *Id.* Todd Smith of MLS Consultants, in response to being questioned about whether any of his clients told him that another realtor would not show their property if it had been listed by MLS Consultants, answered that he recalled "being made aware of a situation that sounded like the question you described." Smith Deposition, DN 657-5 at p. 12. However, he did not recall the individuals involved. *Id.*

Finally, Plaintiffs point to an alleged offer of Rector Hayden to fix the buyer's broker fee at 3% as direct evidence of the alleged conspiracy. Ray Rector, in the 1970s, was unhappy with the prevalence of 40/60 commission splits at the time and wrote a letter to the members of the Lexington Bluegrass **[*25]** Association of Realtors saying that, in the future, Rector Hayden would split commission fees 50/50. Additionally, Rector Hayden's Performance Guidelines Manual states: "The policy of this firm is to pay 3% of the sales price to a cooperating Broker/selling side, as long as the other Broker reciprocates on the same basis." DN 654-32 at p. 58. Plaintiffs contend that, because Defendants had a high degree of transactions with 3% buyer's broker fees, they thereby "reciprocated" and agreed to the conspiracy to fix buyer's broker fees.

The Court finds that Plaintiffs have not presented direct evidence that Defendants conspired to fix real estate commissions at a supra-competitive 6%. First, the Court has thoroughly reviewed the transcript of the public hearing at the KREC Holiday Inn and finds no direct evidence of a conspiracy to fix commission rates or to not compete on the basis of price. Plaintiffs, in their response to Defendants' motions for summary judgment, have taken comments out of context and construed them in a highly-strained manner. For example, Plaintiffs contend that Mr. McMahan's use of the term "honorable" is used to describe firms that do not engage in competition and **[*26]** could be viewed as a euphemism for "people like me who don't cut commissions." DN 656 at p. 14. An more plausible reading is that Mr. McMahan used the term "honorable" to refer to full service brokers working in Kentucky as opposed to Internet brokers who "sit[] behind a computer" and "offer [customers] all these services and what have you" and cannot be regulated. The fact that Plaintiffs have manipulated Mr. McMahan's comments in an attempt to show to this Court how the comments made at the public hearing constituted an illegal agreement highly undermines its argument that the transcript provides direct evidence of a conspiracy. Additionally, Mr. McMahan did not suggest that brokers in Kentucky charge the same supra-competitive commission rate or suggest that brokers in Kentucky not negotiate their commissions. Accordingly, the transcript of the KREC public hearing is not "tantamount to an acknowledgement of guilt." *In re High Fructose Corn Syrup Antitrust Litig, 295 F.3d at 662*.

Second, the opinion of Todd Smith regarding the existence of an "unspoken conspiracy to fix prices" is not direct evidence that the defendants in this action illegally conspired to fix prices in violation of *Section 1* of the Sherman Act. Mr. Smith is not a defendant in this action **[*27]** and did not link the defendants in this action to any conspiracy. Thus, Mr. Smith's opinion is not "tantamount to an acknowledgment of guilt." *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d at 662*. Further, Mr. Smith did not any provide any factual basis for his opinion regarding the existence of a conspiracy outside of his perception that it was a "large coincidence" that the majority of brokers in Louisville were charging 6% to 7%. Evidence that Defendants tended to charge the same amount is not direct evidence that Defendants agreed to charge the same amount. Accordingly, Mr. Smith's testimony, even if admissible as a lay opinion, provides no direct evidence of an *illegal agreement* between Defendants in this action.

Third, the evidence of harassment does not provide direct evidence that Defendants in this action conspired to fix prices. Ms. Campbell, Mr. Gavin, Mr. Carman, and Mr. Smith are not defendants in this action and their statements do not implicate Defendants. Indeed, many of the alleged harassers are unknown and unidentified. More importantly, harassment for offering buyer's brokers rates of less than 3% does not constitute direct evidence of a conspiracy to fix full commission rates at 6%. A finder of fact would need to **[*28]** infer that a buyer's broker fee of 3% always resulted in a supra-competitive full commission rate of 6% and that these individuals were therefore harassed for failing to set a full commission rate of 6%. Likewise, the Ray Rector letter offering to split commissions 50/50 is not direct evidence of an offer to fix the full commission rate. A jury would need to infer that a 50/50 split always results in supra-competitive full commission rate. This of course is an unreasonable inference because a 50/50 split on a commission of 2% surely does not mean that the 2% rate is supra-competitive. Accordingly, Plaintiffs have not presented direct evidence that Defendants conspired to fix real estate commissions at a supra-competitive 6%.

b. Circumstantial Evidence

Having determined that Plaintiffs have not presented direct evidence of a conspiracy, the Court must now determine whether Plaintiffs have presented sufficient circumstantial evidence to allow a jury to infer the existence of an illegal agreement to fix prices. "In the absence of direct evidence, the plaintiffs may nevertheless support their claim with circumstantial evidence of conscious parallelism." *In re Baby Food Antitrust Litig., 166 F.3d at 121*. "Conscious parallelism, sometimes **[*29]** called oligopolistic price coordination, is described as the process 'not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a prefixed maximizing, supracompetitive level by recognizing their shared economic interest and their interdependence with respect to price and output decisions.'" *Id.* (quoting *Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993))*. When competitors in a market establish their prices, not by agreement, but rather in a consciously parallel fashion, this may provide probative evidence of an understanding between competitors to fix prices. *Id.*

However, "[i]n an oligopolistic market, interdependent parallelism can be a necessary fact of life but be the result of independent pricing decisions." *Id.* For illustration:

> [I]n a market served by three large companies, each firm must know that if it reduces its price and increases its sales at the expense of its rivals, they will notice the sales loss, identify the cause, and probably respond. In short, each firm is aware of its impact upon the others. Though each may independently decide upon its own course of action, any rational decision must take into account the anticipated reaction of the other two firms. Whenever **[*30]** rational decision-making requires an estimate of the impact of any decision on the remaining firms and an estimate of their response, decisions are said to be "interdependent." Because of their mutual awareness, oligopolists' decisions may be interdependent although arrived at independently.

Id. (quoting Areeda, ***Antitrust Law*** § 1429 (1986)).

Thus, "[t]he law is settled that proof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express, can be inferred but that such evidence, without more, is insufficient unless the circumstances under which it occurred make the inference of rational, independent choice less attractive than that of concerted action." *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 446 (3d Cir. 1977)*. As explained above, to survive summary judgment, the circumstantial evidence must tend to exclude the possibility of independent conduct. *Matsushita, 475 U.S at 588*. The Sixth Circuit has listed several important factors to evaluate in this analysis including: (1) whether the defendants' actions, if taken independently, would be contrary to their economic self-interest; (2) product uniformity; (3) whether the defendants have been uniform in their actions; (4) whether the defendants have exchanged or have had the opportunity **[*31]** to exchange information relative to the alleged conspiracy; and (5) whether the defendants have a common motive to conspire or a large number of communications. *Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1009 (6th Cir. 1999)*; *Wallace v. Bank of Bartlett, 55 F.3d 1166, 1168 (6th Cir. 1995)*. Such evidence are described as "plus factors." *Wallace, 55 F.3d at 1168*. Here, plus factors are needed to show that Defendants' conduct in establishing a supra-competitive 6% commission rate was conscious and not the result of independent business decisions. *See id.*

i. Defendants' Parallel Pricing Behavior

Plaintiffs contend that Semonin, Rector Hayden, and McMahan Company engaged in multiple types of parallel pricing behaviors, all following "parallel, artificially standardized systems."

Semonin maintained a Guidelines for Independent Contracts that applied to all of its agents. DN 654-10. With respect to commissions, the policy stated, in pertinent part, as follows:

> **Residential Listings (Louisville and Indiana)**
> Semonin REALTORS commission policy on ALL residential listings is 7%, with the following exceptions:
> ...
> Properties in excess of $1 million — 6% to 7%.
>
> **Sales Commission Splits**
> On all Kentucky properties listing at 7% the listing/sales commission split offered will be 4/3. Semonin will keep 4% and offer 3% to brokers.
> ...
>
> **Residential Listings (Lexington) [*32]**
> Semonin REALTORS commission policy on ALL residential listings in Lexington is 6%, with the following exceptions:
> ...
> Properties in excess of $1 million — 5% to 6%.
>
> **Sales Commission Splits**
> Listing/sales between companies in Kentucky will be on a 50/50 basis.

DN 654-10 at p. 40-41. That policy was in effect until February 2005, when HSK reset its goal listing commission for Semonin at 6%. DeVries Declaration, DN 627-4 at at ¶ 14.

When Rector Hayden was purchased by HSA in 2003, it identified a goal listing commission of 6%. *Id.* at ¶ 15. Rector Hayden maintains a Performance Guidelines Manual. DN 654-32. With respect to commissions, the manual states, in pertinent part, as follows:

> **3. COMMISSION SCHEDULE**
> The minimum commission fee for any listing taken by the office is $1,000.00 or 6%, whichever is higher.
> ...
>
> **6. VARIABLE RATE COMMISSION**
>
> The use of Variable Rate Commission (VRC) is **prohibited** by this firm, verbally or in writing when acting as listing brokers. Variable rate commission is where one amount of commission is payable if the listing agent or our Company sells the property and a different amount of commission is payable if the sale results through the efforts of the seller or a cooperating broker. **[*33]** For example, **you are not to offer**, "The commission is 6%, but if I sell it myself, I will only charge you 5%."
>
> **7. DISCOUNTED COMMISSION SINGLE FAMILY RESIDENTIAL ONLY**

> Rector-Hayden, Realtors strongly discourages discounting commissions. In the rare case . . . if a listing agent chooses to lower his/her commission, the shortfall portion shall be absorbed by the listing agent, with the office and selling agent retaining their regular portion based on the minimum 6% commission. For example, if a listing agent lists a property at a commission of 5 1/2 % the fee will be 5 1/2 % regardless of who sells the property. In this example, the listing agent would absorb the 1/2 %.
>
> ...
>
> **15. COMMISSION PAID TO COOPERATING BROKER/SELLING SIDE**
>
> The policy of this firm is to pay 3% of the sales price to a cooperating Broker/selling side, as long as the other Broker reciprocates on the same basis. In the event a seller is willing to pay more than the normal brokerage fee charged by Rector-Hayden, Realtors, the listing agent is to specify in the listing the amount to be paid to the cooperating Broker/selling side, with a minimum of 3% being offered to the cooperating Broker/selling side.

DN 654-32 at p. 52-58. **[*34]**

Brad DeVries, president and CEO of HSK, states in his affidavit that "Semonin and Rector-Hayden set their pricing and commission policies independently from HomeServices of American and, indeed, independently of one another, even though they were both part of HomeServices of Kentucky after Rector-Hayden's purchase." DeVries Declaration, DN 627-4 at ¶ 22. According to Mr. DeVries, even though HSK companies may have a goal listing commission rate of 6% or 7%, it does not require that its agents charge that rate. *Id.* at ¶ 17. "It often approves, and its agents often charge, listing commission rates below 6%, for a variety of deal-specific reasons such as effective negotiation by the homeowner, the absence of a buyer's agent, the desire to assist in getting a deal done, a personal connection with the client, repeat business from the client or the price of the home. Occasionally, HSK is able to charge more than 6%." *Id.*

McMahan Company has a Policy and Procedures Manual covering its brokers, agents, and employees. With respect to commission rates, McMahan Company's manual states, in pertinent part, as follows:

No commission will be less than 6% on listings without management approval.

> . . . **[*35]** Any concessions made by Associate at closing and not pre-approved by management will be the sole responsibility of the Associate to pay. NO EXCEPTIONS.

Contract	Minimum	Preferred
...		
Resale Residential	6%	7%
...		

> Minimum commission on . . . residential property is $2100. Any exceptions to these commissions must be discussed and approved by management.
>
> If you list a property at 7% you can make the decision to list at 4/3 (4% to listing company/3% to selling company) or 3.5/3.5, but once you list the property in MLS, it cannot be negotiated differently. (That would be considered unfair trade.) You have to treat all equal. However, it is understood beforehand that any inter-company (COLDWELL BANKER McMAHAN) sale will be split according to the amount that is offered on the MLS listing data sheet to the cooperating agent.

DN 633-6 at p. 25. Jerry McMahan, in his affidavit, stated that he alone established this commission policy for McMahan Company. DN 633-6 at ¶ 9. He further stated the basis he relied upon for establishing the commission policy:

> Coldwell Banker McMahan Company's commission policy is based on several business considerations and business judgments made by [him]. One important fact is **[*36]** the cost of doing business, including the resources that Coldwell Banker McMahan Company provides to its agents. Another key factor is establishing a commission rate that I believe reflects the value of the services that Coldwell Banker McMahan agents provide to their clients. The commission policy is also based on my experience in the real estate business. I broke into

> the real estate business my (sic) working for my father in a predecessor company to Coldwell Banker McMahan Company. My father's business used pre-printed forms that contained a 6% commission for homes . . . . When I started working as an agent, many of my listings were at 6%, but I was also able to obtain a number of listings at 7% or 8%. This experience informed my judgment as to what consumers were willing to pay for full-service real estate brokerage.

Id. at If 10.

At McMahan Company, the managing broker of an office had authority to grant approval for variances from the minimum commission levels for agents in their office. DN 633-6 at If 11. Mr. McMahan, as principal broker overseeing all offices, also had authority to approve departures from McMahan Company's commission policy for any office. *Id.* Mr. McMahan, in **[*37]** his affidavit, stated that his decisions to grant or deny requests for departure from the commission policy were based solely on his business judgment about what was in the best interest of the company. *Id.* at ¶ 12. "Coldwell Banker McMahan would often approve lower commissions in order to ensure the success of transactions in which the parties were close, but not in agreement, on economic terms. Another common reason for approval to depart from the commission policy was that Coldwell Banker McMahan was on both sides of a transaction . . ,, *Id.* at ¶ 14. Additionally, Mr. McMahan may approve a departure for repeat clients. *Id.*

In addition to examining Defendants' written policies concerning their respective commissions structures, Plaintiffs' experts analyzed Defendants' actual transaction data during the Class Period. Dr. French found that, for 53.33% of Defendants' transactions, the full commission rate was exactly 6%. French Report, DN 639-1 at p. 59. However, the prevalence of the exact full commission 6% rate varied among Defendants: (1) Semonin charged exactly 6% in 54.93% of its transactions; (2) Rector Hayden charged exactly 6% in 84.58% of its transactions; and (3)n McMahan **[*38]** Company charged exactly 6% in 57.78% of its transactions. *Id.* at Tables la-ld. For 84.08% of Defendants' transactions, the full commission rate fell between 5% and 7%.[3] *Id.* at p. 59. The average weighted commission rates charged by Defendants by year of the Class Period are as follows:

Year	Semonin	Rector Hayden	McMahan
2001	5.92%	-	5.73%
2002	5.93%	-	5.85%
2003	5.91%	5.93%	5.77%
2004	5.81%	5.95%	5.81%
2005	5.89%	5.85%	5.68%

French Report, DN 639-1 at Table 13. Dr. French further found that Defendants offered a buyer's broker commission rate of exactly 3% in 77.08% of their transactions. The prevalence of the 3% buyer's broker rate varied

[3] Plaintiffs maintain that full commission rates between 5% and 7% are consistent with the alleged conspiracy. Defendants charged a full commission rate of exactly 7% in 7.21% of their transactions, as agents were encouraged to obtain full commissions higher than the minimum acceptable commission of 6%. Defendants charged exactly 5% in 12.76% of their transactions during the Class Period. According to Plaintiffs and Dr. Yavas, "one explanation for a 5% commission is the offer of a volume discount off of the 6% standard to a customer who is selling one residence and buying another, and who retains the agent as the listing agent for the residence to be sold and also as the buyer's agent on the residence to be purchased." DN 654 at p. 32-33. Additionally, other discounts may be offered or commissions foregone altogether when agents are buying or selling property for themselves. Also, in some situations, a broker will authorize payment for a repair or improvement of a property by an agent if such a cost is preventing the transaction from closing. *Id.* Dr. Yavas has also presented several reasons for commission rate variations such as policies allowing for friends and relatives to obtain services at reduced commission and savvy home sellers who ask the listing agent to reduce the commission if a buyer comes straight to the firm. However, Plaintiffs maintain that, if the standard were lower, the discounted rate would likewise be lower.

between Defendants, with Rector Hayden having the highest prevalence at 90.49% and McMahan Company having the lowest at 64.98%.

Dr. French found that Defendants' commission rates did not vary to any significant extent with housing prices, as he opines should happen in the absence a pricing conspiracy. DN 639-1. Defendants' data shows that the median home price increased from $98,000 in 2002 to $115,000 in 2005; however, Defendants' average commission rate fell from just 5.78% in 2002 to 5.72% in 2005. Analyzing the data for statistical significance, Dr. French states that the correlation **[*39]** coefficients between the independent variable of a home's selling price and the dependent variable of the commission rate verifies that there is only a weak correlation between the two variables. According to Dr. French, economic theory predicts that commission rates would vary inversely with the selling price of the property.

Furthermore, Plaintiffs point to evidence that Defendants' commission rates for real estate brokerage services did not decline despite declining costs through the Class Period. Dr. French opined that economic theory predicts that, in a competitive brokerage market, commission rates would decrease if brokers' costs declined. However, Semonin's income statements from 1999-2004 show that its expenses declined as a percent of income yet its average commission rates remained stable between 2001 and 2004. *Id.* at ¶¶ 77-80. Additionally, Defendants' expert Dr. Scott agreed that Defendants' costs do not go up linearly with the price of the house. Thus, "while Defendants' brokerage commissions increase proportionately with the increase in the sales price of the house, their costs do not."

Dr. Yavas likewise observed that Defendants' transaction data showed that the median **[*40]** and mode full commission rate was 6%, while the median and mode buyer's broker commission rate was 3%. Yavas Report, DN 639-8 at ¶ 30. Dr. Yavas then compared Defendants' data to data for other cities across the United States to illustrate how, in contrast to Kentucky, other cities saw significant decreases in the proportion of buyer's broker commission rates that were exactly 3% from 2001 to 2005. DN 639-8 at II 32-33. Next, Dr. Yavas analyzed Defendants' transaction data by performing a series of regression analyses to determine the effect of location, year, and transaction price on the full commission rate, the listing commission rate, and the buyer's broker commission rate. DN 639-8 at ¶ 36-37. After finding that these independent variables had little or no effect on Defendants' commission rates, Dr. Yavas explained that this is the opposite of what one would expect in a competitive market. *Id.* at ¶ 41. Dr. Yavas opines that "observing a uniform commission rate across property prices means we are observing different, not the same, commission amounts being charged for properties with different market values. Given the high degree of homogeneity of the brokerage services, uniform **[*41]** commission rate amounts to price discrimination, and contradicts the law of one price, hence is not compatible with price competition." Yavas Supp. Report, DN 651-13 at ¶ 36.

ii. The Existence of Plus Factors

In addition to providing evidence of parallel pricing decision, Plaintiffs have produced evidence of several plus factors which, in their view, tends to exclude the possibility that Defendants acted independently.

1. <u>Actions Contrary to Economic Self-Interest</u>

The existence of actions taken contrary to economic self-interest has been described as one of the most important plus factors, in that such a finding will consistently tend to exclude the likelihood of independent conduct. *Re/Max Intern., Inc. v. Realty One, Inc., 173 F.3d 995, 1009 (6th Cir. 1999)*. However, "Wile concept of 'action against self-interest' is ambiguous and one of its meanings could merely constitute a restatement of interdependence." *In re Baby Food, 166 F.3d at 122*. Plaintiffs contend that they have adduced substantial evidence that Defendants' parallel actions, if taken independently, would be contrary to their economic self-interest.

First, Plaintiffs contend that Defendants acted contrary to their economic self-interest in charging an increasing *amount* of commission (instead of rate) for higher-priced homes. Plaintiffs **[*42]** contend that, if Defendants lowered commissions for higher-price homes, they could gain market share. Plaintiffs thus conclude that, in the absence of collusion, Defendants would not have independently adopted a policy of charging the same commission rate on all transactions.

Second, Plaintiffs contend that Defendants acted contrary to their economic self-interest in refusing to show houses where a listing broker offered less than 3% to the buyer's broker. Plaintiffs point to evidence contained in Dr. Yavas's expert report that buyer's brokers would forego doing business with a listing broker who offered a buyer's broker commission of less than 3% on the MLS, refusing to show suitable properties to their clients in breach of their fiduciary duties to their clients and in derogation of their own financial interest. Dr. Yavas, in his report, offers an example of how such an action would be contrary to self-interest:

> Consider again two properties listed at $100,000 and $600,000. Suppose the offer to the buyer's broker for the first property is 3% while the offer for the second property is only 1%. A buyer's broker would earn $3,000 from selling the first property and $6,000 from selling **[*43]** the second property. If a broker has buyers interested in both properties, why would the broker try hard to sell the first property and avoid selling the second property even though the second property would generate twice as much in commission? Thus, why would a listing broker offer twice as much or even more for the second property . . . ? The only explanation is that there is a credible threat from the buyers' brokers to steer their clients away from properties with less than the 3% commission rate, and such a non-credible threat (because it is not financially rational) can be sustained only through collusion.

DN 639-8 at ¶ 45.

Third, Plaintiffs contend that Defendants refused to involve themselves in For-Sale-By-Owner transactions in derogation of their economic self-interest. As evidence of this, Plaintiffs point to an email from Keith Rector to Shannon Dodd and Lynn Barber sent on February 25, 2005. Keith Rector had received an email from an individual who stated that his house would be for sale by owner (FSBO) and that he is offering 3% to the agent that sells/closes his house and that the agent could act as his agent for the purchase of a new home. Yavas Report, DN 651-13 at **[*44]** ¶ 38. In his email to Ms. Dodd and Ms. Barber, Keith Rector stated: "Ladies, think this is too strong?: Dearest Brent, We all hope you die and rot in hell. Most sincerely, Keith." *Id.* Plaintiffs contend that Rector Hayden thus refused to deal with a FSBO transaction, even though it would have received a 3% commission. Keith Rector, in his deposition, explained that the individual was "not willing to list with us and employ us, but he would like the benefits of our agents trying to sell his home;" thus he "wanted all of our services and exposure for no cost." DN 669-5 at p. 3-4.

2. <u>Product Uniformity</u>

Plaintiffs rely on the homogenous nature of real estate services as a plus factor. Dr. French opined that "the commission for brokerage services does not vary with the tasks done or the specific services actually provided, because the commission is the charge for bringing the seller and a buyer together to make a sale of the property, regardless of which specific tasks and services are provided to achieve the sale. The prices of this homogenous service — selling the property — are largely invariant as a percent of the sales price as shown [in Defendants' data], and cannot be shown to vary **[*45]** to any significant degree with the agent's effort, the selling price of the property, the location or condition of the property, or any other factor." French Supp. Report, DN 639-10 at ¶ 91. Dr. Yavas additionally opines that, "given the homogenous nature of brokerage services, economic theory dictates that the commission amount charged for each transaction should be similar, and thus that the commission rate should decrease proportionately with increases in the selling price." DN 654; Yavas Report, DN 639-8 at ¶ 9, 11-12. However, Plaintiffs' experts opine that Defendants' commission rates did not significantly decline with increases in the selling price.

3. <u>Opportunity to Conspire</u>

As an additional plus factor, Plaintiffs rely upon evidence relating to the structure of the real estate market in Kentucky which make it conducive to collusion. Specifically, Plaintiffs rely upon evidence of Defendants' knowledge of other brokers' commission fees and Defendants' opportunities to conspire as a means to monitor compliance with the agreement and to enforce it.

Plaintiffs contend that brokers' full commission fees were listed on the MLS listing for at least part of the Class Period. Mr. McMahan **[*46]** testified that "back then in our MLS, it told — it showed the total commission and how it was — how it was broke." McMahan Deposition, DN 654-19 at p. 51. Mr. McMahan then stated "That's when NAR, I think came down the directive to all the — all the different state associations and the boards that with agency you only post what's paid to the cooperating agent." *Id.* When asked when this occurred, Mr. McMahan stated that it has probably been since 1999. *Id.* With respect to when the KREC implemented the NAR directive, Mr. McMahan could not remember but stated that it could possibly have been in the early 2000s. *Id.* at p. 52. He then stated that if he wanted to find out, he would probably call Lisa Stephenson to find out. *Id.* Ms. Stephenson, the Executive Director of GLAR, testified that full commission information was not listed at least since she began working there in 1996. Stephenson Deposition, DN 669-2 at p. 5-7.

Plaintiffs further state that the use of the MLS system allowed Defendants to "signal" to other brokers. According to Plaintiffs, after Ray Rector's 50/50 commission split proposal was accepted, the buyer's broker fee of 3% directly and effectively signaled that the 6% fee was being **[*47]** charged by the selling broker. Thus, if a Defendant offered a 3% broker's fee on the MLS listing, others would know that the listing broker was charging a 6% full commission fee. Plaintiffs also contend that Defendants had full access to the commissions charged by other brokers at closings of real estate transaction in which any Defendants or other brokers participated.[4]

Plaintiffs also rely upon Defendants' many meetings and conversations with one another as a manner of sharing confidential information with competitors. Specifically, Plaintiffs point to the testimony of Brad DeVries of HSK regarding the following: (1) communications with other companies — which Mr. DeVries testified were "far outside our local market area" — about charging of a flat administrative fee: (2) discussions of the KREC rule at HSA meetings; (3) acknowledgments that other brokers in the market were charging administrative fees; (4) interactions with Cendant agents; (5) surveillance of HUD statements at closings;[5] and (6) the recruitment of experienced agents from other brokerage companies. DeVries Deposition, DN 654-10.

Plaintiffs also rely upon the deposition testimony of Ray Rector, wherein he stated that **[*48]** brokers tend to discuss commission fees when they get together. In his deposition, when asked about talking to other people from around the country about what the buying broker fee is in other areas, Mr. Rector responded that: "Buying broker fee? I'm sure there's been a conversation. You get two Realtors together, there's going to be a conversation about these subjects, but I don't know specifically how to answer your question." Rector Deposition, DN 654-8 at p. 197. Mr. Rector also testified that he had lunch with George Gans (Semonin Lexington) and met with Susan Fister (Semonin) and Janice Copeland (Re/Max Creative). *Id.* Mr. Rector also served on boards with Mr. McMahan of McMahan Company. Thus, Plaintiffs argue that "from all these contacts and other sources, real estate brokers knew what one another were charging" and there was "an overwhelming opportunity to conspire." DN 656 at p. 36.

4. <u>Common Motive to Conspire</u>

As a second plus factor, Plaintiffs point to evidence that Defendants had a common motive to conspire — to maximize profit.

5. <u>Other Circumstantial Evidence</u>

Finally, Plaintiffs rely upon the DOJ lawsuit regarding the KREC Rebate Ban as circumstantial evidence of the alleged **[*49]** conspiracy. According to Plaintiffs, "By virtue of all the foregoing and the agreements regarding their buyer's broker fee, Defendants had the ability to monitor compliance with an agreement not to compete on the basis of price UNLESS rebates of commissions were made after the closings." DN 654 at p. 28. However, the enactment of the KREC Rebate Ban closed the door on rebates made after or before the HUD-1 closing and made

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4 The Court assumes Plaintiffs are referring to the federally mandated HUD-1 disclosure forms.

5 Plaintiffs cite to an email from Brad DeVries to Rhonda Benavidez, which states: "We are also looking at the HUD statements for the closings we have on our competitors listings. We are calculating the amount we get, plus the amount they keep, and then coming up with a total. We think that will give us the answer we are looking for (or at least part of it)." DeVries Deposition, DN 654-11 at p. 24.

it more difficult to cheat on the agreement. *Id.* Plaintiffs also rely upon comments made by brokers in Kentucky in response to a KREC survey, which appeared in the DOJ complaint, as circumstantial evidence that Defendants conspired to fix supra-competitive commissions. For example, one unidentified individual stated that repealing the KREC Rebate Ban "would turn into a bidding war, lessen our profits and cheapen our 'so called' profession." Another stated that "If inducements were allowed, they could lead to competitive behavior, which would make us look unprofessional in the eyes of the public." According to Dr. French, "such views are wholly consistent with forming a cartel to fix commission rates at a high level and with enforcing adherence to the high prices." **[*50]** French Report, DN 639-1 at ¶ 84.

iii. Analysis of the Circumstantial Evidence Viewed in its Totality

In evaluating the evidence of an antitrust conspiracy for purposes of ruling on a defendant's motion for summary judgment, courts must be careful not to fall into the trap of concluding that, if no single item of evidence presented by the plaintiffs points unequivocally to conspiracy, then the evidence as a whole cannot defeat summary judgment. *In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d at 655*. Thus, the Court will examine the circumstantial evidence produced by Plaintiffs in its totality, viewed in a light most favorable to Plaintiffs, to determine whether it supports an inference that Defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective and tends to exclude the possibility that Defendants were acting independently. *See Matsushita, 475 U.S. at 588*.

First, Plaintiffs have produced evidence which, in their view, shows parallel pricing behavior. However, Plaintiffs' evidence of parallel pricing shows merely that each Defendant had a policy of charging a minimum commission of 6% and that each Defendant occasionally deviated from its respective policy for various reasons. The evidence shows that these policies were in **[*51]** effect before the Class Period and were not adopted in response to any meeting or communication between Defendants. Mr. McMahan testified that the rate was 6% when he began working for his father and that his experience informed his judgment as to what consumers were willing to pay for full-service real estate brokerage services. When HSA purchased Semonin, Semonin's policy set a minimum commission of 7% for the Louisville area. When HSK purchased Rector Hayden, Rector Hayden's policy set a minimum commission of 6%. Dr. French testified that "If you tell your agents that you can do it at six percent and most of their rivals are telling six percent, they are not even going to talk about seven percent to their actual customers . . . . So if everybody is generally charging six percent and one of them wants to charge seven percent and sticks to it, then that one is going to be in trouble." French Deposition, at 202:12 - 203:8. The prevalence of the 6% rate, then, is just as consistent with independent pricing decisions. The existence of a conspiracy cannot be inferred solely on the basis that Defendants tended to charge the same amount for their services.

Further, that declining costs did **[*52]** not result in decreasing commission rates is not probative of an illegal agreement to fix prices. The Sixth Circuit has concluded that a price set without regard to a defendant's costs does not require a conclusion that a defendant conspired to set the price. *Wallace, 55 F.3d at 1168-69* (where defendant banks admittedly set fees without regard to cost). *See also Hall v. United Air Lines, Inc., 296 F. Supp. 2d 652, 676 (E.D. N.C. 2003)*, *aff'd sub nom. Hall v. Am. Airlines, Inc., 118 F. App'x 680 (4th Cir. 2004)* ("The price of any good sold to a consumer is the result of many different factors, and the ability to reduce one cost does not mean that a producer can directly pass on that cost reduction in the form of a price reduction for the consumer.").

Evidence that Defendants fixed the buyer's broker commission rate at 3% is not probative of a conspiracy to fix full commission rates at a supra-competitive 6%. Ray Rector's 1970s letter shows only an offer to split commissions 50/50 with cooperating brokers. Nevertheless, evidence relating a 50/50 commission split, the prevalence of 3% buyer's brokers rates, brokers' refusals to show homes which offered a buyer's broker rate of less than 3%, and harassment of those who offered less than 3% are not probative of a conspiracy to fix the prices of full commissions. The Sixth Circuit has unequivocally **[*53]** proclaimed that "setting cooperative sales-commission rates is not price fixing: it has no relation to the amount charged to clients for an agent's services." *Re/Max Intern., 173 F.3d at 1025*. "Rather, cooperative rates constitute incentives for non-listing agents to show the listed property." *Id.* Thus, even if it was necessary for a listing broker to offer a 3% buyer's broker commission to the cooperating broker as an incentive, the listing broker is free to charge his client 4%, 5%, 10%, or even 3% plus a flat fee as Dr. Yavas has suggested may occur in a perfectly competitive market. Yavas Report, DN 639-8 at ¶ 78-79. Accordingly, Plaintiffs' reliance on the 3% buyer's broker rate to show that Defendants' conspired to set a 6% full commission rate is unfruitful.

Second, Plaintiffs have produced evidence which, in their view, shows that Defendants acted contrary to their economic self-interest. Plaintiffs contend that, if Defendants were acting independently, they would reduce the commissions charged on higher-priced homes in order to increase their market share. However, any rational decision on commission rates would take into account the realities of the market and the estimated reaction of other real estate **[*54]** companies. *In re Baby Food Antitrust Litig., 166 F.3d at 121*. Plaintiffs experts and Defendants both agree that real estate brokerage services are inelastic in that the number of property listings does not respond to changes in commission rates. French Report, DN 639-1 at ¶ 100. Because Defendants' services are inelastic, lower commissions will not increase demand. *See* *E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128, 132 (2d Cir. 1984)* ("Although a manufacturer in an inelastic market can temporarily capture an increased market share by price reductions or secret discounts, the reductions or discounts are usually discovered and met sooner or later by some form of competition by the other producers without increasing the volume of total sales in the market."). If one competitor were to lower its commission rate and gain market share in the short-term, other companies may lower their commission rates in turn to prevent the loss of market share. Thus, "[t]he sole effect of a price reduction in a declining, inelastic market, therefore, is to reduce the industry's total profits." *Id.* In the Louisville market, four defendant entities possessed a combined market share between 53.9% and 68.4% during the Class Period, making it even more likely that Defendants were cognizant of their interdependence. French Report, **[*55]** DN 639-1 at ¶ 94. Accordingly, evidence that Defendants have not decreased their commission rates is not evidence that they acted contrary to their economic self-interest.

Additionally, refusing to show homes where the offered buyer's broker commission fee is less than 3% is not contrary to Defendants' economic self-interest. Plaintiffs and Dr. Yavas use the example of choosing to show a client a $100,000 home with a 3% buyer's broker commission and refusing to show a client a $600,000 home with a 1% buyer's broker commission. Dr. Yavas asks, "why would the broker try hard to sell the first property and avoid selling the second property even though the second property would generate twice as much in commission?" However, Dr. Yavas's question misses the point. Instead of showing a client a $600,000 home with a 1% buyer's broker commission, an agent is likely to show the client another $600,000 home with a 3% buyer's broker commission. This choice, which is consistent with the Sixth Circuit's conclusion that a cooperative sales-commission rate acts as an incentive to the cooperating broker, is completely rational and not against Defendants' independent economic self-interest.

Further, **[*56]** Plaintiffs have not shown that Defendants refused to involve themselves in For-Sale-By-Owner transactions in derogation of their economic self-interests. Plaintiffs have one ambiguous anecdote wherein Rector Hayden expressed its disinterest in dealing with an individual who listed his own home FSBO. There may be several reasons why a defendant would not want to involve themselves in this particular FSBO transaction or others, including the reason explained by Keith Rector that the particular home seller wanted to use Rector Hayden's services without employing them. Additionally, Plaintiffs have not presented any evidence that Defendants systematically refused to participate in FSBO transactions. Thus, this one anecdote does not show that Defendants acted contrary to their economic self-interest.

Third, Plaintiffs have produced evidence that real estate services are homogenous and that the cost of providing real estate services therefore does not increase with the price of the home. Thus, Plaintiffs contend that Defendants' failure to charge decreasing commission rates for higher-priced homes is probative of an illegal conspiracy to fix prices. However, the homogenous nature of real **[*57]** estate services, on its own, provides no evidence to support an inference of collusion. The evidence shows that Defendants' commission rates did decrease by a small, though statistically significant degree, as the price of a home decreased. French Report, DN 639-1 at ¶ 124-125. Semonin's policy also evidenced a lower minimum commission for homes priced higher than $1 million. Nevertheless, charging a standard commission rate across the board and retaining increasing profits from the sale of higher priced homes is consistent with rational business judgment and not probative of an illegal agreement to fix commissions. Indeed, charging a standard rate across the board is common in other industries such as contingent fees charged by attorneys which customarily do not vary based upon the potential recovery. Accordingly, this evidence does not tend to exclude the possibility that Defendants acted independently.

Fourth, Plaintiffs have presented evidence, which in their view, shows Defendants knew the commission rates of other Defendants and had opportunities to conspire. According to Plaintiffs, this enabled Defendants to monitor and enforce the alleged conspiracy. However, awareness of other **[*58]** real estate companies' commission rates does not tend to rule out independent conduct. As an initial matter, the evidence does not support Plaintiffs' contention that, for at least part of the Class Period, the full commission was listed on the MLS. Mr. McMahan testified that he was unsure when this practice stopped, but that Lisa Stephenson would know. Ms. Stephenson testified that the full commission had not been listed at least since 1996. Additionally, that Defendants may learn what their competitors are charging by seeing the listed commission rate on the federally mandated HUD-1 form is not probative of a conspiracy, as there is no evidence that Defendants' used this information to set their own listing commission rates. *See* *In re Travel Agent Commission Antitrust Litig., 583 F.3d 896, 906-07 (6th Cir. 2009)* (finding that publication of pricing information did not exclude the possibility of independent conduct). Additionally, there is no evidence that individuals with pricing authority shared or discussed their respective commission rates. Regardless, "[t]he exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets **[*59]** more, rather than less, competitive." *United States v. United States Gypsum Co., 438 U.S. 422, 443 n. 16, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)*.

In *Wallace v. Bank of Bartlett*, the plaintiffs brought an antitrust action against nine banks for fixing the among of fees charged to bank customers. *55 F.3d 1166*. The Plaintiffs in *Wallace* presented evidence that the defendant banks charged essentially the same fee for check written without sufficient funds, and argued that public disclosure of the fees and the failure of the banks to set fees relative to costs were plus factors which showed a *§ 1* violation. *Id. at 1168*. The defendant banks conceded that they did not set their fees in related to costs and admitted that they evaluated the fees charged by other banks when they set fees. *Id. at 1169*. The Sixth Circuit noted that "[t]he [b]anks naturally are interested in surveying the market to determine what other banks are charging in order to make strategic competitive decisions." *Id.* The court concluded that the evidence did not tend to show that the banks conspired to set their fees. Thus, mere awareness of competitors' commissions does not support an inference that Defendants agreed to conspire.

Additionally, mere opportunity to conspire does not, standing alone, support an inference that an illegal agreement existed. *In re Travel Agent Com'n Antitrust Litigation, 583 F.3d at 911*. Although Defendants **[*60]** often communicated and cooperated with one another and often attended the same meetings, "communications between competitors do not permit an inference of an agreement to fix prices unless those communications rise to the level of an agreement, tacit or otherwise." *In re Baby Food, 166 F.3d at 126*. Mere communication and cooperation between brokers does not support an inference of collusion in this case for another important reason. In the real estate market, cooperation between the listing broker and a buyer's broker occurs in the majority of transactions. French Report, DN 639-1 at ¶ 21. Indeed, Mr. French notes that brokers and agents *must* cooperate with one another to facilitate real estate sales. *Id.* at ¶ 92. Additionally, at a closing, which frequently occurs with other broker, the federally-mandated HUD-1 form lists the commissions. Thus, cooperation and communication between Defendants and knowledge of what other brokers charge is just as consistent with independent conduct. Accordingly, such evidence cannot support an inference that Defendants agreed to fix prices.

Plaintiffs argue that comments made at the Holiday Inn public hearing before the KREC go beyond mere communication and support an inference that **[*61]** Defendants agreed not to compete with one another on the basis of commissions.[6] To this end, Plaintiffs contend that Mr. McMahan made an "improper proposal" when he

[6] In addition to arguing that the comments made at the public hearing do not amount to an illegal agreement, Defendants also argue that the comments made at the public hearing are not admissible pursuant to the *Noerr-Pennington* doctrine, which "allows businesses to combine and lobby to influence the legislative, executive, or judicial branches of government or administrative agencies without antitrust or *§ 1983* liability, because the *First Amendment's* right of petition protects such

stated that, "In my opinion the most unprofessional thing we can do in this business is cut our commission. I think we ought to be worth what we charge in the service that we offer." DN 656-13 at p. 31. However, a consideration of Mr. McMahan's comments in the context of the purpose of the public hearing leads to a more benign interpretation: that Mr. McMahan, in expressing his view that relaxing the KREC Rebate Ban and allowing inducements will help brokers compete with the Internet brokers, differentiates between inducements which cut commission rates — which he views as unprofessional — and non-monetary inducements such as home warranties. A plausible inference is that Mr. McMahan thought full service brokers should not compete with the Internet brokers by offering inducements in the form rebates, but should compete with Internet brokers by making their services worth what they charge — whatever that may be. Such a reading is even more likely if one consider previous speakers who commented that inducements are unprofessional, **[*62]** result in decreased levels of services, and allow "faceless, nameless, unqualified people dealing through the Internet to attract you to them, not by anything that they have to offer except what they have to give." Holiday Inn transcript, DN 656-13 at p. 24, 29 (comments of Sue Ernst and Ray Rector). Indeed, Ann McDonald, who was present at the public hearing, testified that she did not interpret Mr. McMahan's comments as "setting commissions." DN 656-15 at p. 22.

Plaintiffs additionally argue that the comments of Doug Myers of Semonin that "I'd like to see our competition based on our professional performance, not upon our brokerage fees" constituted a meeting of the minds between McMahan Company and HSK. DN 656-13 at p. 40. Mr. Myers comments express only his opinion of what he would like to see occur in the future and do not support an inference that HSK agreed with McMahan Company or any other Defendant to establish or maintain supra-competitive real estate commissions. Further, Mr. Myer is an independent contractor of Semonin and Plaintiffs have produced no evidence that Mr. Myers had any authority with respect to the commission rate **[*63]** structure of Semonin. DeVries Deposition, DN 654-11 at p. 15; *see* *Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1357 (9th Cir. 1982)* (finding that evidence of sporadic exchanges of shop talk among field sales representatives who lack pricing authority is insufficient to survive summary judgment).

Importantly, Plaintiffs have presented no evidence of any parallel change or impact on Defendants' pricing decisions after any alleged communication or invitation that was made at the KREC public hearing or any other meeting between Defendants. *Compare* *Krehl, 664 F.2d at 1357* (holding that, to survive summary judgment, there must be evidence that the exchanges of information had an impact on pricing decisions), *with* *Interstate Circuit v. United States, 306 U.S. 208, 227, 59 S. Ct. 467, 83 L. Ed. 610 (1939)* ("Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the *Sherman Act*"); *In re Delta/AirTran Baggage Fee Antitrust Litigation, 733 F. Supp. 2d 1348, 1361 (N.D. Ga. 2010)* (where Plaintiffs presented evidence that Defendants engaged in collusive communications through earnings calls and industry conferences and then aligned their business practices following the collusive communications); and *Standard Iron Works v. Arcelormittal, 639 F. Supp. 2d 877 (N.D. Ill. 2009)* (finding conspiracy plausible despite lack of direct evidence of collective action **[*64]** where a series of industry meetings attended by steel executives were followed by industry-wide production cuts). Accordingly, the comments made at the Holiday Inn KREC public hearing do not support an inference that an agreement was made by Defendants.

Fifth, Plaintiffs contend that Defendants had a common motive to conspire. However, Defendants' motive to maximize profits cannot support an inference of a conspiracy. "In a free capitalistic society, profit is always a motivating factor in the conduct of a business. Profit is a legitimate motive in pricing decisions, and something more is required before a court can conclude that competitors conspired to fix prices in violation of the Sherman Act." *In*

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activities." *Knology, Inc. v. Insight Communs. Co., L.P., 393 F.3d 656, 658 (6th Cir. 2004)*. Plaintiffs maintain that Mr. McMahan's and Mr. Myer's comments should be considered by this Court by arguing that the "sham" exception to the *Noerr-Pennington* doctrine is applicable. "Such a 'sham' situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means." *Id. at 658-59* (internal quotation marks omitted). However, because the Court finds that the Plaintiffs' reading of the Holiday Inn transcript is unreasonable, the Court need not determine that applicability of the *Noerr-Pennington* doctrine.

re Baby Food, 166 F.3d at 134-35. If this Court were to find that Defendants' motive to maximize profits supported an inference of an illegal conspiracy, then all businesses would be subject to anti-trust liability.

Lastly, the DOJ lawsuit regarding the KREC Rebate Ban and comments of unidentified brokers on their views of the KREC Rebate Ban cannot support an inference that Defendants conspired to establish and maintain supra-competitive commission rates. Pleadings in a complaint do not constitute evidence. Additionally, **[*65]** the comments of unidentified brokers which appear in the complaint, are inadmissible hearsay. Accordingly, the DOJ lawsuit and pleadings do not support an inference that the Defendants in this conspired to set and maintain supra-competitive commission rates.

The Court has thoroughly reviewed the evidence and finds that Plaintiffs have not presented sufficient evidence to meet the stringent summary judgment standard in *§ 1* antitrust cases. Price-fixing "includes more than the mere establishment of uniform prices." *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*. Even assuming Defendants engaged in consciously parallel pricing, Plaintiffs have not produced "evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Matsushita, 475 U.S. at 588*. At most, Plaintiffs have shown that, despite the passage of time and increases in the prices of residential real estate, commission rates in Kentucky have continued to hover around 6%. However, Defendants' establishment and maintenance of a standard 6% commission rate is just as consistent with independent pricing decisions, as each firm rationally would look to what competitors charge and consider competitors' possible reactions in order to make their own strategic competitive decisions. **[*66]** *See Wallace, 55 F.3d at 1169*. Additionally, establishment and maintenance of a 6% commission rate is not contrary to Defendants' independent economic self-interest, but a rational decision based upon the recognition of real estate brokers' interdependence in the inelastic real estate market.

The testimony of Plaintiffs' experts concerning economic theory's predictions of commission structures which would exist in a perfectly competitive real estate market is not sufficient to overcome the insufficiency of Plaintiffs' evidence. Such abstract conclusions, based merely upon "economic theory" and not upon the specific facts of this case, simply do not show that Defendants' commission policies were the result of illegal agreement and not the result of independent decisions based upon a recognized interdependence. Indeed, Dr. Yavas has conceded that "pretty much every market in the United States is a commission rate based on a percentage of the sales price of a home." Yavas Deposition at 370-71.

This is not a case where one defendant announces a change in its pricing and the others quickly follow suit, or a case where a meeting between defendants is immediately followed by a parallel change in the defendants' pricing. **[*67]** *See e.g., In re High Fructose Corn Syrup, 295 F.3d at 658* (after one defendant announced it was raising its prices, the other defendants quickly followed suit and adopted the same pricing structure); *In re Delta/AirTran Baggage Fee Antitrust Litigation, 733 F. Supp. 2d 1348, 1361 (N.D. Ga. 2010)* (where Plaintiffs presented evidence that Defendants engaged in collusive communications through earnings calls and industry conferences and then aligned their business practices following the collusive communications). Additionally, this is not a case where the defendants have acknowledged an "understanding" or "agreement" among one another. *See e.g., In re High Fructose Corn Syrup, 295 F.3d at 662* (where a defendant's manager commented that "we have an understanding within the industry not to undercut each other's prices" and a defendant's handwritten document wondered if new entrants to the market would "play by the rules (discipline)"). Unlike in these cases, the evidence produced here is simply insufficient to support an inference that Defendants conspired to fix the prices of real estate commissions in Kentucky.

Despite a lengthy and exhaustive discovery process, no evidence has been produced which supports an inference that Defendants *agreed* to establish and maintain supra-competitive commission rates. "The existence of an agreement is the hallmark of a *Section 1* claim." *In re Baby Food Antitrust Litigation, 166 F.3d 112, 117 (3d Cir. 1999)*. Because **[*68]** the evidence presented by Plaintiffs is just as consistent with permissible competition, it is therefore is insufficient to meet the stringent standards governing *§ 1* claims and Defendants are entitled to summary judgment.

V. ANALYSIS OF EVIDENCE OF HSA'S DIRECT PARTICIPATION IN CONSPIRACY

Assuming Plaintiffs presented evidence which supported an inference of a conspiracy to fix real estate commissions in Kentucky and tended to exclude the possibility of independent conduct, Defendant HSA contends that it is entitled to summary judgment because Plaintiffs have produced no evidence that HSA directly participated in the alleged conspiracy. In their response to HSA's motion for summary judgment, Plaintiffs put forth three theories under which HSA would allegedly be liable in this action: direct participant liability, alter ego liability, and successor liability. The Court will examine each of these theories.

Because there cannot be a conspiracy between a corporate parent and its subsidiary, *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, to prevail on its claim against HSA, Plaintiffs "must set forth facts establishing [HSA's] direct and independent participation in the alleged conspiracy." *Id.* at 688 (citing *McCray v. Fidelity Nat'l Title Ins. Co., 636 F.Supp.2d 322, 334 (D.Del.2009)*; *In re Pressure Sensitive Labelstock Antitrust Litig., 566 F.Supp.2d 363, 375-77 (M.D.Pa.2008)*; *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc., 311 F.Supp.2d 1048, 1068-69 (D.Colo.2004))*. Plaintiffs contend that the evidence **[*69]** shows HSA "engaged in independent conduct directing and encouraging the anticompetitive conduct of [HSA's] Semonin and Rector-Hayden Divisions" and "directly involved itself in the Kentucky real estate business through its two Kentucky Divisions." DN 652 at p. 6.

In support of this argument, Plaintiffs cite *Nobody In Particular Presents, Inc. v. Clear Channel Communications, Inc., 311 F. Supp. 2d 1048 (D. Colo. 2004)*("*NIPP*"). In *NIPP*, the district court explained that, "If a parent corporation, through its own employees and agents, is directing, controlling, and encouraging a wholly-owned subsidiary's anticompetitive conduct, the subsidiary dare not defy its sole shareholder's policies. To conclude that a parent can direct and require anticompetitive conduct of its subsidiaries, like any principal directing the conduct of an agent, and then escape antitrust liability by hiding behind its separate incorporation is counterintuitive." *Id. at 1069*. The *NIPP* court thus held that "a parent can be considered a competitor in a market where its subsidiary is a participant if, and only if, the parent sufficiently controls, dictates, or encourages the policies of the subsidiary. When the parent controls, directs, or encourages the subsidiary's anticompetitive conduct, the parent engages in sufficient independent **[*70]** conduct to be held directly liable as a single enterprise with the subsidiary under the Sherman Act." *Id. at 1070*.

In *NIPP*, the plaintiff alleged that the parent company coordinated the use of its different subsidiaries to increase the power of its subsidiaries and therefore increase its own power in various markets. *Id.* The record showed that the management of the parent company: (1) "set the vision, strategy, and culture of all subsidiaries" operating its subsidiaries as divisions of the company reporting up to the parent company; (2) controlled the budgets of the subsidiaries by writing most of the checks that the subsidiaries required so that the divisions could not spend money on capital acquisitions; (3) handled the payroll; (4) routinely reviewed staffing level and operating costs and advised local manager on broad policy matters; (5) took responsibility for long-range planning, allocating resources, financial reporting, and controls; (6) coordinated meetings between managers from the different subsidiaries; and (7) created a department to facilitate communication and cooperation between the different subsidiaries. *Id. at 1071-72*. Thus, the district court found that the evidence supported holding the **[*71]** parent company liable.

Plaintiffs argue that HSA's direct participation in the alleged conspiracy is confirmed by business records and emails collected during discovery, fragments of which are set forth in Plaintiffs' response to HSA's motion for summary judgment. This collection of business records and emails shows the following: (1) Rector Hayden and Semonin were sometimes referred to as "divisions;" (2) HSA provided tools and resources to Rector Hayden and Semonin; (3) Rector Hayden and Semonin reported monthly to HSA; (4) HSA was concerned with and involved in Rector Hayden's and Semonin's business strategy; (5) HSA reviewed Rector Hayden's and Semonin's budgets and required reclassification of certain budget items and use of certain accounting principles; (6) HSA required its approval for plans or acquisitions exceeding plans by $50,000; (7) HSA provided various human resources activities and policies for its companies; (8) HSA collected financial data and created protocols to facilitate communication between HSA and its subsidiaries; (9) HSA CEO founded the Realty Alliance — a group of brokers who meet to discuss issues such as business enhancements and strategic planning and **[*72]** to be brought up to date on NAR activities; and (10) HSA would like to look to national relationships to leverage its overall size.

The Court has reviewed these records, and finds no evidence supporting Plaintiffs' argument that HSA controlled or encouraged Semonin or Rector Hayden's alleged anticompetitive conduct. There is no evidence that HSA discussed commission policies with Semonin or Rector Hayden, set commission policies for Semonin or Rector Hayden, or encouraged agreement or consensus on commission policies between the two. Instead, the evidence merely shows circumstances typical of any parent-subsidiary relationship. Without incurring liability, a parent may articulate and formulate general policies and procedures for its subsidiaries, *Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001)*; may coordinate and cooperate and regularly share financial and operating information, *Hopper v. Ford Motor Co. Ltd., 837 F. Supp. 840, 844 (S.D. Tex. 1993)*; may approve its subsidiaries' budgets, *Joiner v. Ryder Sys., 966 F. Supp. 1478, 1485 (C.D. Ill. 1996)*; and may be directly involved in financing and micro-management of its subsidiaries, *Doe v. Unocal Corp., 248 F.3d 915, 927 (9th Cir. 2001)*. Finally, generic references to Semonin and Rector Hayden as "divisions" does not show that HSA controlled the day-to-day operations of these companies and does not establish an alter ego relationship. *Akzona Inc. v. E.I Du Pont De Nemours & Co., 607 F. Supp. 227, 238 (D. Del. 1984)*. In sum, the evidence produced **[*73]** by Plaintiffs does not show HSA directly participated in a conspiracy to fix real estate commissions in Kentucky.

Next, Plaintiffs contend that HSA should be held liable for the alleged conspiracy under an alter ego theory of liability. As an initial matter, Plaintiffs have not pled an alter ego or piercing the corporate veil claim in their Fourth Amended Complaint and cannot now, when faced with summary judgment, assert this new theory of liability. Nevertheless, Plaintiffs have not produced evidence which would justify piercing the corporate veil to hold HSA liable for the alleged actions of Semonin and Rector Hayden. Because "[p]arents of wholly owned subsidiaries necessarily control, direct, and supervise the subsidiaries to some extent," *IDS Life Ins. Co. v. SunAmerica Life Ins. Co., 136 F.3d 537, 540 (7th Cir. 1998)*, the subsidiary's separate existence can be disregarded only where "the parent exercises control, not mere majority of complete stock control, but complete domination, not only of finances, but of policy and business practice . . . so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own." *Broussard v. Meineke Discount Muffler Shops, Inc., 155 F. 3d 331, 349 (4th Cir. 1998)*. Under Kentucky law, a court may pierce the corporate veil if two elements are present: (1) domination of **[*74]** the corporation resulting in a loss of corporate separateness and (2) circumstances in which continued recognition of the corporation would sanction fraud and promote injustice. *Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC, 360 S.W.3d 152, 165-66 (Ky. 2012)*.

Here, Plaintiffs allege that HSA "refused to produce any documentary evidence showing that its relevant 'subsidiaries' respected basic corporate requirements such as holding regular Shareholder and Board Meetings, promulgating By-Laws and Resolutions, maintaining Minute Books, or requiring its Officers and Directors to know the duties and responsibilities imposed by Kentucky law on the Officers and Directors of a Kentucky Corporation." DN 652 at p. 30. The evidence shows that HSA, Semonin and HSK shared common officers. During the Class Period, two officers of HSA were among the four or more officers of Semonin or HSK. Mr. Peltier, who was the President and CEO of HSA, testified that he was "not sure" if he served as an officer of Semonin (he did) and that he had no "official duties" in his capacity as an HSK officer. Mr. DeVries of HSK testified that HSK convened for one formal meeting a year and stated that HSK maintained no minute books and created no written record of the yearly meeting other than the **[*75]** written consent.

Plaintiffs have produced no evidence that HSA so dominated HSK's finances, business practices, and policies so as to justify piercing the corporate veil. As the Supreme Court has explained, "it is hornbook law that 'the exercise of the 'control' which stock ownership gives to the stockholders ... will not create liability beyond the assets of the subsidiary. That 'control' includes the election of directors, the making of by-laws ... and the doing of all other acts incident to the legal status of stockholders. Nor will a duplication of some or all of the directors or executive officers be fatal." *United States v. Bestfoods, 524 U.S. 51, 61-62, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998)*. Accordingly, even if Plaintiffs pled an alter ego liability claim in their complaint, Plaintiffs have not presented evidence which would support such a claim.

Finally, Plaintiffs argue that HSA should be held liable for the alleged anticompetitive acts of its subsidiary under principles of successor liability. Plaintiffs contend that, after HSA acquired Semonin and Rector Hayden, HSA did not terminate their agreements not to compete on the basis of price but continued those agreements "in full force." However, HSK — which does business as Semonin and Rector Hayden — is still **[*76]** in existence. Thus, Plaintiffs' theory of successor liability does not fit the facts of this case.

In sum, even if Plaintiffs presented sufficient evidence to support an inference that Defendants' conspired to fix real estate commissions in violation of *Section 1* of the Sherman Act, Plaintiffs cannot show that Defendant HSA directly participated in the alleged conspiracy or would be liable under any other theory. Accordingly, Defendant HSA is entitled to summary judgment on this additional ground.

VI. CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment (DN 628, DN 625, DN 633) are GRANTED. A separate Order consistent with this Opinion shall issue.

July 18, 2017

Date

/s/ Thomas B. Russell

United States District Judge

Racek v. Rady Children's Hosp. of San Diego

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

July 20, 2012, Opinion Filed

D058173

Reporter

2012 Cal. App. Unpub. LEXIS 5368 *; 2012-2 Trade Cas. (CCH) P77,984; 2012 WL 2947881

EDWARD RACEK, Plaintiff and Appellant, v. RADY CHILDREN'S HOSPITAL OF SAN DIEGO, Defendant and Respondent.

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

Subsequent History: Review denied by, Request denied by Racek (Edward) v. Rady Children's Hospital of San Diego, 2012 Cal. LEXIS 9498 (Cal., Oct. 10, 2012)

Prior History: **[*1]** APPEAL from a judgment of the Superior Court of San Diego County. Super. Ct. No. 37-2009-00081893-CU-NP-CTL. David B. Oberholtzer, Judge.

Disposition: Affirmed.

Core Terms

cause of action, shifts, trauma, pediatric, surgeons, Cartwright Act, back-up, trauma center, assigned, staffing, general surgeon, antitrust, statute of limitations, oral contract, trial court, conspiracy, surgery, demurrer, promise, unfair, anticompetitive, violations, equitable, summary judgment motion, limitations period, restraint of trade, quantum meruit, policies, equitable estoppel, anti trust law

Judges: IRION, J.; MCCONNELL, P. J., HALLER, J. concurred.

Opinion by: IRION, J.

Opinion

Edward Racek, M.D., appeals from a judgment against him in his lawsuit against Rady Children's Hospital of San Diego (the Hospital) arising out of the Hospital's staffing decision to assign Racek to fewer primary call shifts and more back-up call shifts in the Hospital's trauma center. As we will explain, we conclude that the trial court properly sustained the Hospital's demurrer to Racek's causes of action alleging violations of antitrust and unfair business practice laws, and that the trial court properly granted summary judgment on Racek's causes of action for breach of oral contract and quantum meruit. Accordingly, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

The Hospital operates a pediatric trauma center in San Diego. Racek is a board certified general surgeon, who worked in the Hospital's trauma center for over 20 years, but he is not certified as a pediatric surgeon. The Hospital assigns physicians to be on call in the trauma center by assigning them to either **[*2]** a "primary call" shift or a "back-up call" shift. Physicians are compensated for each shift they are on call in the trauma center, with the physician working the primary call shift paid more than the physician working the back-up call shift. According to Racek, the Hospital also has policies (1) permitting only pediatric surgeons to perform trauma surgery, even when a general surgeon is on trauma call; [1] and (2) permitting only pediatric surgeons to be on call to perform general surgery.

In January 2009 Racek filed a complaint against (1) the Hospital; (2) Children's Specialists of San Diego (CSSD), which is a pediatric specialty medical group; and (3) two physicians who worked shifts in the Hospital's trauma center and were members of CSSD — Mary Hilfiker, M.D., and Nicholas Saenz, M.D. Hilfiker was also the director of the Hospital's trauma center with responsibility for coordinating the schedule of physicians to work the primary call and back-up call shifts.

Racek's complaint alleged that in 2003 the former director of the **[*3]** Hospital's trauma center, Dr. Barry LoSasso, orally agreed to provide Racek with at least six to eight primary call shifts per month or at least as many primary call shifts as the busiest primary call doctor. According to Racek, he terminated his position providing trauma care at another hospital to participate in the promised trauma call shifts at the Hospital.

As alleged in the complaint, after Hilfiker replaced LoSasso as director of the Hospital's trauma center, Hilfiker stated in October 2006 that she intended to give preference to pediatric surgeons, instead of general surgeons, when assigning trauma call shifts. The complaint alleged that as a result of the change in policy, Racek's assignment to primary call shifts "decreased to 2.5 to 5 per month," and the assignment of other general surgeons to primary call shifts in the Hospital's trauma center similarly decreased. According to the complaint, while decreasing the assignment of general surgeons to primary call shifts, Hilfiker also increased the assignment of general surgeons to back-up call shifts, with Racek's assignment to back-up call shifts averaging nine per month. Although not explained in the complaint, other documents **[*4]** submitted in connection with a summary judgment motion show that Hilfiker's implementation of these policies on behalf of the Hospital coincided with a review of the certification of the Hospital's trauma program by the American College of Surgeons in February 2006. The review noted that one weakness of the Hospital's trauma program was that "three of the five core surgeons on the trauma panel were general surgeons who took trauma call but did not operate or provide inpatient care," which detracts from continuity of care. The review noted that "[o]nly two of the seven pediatric surgeons take primary trauma call."

The complaint also alleged that it was often the case that the physician assigned to the back-up call shift would end up being required to report to the Hospital for duty when a pediatric surgeon was assigned to the primary call shift. As the complaint explained, this was because pediatric surgeons were allowed to simultaneously be assigned to general pediatric surgery call and would often end up performing general pediatric surgery rather than being able to cover the trauma care duties, necessitating that the physician on the back-up call shift report to the Hospital. Racek **[*5]** alleged that when on back-up call shift, he was to perform primary call duties approximately 74 percent of the time.

Against all of the defendants, the complaint alleged causes of action for (1) antitrust violations under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) [2] and (2) violation of the Unfair Competition Law (*§ 17200 et. seq.*) (the UCL). Against the Hospital alone, the complaint further asserted causes of action for breach of oral contract, and recovery of the reasonable value of services rendered under a theory of quantum meruit. A cause of action against Hilfiker alone alleged intentional interference with prospective economic advantage.

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[1] Although the record does not specifically describe the duties of a physician on trauma call, we infer that the duties are distinct from performing trauma surgery.

[2] All further statutory references are to the Business and Professions Code unless otherwise specified.

Without granting Racek leave to amend his complaint, the trial court sustained the demurrers filed by each of the defendants to the antitrust and unfair business practices causes of action as well as the cause of action for intentional interference with prospective economic advantage against Hilfiker.

The Hospital filed a motion for summary judgment on the remaining causes of action for breach of oral contract and quantum meruit. The **[*6]** trial court granted the summary judgment motion and entered judgment in favor of the Hospital.

Racek appeals from the judgment in favor of the Hospital, but he has not pursued an appeal as to the other defendants.

II

DISCUSSION

A. *The Trial Court Properly Sustained the Hospital's Demurrer to the Cartwright Act and Unfair Competition Causes of Action*

We first consider Racek's challenge to the trial court's order sustaining the Hospital's demurrer to the causes of action alleging (1) an antitrust conspiracy in violation of the Cartwright Act and (2) violation of the UCL.

1. *Standard of Review*

" 'On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.' " (*Los Altos El Granada Investors v. City of Capitola (2006) 139 Cal.App.4th 629, 650, 43 Cal. Rptr. 3d 434*.) "A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the court acted on that ground." (*Carman v. Alvord (1982) 31 Cal.3d 318, 324, 182 Cal. Rptr. 506, 644 P.2d 192*.) In reviewing the complaint, "we must assume the **[*7]** truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable." (*Howard Jarvis Taxpayers Assn. v. City of La Habra (2001) 25 Cal.4th 809, 814, 107 Cal. Rptr. 2d 369, 23 P.3d 601*.)

Further, "[i]f the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. . . . If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. . . . The plaintiff has the burden of proving that an amendment would cure the defect." (*Schifando v. City of Los Angeles (2003) 31 Cal.4th 1074, 1081, 6 Cal. Rptr. 3d 457, 79 P.3d 569*, citations omitted.)

2. *The Cartwright Act Cause of Action*

"The Cartwright Act states that '[e]xcept as provided in this chapter, every trust is unlawful, against public policy and void.' (*§ 16726*.) *Section 16720* defines the term 'trust' as 'a combination of capital, skill or acts by two or more persons' for certain enumerated anticompetitive purposes, including '[t]o create or carry out restrictions in trade or commerce.' (*§ 16720, subd. (a)*.) That prohibition is analogous to the catchall language **[*8]** of *section 1* of the Sherman Act (*15 U.S.C. § 1*), which prohibits '[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce.' [Citation.] Thus, although the Cartwright Act was not patterned after the Sherman Act [citations], federal case law interpreting the Sherman Act is often a useful aid in interpreting the Cartwright Act [citations]." (*Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc. (2011) 198 Cal.App.4th 1366, 1374, 131 Cal. Rptr. 3d 519* (*Flagship Theatres*).)

"Under both Cartwright Act and Sherman Act case law, some restraints of trade are treated as per se unlawful, while others are analyzed under the 'rule of reason.' 'In general, only unreasonable restraints of trade are prohibited. [Citation.] However, "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." [Citation.] Among these per se violations is the concerted refusal to deal with other traders, or, as it is often called, the group boycott. [Citations.]' **[*9]** [Citation.] Under the rule of reason, the challenged conduct is unlawful only if its anticompetitive effects outweigh its procompetitive effects." (*Flagship Theatres, supra, 198 Cal.App.4th at p. 1374*.)

"A cause of action for violation of the Cartwright Act ' " 'must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts.' " ' " (*Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 373, 113 Cal. Rptr. 2d 175*.) For "plaintiffs to recover damages for antitrust violations, they 'must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.' " (*Flagship Theatres, supra, 198 Cal.App.4th at p. 1378*.) "[T]he antitrust injury requirement means that an antitrust plaintiff must show that it was injured by the anticompetitive aspects or effects of the defendant's conduct . . . ," and that the plaintiff's " 'loss stems from a competition-*reducing* aspect or effect of the defendant's behavior.' " (*Id. at pp. 1380, 1381*.)

" 'California requires a "high degree of particularity" in the pleading of Cartwright Act **[*10]** violations [citation], and therefore generalized allegations of antitrust violations are usually insufficient. [Citation.] . . . The absence of factual allegations of specific conduct in furtherance of the conspiracy to eliminate or reduce competition makes the complaint legally insufficient.' " (*Marsh v. Anesthesia Services Medical Group, Inc. (2011) 200 Cal.App.4th 480, 493, 132 Cal. Rptr. 3d 660* (*Marsh*).)

Racek's complaint alleged that the Hospital violated the Cartwright Act when it, "by and through Dr. Hilfiker, and CSSD, along with Dr. Saenz, through their interlocking business and personnel [*sic*] relationships . . . effectively conspired against Dr. Racek and other trauma surgeons in order to increase the CSSD's pediatric surgeons' Primary Trauma Call shifts and limit or restrain general surgeons, such as Dr. Racek, from participating in Primary Trauma Call shifts." Racek alleged that this conduct amounted to "a conspiracy to restrain trade and prohibit competition." He further alleged that the conspiracy in violation of the Cartwright Act consisted of "allowing only pediatric surgeons to be on general surgery call duty," "requiring that all trauma surgeries . . . be performed by pediatric surgeons," **[*11]** and "giv[ing] preference to the pediatric surgeons for all surgeries." The purported injury identified in the complaint stemming from this alleged anticompetitive conduct was "substandard care being provided at Children's Hospital" occurring "when pediatric surgeons schedule necessary and emergent surgeries for later times . . . to accommodate pediatric surgeons['] schedules, as opposed to scheduling such surgeries sooner with a general surgeon." The complaint also alleged injury in the form of "restraining Dr. Racek and other general surgeons from performing trauma and general surgeries at [the Hospital]."

The Hospital presented several arguments in support of its demurrer to the Cartwright Act cause of action, among which were that the complaint (1) did not sufficiently allege a conspiracy involving two or more persons and (2) did not identify conduct unreasonably restraining trade or prohibiting competition. As we will explain, both of these arguments have merit.

We first discuss whether the complaint sufficiently alleges a conspiracy involving two or more persons. A violation of the Cartwright Act requires "a combination of capital, skill or acts by two or more persons" for prohibited **[*12]** purposes. (*§ 16720*.) " '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes (1994) 25 Cal.App.4th 530, 543, 30 Cal. Rptr. 2d 706*.) " '[A]n individual acting alone through his agent or a corporation acting alone through its officers is not a combination in restraint of trade proscribed by the statute.' " (*Id. at p. 544*.) "[A] corporation cannot conspire with itself or its agents for purposes of the antitrust laws." (*Kolling v. Dow Jones & Co. (1982) 137 Cal.App.3d 709, 720, 187 Cal. Rptr. 797*.) Because "[c]oordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition . . . ," "officers or employees of the same firm do not provide the plurality of actors imperative for a[n] [antitrust] conspiracy." (*Copperweld Corp. v. Independence Tube Corp. (1984) 467 U.S. 752, 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628*.) Therefore, "it is well settled that a complaint for antitrust violations which fails to allege . . . concerted action by separate entities maintaining separate and independent interests is subject to demurrer." (*G.H.I.I. v. MTS, Inc. (1983) 147 Cal.App.3d 256, 266, 195 Cal. Rptr. 211 (G.H.I.I.)*.)

The complaint vaguely refers to a conspiracy involving **[*13]** the "Hospital, by and through Dr. Hilfiker, and CSSD, along with Dr. Saenz" accomplished "through their interlocking business and personnel [*sic*] relationships." As we have described, the complaint identifies the prohibited restraint of trade as consisting of the Hospital's policies preferring pediatric surgeons in certain types of staffing decisions over general surgeons. However, those policies were put in place by the Hospital, and to the extent they include the policy stated by Hilfiker of scheduling fewer general surgeons for primary call shifts, that policy was enacted in her capacity as an agent of the Hospital in her role as its trauma center director. The complaint contains no allegations of how CSSD or Saenz participated in the purported conspiracy or the setting of the Hospital's staffing policies. "General allegations of the existence and purpose of the conspiracy are insufficient and appellants must allege specific overt acts in furtherance thereof." (*Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 318, 70 Cal. Rptr. 849, 444 P.2d 481*.) As the complaint's specific allegations of participation in the conspiracy are limited to acts by the Hospital and Hilfiker acting as the **[*14]** Hospital's agent, it fails to adequately plead "concerted action by separate entities maintaining separate and independent interests" as required by the Cartwright Act. (*G.H.I.I., supra, 147 Cal.App.3d at p. 266*.) Demurrer was proper on that ground.

The other meritorious basis for demurrer is the complaint's failure to identify conduct unreasonably restraining trade or prohibiting competition in the relevant market. As explained in a persuasive opinion by the federal Seventh Circuit Court of Appeals, "without something more, a staffing pattern dispute at one hospital does not cause an unreasonable restraint of trade within the ambit of the antitrust laws." (*BCB Anesthesia Care v. Passavant Memorial Area Hosp. Ass'n (7th Cir. 1994) 36 F.3d 664, 668, fn. 3* (*BCB Anesthesia*).) "The cases involving staffing at a single hospital are legion. Hundreds, perhaps thousands of pages in West publications are devoted to the issues those circumstances present. Those cases invariably analyze those circumstances under the rule of reason — there is nothing obviously anticompetitive about a hospital choosing one staffing pattern over another or in restricting the staffing to some rather than many, **[*15]** or all. [Citation.] A hospital has an unquestioned right to exercise some control over the identity and number to whom it accords staff privileges. [Citation.] Malpractice concerns, quality of care, market perceptions, cost, and administrative considerations may all impact those decisions. [¶] Those hundreds or thousands of pages almost always come to the same conclusion: the staffing decision at a single hospital was not a violation of *section 1* of the Sherman Act." (*Id. at p. 667*.) [3] "A staffing decision does not itself constitute an antitrust injury. 'If the law were otherwise, many a physician's workplace grievance with a hospital would be elevated to the status of an antitrust action. To keep the antitrust laws from becoming so trivialized, the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market.' " (*Id. at p. 669*.)

Relying on *BCB Anesthesia*, this court recently explained in the context of a Cartwright Act challenge to a hospital staffing decision that "[b]efore a court will interfere with how one hospital staffs its physician needs, a strong showing would be required that the purpose and effect of the anticompetitive conduct, within the relevant market defined by the plaintiffs, was outside of reasonable professional standards." (*Marsh, supra, 200 Cal.App.4th at p. 499*.) In *Marsh*, the plaintiff anesthesiologist who complained about a hospital's staffing policies did not establish an unreasonable restraint of trade or prohibition on competition because she did not identify any effect on competition

[3] Racek argues that the Hospital and its alleged coconspirators engaged in a "group boycott" of general surgeons or a "horizontal restraint," which under relevant case law constitute per se unreasonable restraints on trade and therefore relieve the court from having to apply a rule of reason analysis to **[*16]** determining whether Racek identified an unreasonable restraint of trade in the relevant market. We disagree. First, Racek has not identified a horizontal restraint, which involves "entities at the same level combining to deny a competitor at their level the benefits enjoyed by the members of the group." (*Freeman v. San Diego Assn. of Realtors (1999) 77 Cal.App.4th 171, 195, fn. 26, 91 Cal. Rptr. 2d 534*.) The Hospital is not at the same level of market structure as Racek because it does not compete with him as a surgeon. Second, the type of "group boycott" that constitutes a per se unreasonable restraint of trade arises when there is an effort "to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.' . . . In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete." (*Northwest Stationers v. Pacific Stationery (1985) 472 U.S. 284, 293-294, 105 S. Ct. 2613, 86 L. Ed. 2d 202*, citations omitted.) That is not the situation described by the complaint. Instead, as we have explained, this case involves a hospital's internal staffing decisions, and case law **[*17]** invariably analyzes antitrust challenges to such staffing decisions under a rule of reason analysis rather than finding them to constitute a per se unreasonable restraint on trade. (*BCB Anesthesia, supra, 36 F.3d at p. 667*.)

in either the market for anesthesiologists in area hospitals or the consumer market for patients who use the services of anesthesiologists. (*Id. at pp. 499-500*.)

Here, too, Racek has not identified unreasonable anticompetitive conduct because there is no indication that the Hospital's **[*18]** staffing policies regarding general surgeons and pediatric surgeons effect competition in the market for surgical or trauma care services in the San Diego area, either as to the surgeons who seek to offer their services in that market or the patients who use those services. Racek complains that he and the other general surgeons at the Hospital have been injured, but the Hospital is simply his place of employment, and is not the same as the San Diego area market for general surgical services. Thus, as in *Marsh* and *BCB Anesthesia*, Racek "did not allege . . . the kind of 'facts indicating special circumstances raising antitrust concerns,' with respect to any detrimental effect on competition that caused injury, in excess of [his] own personal business concerns and circumstances." (*Marsh, supra, 200 Cal.App.4th at p. 500*, quoting *BCB Anesthesia, supra, 36 F.3d at p. 668*.) To state a claim under the Cartwright Act for unreasonable restraint of trade, "a complaint must allege 'facts from which injury to market-wide competition can be inferred.' " (*Marsh, at p. 495*.) Racek has failed to plead a claim under the Cartwright Act because he has not identified an injury to market-wide competition **[*19]** sufficient to establish an unreasonable restraint on trade. [4] Demurrer was therefore proper on this ground as well.

Racek briefly argues that the trial court should have granted him leave to amend his complaint to cure the pleading defects identified by the Hospital. However, Racek has made no attempt to explain how he would amend his complaint to address the deficiencies we have noted above. Therefore, we conclude that **[*20]** the trial court properly sustained the demurrer to the Cartwright Act cause of action without leave to amend.

3. *The UCL Cause of Action*

We next consider the order sustaining the demurrer to the cause of action for violation of the UCL. "*Section 17200* . . . defines 'unfair competition' to include 'any unlawful, unfair or fraudulent business act or practice.' The broad scope of the statute encompasses both anticompetitive business practices and practices injurious to consumers. [Citation.] An act or practice may be actionable as 'unfair' under the unfair competition law even if it is not 'unlawful.' " (*Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 374, 113 Cal. Rptr. 2d 175*.)

To the extent that Racek bases his UCL claim on the allegation that the Hospital acted *unlawfully* in that it violated the Cartwright Act, that claim is foreclosed by our rejection of the Cartwright Act claim.

Racek also argues that the Hospital has committed an *unfair* act or practice in violation of the UCL. As Racek acknowledges, our Supreme Court has significantly limited the meaning of the term "unfair" in the context of cases where the wrong complained of is anticompetitive conduct. "When a plaintiff who claims to have suffered **[*21]** injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527*.) For the same reason that Racek has not identified an actual violation of the antitrust laws, he also has not identified an incipient violation. Put simply, Racek has not described a threatened injury to competition in any relevant market.

Racek also argues that it was "unfair" for the Hospital to allegedly pay him the compensation for working a back-up call shift on those allegedly excessive instances when he was called to provide trauma care because the pediatric

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[4] Racek contends that he has identified "serious anti-competitive injury in that the Hospital's acts have resulted in substandard care being offered to the patients of the only designated pediatric trauma center in San Diego County." He is apparently referring to the complaint's allegation that due to the Hospital's purported policy of giving preference to pediatric surgeons for all surgeries and only allowing pediatric surgeons to be on general surgery call duty, surgeries are not scheduled as soon as they would be if general surgeons were allowed to operate. The problem with this argument is that an antitrust claim requires an *injury to competition* in the market, and the alleged provisions of substandard care is not an injury to the competitiveness of the marketplace.

surgeon assigned to the primary call shift was busy performing pediatric surgery. However, that allegation amounts to no more than an individual complaint about the terms of his contract for compensation with the Hospital for working back-up call shift, **[*22]** and is thus not an "unfair" practice within the meaning of the UCL. As our Supreme Court has explained, "the UCL 'is not an all-purpose substitute for a tort or contract action.' [Citation.] Instead, the act provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. . . . [T]he 'overarching legislative concern [was] to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition.' " (*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1150, 131 Cal. Rptr. 2d 29, 63 P.3d 937*.)

We accordingly conclude that the trial court properly sustained the Hospital's demurrer to the UCL cause of action. Further, because Racek has not attempted to explain how he could amend his complaint to state a claim under the UCL, the trial court properly denied leave to amend.

B. *The Trial Court Properly Granted Summary Judgment on the Breach of Oral Contract and Quantum Meruit Causes of Action*

We next consider Racek's challenge to the trial court's order granting summary judgment in favor of the Hospital on the causes of action for breach of oral **[*23]** contract and quantum meruit.

1. *Legal Standards Applicable to Summary Judgment*

Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is to be granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. A defendant "moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850, 107 Cal. Rptr. 2d 841, 24 P.3d 493* (*Aguilar*).) A defendant may meet this burden either by showing that one or more elements of a cause of action cannot be established or by showing that there is a complete defense. (*Ibid.*)

If the defendant's prima facie case is met, the burden shifts to the plaintiff to show the existence of a triable issue of material fact with respect to that cause of action or defense. (*Aguilar, supra, 25 Cal.4th at p. 849*; *Silva v. Lucky Stores, Inc. (1998) 65 Cal.App.4th 256, 261, 76 Cal. Rptr. 2d 382*.) Ultimately, the moving party "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar, at p. 850*.)

We review a summary **[*24]** judgment ruling de novo to determine whether there is a triable issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. (*Certain Underwriters at Lloyd's of London v. Superior Court (2001) 24 Cal.4th 945, 972, 103 Cal. Rptr. 2d 672, 16 P.3d 94*.) "In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment." (*Lenane v. Continental Maritime of San Diego, Inc. (1998) 61 Cal.App.4th 1073, 1079, 72 Cal. Rptr. 2d 121*.) "[W]e are not bound by the trial court's stated reasons for its ruling on the motion; we review only the trial court's ruling and not its rationale." (*Gafcon, Inc. v. Ponsor & Associates (2002) 98 Cal.App.4th 1388, 1402, 120 Cal. Rptr. 2d 392*.)

2. *The Cause of Action for Breach of Oral Contract*

Racek alleged that the Hospital entered into an oral contract with him when the former director of the Hospital's trauma center, LoSasso, told Racek that he would be assigned "at least 6 to 8 Primary Trauma Call shifts per month, or at least as many shifts as the busiest Primary Trauma Call doctor." The complaint alleges that the promise was made in 2003. However, in a declaration filed in opposition to the **[*25]** Hospital's summary judgment motion, Racek stated that the promise was made in 2005. According to Racek, the Hospital breached that agreement when Hilfiker became director of the trauma center and assigned Racek to fewer primary call shifts and more back-up call shifts because he was not a pediatric surgeon.

The Hospital moved for summary judgment on the breach of oral contract cause of action on several grounds, one of which was that it was barred by the statute of limitations. As we find that ground to be dispositive of the motion for summary judgment, we will limit our discussion accordingly.

The statute of limitations applicable to a cause of action for breach of oral contract is two years. (*Code Civ. Proc., § 339, subd. (1)*.) Racek filed his lawsuit in January 2009.

In support of its summary judgment motion, the Hospital relied on evidence that Hilfiker became the new director of trauma services and reduced Racek's primary call shifts in 2006, which was more than two years before Racek filed his complaint in 2009. Specifically, the Hospital pointed out that in a response to an interrogatory, Racek stated that "[i]n 2006, Dr. Hilfiker, as the new head of the trauma department, breached **[*26]** the agreement made by Dr. Lo[S]asso, by reducing the number of primary call trauma shifts assigned to Dr. Racek." [5] The breach that Racek identified occurring in 2006 took place more than two years before Racek filed his complaint in 2009, and therefore a cause of action based on that breach is barred by the two-year statute of limitations set forth in *Code of Civil Procedure section 339, subdivision (1)*.

Racek contends that despite the fact that Hilfiker first reduced Racek's primary call shifts in 2006, the two-year statute of limitations does not bar his **[*27]** claim for breach of oral contract for two reasons: (1) the Hospital committed an "ongoing breach" of the oral contract each month it continued to assign him to fewer primary call shifts than LoSasso promised; and (2) the Hospital is estopped from relying on the statute of limitations because up until 2008, Hilfiker's supervisor at the Hospital told Racek that he was "looking into" the situation regarding Racek's shift assignments.

We find no merit to Racek's argument that his action for breach of oral contract is saved from the statute of limitations bar on the ground that the Hospital committed an ongoing breach. "Ordinarily, a cause of action for breach of contract accrues on the failure of the promisor to do the thing contracted for at the time and in the manner contracted." (*Waxman v. Citizens Nat. Trust & Sav. Bank (1954) 123 Cal.App.2d 145, 149, 266 P.2d 48*.) "The limitations period begins to run when the plaintiff possesses a true cause of action, i.e., where events have developed to a point where the plaintiff is entitled to a legal remedy, not merely a symbolic judgment such as an award of nominal damages." (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp. (1992) 6 Cal.App.4th 603, 614, 7 Cal. Rptr. 2d 859*.) **[*28]** In limited circumstances, the nature of the promise is such that the obligation is "continuing, so that each failure to perform results in a new breach, giving rise to a new cause of action." (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 522, p. 667.) However, Racek has identified no authority from which we could conclude that an agreement to provide a specific staffing assignment in an ongoing employment relationship is the type of obligation that continually gives rise to a new breach and thus avoids a statute of limitations bar. The only authority that Racek cites is entirely inapposite, as it deals with the accrual of a cause of action for unpaid wages, holding that a distinct cause of action accrues on each payday as a separate failure to pay the specific obligation due for that payday. (*Cuadra v. Millan (1998) 17 Cal.4th 855, 859, 72 Cal. Rptr. 2d 687, 952 P.2d 704*.) In contrast, this case deals with a *single* and *specific* alleged contractual obligation to assign Racek to the primary care shifts promised by LoSasso. According to Racek's own interrogatory responses, the Hospital breached that specific obligation in 2006, and he suffered injury as of that date. Therefore, the cause of action accrued in 2006 **[*29]** and was barred by the statute of limitations by the time the complaint was filed in 2009.

We also reject Racek's contention that the Hospital is estopped from asserting the statute of limitations. As support for his estoppel argument, Racek relies on his declaration, which describes his conversations with Dr. Buzz Kaufman at the Hospital, whom he describes as supervising Hilfiker in her role as the director of the trauma center.

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[5] This statement is consistent with Racek's complaint, which states that "[s]tarting in or about October 2006, and continuing to the present, [the Hospital] breached the oral agreement" by failing to assign him to the shift promised by LoSasso. It is also consistent with the statement in Racek's declaration that "in October 2006, Dr. Hilfiker announced that she would give preference to pediatric surgeons for primary trauma call shifts," and that according to his review of data beginning in the Fall of 2006, his primary call shifts "decreased to 2.5 to 5 per month," and his back-up call shifts increased to approximately 11 per month.

According to Racek, he met with Kaufman for the first time in the Fall of 2006 regarding his decreased primary call shift assignments. Racek stated in his declaration that Kaufman instructed him to collect data regarding each surgeon's shifts in the trauma center, and that "[s]everal months later" Racek met with Kaufman to review those findings, at which point Kaufman "indicated that he would review my data and otherwise 'look into' the situation." Racek declared that "[a]t some point, in 2008, Dr. Kaufman affirmatively stated to me that the Hospital would not honor Dr. Lo[S]asso's agreement with me regarding my number of primary call shifts."

" ' "Equitable estoppel . . . comes into play only after the limitations period has run and addresses . . . the circumstances **[*30]** in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life . . . from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice." ' " (*Lantzy v. Centex Homes (2003) 31 Cal.4th 363, 383, 2 Cal. Rptr. 3d 655, 73 P.3d 517* (*Lantzy*).) Equitable estoppel to rely on the statute of limitations is based on the principle that " ' "[o]ne cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought." ' " (*Ibid.*)

Racek makes very clear that he is not relying on the doctrine of equitable tolling, under which "the limitations period *stops running* during the tolling event, and begins to run again only when the tolling event has concluded." (*Lantzy, supra, 31 Cal.4th at p. 370*.) In contrast, the doctrine of equitable **[*31]** estoppel, on which Racek relies, " ' "comes into play only *after* the limitations period has run." ' " (*Id. at p. 383*, italics added.) If the defendant's misleading conduct ceased before the running of the statute of limitations, and thus did not prevent the defendant from filing suit within the applicable limitations period, the doctrine of equitable estoppel does not apply. (*Vaca v. Wachovia Mortgage Corp. (2011) 198 Cal.App.4th 737, 746, 129 Cal. Rptr. 3d 354*.) Here, Racek has not established that Kaufman continued to "look into" the staffing issue after the date that the statute of limitations bar arose in October 2008. Instead, Racek's declaration vaguely states that "[a]t some point, in 2008," Kaufman stated that the Hospital would not honor the oral agreement allegedly made by LoSasso. Therefore, Racek has not established that the Hospital caused him to wait until after the statute of limitations had expired to file his lawsuit.

Further, Kaufman's statement that he was "looking into" the staffing assignments was not enough to create an equitable estoppel because it was merely a promise to investigate whether an already-existing breach would be cured, with no promise of what the outcome would be. A defendant **[*32]** is equitably estopped from invoking the statute of limitations when it makes representations that "mak[e] it unnecessary to sue." (*Lantzy, supra, 31 Cal.4th at p. 384*.) For instance, estoppel arises where there has been a promise of settlement (*Flintkote Co. v. Presley of Northern California (1984) 154 Cal.App.3d 458, 465, 201 Cal. Rptr. 262*) or when the defendant represents "that all actionable damage has been or will be repaired." (*Lantzy, at p. 384*.) In such instances, a plaintiff may be able to prove — as necessary to establish estoppel — that it has reasonably relied on the defendant's conduct to its detriment. (See *Lantzy, at p. 384* [estoppel requires that "the plaintiff reasonably relies on [the defendant's] representation to refrain from bringing a timely action"].) A statement that Kaufman would "look into" the staffing issue is not a promise of settlement or other promise to redress the alleged contractual breach asserted by Racek. Therefore, it is not a statement sufficient to create the reasonable reliance needed to equitably estop the Hospital from relying on the statute of limitations.

Racek has identified no basis to avoid the statute of limitations from applying to his cause of action for **[*33]** breach of oral contract. Accordingly, we conclude that the trial court properly granted summary judgment on that cause of action.

3. *The Quantum Meruit Cause of Action*

Racek's cause of action for quantum meruit is based on his claim that he should have been paid more for those shifts when he was assigned to a back-up call shift but was called to perform the duties of the primary call doctor because that doctor was busy in surgery. As we will explain, the quantum meruit claim fails because an express contract covers the same subject.

As the Hospital established through the evidence that it submitted in support of its summary judgment motion, the terms of Racek's provision of trauma services for the Hospital were set forth in a written contract which (1) described the duties performed by physicians while on primary call and back-up call and (2) specified the compensation that Racek would be paid when assigned to a primary call shift and a back-up call shift. The essence of Racek's quantum meruit claim is that the compensation for the back-up call shifts provided in his express agreement was insufficient because of the disproportionate number of times that he was called into the hospital **[*34]** to perform trauma center duties when he was on back-up call.

"Quantum meruit is an equitable theory which supplies, by implication and in furtherance of equity, implicitly missing contractual terms. Contractual terms regarding a subject are not implicitly missing when the parties have agreed on express terms regarding that subject." (*Hedging Concepts, Inc. v. First Alliance Mortgage Co. (1996) 41 Cal.App.4th 1410, 1419, 49 Cal. Rptr. 2d 191*.) Thus, "it is well settled that there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation." (*Ibid.*) " 'The reason for the rule is simply that where the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability.' " (*Ibid.*)

Because Racek's express agreement with the Hospital sets forth the compensation he is to receive when assigned to a back-up call shift, he may not bring a cause of action in quantum meruit seeking additional compensation for doing that work. [6]

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.

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[6] In addressing the quantum meruit cause of action in his appellate briefing Racek argues that under the **[*35]** terms of his written agreement with the Hospital, he should have been compensated at the rate applicable to primary call shifts whenever he was on back-up call duty and called to perform the duties of a physician on primary call. However, that argument describes a claim for breach of contract, not a claim for quantum meruit, which, as we have explained, cannot exist when an express contract covers the same subject matter. We have seen no indication in the record that Racek intends to assert a cause of action against the Hospital for breach of his written contract; he has chosen to proceed under a theory of quantum meruit.

Nfinanse, Inc. v. Interactive Communs. Int'l

United States District Court for the Northern District of Georgia, Atlanta Division

July 24, 2012, Decided; July 24, 2012, Filed

CIVIL ACTION NO. 1:11-CV-3728-AT

Reporter
2012 U.S. Dist. LEXIS 203106 *

NFINANSE, INC., Plaintiff, v. INTERACTIVE COMMUNICATIONS INTERNATIONAL, INC., Defendant.

Subsequent History: Modified by, Motion granted by *Nfinanse, Inc. v. Interactive Communs. Int'l, 2012 U.S. Dist. LEXIS 203191 (N.D. Ga., Oct. 15, 2012)*

Core Terms

nFinanSe, card, Network, reload, retailers, distributor, conspiracy, horizontal, distribute, providers, contracts, breached, motion to dismiss, alleges, dual, offering, e-mails, packs, terms, hub-and-spoke, compete, Launch, join, pleads, rule of reason, case-by-case, spokes, price fixing, pricing, distribution agreement

Counsel: **[*1]** For nFinanSe, Inc., Plaintiff: Fredric Joseph Bold, Jr., Bondurant Mixson & Elmore, LLP, Atlanta, GA; Homer Lamar Mixson, Bondurant Mixson & Elmore, Atlanta, GA.

For Interactive Communications International, Inc., Defendant: Debra Dawn Bernstein, Alston & Bird, Atlanta, GA; Melissa Mahurin Whitehead, Tachau Meek - KY, Louisville, KY; Van A. Anderson, Alston & Bird, LLP - Atl, Atlanta, GA.

Judges: Amy Totenberg, United States District Judge.

Opinion by: Amy Totenberg

Opinion

ORDER

This matter is before the Court on Defendant Interactive Communications International, Inc.'s ("InComm") Motion to Dismiss Plaintiff's Second Amended Complaint ("SAC") [Doc. 57]. For the reasons stated below, the Court **GRANTS** Defendant's motion in part and **DENIES** in part.

I. STANDARD FOR MOTION TO DISMISS

This Court may dismiss a pleading for "failure to state a claim upon which relief can be granted." *FED. R. CIV. P. 12(b)(6)*. A pleading fails to state a claim if it does not contain allegations that support recovery under any recognizable legal theory. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1216 (3d ed. 2002); *see also* *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. In considering a *Rule 12(b)(6)* motion, the Court construes the pleading in the non-movant's favor and accepts the allegations of facts **[*2]** therein as true. *See* *Duke v. Cleland, 5 F.3d 1399, 1402 (11th Cir. 1993)*. The pleader need not have provided "detailed factual allegations" to survive dismissal, but the "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In essence, the pleading "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 570*). "Plausibility is the key, as the well-pled allegations must nudge the claim across the line from conceivable to plausible." *Jacobs v. Tempur-Pedic Intern., Inc., 626 F.3d 1327, 1333 (11th Cir. 2010)* (quoting *Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1261 (11th Cir. 2009)* (quoting *Twombly, 550 U.S. at 570*)) (internal quotation marks omitted).

II. BACKGROUND

A. Background on the GPR Card Industry

Plaintiff nFinanSe is a company that sells general purpose reloadable prepaid cards ("GPR cards"). (SAC ¶ 14.) GPR cards function like traditional debit cards but are not tied to a customer's bank account. (SAC ¶ 16.) Instead, GPR cards are available for purchase at retail outlets like the convenience stores Dollar General and Cumberland Farms. (*Id.* ¶¶ 14, 16.) Customers fund their cards with a desired amount of money and use their cards to make purchases from participating merchants, withdraw **[*3]** money from ATMs and buy goods or services online or by phone. (*Id.*) Cardholders can also pay a fee to reload their cards when they deplete their original deposit. (*Id.*)

The GPR card market currently generates approximately $100 billion in annual revenue. (*Id.* ¶ 1.) The market features a number of horizontal competitors, including InComm, nFinanSe, NetSpend, PayPal and Green Dot. (*Id.* ¶¶ 19, 21.) These various card providers compete on fees ranging from an initial card purchase fee to individual transaction fees to card reload fees. (*Id.* ¶ 18.) Providers also compete on "card features, overall quality, and customer service." (*Id.*)

nFinanSe has made its mark on the GPR card industry by "charging the lowest overall prices in the industry." (*Id.* ¶ 22.) For example, nFinanSe charges $3.00 for a card purchase and $2.95 for a card reload. (*Id.*) By contrast, Green Dot charges a reload price of $4.95. (*Id.* ¶ 64.)

In order to gain access to retailers, GPR card providers like nFinanSe rely on "national distributors to place GPR cards in retail chains." (*Id.* ¶ 24.) These distributors are responsible for processing card activation, (*id.*), offering "a suite of GPR cards" featuring a centralized "point-of-sale **[*4]** technology platform" (*id.* ¶ 26), and determining the placement of GPR cards on retailers' shelves (*id.* ¶¶ 68-69). Retailers have an incentive to deal with only a single national distributor because "1) retailers typically desire to minimize the amount of activation technology in their stores . . . and 2) retailers are often precluded from accepting GPR cards from multiple distribution sources due to an exclusivity agreement with a distributor." (*Id.*; *see also id.* ¶ 26.) Since the nascent years of the GPR card market, individual card providers have found it increasingly difficult to compete with the more efficient national distributors and establish direct distribution deals with retailers. (*Id.* ¶ 27.)

Two companies currently dominate the GPR card distribution market. (*Id.* ¶ 28.) InComm, the defendant in this case, "is the nation's and the world's largest distributor of prepaid cards." (*Id.*) InComm distributes GPR cards to approximately 150,000 retail locations in the United States, including the country's largest grocery, big box and convenience stores. (*Id.*) InComm's largest competitor in the GPR card distribution market is Blackhawk, Inc., a subsidiary of Safeway, Inc. and the country's **[*5]** second-largest GPR card distributor. (*Id.*)

In addition to its role as a GPR card distributor, Defendant InComm is also a GPR card provider. (*Id.* ¶ 2.) The company offers the "Mio" GPR card, which competes directly with cards offered by nFinanse in the GPR card market. (*Id.*) InComm also offers its own "reload packs," which customers use to reload their GPR cards at retail outlets. (*Id.*) These reload packs also compete with similar packs offered by nFinanSe and other competing GPR card providers. (*Id.*) The Mio card has "higher overall fees" than nFinanSe's GPR card. (*Id.* ¶ 2.)

B. nFinanSe's GPR Card Distribution Agreements

In September 2007, nFinanSe was looking for a way to break into the GPR card market. Recognizing that it needed a distributor to help bring its product to retail, nFinanSe signed a distribution agreement with InComm ("the Discover Contract"). (*Id.* ¶ 29.) Under the terms of the agreement, InComm would distribute nFinanSe's Discover-branded GPR card, "providing card issuance and activation services, and assisting with marketing." (*Id.*) The contract provided that InComm would "use commercially reasonable efforts and proceed in good faith to execute the agreement, test the **[*6]** product and launch the Program." (*Id.*) The contract pertained only to nFinanSe's Discover-branded cards because nFinanSe was only offering Discover-branded cards at the time of execution. (*Id.*)

Shortly after signing its distribution contract with InComm, and in an effort to grow its GPR card business, nFinanSe sought and was granted authorization to provide Visa-branded GPR cards. (*Id.* ¶ 32.) In October 2009, nFinanSe Chief Executive Officer Jerry Welch met with InComm President and CEO Brooks Smith to inquire whether InComm would be willing to distribute nFinanSe's Visa-branded cards in addition to its Discover-branded cards. (*Id.* ¶ 33.) According to nFinanSe's Second Amended Complaint, Smith responded "Jerry, if the retailers want your Visa product, then we [InComm] are going to give it to them." (*Id.*) nFinanSe refers to this conversation as the "Visa Amendment" to the Discover Contract. (*Id.*)

nFinanSe and InComm later confirmed the details of the Visa Amendment in a series of e-mails from October and November 2009. (*Id.*) The relevant e-mails state that "any retailer wanting to offer nFinanSe's GPR cards must submit a written request to InComm, which InComm would approve on a case-by-case basis." (*Id.* ¶ 36.) nFinanSe **[*7]** contends that the "case-by-case" qualifier was designed to "prevent InComm from distributing nFinanSe's GPR cards, at nFinanSe's behest, to stores that did not want them." (*Id.*) nFinanSe then alleges that the "case-by-case" provision was also designed to protect InComm, namely, by insuring against a promise from nFinanSe "that InComm would begin card distribution with insufficient lead time for InComm to be ready to proceed." (*Id.*) However, the provision was not designed to allow InComm to refuse retailer requests for nFinanSe's Visa-branded GPR card. (*Id.*) Instead, as an amendment to the Discover Contract, the Visa Amendment incorporated the Discover Contract's provision that "InComm *shall* arrange for and coordinate account management and maintenance functions *at those InComm Retailer locations which notify InComm in writing that they intend to participate in the Program*." (*Id.* ¶ 37.)

nFinanSe pleads that the Visa Amendment "was a valid written amendment that added distribution of nFinanSe's Visa GPR cards to the Discover Contract." (*Id.* 34.) nFinanSe pleads in the alternative that the Visa Amendment was "a new written contract . . . for the distribution of nFinanSe's Visa-branded GPR cards pursuant to the terms of the Discover Contract." (*Id.* ¶ 35.) **[*8]** nFinanSe argues that the Visa Amendment was for a two-year term. (Pl.'s Resp. at 24.) The manner in which the parties contracted for the distribution of nFinanSe's Visa-branded GPR cards "was not an unusual industry practice." (*Id.* ¶ 41.)

Following the parties' execution of the Visa Amendment in October 2009, InComm began distribution of nFinanSe's Visa-branded GPR card to retailers across the country. (*Id.* ¶ 38.) InComm conducted its distribution "in the same manner under the Visa Amendment as the Discover-branded GPR cards had been (and continue to be) distributed under the Discover Contract." (*Id.* ¶ 38.) InComm also indicated that it intended to fulfill the Visa Amendment in late 2010 when it charged nFinanSe $65,000 for warehouse security upgrades required by Visa. (*Id.* ¶ 39.)

In addition to its distribution agreement with InComm, nFinanSe entered into a distribution contract with Coinstar E-Payment Services, Inc. in July 2009 ("the Coinstar Discover Contract"). (*Id.* ¶ 42.) Like nFinanSe's original contract with InComm, the Coinstar agreement also pertained only to nFinanSe's Discover-brand GPR cards. As it had with InComm, however, nFinanSe would later amend its contract with Coinstar to include distribution of nFinanSe's Visa-brand GPR cards, as well ("the Coinstar Visa Amendment"). **[*9]** (*Id.* ¶ 43.) Coinstar agreed "that the distribution of nFinanSe's Visa-branded cards would be covered by the same Coinstar Discover Contract governing distribution of nFinanSe's Discover-branded cards." (*Id.*) The amendment was later confirmed in writing and thereby constituted either a valid written amendment to the Coinstar Discover Contract, (*id.* ¶ 44), or a new written agreement for the distribution of nFinanSe's Visa-branded cards (*id.* ¶ 45).

InComm acquired Coinstar's e-payment business in May 2010. (*Id.* ¶ 47.) The acquisition meant that InComm had assumed the Coinstar Discover Contract and the Coinstar Visa Amendment. (*Id.*)

C. The Vanilla Reload Network

Just as nFinanSe was beginning to introduce its Visa-branded GPR cards, it was contacted by InComm about participating in InComm's new Vanilla Reload Network ("the Network"). (*Id.* ¶ 48.) The Network was touted as a centralized GPR card reload method that consumers could use to reload their cards, regardless of the brand of GPR card they had originally purchased. (*Id.* ¶ 55.) Network participants would no longer have to offer individual reload packs; instead, all consumers using Network-participating GPR cards could reload their cards at one centralized retail location using a single reload **[*10]** technology. The Network would also offer "expanded opportunities for distributing" a participating company's GPR cards. (*Id.* ¶ 48.) nFinanSe has alleged that the true purpose of the Network was to reduce competition among GPR card providers and advantage InComm's Mio card. (*Id.* ¶ 23.)

At a September 2010 meeting, InComm relayed information regarding the Network to nFinanSe. (*Id.*) In particular, InComm stated that it would require all GPR card companies participating in the Network to charge a uniform reload fee of $3.95, (*id.* ¶ 56), a full $1 more than nFinanSe's $2.95 reload fee (*id.* ¶ 49). InComm indicated at a meeting in early summer 2011 that the terms it was offering to nFinanSe to join the Network were the same terms it was offering to other GPR card providers. (*Id.* ¶ 57.) nFinanSe viewed the Network's mandatory pricing schedule as excessive and as an anti-competitive market manipulation and therefore declined to join. (*Id.* ¶ 49.) nFinanSe also objected to the Network's exclusivity provision, which bars Network card participants from independently distributing competing reload products to Network retailers. nFinanSe alleges that "[o]ne goal of the exclusivity provision is to entrench **[*11]** InComm's own new Vanilla branded suite of prepaid product and to remove horizontally competing brands of reload products from the store shelves of participating Vanilla Reload Network retailers." (*Id.* ¶ 63.)

Currently, the Network is comprised of three competing GPR card providers: InComm, who also functions as the founder and organizer of the Network, NetSpend, and PayPal. (*Id.* ¶ 55.) All three providers now charge the uniform reload fee of $3.95. (*Id.* ¶ 56.) Prior to joining the Network, InComm and NetSpend charged customers $2.95 and $2.99 per reload, respectively. (*Id.* ¶ 59.) Each company's reload price has therefore increased as a result of its participation in the Network.

InComm was displeased that nFinanSe continued to undercut the Network on reload pricing. (*Id.* ¶ 51.) In January 2011, an InComm executive stated to a counterpart at nFinanSe that "unless nFinanSe raised its pricing, InComm would not likely be going forward with nFinanSe." (*Id.* ¶ 77.) InComm executives also made comments to nFinanSe executives like "[i]f I were you, I'd change my pricing" and stated that InComm would increase its distribution of nFinanSe's Visa-branded GPR cards if nFinanSe would increase its **[*12]** reload pricing and join the Network. (*Id.*)

After realizing that it would be unable to sway nFinanSe on the issue of reload pricing, InComm began "holding up retailers' requests to offer nFinanSe's Visa-branded GPR cards at their stores." (*Id.* ¶ 53.) InComm stated that it was holding up retailer requests because nFinanSe refused to join InComm's Network. (*Id.* ¶ 54.) InComm also reduced the number of pegs showcasing nFinanSe GPR cards at Fred's stores and placed nFinanSe's cards in the least desirable position on the rack. (*Id.* ¶ 68.)

nFinanSe attempted to compromise with InComm on multiple occasions, including by offering to hang its own reload packs next to the Network's packages and by offering to join the Network without raising its reload price. (*Id.* ¶ 80.) InComm declined these offers and in October 2011, informed nFinanSe in a letter that it would stop distributing nFinanSe's Visa-branded GPR cards to all stores beginning on September 19, 2011. (*Id.* ¶ 83.)

nFinanSe filed a Complaint against InComm in this Court on October 31, 2011 for breach of contract, promissory estoppel and antitrust conspiracy. nFinanSe alleged that the Network constituted a *per se* illegal horizontal price-fixing **[*13]** agreement, and that InComm had unlawfully retaliated against nFinanSe for declining to join the Network by breaching the Visa Amendment and the Coinstar Visa Amendment. (*Id.* ¶¶ 49-63.) InComm filed a

Motion to Dismiss on November 28, 2011, and nFinanSe filed a First Amended Complaint ("FAC") on December 14, 2011. InComm then filed a Motion to Dismiss the FAC.

On March 7, 2012, the Court heard oral argument from the parties on InComm's Motion to Dismiss and on nFinanSe's Motion for a Preliminary Injunction. The Court denied nFinanSe's motion for injunction on the ground that there was not a reasonable likelihood nFinanSe would prevail on its claims at trial. (Hr'g Tr. 139:14-19.) The Court took InComm's motion under advisement. (*Id.* 140:3-4.)

On April 26, 2012, the Court granted nFinanSe's Motion to File the SAC. The Court then denied InComm's pending Motion to Dismiss as moot and permitted a renewed motion to dismiss to be filed on the Second Amended Complaint. This matter is now before the Court on InComm's Motion to Dismiss the SAC.

III. DISCUSSION

A. The Vanilla Reload Network Does not Constitute a *Per Se* Illegal Restraint on Competition.

Section 1 of the Sherman Antitrust Act declares illegal "[e]very contract, combination in the form of **[*14]** trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Long ago, however, the Supreme Court made clear that "not every agreement that restrains competition will violate the Sherman Act." *Levine v. Central Florida Med. Affiliates, Inc., 72 F.3d 1538, 1545 (11th Cir. 1996)*. Instead, only those agreements found to "*unreasonably* restrain competition" will result in Section 1 liability. *Id.* (citing *Standard Oil Co. v. United States, 221 U.S. 1, 58-64, 31 S. Ct. 502, 55 L. Ed. 619 (1911))*. "[A] restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be 'per se' unreasonable, or because it violates what has come to be know as the 'Rule of Reason.'" *F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 457-58, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*. Under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*.

A restraint is declared *per se* illegal, by contrast, "only when history and analysis have shown that in sufficiently similar circumstances the rule of reason unequivocally results in a finding of liability." *Consultants & Designers, Inc. v. Butler Serv. Grp., Inc., 720 F.2d 1553, 1562 (11th Cir. 1983)*. "[T]he *per se* rule is [therefore] appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all **[*15]** or almost all instances under the rule of reason." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886-87, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (citations omitted). "Examples of such [restraints] include horizontal price fixing among competitors, group boycotts, and horizontal market division — business relationships that, in the courts' experience, virtually always stifle competition." *Jacobs v. Tempur-Pedic Intern., Inc., 626 F.3d 1327, 1333 (11th Cir. 2010)*.

1. Each Network Agreement Should be Evaluated Under the Rule of Reason.

In evaluating a claim that a restraint is *per se* illegal, an important consideration is whether the restraint at issue is horizontal, i.e. between competitors, or vertical, i.e. between noncompetitors. *Arizona v. Maricopa Cnty. Medical Soc., 457 U.S. 332, 348, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)* (noting that "horizontal restraints are generally less defensible than vertical restraints"). The Supreme Court has pointed out that vertical restraints "are widely used in our free market economy . . . [and] there is substantial scholarly and judicial authority supporting their economic utility." *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57-58, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*; *see also* Robert H. Bork, *The Rule of Reason and the* Per Se *Concept: Price Fixing and Market Division II*, 75 Yale L.J. 373, 404 ("The ability of all truly vertical restraints to enhance the efficiency of [an] integration [is] demonstrated by the argument that they can serve no other function."). Horizontal restraints, by contrast, are generally considered **[*16]** to have more harmful economic effects, and are therefore more likely to be declared *per se* illegal. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 888, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*.

nFinanSe alleges that InComm engaged in *per se* illegal horizontal price fixing when it signed contracts with NetSpend and PayPal to launch the Network. nFinanSe points out that InComm sells its own brand of GPR card and, prior to founding the Network, offered its own brand of GPR card reload pack in retail stores across the country. InComm's GPR cards and reload packs each competed directly with the cards and reload packs offered by NetSpend and PayPal. nFinanSe contends that each Network agreement to fix the price for GPR card reloads was therefore a *per se* illegal agreement between horizontal competitors.

In support of its argument, nFinanSe marshals evidence indicating that "InComm's operation of the Vanilla Reload Network and its provision of distribution services are not separate and distinct from its provision of GPR and other prepaid products that directly and horizontally compete with nFinanSe's, NetSpend's, and PayPal's GPR cards." (SAC ¶ 111; *see also id.* ¶ 112 (alleging that "InComm's role as the Mio . . . card provider and the Vanilla Reload Network manager are **[*17]** seamlessly integrated")). For example, nFinanSe notes that InComm employees responsible for marketing the Mio card are also responsible for selling the Network to retailers. (*Id.* ¶ 112.) nFinanSe claims that, like the *per se* illegal market division agreement in *Palmer v. BRG of Ga., Inc., 498 U.S. 46, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)*, each Network contract is a "*per se* unlawful horizontal restraint of trade . . . embedded in an otherwise legal vertical agreement." (Pl.'s Resp. at 12.) nFinanSe pleads that "[t]he real effect of this naked agreement to fix the reload price in the Vanilla Reload Network will be an increase in prices and a reduction in competition and/or market output at participating Vanilla Reload Network and/or InComm retailers." (*Id.* at ¶ 115)

InComm responds that it executed each of its Network contracts in its capacity as a distributor of GPR cards and as a founder of the Network. InComm does not dispute that its relationship with NetSpend and PayPal is in some sense competitive. However, InComm refuses to concede that this competition makes the Network agreements horizontal. Instead, InComm characterizes the Network contracts as "'dual distribution' or 'hybrid' agreements [involving] both horizontal and vertical elements." (Mot. Dismiss **[*18]** at 8.) Because the agreements are not purely horizontal, InComm asks that they be judged under the rule of reason. (*Id.*; *see also* *id. at 10-11* ("Dual distribution cases and other cases involving hybrid agreements recognize that a single company . . . may operate at multiple levels within an industry without engaging in *per se* illegal conduct.")).

The Court notes as a preliminary manner that nFinanSe's reliance on *Palmer* is misplaced. In *Palmer*, two companies offering bar review courses competed for the bar review course market in Georgia. *Palmer, 498 U.S. at 47*. One company was the largest provider of bar review courses in the country; the other was a new entrant to the market. *Id.* Together, they became the primary bar review course providers in Georgia during the relevant time period. *Id.* After a number of years, the two companies entered into a licensing agreement whereby the larger company would license the smaller company to market its bar review materials in Georgia. *Id.* The larger company agreed not to compete in Goergia, and the smaller company agreed not to compete outside of Georgia. *Id.* The larger company also received a percentage of the sales dollars generated by the smaller company. *Id.* Immediately after **[*19]** the licensing agreement was executed, the larger company increased the price of its course from $150 to over $400. *Id.*

The Supreme Court held that the licensing contract was a *per se* illegal horizontal agreement to divide the market. *Id. at 49*. The court reasoned that "[t]he revenue-sharing formula . . . coupled with the price increase that took place immediately after the parties agreed to cease competing with each other . . . indicates that [the] agreement was formed for the purpose and with the effect of raising the price of the bar review course." *Id.* (internal quotation marks omitted). The *Palmer* Court made clear that "horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition." *Id. at 49*.

Unlike the agreement in *Palmer*, the Network contracts here involve one party, InComm, which acts both as a competitor and as a noncompetitive distributor in the GPR card market. Even on the face of nFinanSe's pleadings, the Network appears to be a "bona fide joint venture" designed by a GPR reload pack distributor to integrate the reload software of multiple GPR card providers into a centralized card reload system. The Network's efforts to fix the price **[*20]** of GPR card reloads may have some anticompetitive impact. However, it is clear even from the SAC that the Network as a whole is not a sham agreement designed only to obscure illegal horizontal price fixing. *See* *Augusta News Co. v. Hudson News Co., 269 F.3d 41, 48 (1st Cir. 2001)* (describing the agreement in Palmer as "more or less a sham transaction designed to disguise a naked market division arrangement [that] did not involve a bona fide joint venture"). The facts of this case therefore cannot be squared with those of *Palmer*.

Although this case is not analogous to *Palmer*, neither is it on all fours with the dual distribution cases cited by InComm. Dual distribution cases involve manufacturers who sell their products both through a distributor and independently at retail. *See, e.g.*, *Jacobs, 626 F.3d at 1340* (analyzing a dual distribution system in which a manufacturer "sold mattresses both through its authorized distributors and through its website"); *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 720 (11th Cir. 1984)* (describing a dual distributorship in which the owner of a brand licenses independent franchisees and also "operates its own franchises" in competition with those franchisees); *AT&T Corp. v. JMC Telecom, LLC, 470 F.3d 525, 528 (3rd Cir. 2006)* (evaluating an agreement whereby AT&T sold its prepaid calling service independently and also contracted with JMC to sell its prepaid calling service **[*21]** at retail); *PSKS, Inc. v. Leegin Creative Leather Prods., Inc., No. 2:03 CV 107, 2009 U.S. Dist. LEXIS 28505, 2009 WL 938561, at *6* ("Where a manufacturer is both a wholesale distributor and retail distributor it is called a 'dual distribution system.'"). The Supreme Court has held that dual distribution agreements fixing resale price should be evaluated under the rule of reason because minimum resale price maintenance that reduces intrabrand competition may have the procompetitive effect of increasing interbrand competition. *Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 889, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*.

Unlike a traditional dual distributor, InComm sells its own unique GPR card, called the Mio card, at retail. Prior to the advent of the Network, InComm also sold its own Mio reload packs, which competed with the reload packs sold in stores by NetSpend and PayPal. As a result, InComm's agreement with NetSpend and PayPal to fix the price for GPR card reloads has the effect of reducing *interbrand* competition. The dual distribution cases InComm cites in support of its position are therefore not analogous to the case at hand.

There is some indication that the Eleventh Circuit has expanded its definition of a "dual distributor" beyond the one traditionally accepted in ***antitrust law***. In *Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir. 1973)*, the Fifth Circuit considered **[*22]** an agreement allocating territory between a distributor, Gilliland, and a manufacturer, Hobart, where Gilliland also manufactured and sold goods in direct competition with Hobart. In *Jacobs*, the Eleventh Circuit referred to the agreement in *Hobart Bros*. as a "dual distribution relationship," *Jacobs, 626 F.3d at 1340 n.15*, even though the agreement restricted *interbrand*, and not *intrabrand*, competition. It therefore appears possible that the Eleventh Circuit would include cases such as the one before the Court in the class of dual distributorships, albeit not of the traditional variety.

The Court is mindful in deciding whether to apply the *per se* rule that restraints on trade "must be treated as [they] operate[] in practice rather than as arranged by skillful drafting." *Hobart Bros. Co., 471 F.2d 899* (internal quotation marks omitted) (citing *Simpson v. Union Oil Co. of Ca., 377 U.S. 13, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964)* (refusing to allow "legality for antitrust purposes [to] turn on clever draftsmanship," *id. at 25*)). However, the Court also notes once more that a finding of *per se* illegality is inappropriate unless courts have "had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." *Leegin Creative Leather Prods., Inc., 551 U.S. at 886-87 (2007)* **[*23]** (citations omitted). The decision to apply the *per se* rule, moreover, cannot be made without paying "close attention . . . to procompetitive, efficiency-creating integration that is accomplished as the result of an anticompetitive, yet ancillary, restraint." *Nat'l Bancard Corp. (NaBanco) v. VISA USA, Inc., 779 F.2d 592, 603 (11th Cir. 1986)*; *see also* *In re Terazosin Hydrochloride Antitrust Litigation, 352 F. Supp. 2d 1279, 1314 (S.D. Fla. 2005)* (noting that "ancillary" restraints resulting "in an efficiency-enhancing integration among the parties to the agreement" are not *per se* illegal).

nFinanSe has pled that the Network's price-fixing agreement has had significant anticompetitive effects. However, even on the face of nFinanSe's pleadings, it would be unreasonable to conclude that the agreement was designed as a "naked" restraint on trade — that is, as a restraint formed "with no purpose except stifling competition." *White*

Motor Co. v. United States, 372 U.S. 253, 263, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963). InComm as a distributor of GPR cards and reload packs has founded a reload network that creates a more centralized and efficient reload process for consumers and retailers and in which upstream card providers participate. The restraint at issue arguably functions within the context of a larger "efficiency-creating integration"; it is therefore not obvious that the restraint exists *only* to stifle competition. Instead, the Network agreements count among the many "restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997) (quoting Indiana Fed'n of Dentists, 476 U.S. at 458-59). For this reason, adoption of the *per se* rule would be inappropriate in this case, even though the Defendant's Network arrangement includes some disturbing, anti-competitive **[*24]** features. nFinanSe's claim that the individual Network agreements amount to *per se* illegal horizontal price fixing is therefore **DISMISSED**. In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 317 (3rd Cir. 2010) (noting that, if a plaintiff pleads "exclusively *per se* violations" of the Sherman Act, and "the court determines that the restraint at issue is sufficiently different from the *per se* archetypes to require application of the rule of reason, the plaintiff's claims will be dismissed").

2. The Network Does Not Constitute a *Per Se* Illegal Hub-and-Spoke Conspiracy.

nFinanSe has also raised the argument that the Network constitutes a *per se* illegal hub-and-spoke conspiracy. A hub-and-spoke conspiracy exists where "a central core of conspirators recruits separate groups of co-conspirators to carry out the various functions of the illegal enterprise." United States v. Chandler, 388 F.3d 796, 807 (11th Cir. 2004). The central core of conspirators form the "hub" of the wheel and move outward among the separate groups, or "spokes," to recruit. *Id.* If the various spokes of the conspiracy are unaware of each other, "the conspiracy is analogous to a 'rimless wheel,' with nothing connecting the separate spokes into a single conspiracy." United States v. Huff, 609 F.3d 1240, 1244 (11th Cir. 2010) (quoting Chandler, 388 F.3d at 807). A rimless wheel cannot form the basis for a single illegal agreement; a true hub-and-spoke **[*25]** conspiracy occurs only if "the various spokes are aware of each other and of their common aim." United States v. Seher, 562 F.3d 1344, 1367 (11th Cir. 2009); *see also* Kotteakos v. U.S., 328 U.S. 750, 755 (1946), 66 S. Ct. 1239, 90 L. Ed. 1557 (distinguishing between a hub-and-spoke conspiracy and several independent conspiracies involving "separate spokes meeting at a common center . . . without the rim of the wheel to enclose the spokes" (internal quotation mark omitted)).

The existence of a hub-and-spoke conspiracy is made more plausible if the various spokes are interdependent. Seher, 562 F.3d at 1366; *see also id.* ("To determine [the existence of] a single conspiracy, we consider (1) whether a common goal existed; (2) the nature of the underlying scheme; and (3) the overlap of participants." (quoting United States v. Edouard, 485 F.3d 1324, 1347 (11th Cir. 2007)); United States v. Perez, 489 F.2d 51, 59 n.11 (5th Cir. 1973) ("[T]he test [of a hub-and-spoke conspiracy] seems to be one of 'interdependence.'").[1] In Interstate Circuit v. United States, 306 U.S. 208, 59 S. Ct. 467, 83 L. Ed. 610 (1939), the Supreme Court found a hub-and-spoke conspiracy where "[e]ach [spoke] was aware that . . . without substantially unanimous action . . . there was risk of a substantial loss of the business and good will." In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 331 (3rd Cir. 2010) (quoting Interstates Circuit, 306 U.S. at 222); *see also id.* ("Key to *Interstate Circuit*'s conspiracy finding was its determination that each distributor's decision to accede to Interstate's demands would have been economically self-defeating unless the other distributors did **[*26]** the same.").

nFinanse contends that, like the "hub" in *Interstate Circuit*, InComm functioned as the ringleader of a single conspiracy involving NetSpend and PayPal. nFinanSe alleges that "NetSpend and PayPal knowingly worked together and with InComm to accomplish the common purpose of establishing the . . . Network with a fixed reload price." (SAC ¶ 106.) nFinanSe suggests as evidence of this conspiracy that InComm broached the subject of the Network in meetings with nFinanSe and at industry conferences. (*Id.*) Although nFinanSe acknowledges that it has no evidence of any express agreement between NetSpend and PayPal, it contends that the Network participants

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[1] In Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

"knew that InComm was similarly pursuing other GPR card providers based on (1) InComm's promotion of the proposed fixed price within the prepaid card industry and (2) InComm's negotiations with nFinanSe, which nFinanSe reasonably believes mirrored InComm's negotiations with others." (Pl.'s Resp. at 17-18.)

The Court concludes that nFinanSe has not pled sufficient facts to raise a plausible claim of a hub-and-spoke conspiracy. Contrary to nFinanSe's insinuations, InComm was well within its rights to approach potential Network participants **[*27]** about its new program, and even to advertise the program at public gatherings. That InComm launched a publicity campaign does not mean that NetSpend and PayPal knew who else would be participating in the Network, nor does it mean that one company conditioned its participation on its competitor's agreement to join. As in *Chandler*, there is no indication that either Network participant knew about the other or that either encouraged the other to join, beyond nFinanSe's conclusory claim that such knowledge was imparted as a result of InComm's advertising efforts.[2] *See* Seher, 562 F.3d at 1366-67 (finding a hub-and-spoke conspiracy because the spokes knew about each other and encouraged one another to participate in the arrangement).

Indeed, on the face of nFinanSe's pleadings, it is just as likely that NetSpend and PayPal each agreed to participate in the Network independently and because the Network offers a host of cost-cutting and product-distribution opportunities. No matter how large the Network ultimately grows and independent of which businesses InComm can recruit to participate, these opportunities will continue to exist. For example, Network participants no longer need to invest in costly reload software **[*28]** technology; participants can depend on InComm to market any necessary reload software to retailers; and participants can expect that their customers will now be able to reload their cards at a greater number of InComm-related retail locations. nFinanSe's allegation that NetSpend and PayPal elected to join the Network because they agreed to act in concert is therefore highly conclusory: the fact that both companies joined the Network is just as easily explained by each company's independent economic incentives. *See* Twombly, 550 U.S. at 557 (dismissing a "conclusory allegation" as insufficient to survive a motion to dismiss). Accordingly, nFinanSe's claim that the Network constitutes a *per se* illegal hub-and-spoke conspiracy is **DISMISSED**.

B. nFinanSe's Claim for Breach of Contract is Dismissed in Part.

1. nFinanSe has Failed to State a Claim that InComm Breached the Visa Amendment to the Discover Contract.

nFinanSe also argues that InComm has breached a so-called Visa Amendment to the parties' Discover Contract by refusing to distribute nFinanSe's Visa-branded GPR card. The Visa Amendment was either an amendment to the Discover Contract or "a new written contract . . . for the distribution of nFinanSe's Visa-branded GPR cards pursuant to the terms of the Discover Contract." (*Id.* ¶ 35.) nFinanSe claims that **[*29]** InComm incorporated the terms of the Discover Contract into the Visa Amendment, that InComm executives put this Amendment into writing via e-mail, and that the "case-by-case" qualifier InComm included in its e-mails was designed as a "mechanism to prevent InComm from distributing nFinanSe's GPR cards, at nFinanSe's behest, to stores that did not want them. The parties understood that this provision could affect the *timing* of retailer approvals but not the *fact* of retailer approvals." (SAC ¶ 36.)

InComm has moved to dismiss nFinanSe's breach of contract claim under the statute of frauds. Under Georgia's Statute of Frauds, contracts of greater than one year duration are enforceable only if in writing and signed by the

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[2] nFinanSe does allege that InComm told nFinanSe executives at a business meeting in 2011 that "NetSpend, American Express, Western Union, and MoneyGram had 'all signed' onto InComm's . . . Network with a fixed reload price of $3.95. (Compl. ¶ 103. However, even if this pleading is accepted as true, there is no indication that the same conversation occurred between InComm and NetSpend or between InComm and PayPal, or that these businesses proceeded as groups based on the understanding that otherwise there would be "a substantial loss of the business and good will." Interstate Circuit, 306 U.S. at 222.

party undertaking the contractual obligation. *O.C.G.A. § 13-5-30*. InComm argues, therefore, that the purported Visa contract between InComm and nFinanSe is not enforceable or legally binding. nFinanSe, in an apparent move away from its contention that the Visa Amendment was a written agreement, counters that "the parties fully performed the Visa contract for *1.6 years*, approximately 80% of the [contract's alleged] two-year term." (Pl.'s Resp. at 24.) InComm's alleged part performance thereby removed the barrier of the **[*30]** statute of frauds.

In the SAC, nFinanSe took the position that the Visa Amendment was a written agreement. This position is untenable. Although multiple documents may together form a valid written contract, "the necessary terms [of the contract must be] contained in signed contemporaneous writings." *Baker v. Jellibeans, Inc., 252 Ga. 458, 314 S.E.2d 874, 877 (Ga. 1984)*; *see also* *Bd. of Regents of Univ. Sys. of Ga. v. Tyson, 261 Ga. 368, 404 S.E.2d 557, 559 (Ga. 1991)* (striking down a claim for breach of contract where there was no indication of a writing containing the terms of the purported contract); *Merk v. Dekalb Cnty., 226 Ga. App. 191, 486 S.E.2d 66, 68 (Ga. Ct. App. 1997)* (citing *Bd. of Regents of Univ. Sys. of Ga., 404 S.E.2d at 559*) (same). In this case, the series of e-mails nFinanSe claims as evidence of the Visa Amendment prove nothing more than that InComm "agree[d] to add the Visa GPR product at Winn Dixie only and that any others would be dealt with on a case-by-case basis." (Pl.'s Ex. E-2.) The e-mails include no mention of terms such as the duration of the contract and evidence no meeting of the minds as to any "condition-less" distribution agreement. (Pl.'s Resp. at 23.) nFinanSe has of course offered an explanation for the "case-by-case" qualifier in the e-mail chain. However, this explanation is a tortured one; there is no reason to believe that the qualifier means anything other than that InComm would decide for itself whether to approve retailer requests for nFinanSe's Visa-branded **[*31]** GPR card. *See also* *Hugh Symons Grp., plc v. Motorola, Inc., 292 F.3d 466, 469-70 (5th Cir. 2002)* (holding e-mail exchange insufficient to satisfy statue of frauds where the messages at issue omitted vital terms of the purported contract); *Toghiyany v. AmeriGas Propane, Inc., 309 F.3d 1088, 1091 (8th Cir. 2002)* (same); *S&S Textiles Intern. v. Steve Weave, Inc., No. 00 CIV.8391 DLC, 2002 U.S. Dist. LEXIS 14742, 2002 WL 1837999, at *5 (same)*.

nFinanSe attempts to rehabilitate its interpretation of the e-mails by contending that Mr. Skiba used the term "Product Launch" in his message to refer to a term in the Discover Contract. In that contract, the term "Program Launch" is defined as "the date that InComm commences offering the Program to potential Purchasers." (Pl.'s Resp. at 21.) Accordingly, any use of the term "Launch" therefore "presupposes the fact of distribution and only addresses the timing." (*Id.*)

nFinanSe's reading of Mr. Skiba's e-mail is not plausible. The message expressly states that any further "Product Launch" will be done on a case-by-case basis "*per Lisa Liban's comments*." (Compl. Ex. E-1) (emphasis added). Ms. Liban's e-mail had simply confirmed that, beyond Winn Dixie, any retailer requests for nFinanSe's GPR card "would be dealt with on a case-by-case basis." (Compl. Ex. E-2.) Ms. Liban made no mention of any "Product **[*32]** Launch" or Discover Contract. She was speaking in plain language and clearly intended to communicate that InComm would not approve further Visa card distribution if such distribution did not meet InComm's "strategic goals." (Compl. Ex. E-1.) Furthermore, even if Mr. Skiba intended his reference to a "Product Launch" to have some formal contractual meaning, that term is nowhere to be found in the Discover Contract. Instead, the Contract refers to a "*Program* Launch."[3]

nFinanSe has therefore failed to raise a claim that the Visa Amendment was a written agreement in satisfaction of the Statute of Frauds. However, under Georgia law, the Statute of Frauds does not apply "where there has been such part performance of the contract as would render it a fraud of the party refusing to comply, if the court did not compel a performance." *Smith v. Cox, 277 S.E.2d 512, 564 (Ga. 1981)*. Part performance will only except a contract from the Statute if it is "shown [to be] consistent with the presence of a contract and inconsistent with the lack of a contract." *R.T. Patterson Funeral Home, Inc. v. Head, 215 Ga. App. 578, 451 S.E.2d 812, 817 (Ga. Ct.*

[3] nFinanSe also claims "[a]s further evidence of the Visa Amendment . . . [that], in late 2010, InComm charged and collected from nFinanSe $65,000 for warehouse security upgrades that InComm told nFinanSe were required *by Visa*." (Compl. ¶ 39.) Such evidence is of no consequence: security upgrades required by Visa were necessary because InComm was distributing nFinanSe's Visa cards on a case-by-case basis, not because InComm had agreed to distribute the cards on the same terms as the Discover Contract.

App. 1994). The part performance must therefore be "essential to the contract, that is, required by its terms." Hudson v. Venture Indus., Inc., 243 Ga. 116, 252 S.E.2d 606, 608 (Ga. 1979).

nFinanSe has claimed that InComm performed its responsibilities under the terms of the Visa Amendment for 1.6 **[*33]** years. nFinanSe alleges that InComm distributed its Visa-branded GPR cards to retailers without exception until "nFinanSe rebuffed InComm's price-fixing demands." (Pl.'s Resp. at 23.) nFinanSe pleads that InComm's part performance indicates that the Visa Amendment was an agreement incorporating "every jot and tittle of the 37-page Discover Card agreement." (Pl.'s Resp. at 25.)

nFinanSe pleadings regarding InComm's part performance are once again conclusory. The fact that InComm distributed nFinanSe's Visa-branded GPR card for over a year indicates nothing more than that InComm was approving retailer requests for the card on a "case-by-case" basis. That InComm distributed the Visa-branded card for some period of time does not mean that the Visa Amendment incorporated the Discover Contract or that it included a two-year term or an unconditional distribution agreement. InComm's "part performance" was in no way required by an unconditional distribution agreement or a two-year contract term. InComm merely did what it said it would do in its e-mails, namely, distribute nFinanSe's Visa-branded card as it saw fit. Since there is no indication on the face of nFinanSe's SAC that InComm breached the terms of any written **[*34]** or oral Visa Amendment, nFinanSe's claim for breach of the Visa Amendment is **DISMISSED**. Additionally, since nFinanSe has failed to plead facts indicating the existence of a "condition-less" Visa Amendment, any resources it expended in reliance on such a contract were unreasonable. O.C.G.A. § 13-3-44 (noting that a promise must be fulfilled if the promisor "reasonably expect[ed] [the promise] to induce action . . . on the part of the promisee"); Johnson v. Univ. Health Servs., Inc., 161 F.3d 1334, 1340 (11th Cir. 1998) ("Promissory estoppel requires that reliance on the promise be reasonable."). Accordingly, nFinanSe's claim for promissory estoppel in the context of the Visa Amendment is **DISMISSED**.

2. nFinanSe has Pled Sufficient Facts to State a Claim that InComm Breached the Discover Contract and the Coinstar Discover Contract.

nFinanSe has also alleged that InComm breached "all of its contracts with nFinanSe by, *inter alia*, breaching its account management and maintenance obligations, failing to deal with nFinanSe on a good-faith basis as the parties' contracts require, and by failing to properly distribute nFinanSe's product to a significant number of stores of its largest retailer, Dollar General, during December 2011." (SAC ¶ 91.) nFinanSe alleges that InComm officers have "ceased communicating with nFinanSe" since the commencement **[*35]** of the present lawsuit, "despite the fact that communication between the parties is necessary for full performance of the contracts." (*Id.*) InComm responds that nFinanSe's claim fails because nFinansSe "fails to specify which provisions of which 'contracts' it alleges were breached and fails to allege that it has suffered any damage whatsoever from the alleged breaches." (Mot. Dismiss at 18.)

Under *Twombly*, a plaintiff survives a motion to dismiss if its pleading "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). Here, nFinanSe pleads that InComm has ceased communicating with nFinanSe executives regarding the details of their written distribution contracts and failed to "properly distribute" nFinanSe's product to its largest retailer. nFinanSe claims that as a result of this breach, its product was not available in sufficient or expected quantity "during . . . the most important sales month of the year." (SAC ¶ 91.)

Accepting nFinanSe's pleading as true, such behavior on the part of InComm would surely constitute a breach of the Discover Contract's provision that InComm "use commercially reasonable efforts **[*36]** and proceed in good faith to execute the agreement, test the product and launch the Program." *See* Ernie Haire Ford, Inc. v. Ford Motor Co., 260 F.3d 1285, 1291 (11th Cir. 2001) ("With the implied covenant [of good faith and fair dealing], one party cannot capriciously exercise discretion . . . so as to thwart the contracting parties' reasonable expectations."). Such behavior would also constitute a breach of the implied covenant of good faith and fair dealing in the written Coinstar Discover Contract, *id.*, which nFinanSe has pled InComm assumed in May 2010. Since the Discover Contract and Coinstar Discover Contract are among the many contracts nFinanSe alleges has been breached, nFinanSe has pled sufficient facts to state a plausible claim for relief. Accordingly, InComm's motion to dismiss nFinanSe's claim for breach of the Discover Contract and Coinstar Discover Contract is **DENIED**.

3. nFinanSe has Pled Sufficient Facts to State a Claim that InComm Breached the Coinstar Visa Amendment.

In a final claim for breach of contract, nFinanSe has alleged that InComm breached a separate contract called the Coinstar Visa Amendment. The Coinstar Visa Amendment was originally between nFinanSe and Coinstar and amended a prior agreement called the the Coinstar Discover Contract. The Coinstar Discover Contract was similar to the InComm Discover Contract, and the Amendment "stated that distribution of nFinanSe's **[*37]** Visa-branded cards would be covered by the same Coinstar Discover Contract governing distribution of nFinanSe's Discover-branded cards." (SAC ¶ 43.) nFinanSe alleges that the Amendment was in writing. (*Id.* ¶ 44.) When InComm acquired Coinstar's e-payment business in May 2010, it assumed the Coinstar Discover Contract and the Coinstar Visa Amendment. When InComm stopped distributing nFinanSe's Visa-branded card in 2011, it was in breach of its assumed Coinstar Visa Amendment.

InComm's Motion to Dismiss does not address its alleged breach of the Coinstar Visa Amendment. InComm states only that nFinanSe, in claiming that InComm breached all of its nFinanSe distribution contracts, "fails to specify which provisions of which 'contracts' it alleges were breached and fails to allege that it has suffered any damage whatsoever from the alleged breaches." (Mot. Dismiss at 18.) InComm's argument clearly fails in the context of the alleged written Coinstar Visa Amendment: nFinanSe has made clear the terms of the Amendment, claimed that InComm assumed the Amendment in May 2010, explained that InComm breached the Amendment by ceasing to distribute its Visa-branded GPR card to "any new retailers," (SAC ¶ 94), and described the various ways in which it has been damaged by this breach (*id.*). At the motion to dismiss stage, all that is needed for **[*38]** a complaint to go forward is a plausible claim for relief. Here, nFinanSe has pled sufficient facts to state such a claim. InComm's Motion to Dismiss nFinanSe's claim for breach of the Coinstar Visa Amendment is therefore **DENIED**.

IV. CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss [Doc. 57] is **GRANTED IN PART** and **DENIED IN PART**. Defendant's motion to dismiss Plaintiff's claim for a *per se* violation of the Sherman Act is **GRANTED**. Defendant's motion to dismiss Plaintiff's claim for breach of the Visa Amendment is also **GRANTED**. Defendant's motion to dismiss Plaintiff's claims for breach of the Discover Contract, the Coinstar Discover Contract and the Coinstar Visa Amendment is **DENIED**.

IT IS SO ORDERED this 24th day of July, 2012.

/s/ Amy Totenberg

Amy Totenberg

United States District Judge

Ruiz v. Suntrust Mortg., Inc.

United States District Court for the Eastern District of California

July 24, 2012, Decided; July 24, 2012, Filed

CASE NO. CV F 12-0878 LJO BAM

Reporter
2012 U.S. Dist. LEXIS 103239 *; 2012 WL 3028001

FLORIDA RUIZ, Plaintiff, vs. SUNTRUST MORTGAGE, INC., et al., Defendants.

Subsequent History: Dismissed without prejudice by *Ruiz v. Suntrust Mortg., Inc., 2012 U.S. Dist. LEXIS 107703 (E.D. Cal., Aug. 1, 2012)*

Prior History: *Ruiz v. Suntrust Mortg., Inc., 2012 U.S. Dist. LEXIS 101282 (E.D. Cal., July 20, 2012)*

Core Terms

foreclosure, allegations, trust deed, fraudulent, recorded, documents, notice, default, promissory note, quiet title, cause of action, foreclose, punitive damages, borrower, declaratory relief, lender, fails, irregularities, initiate, misrepresentation, indebtedness, robo-signing, purported, unfair competition, business practice, securitization, particularity, defendants', references, rights

Counsel: **[*1]** For Florida Ruiz, Plaintiff: Adlore V. Clarambeau, Brian Stuart, NCAED, ARYA LAW CENTER, P.C., Costa Mesa, CA.

For Sun Trust Mortgage, Inc., a Virginia Corporation, Mortgage Electronic Registration System, Inc., a Delaware Corporation, Federal National Mortgage Association, a Government Sponsored Enterprise, Defendants: Bryan M. Leifer, Jennifer K. Weinhold, Akerman Senterfitt LLP, Los Angeles, CA.

Judges: Lawrence J. O'Neill, UNITED STATES DISTRICT JUDGE.

Opinion by: Lawrence J. O'Neill

Opinion

ORDER ON DEFENDANTS' F.R.Civ.P. 12 MOTION TO DISMISS

(Doc. 6.)

INTRODUCTION

Several defendants [1] seek to dismiss as legally barred and lacking merit plaintiff Florida Ruiz' ("Ms. Ruiz'") claims to challenge foreclosure of her Bakersfield property ("property"). Ms. Ruiz responds that defendants' wrongful conduct precludes foreclosure of her property. This Court considered defendants' *F.R.Civ.P. 12(b)(6)* motion to dismiss on the record without a hearing, pursuant to *Local Rule 230(g)*. For the reasons discussed below, this Court DISMISSES this action against defendants.

BACKGROUND[2]

Ms. Ruiz' Property Loans And Foreclosure

On April 1, 2007, Mr. Ruiz obtained from SunTrust a $189,592 loan secured by a deed of trust ("first DOT") on the property and which was recorded on April 13, 2007. [3] The first DOT identifies SunTrust as lender and MERS as nominee of SunTrust and SunTrust's successors and assigns and as beneficiary under the deed of trust.

Also on April 1, 2007, Ms. Ruiz obtained a second $47,398 loan secured by a second deed of trust on the property and which was also recorded on April 13, 2007. That deed of trust identifies SunTrust as lender and MERS as nominee of SunTrust and SunTrust's successors and assigns and beneficiary under the deed of trust.

After Ms. Ruiz defaulted, Recontrust Company ("Recontrust") recorded **[*3]** a notice of default and election to sell under deed of trust on May 15, 2009. After Ms. Ruiz failed to cure her default, Recontrust recorded a notice of trustee's sale on January 12, 2010. The property was sold at foreclosure on March 4, 2010, and Recontrust recorded a trustee's deed upon sale on March 12, 2010.

The foreclosure sale was rescinded, and a notice of rescission of trustee's deed upon sale was recorded on December 8, 2011.

By an August 18, 2011 assignment of deed of trust, MERS assigned to SunTrust all beneficial interest under the first DOT. The assignment of deed of trust was recorded on September 2, 2011 and is signed by MERS Vice President Doyle Mitchell ("Mr. Mitchell").

On September 16, 2011, the Wolf Law Firm recorded a second notice of default and election to sell under deed of trust for the property. The Wolf Law Firm substituted as trustee under the first DOT on September 30, 2011. The substitution of trustee was recorded on February 15, 2012. The Wolf Law Firm caused a notice of trustee's sale of the property to be recorded on February 15, 2012.

Ms. Ruiz' Claims

Prior to removal to this Court, Ms. Ruiz filed her original complaint in state court on February 22, 2012. **[*4]** Ms. Ruiz proceeds on her FAC, filed on May 14, 2012, to challenge SunTrust's authority "to initiate and complete foreclosure" in that SunTrust "is neither the Promissory Note Holder, nor the actual Beneficiary of the Deed of Trust." The FAC alleges that SunTrust "cannot show proper receipt, possession, transfer, negotiations, assignment and ownership of the borrowers' Promissory Note and Deed of Trust." The FAC continues that "none of the parties

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[1] The defendants seeking *F.R.Civ.P. 12(b)(6)* dismissal are SunTrust Mortgage, Inc. ("SunTrust"), Mortgage Electronic Registration Systems, Inc. ("MERS"), and Federal **[*2]** National Mortgage Association ("Fannie Mae") and will be referred to collectively as "defendants."

[2] The factual recitation is derived generally from Ms. Ruiz' First Amended Complaint ("FAC"), the target of defendants' challenges, as well as other matters which this Court may consider on a *F.R.Civ.P. 12(b)(6)* motion to dismiss.

[3] Documents pertaining to Ms. Ruiz' loans and property foreclosure were recorded with the Kern County Official Records.

to neither the securitization transaction, nor any of the Defendants in this case, hold a perfected and secured claim in the Property." The FAC alleges claims of wrongful foreclosure, fraud, slander of title, quiet title and California statutory violations. The claims will be discussed in greater detail below.

DISCUSSION

F.R.Civ.P. 12(b)(6) Motion To Dismiss Standards

Defendants characterize the FAC's claims as lacking merit to warrant dismissal.

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the **[*5]** claims." *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*; *Gilligan v. Jamco Development Corp., 108 F.3d 246, 249 (9th Cir. 1997)*. A *F.R.Civ.P. 12(b)(6)* dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*; *Graehling v. Village of Lombard, Ill., 58 F.3d 295, 297 (7th Cir. 1995)*. A *F.R.Civ.P. 12(b)(6)* motion "tests the legal sufficiency of a claim." *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*.

In addressing dismissal, a court must: (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-338 (9th Cir. 1996)*. Nonetheless, a court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Securities Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (citation omitted). A court "need **[*6]** not assume the truth of legal conclusions cast in the form of factual allegations," *U.S. ex rel. Chunie v. Ringrose, 788 F.2d 638, 643, n. 2 (9th Cir.1986)*, and must not "assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated . . . laws in ways that have not been alleged." *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526, 103 S.Ct. 897, 74 L. Ed. 2d 723 (1983)*. A court need not permit an attempt to amend if "it is clear that the complaint could not be saved by an amendment." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005)*.

A plaintiff is obliged "to provide the 'grounds' of his 'entitlement to relief' [which] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly, 550 U.S. 544,127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)* (internal citations omitted). Moreover, a court "will dismiss any claim that, even when construed in the light most favorable to plaintiff, fails to plead sufficiently all required elements of a cause of action." *Student Loan Marketing Ass'n v. Hanes, 181 F.R.D. 629, 634 (S.D. Cal. 1998)*. **[*7]** In practice, a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly, 550 U.S. at 562, 127 S.Ct. at 1969* (quoting *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984))*.

In *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937,1949, 173 L. Ed. 2d 868 (2009)*, the U.S. Supreme Court explained:

> . . . a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. (Citations omitted.)

After discussing *Iqbal*, the Ninth Circuit summarized: "In sum, for a complaint to survive [dismissal], the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009)* **[*8]** (quoting *Iqbal, 556 U.S. 662, 129 S.Ct. at 1949*).

The U.S. Supreme Court applies a "two-prong approach" to address dismissal:

> First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not "show[n]"-"that the pleader is entitled to relief." *Fed. Rule Civ. Proc. 8(a)(2)*.
>
> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they **[*9]** must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 556 U.S. 662, 129 S.Ct. at 1949-1950.

Moreover, a court may consider exhibits submitted with the complaint. *Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987)*;*Van Winkle v. Allstate Ins. Co., 290 F.Supp.2d 1158, 1162, n. 2 (C.D. Cal. 2003)*. A "court may consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)*. A court may treat such a document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under *Rule 12(b)(6)*." *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir.2003)*. Such consideration prevents "plaintiffs from surviving a *Rule 12(b)(6)* motion by deliberately omitting reference to documents upon which their claims are based." *Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998)*. **[*10]** [4] A "court may disregard allegations in the complaint if contradicted by facts established by exhibits attached to the complaint." *Sumner Peck Ranch v. Bureau of Reclamation, 823 F.Supp. 715, 720 (E.D. Cal. 1993)* (citing *Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir.1987))*.

With these standards in mind, this Court turns to defendants' challenges to the FAC's claims.

Failure To Tender

The FAC's claims challenge foreclosure of the property. In particular, the FAC's (first) wrongful foreclosure claim alleges that SunTrust "does not have the authority to initiate foreclosure as it is not truly the beneficiary of the Deed of Trust" and "lacks the authority to foreclose on the Plaintiff's Property as it is not the Beneficiary **[*11]** of the Deed of Trust." The claim appears to rest on Ms. Ruiz' assertion that MERS, not Suntrust, is the first DOT beneficiary and "Suntrust does not have the authority to tell Defendant Wolf Firm to initiate foreclosure."

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[4] "We have extended the 'incorporation by reference' doctrine to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint." *Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005)* (citing *Parrino, 146 F.3d at 706*).

Defendants contend that the FAC's claims challenging foreclosure sale are barred by Ms. Ruiz' failure to tender amounts owed on her loans. Mr. Ruiz responds that "[i]t would be inequitable to require the Plaintiff to tender to an entity that does not have the right to foreclose."

"A tender is an offer of performance made with the intent to extinguish the obligation." *Arnolds Management Corp. v. Eischen, 158 Cal.App.3d 575, 580, 205 Cal.Rptr. 15 (1984)* (citing *Cal. Civ. Code, § 1485*; *Still v. Plaza Marina Commercial Corp., 21 Cal.App.3d 378, 385, 98 Cal.Rptr. 414 (1971))*. "A tender must be one of full performance . . . and must be unconditional to be valid." *Arnolds Management, 158 Cal.App.3d at 580, 205 Cal.Rptr. 15*. "Nothing short of the full amount due the creditor is sufficient to constitute a valid tender, and the debtor must at his peril offer the full amount." *Rauer's Law etc. Co. v. S. Proctor Co., 40 Cal.App. 524, 525, 181 P. 71 (1919)*.

A defaulted borrower is **[*12]** "required to allege tender of the amount of [the lender's] secured indebtedness in order to maintain any cause of action for irregularity in the sale procedure." *Abdallah v. United Savings Bank, 43 Cal.App.4th 1101, 1109, 51 Cal.Rptr.2d 286 (1996)*, *cert. denied*, *519 U.S. 1081, 117 S. Ct. 746, 136 L. Ed. 2d 684 (1997)*. In *FPCI RE-HAB 01 v. E & G Investments, Ltd., 207 Cal.App.3d 1018, 1021, 255 Cal.Rptr. 157 (1989)*, the California Court of Appeal explained:

> . . . generally "an action to set aside a trustee's sale for irregularities in sale notice or procedure should be accompanied by an offer to pay the full amount of the debt for which the property was security." . . . . This rule . . . is based upon the equitable maxim that a court of equity will not order a useless act performed. . . . "A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust." . . . The rationale behind the rule is that if plaintiffs could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the plaintiffs. (Citations omitted.)

An action to set aside a foreclosure sale, unaccompanied **[*13]** by an offer to redeem, does not state a cause of action which a court of equity recognizes. *Karlsen v. American Sav. & Loan Assn., 15 Cal.App.3d 112, 117, 92 Cal.Rptr. 851 (1971)*. The basic rule is that an offer of performance is of no effect if the person making it is not able to perform. *Karlsen, 15 Cal.App.3d at118, 92 Cal.Rptr. 851* (citing *Cal. Civ. Code, § 1495*). Simply put, if the offeror "is without the money necessary to make the offer good and knows it" the tender is without legal force or effect. *Karlsen, 15 Cal.App.3d at118, 92 Cal.Rptr. 851* (citing several cases). "It would be futile to set aside a foreclosure sale on the technical ground that notice was improper, if the party making the challenge did not first make full tender and thereby establish his ability to purchase the property." *United States Cold Storage v. Great Western Savings & Loan Assn., 165 Cal.App.3d 1214, 1224, 212 Cal.Rptr. 232 (1985)*. "A cause of action 'implicitly integrated' with the irregular sale fails unless the trustor can allege and establish a valid tender." *Arnolds Management, 158 Cal.App.3d at 579, 205 Cal.Rptr. 15*. "Plaintiff's failure to allege that he has tendered or can tender the amount **[*14]** of his indebtedness renders his wrongful foreclosure claim deficient." *Grant v. Aurora Loan Services, Inc., 736 F.Supp.2d 1257, 1270 (C.D. Cal. 2010)*.

"It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured." *Shimpones v. Stickney, 219 Cal. 637, 649, 28 P.2d 673 (1934)*; *see* *Mix v. Sodd, 126 Cal.App.3d 386, 390, 178 Cal.Rptr. 736 (1981)* ("a mortgagor in possession may not maintain an action to quiet title, even though the debt is unenforceable"); *Aguilar v. Bocci, 39 Cal.App.3d 475, 477, 114 Cal.Rptr. 91 (1974)* (trustor is unable to quiet title "without discharging his debt"). "A party may not without payment of the debt, enjoin a sale by a trustee under a power conferred by a deed of trust, or have his title quieted against the purchaser at such a sale, even though the statute of limitations has run against the indebtedness." *Sipe v. McKenna, 88 Cal.App.2d 1001, 1006, 200 P.2d 61 (1948)*.

Moreover, to obtain "rescission or cancellation, the rule is that the complainant is required to do equity, as a condition to his obtaining relief, by restoring to the defendant everything of value which the plaintiff has received in **[*15]** the transaction. . . . The rule applies although the plaintiff was induced to enter into the contract by the fraudulent representations of the defendant." *Fleming v. Kagan, 189 Cal.App.2d 791, 796, 11 Cal.Rptr. 737 (1961)*. "A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust." *Karlsen, 15 Cal.App.3d at 117, 92 Cal.Rptr. 851*. Analyzing "trust deed nonjudicial foreclosure sales issues in the context of common law contract principles" is "unhelpful" given "the comprehensive statutory scheme regulating nonjudicial foreclosure sales." *Residential Capital v. Cal-Western Reconveyance Corp., 108 Cal.App.4th 807, 820, 821, 134 Cal.Rptr.2d 162 (2003)*.

"The rules which govern tenders are strict and are strictly applied." *Nguyen v. Calhoun, 105 Cal.App.4th 428, 439, 129 Cal.Rptr.2d 436 (2003)*. "The tenderer must do and offer everything that is necessary on his part to complete the transaction, and must fairly make known his purpose without ambiguity, and the act of tender must be such that it needs only acceptance by the one to whom it is made to complete the transaction." *Gaffney v. Downey Savings & Loan Assn., 200 Cal.App.3d 1154, 1165, 246 Cal.Rptr. 421 (1988)*. **[*16]** The debtor bears "responsibility to make an unambiguous tender of the entire amount due or else suffer the consequence that the tender is of no effect." *Gaffney, 200 Cal.App.3d at 1165, 246 Cal.Rptr. 421*.

Defendants are correct that the "tender rule" applies "to any causes of action that derive from the wrongful foreclosure allegations or seek redress from foreclosure." Neither the FAC nor record references Ms. Ruiz' tender of indebtedness or meaningful ability to do so. In fact, the record reflects Ms. Ruiz' defaults and failure to cure them to indicate an inability to tender amounts owed on her loans. In addition, Mr. Ruiz fails to substantiate inapplicability of the tender rule based on MERS' status and inequity to require tender. Inequity results with Mr. Ruiz' attempts to thwart defendants' foreclosure rights given her continuing default. Without Ms. Ruiz' meaningful tender, Ms. Ruiz seeks empty remedies, not capable of being granted, to support dismissal of the FAC's claims seeking to challenge foreclosure.

Foreclosure Proceedings

Defendants challenge the FAC's allegations regarding foreclosure or related irregularities.

Under California law, a lender may pursue non-judicial foreclosure **[*17]** upon default with a deed of trust with a power of sale clause. "Financing or refinancing of real property is generally accomplished in California through a deed of trust. The borrower (trustor) executes a promissory note and deed of trust, thereby transferring an interest in the property to the lender (beneficiary) as security for repayment of the loan." *Bartold v. Glendale Federal Bank, 81 Cal.App.4th 816, 821, 97 Cal.Rptr.2d 226 (2000)*. A deed of trust "entitles the lender to reach some asset of the debtor if the note is not paid." *Alliance Mortgage Co. v. Rothwell, 10 Cal.4th 1226, 1235, 44 Cal.Rptr.2d 352, 900 P.2d 601 (1995)*.

If a borrower defaults on a loan and the deed of trust contains a power of sale clause, the lender may non-judicially foreclose. *See* *McDonald v. Smoke Creek Live Stock Co., 209 Cal. 231, 236-237, 286 P. 693 (1930)*. The California Court of Appeal has explained non-judicial foreclosure under the applicable California Civil Code sections:

> The comprehensive statutory framework established to govern nonjudicial foreclosure sales is intended to be exhaustive. . . . It includes a myriad of rules relating to notice and right to cure. It would be inconsistent with the comprehensive **[*18]** and exhaustive statutory scheme regulating nonjudicial foreclosures to incorporate another unrelated cure provision into statutory nonjudicial foreclosure proceedings.

Moeller v. Lien, 25 Cal.App.4th 822, 834, 30 Cal.Rptr.2d 777 (1994); *see* *I.E. Assoc. v. Safeco Title Ins. Co., 39 Cal.3d 281, 285, 216 Cal.Rptr. 438, 702 P.2d 596 (1985)* ("These provisions cover every aspect of exercise of the power of sale contained in a deed of trust.")

Non-judicial foreclosure sales "are governed by a 'comprehensive' statutory scheme. This scheme, which is found in Civil Code *sections 2924 through 2924k*, evidences a legislative intent that a sale which is properly conducted 'constitutes a final adjudication of the rights of the borrower and lender.'" *Royal Thrift and Loan Co. v. County Escrow, Inc., 123 Cal.App.4th 24, 32, 20 Cal.Rptr.3d 37 (2004)* (quoting *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc., 85 Cal.App.4th 1279, 1283-1284, 102 Cal.Rptr.2d 711*, fn. omitted (2001)).

Under subparagraph (a)(1) of *California Civil Code section 2924* ("*section 2924*"), a "trustee, mortgagee or beneficiary or any of their authorized agents" may conduct the foreclosure process. Under *section 2924(b)(4)*, a "person authorized to record **[*19]** the notice of default or the notice of sale" includes "an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee." "Upon default by the trustor, the beneficiary may declare a default and proceed with a nonjudicial foreclosure sale." *Moeller, 25 Cal.App.4th at 830, 30 Cal.Rptr.2d 777*.

"A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender." *Moeller, 25 Cal.App.4th at 831, 30 Cal.Rptr.2d 777*. "As a general rule, a trustee's sale is complete upon acceptance of the final bid." *Nguyen v. Calhoun, 105 Cal.App.4th 428, 440-441, 129 Cal.Rptr.2d 436 (2003)*. "If the trustee's deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly; this presumption is conclusive as to a bona fide purchaser." *Moeller, 25 Cal.App.4th at 831, 30 Cal.Rptr.2d 777* (citations omitted). "A nonjudicial foreclosure sale is accompanied by a common law presumption that **[*20]** it 'was conducted regularly and fairly.'" *Melendrez v. D & I Investment, Inc., 127 Cal.App.4th 1238, 1258, 26 Cal.Rptr.3d 413 (2005)* (quoting *Brown v. Busch, 152 Cal.App.2d 200, 204, 313 P.2d 19 (1957))*. "This presumption may only be rebutted by substantial evidence of prejudicial procedural irregularity." *Melendrez, 127 Cal.App.4th at 1258, 26 Cal.Rptr.3d 413*.

To challenge foreclosure, "it is necessary for the complaint to state a case within the code sections for which reason it is essential to allege the facts affecting the validity and invalidity of the instrument which is attacked." *Kroeker v. Hurlbert, 38 Cal.App.2d 261, 266, 101 P.2d 101 (1940)*. A "trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained where there has been an illegal, fraudulent or wilfully oppressive sale of property under a power of sale contained in a mortgage or deed of trust." *Munger v. Moore, 11 Cal.App.3d 1, 7, 89 Cal.Rptr. 323 (1970)*. As the California Supreme Court explained decades ago:

> It is the general rule that courts have power to vacate a foreclosure sale where there has been fraud in the procurement of the foreclosure decree or where the sale has been improperly, unfairly **[*21]** or unlawfully conducted, or is tainted by fraud, or where there has been such a mistake that to allow it to stand would be inequitable to purchaser and parties. Sham bidding and the restriction of competition are condemned, and inadequacy of price when coupled with other circumstances of fraud may also constitute ground for setting aside the sale.

Bank of America Nat. Trust & Savings Ass'n v. Reidy, 15 Cal.2d 243, 248, 101 P.2d 77 (1940).

Robo-Signing

The FAC makes references to robo-signing loan and foreclosure documents and identifies Mr. Mitchell as a "robo-signer." Defendants characterize such allegations as "nonsensical" to the effect that Ms. Ruiz seeks to sue defendants because "they forged their own signatures on documents to which she was not even a party." Defendants contend that the FAC "fails to establish how [Ms. Ruiz] has standing to challenge the validity of an agent's signature on any of the recorded documents." Defendants note that "[t]here is no requirement that nonjudicially foreclosing parties 'prove' their authority to foreclose." Defendants further challenge "robo-signing allegations" as conclusory. *See* *Cerecedes v. U.S. Bankcorp, 2011 U.S. Dist. LEXIS 51452, 2011 WL 1666938, at *4 (C.D. Cal. 2011)* **[*22]** ("generic allegations of robo-signing and other unspecified irregularities are insufficient to place defendants on notice of how defendants violated those statutes").

The FAC lacks legally cognizable claims based on "robo-signing." "Robo-signing" allegations fail to establish a necessary statutory violation for wrongful foreclosure. The FAC fails to establish how alleged "robo-signing" precludes foreclosure of the property.

Standing To Foreclose

Defendants fault that FAC's attempt to challenge standing to foreclose. Defendants note that the Wolf Law Firm recorded the second notice of default as an authorized agent for MERS as first DOT beneficiary. Defendants continue that after the Wolf Law Firms substituted as trustee, it recorded a trustee's sale notice. A trustee's duties include "to initiate nonjudicial foreclosure on the property upon the trustor's default, resulting in a sale of the property." *Kachlon v. Markowitz, 168 Cal.App.4th 316, 334, 85 Cal.Rptr.3d 532 (2008)*. Defendants explain that MERS as beneficiary properly substituted the Wolf Law Firm as trustee to initiate foreclosure. "The beneficiary may make a substitution of trustee . . . to conduct the foreclosure and sale." **[*23]** *Kachlon, 168 Cal.App.4th at 334, 85 Cal.Rptr.3d 532*.

Ms. Ruiz claims to challenge MERS' authority to assign the first DOT on August 18, 2011 because "both the Promissory Note and Deed of Trust are extinguished" at the March 4, 2010 trustee's sale. Mr. Ruiz asserts "when MERS attempted to assign the Deed of Trust to Defendant Suntrust . . . , there was nothing to assign."

The FAC raises no legitimate grounds to challenge standing to foreclose on the property. The March 4, 2010 trustee's sale was rescinded to render it a nullity. The FAC points to no statutory irregularities to disrupt standing to foreclose. The FAC's standing allegations are unavailing.

Securitization

Defendants challenge the FAC's allegations that securitization of Ms. Ruiz' loans was unlawful to preclude foreclosure. Defendants note that sale of Ms. Ruiz' loans had "no effect on her obligations." The "request for declaratory relief is based on the erroneous theory that all defendants lost their power of sale pursuant to the deed of trust when the original promissory note was assigned to a trust pool. This argument is both unsupported and incorrect." *Hafiz v. Greenpoint Mortg. Funding, Inc., 652 F.Supp.2d 1039, 1043 (N.D. Cal. 2009)*. **[*24]** "[C]ourts have uniformly rejected that securitization of a mortgage loan provides the mortgagor a cause of action." *Velez v. The Bank Of New York Mellon, 2011 U.S. Dist. LEXIS 15481, 2011 WL 572523, at *4 (D. Hi. 2011)* ("The court also rejects Plaintiff's contention that securitization in general somehow gives rise to a cause of action - Plaintiff points to no law or provision in the mortgage preventing this practice, and otherwise cites to no law supporting that securitization can be the basis of a cause of action."

Defendants are correct that securitization of Ms. Ruiz' loans does not diminish the underlying power of sale upon Ms. Ruiz' default. The FAC's securitization allegations fail to support a necessary irregularity to question foreclosure of the property. Ms. Ruiz' opposition papers concede that "securitization has no affect [sic] on the power of sale clause on a deed of trust."

Note Possession

Defendants further attack FAC allegations that foreclosure is dependent on possession of Ms. Ruiz' original notes as well as joint possession of the notes and deeds of trust.

"Under California law, there is no requirement for the production of an original promissory note prior to initiation of a nonjudicial foreclosure. **[*25]** . . . Therefore, the absence of an original promissory note in a nonjudicial foreclosure does not render a foreclosure invalid." *Pantoja v. Countrywide Home Loans, Inc., 640 F.Supp.2d 1177, 1186 (N.D. Cal. 2009)*. "Pursuant to *section 2924(a)(1) of the California Civil Code*, the trustee of a Deed of Trust has the right to initiate the foreclosure process. Production of the original note is not required to proceed with a non-judicial foreclosure." *Hafiz, 652 F.Supp.2d at 1043* (citation omitted).

"Under Civil Code *section 2924*, no party needs to physically possess the promissory note." *Sicairos v. NDEX West, LLC, 2009 U.S. Dist. LEXIS 11223, 2009 WL 385855, *3 (S.D. Cal. 2009)* (citing *Cal. Civ. Code, § 2924(a)(1)*). Rather, "[t]he foreclosure process is commenced by the recording of a notice of default and election to sell by the trustee." *Moeller, 25 Cal.App.4th at 830, 30 Cal.Rptr.2d 777*. "The trustee has the power and the duty to initiate foreclosure proceedings on the property upon the trustor's default, resulting in a sale of the property." *Hafiz, 652*

F.Supp.2d at 1043 (citation omitted). An "allegation that the trustee did not have the original note or had not received it is insufficient to render the foreclosure **[*26]** proceeding invalid." Neal v. Juarez, 2007 U.S. Dist. LEXIS 98068, 2007 WL 2140640, *8 (S.D. Cal. 2007).

Defendants are correct that inclusion of Ms. Ruiz' promissory notes in an investor pool did not preclude foreclosure. The FAC's references to separating Mr. Ruiz' promissory notes from deeds of trust are unavailing given the absence of need to produce original promissory notes. The clear authority is that production of original promissory notes is unnecessary to initiate foreclosure. FAC allegations that defendants violated their pooling and service agreement ("PSA") are insufficient given Ms. Ruiz is not a PSA party and lacks grounds to enforce PSA provisions.

Moreover, Ms. Ruiz fails to substantiate her claim that "assignment of a Deed of Trust separate from the Promissory Note is not a valid assignment" and that "only the holder of the promissory note can foreclose." The authorities discussed above demonstrate the contrary.

MERS Authority

Defendants further challenge FAC allegations to the effect that MERS lacked authority to execute documents to render the documents fraudulent. Defendants note the absence of facts to support Ms. Ruiz' prejudice from foreclosure irregularities.

The California Court of Appeal has **[*27]** explained that prejudice is required for a wrongful foreclosure claim:

> We also note a plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests. . . . Even if MERS lacked authority to transfer the note, it is difficult to conceive how plaintiff was prejudiced by MERS's purported assignment, and there is no allegation to this effect. Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely substituted one creditor for another, without changing her obligations under the note. . . . If MERS indeed lacked authority to make the assignment, the true victim was not plaintiff but the original lender, which would have suffered the unauthorized loss of a $1 million promissory note.

Fontenot v. Wells Fargo Bank, N.A., 198 Cal.App.4th 256, 272, 129 Cal.Rptr.3d 467 (2011); *see* Knapp v. Doherty, 123 Cal.App.4th 76, 86, n. 4, 20 Cal.Rptr.3d 1 (2004) ("A nonjudicial foreclosure sale is presumed to have been conducted regularly and fairly; one attacking the sale **[*28]** must overcome this common law presumption 'by pleading and proving an improper procedure and the resulting prejudice.'"); Angell v. Superior Court, 73 Cal.App.4th 691, 700, 86 Cal.Rptr.2d 657 (1999) (failure to comply with procedural requirements must cause prejudice to plaintiff).

Prejudice is not presumed from "mere irregularities" in the process. Meux v. Trezevant, 132 Cal. 487, 490, 64 P. 848 (1901).

The FAC lacks allegations of requisite prejudice to Ms. Ruiz in connection with foreclosure, especially given her inability to tender amounts owed on her loans or to cure her defaults. Moreover, the first DOT empowers MERS "to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender . . ." The FAC alleges no defect as to MERS to preclude foreclosure, especially given the absence of prejudice to Ms. Ruiz.

Fraud

The FAC's (second) fraud claim alleges that Mr. Mitchell signed the first DOT assignment claiming to be a MERS vice president although Mr. Mitchell is a SunTrust employee. The fraud claim references "forged or fraudulently signed" documents. Ms. Ruiz' opposition papers accuse SunTrust **[*29]** and MERS of fraudulently recording documents "alleging an ownership interest in Plaintiff's Property."

Defendants challenge the absence of facts to support fraud elements and to satisfy *F.R.Civ.P. 9(b)* pleading requirements.

Fraud Elements

The elements of a California fraud claim are: (1) misrepresentation (false representation, concealment or nondisclosure); (2) knowledge of the falsity (or "scienter"); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Lazar v. Superior Court, 12 Cal.4th 631, 638, 49 Cal.Rptr.2d 377, 909 P.2d 981 (1996)*. The same elements comprise a cause of action for negligent misrepresentation, except there is no requirement of intent to induce reliance. *Caldo v. Owens-Illinois, Inc., 125 Cal. App. 4th 513, 519, 23 Cal. Rtpr. 3d 1 (2004)*.

"[T]o establish a cause of action for fraud a plaintiff must plead and prove in full, factually and specifically, all of the elements of the cause of action." *Conrad v. Bank of America, 45 Cal.App.4th 133, 156, 53 Cal.Rptr.2d 336 (1996)*. There must be a showing "that the defendant thereby intended to induce the plaintiff to act to his detriment in reliance upon the false representation" and "that the **[*30]** plaintiff actually and justifiably relied upon the defendant's misrepresentation in acting to his detriment." *Conrad, 45 Cal.App.4th at 157, 53 Cal.Rptr.2d 336*. "The absence of any one of these required elements will preclude recovery." *Wilhelm v. Pray, Price, Williams & Russell, 186 Cal.App.3d 1324, 1332, 231 Cal.Rptr. 355 (1986)*.

Particularity Pleading Standard

F.R.Civ.P. 9(b) requires a party to "state with particularity the circumstances constituting fraud." [5] In the Ninth Circuit, "claims for fraud and negligent misrepresentation must meet *Rule 9(b)*'s particularity requirements." *Neilson v. Union Bank of California, N.A., 290 F.Supp.2d 1101, 1141 (C.D. Cal. 2003)*. A court may dismiss a claim grounded in fraud when its allegations fail to satisfy *F.R.Civ.P. 9(b)*'s heightened pleading requirements. *Vess, 317 F.3d at 1107*. [6] A motion to dismiss a claim "grounded in fraud" under *F.R.Civ.P. 9(b)* for failure to plead with particularity is the "functional equivalent" of a *F.R.Civ.P. 12(b)(6)* motion to dismiss for failure to state a claim. *Vess, 317 F.3d at 1107*. As a counter-balance, *F.R.Civ.P. 8(a)(2)* requires from a pleading "a short and plain statement of the claim showing that the **[*31]** pleader is entitled to relief."

F.R.Civ.P. 9(b)'s heightened pleading standard "is not an invitation to disregard Rule 8's requirement of simplicity, directness, and clarity" and "has among its purposes the avoidance of unnecessary discovery." *McHenry v. Renne, 84 F.3d 1172, 1178 (9th Cir. 1996)*. *F.R.Civ.P 9(b)* requires "specific" allegations **[*32]** of fraud "to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)*. "A pleading is sufficient under *Rule 9(b)* if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Neubronner v. Milken, 6 F.3d 666, 671-672 (9th Cir. 1993)* (internal quotations omitted; citing *Gottreich v. San Francisco Investment Corp., 552 F.2d 866, 866 (9th Cir. 1997))*. The Ninth Circuit has explained:

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[5] *F.R.Civ.P. 9(b)*'s particularity requirement applies to state law causes of action: "[W]hile a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the *Rule 9(b)* requirement that the *circumstances* of the fraud must be stated with particularity is a federally imposed rule." *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003)* (quoting *Hayduk v. Lanna, 775 F.2d 441, 443 (1st Cir. 1995)*(italics in original)).

[6] "In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event, the claim is said to be 'grounded in fraud' or to 'sound in fraud,' and the pleading of that claim as a whole must satisfy the particularity requirement of *Rule 9(b)*." *Vess, 317 F.3d at 1103-1104*.

> Rule 9(b) requires particularized allegations of the circumstances *constituting* fraud. The time, place and content of an alleged misrepresentation may identify the statement or the omission complained of, but these circumstances do not "constitute" fraud. The statement in question must be false to be fraudulent. Accordingly, our cases have consistently required that circumstances indicating falseness be set forth. . . . [W]e [have] observed that plaintiff must include statements regarding the time, place, and *nature* of the alleged fraudulent activities, **[*33]** and that "mere conclusory allegations of fraud are insufficient." . . . The plaintiff must set forth what is false or misleading about a statement, and why it is false. In other words, the plaintiff must set forth an explanation as to why the statement or omission complained of was false or misleading. . . .
> In certain cases, to be sure, the requisite particularity might be supplied with great simplicity.

In Re Glenfed, Inc. Securities Litigation, 42 F.3d 1541, 1547-1548 (9th Cir. 1994) (en banc) (italics in original) *superseded by statute on other grounds as stated in* Marksman Partners, L.P. v. Chantal Pharm. Corp., 927 F.Supp. 1297 (C.D. Cal. 1996); *see* Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997) (fraud allegations must be accompanied by "the who, what, when, where, and how" of the misconduct charged); *see* Neubronner, 6 F.3d at 672 ("The complaint must specify facts as the times, dates, places, benefits received and other details of the alleged fraudulent activity."); Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1401 (1986) ("the pleader must state the time, place, and specific content of the false representations as well as the identities of **[*34]** the parties to the misrepresentation").

In a fraud action against a corporation, a plaintiff must "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal.App.4th 153, 157, 2 Cal.Rptr.2d 861 (1991).

F.R.Civ.P. 9(b) "does not allow a complaint to merely lump multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.'" Swartz v. KPMG LLP, 476 F.3d 756, 764-765 (9th Cir. 2007) (quoting Haskin v. R.J. Reynolds Tobacco Co., 995 F.Supp. 1437, 1439 (M.D. Fla.1998)). In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, "identif[y] the role of [each] defendant[ ] in the alleged fraudulent scheme." Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir.1989). "To state a claim of fraudulent conduct, which carries substantial reputational costs, plaintiffs must provide each and every defendant **[*35]** with enough information to enable them 'to know what misrepresentations are attributable to them and what fraudulent conduct they are charged with.'" Pegasus Holdings v. Veterinary Centers of America, Inc., 38 F.Supp.2d 1158, 1163 (C.D. Cal. 1998) (quoting In re Worlds of Wonder Sec. Litig., 694 F.Supp. 1427, 1433 (N.D. Cal.1988)).

Defendants fault the FAC's failure to identify "any specific misrepresentation" made to Ms. Ruiz and the absence of facts that Mr. Mitchell fraudulently signed documents and misrepresented that he was a MERS assistant vice president. Defendants challenge the FAC's failure to satisfy F.R.Civ.P. 9(b)'s heightened pleading standards given the FAC's formulaic allegations "without any factual specificity." Defendants question how Ms. Ruiz' reliance on defendants' representations damaged Ms. Ruiz in the absence of her ability to challenge foreclosure and failure to satisfy loan obligations to avoid foreclosure.

Defendants raise valid points to attack the fraud claim which is subject to dismissal. The FAC lacks facts to identify specific statements, who made statements, authority to make statements, and when statements were made to satisfy fraud elements and F.R.Civ.P. 9(b) **[*36]** requirements. Ms. Ruiz' references to purported "robo-signing" and forgery are unavailing, especially given the absence of facts to support her justifiable reliance. The FAC's conclusory allegations fail to meet Rule 9(b)'s strict standard. The FAC lacks precise allegations to identify what defendants, through specifically identified and authorized agents or representatives, allegedly promised or represented to result in damage to Ms. Ruiz. Ms. Ruiz ignores that her default resulted in initiation of property foreclosure. The FAC lacks facts to support fraud elements let alone the who, what, when, when and how of alleged misconduct and the heightened federal pleading standard. The FAC's incomplete allegations are insufficient to warrant dismissal of the FAC claims sounding in fraud.

Slander Of Title

The FAC's (third) slander of title claim alleges that defendants "disparaged Plaintiff's exclusive valid title by and through the preparing, posting, publishing, and recording of the documents, including, but not limited to, the Notice of Trustee's Sale, and Trustee's Deed." The claim further alleges that defendants "knew of should have know that such documents were improper in that at the **[*37]** time of execution and delivery of said documents, Defendants had no right, title or interest in the Property." In her opposition papers, Mr. Ruiz claims that the second notice of default and election to sell under deed of trust, recorded on September 16, 2011, "was without effect and fraudulent" and "SunTrust knew it was fraudulent at the time it was filed."

The elements of slander of title are: (1) publication; (2) falsity; (3) absence of privilege; and (4) disparagement of another's land which is relied upon by a third party and which results in a pecuniary loss. *Appel v. Burman, 159 Cal.App.3d 1209, 1214, 206 Cal.Rptr. 259 (1984)*.

Defendants fault the FAC's absence of facts to support slander of title elements in that the FAC fails to address how recorded documents were false given Ms. Ruiz' acknowledged default. Defendants point to the privileged nature of recording, mailing and delivering foreclosure notices. *Section 2924(d)* renders as *California Civil Code section 47* "privileged communications" the "mailing, publication, and delivery" of foreclosure notices and "performance" of foreclosure procedures. "[W]e conclude that the protection granted to nonjudicial foreclosure . . . is **[*38]** the qualified common interest privilege of *section 47, subdivision (c)(1)*." *Kachlon v. Markowitz, 168 Cal.App.4th 316, 341, 85 Cal.Rptr.3d 532 (2008)*; *see* *Consumer Solutions REO, LLC v. Hillery, 658 F.Supp.2d 1002, 1018 (N.D. Cal. 2009)* (conduct is "protected by the qualified privilege of *§ 47(c)* so long as . . . not malicious"); *see also* *Hagberg v. California Federal Bank FSB, 32 Cal.4th 350, 361 7 Cal. Rptr. 3d 803, 81 P.3d 244 (2004)* ("As noted, the only tort claim we have identified as falling outside the privilege established by *section 47(b)* is malicious prosecution.").

Defendants continue that foreclosure notices do not slander title in that they do not disparage land. *See* *Ortiz v. Accredited Home Lenders, Inc., 639 F.Supp.2d 1159, 1168 (S.D. Cal. 2009)* ("The recorded foreclosure Notices do not affect Plaintiffs' title, ownership, or possession in the Property.") Lastly, defendants note the FAC's absence of allegations of how Ms. Ruiz' reliance on foreclosure documents caused her pecuniary loss.

Defendants are correct that the FAC lacks facts to support slander of title elements. The recording, mailing and delivery of foreclosure documents are privileged to negate a necessary element of the claim. **[*39]** Ms. Ruiz can plead no facts to revive a slander of title claim.

Quiet Title

The FAC's (fourth) quiet title claim seeks this Court's declaration that Ms. Ruiz is the property's "title owner of record" and to quiet title in Ms. Ruiz "as of the date on which is [sic] loan transaction was consumed."

Defendants challenge the quiet title claim's failure to satisfy statutory and tender requirements.

California Code of Civil Procedure section 760.010 provides for an action "to establish title against adverse claims to real or personal property or any interest therein." California Code of Civil Procedure section 761.020 mandates a "verified" complaint for a quiet title action to include:

1. A legal description and street address of the subject real property;
2. The title of plaintiff as to which determination is sought and the basis of the title;
3. The adverse claims to the title of the plaintiff against which a determination is sought;
4. The date as of which the determination is sought; and
5. A prayer for the determination of the title of the plaintiff against the adverse claims.

The quiet title remedy "is cumulative and not exclusive of any other remedy, form or right of action, or proceeding provided **[*40]** by law for establishing or quieting title to property." *Cal. Code Civ. Proc., § 760.030*.

The FAC is unverified and lacks the property's legal description and facts as to the title of which Ms. Ruiz seeks determination and the basis of Ms. Kham's purported title given her inability to tender amounts due on their loans. A quiet title claim requires an allegation that the plaintiffs "are the rightful owners of the property, i.e., that they have satisfied their obligations under the Deed of Trust." *See* *Kelley v. Mortgage Electronic Registration Systems, Inc., 642 F.Supp.2d 1048, 1057 (N.D. Cal. 2009)*. Defendants correctly question the FAC's reference to April 1, 2007, the date of loan consummation, as the date for quiet title purposes. The FAC lacks facts that Ms. Ruiz is the property's rightful owner, has satisfied DOT obligations and thus lacks a properly pled quiet title claim.

Moreover, a purported quiet title claim is doomed in the absence of a tender of amounts owed. "It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured." *Shimpones v. Stickney, 219 Cal. 637, 649, 28 P.2d 673 (1934)*. "A party may not without payment **[*41]** of the debt, enjoin a sale by a trustee under a power conferred by a deed of trust, or have his title quieted against the purchaser at such a sale, even though the statute of limitations has run against the indebtedness." *Sipe v. McKenna, 88 Cal.App.2d 1001, 1006, 200 P.2d 61 (1948)*; *see* *Mix v. Sodd, 126 Cal.App.3d 386, 390, 178 Cal.Rptr. 736 (1981)* ("a mortgagor in possession may not maintain an action to quiet title, even though the debt is unenforceable"); *Aguilar v. Bocci, 39 Cal.App.3d 475, 477, 114 Cal.Rptr. 91 (1974)* (trustor is unable to quiet title "without discharging his debt. The cloud upon his title persists until the debt is paid.").

"A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust." *Karlsen, 15 Cal.App.3d at 117, 92 Cal.Rptr. 851*. An "action to set aside the sale, unaccompanied by an offer to redeem, would not state a cause of action which a court of equity would recognize." *Copsey v. Sacramento Bank, 133 Cal. 659, 662, 66 P. 7 (1901)*.

Ms. Ruiz is unable to quiet title in her favor without paying or tendering her outstanding indebtedness. With the FAC's absence of a meaningful ability **[*42]** or willingness to tender the indebtedness, a purported quiet title claim fails. This Court is not in a position to award Ms. Ruiz a windfall.

Lastly, defendants are correct that given the rescission of the foreclosure sale, defendants do not assert a right to title and Ms. Ruiz effectively seeks to quiet title against herself. The quiet title claim fails and is subject to dismissal.

Declaratory Relief

The FAC's (fifth) declaratory relief claim alleges that defendants "do not have authority to foreclose upon and sell the Property" and seeks "a judicial determination of the rights, obligations and interest of the parties with regard to the Property."

Defendants contend that Ms. Ruiz is not entitled to declaratory relief. Mr. Ruiz's response is confusing. Her opposition papers state: "Declaratory Relief fail [sic] because they are based on the same cause of action that Defendants lack the standing to foreclose."

The FAC lacks a viable declaratory relief claim. The Declaratory Judgment Act ("DJA"), *28 U.S.C. §§ 2201*, *2202*, provides in pertinent part:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare **[*43]** the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. §2201(a).

The DJA's operation "is procedural only." *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240, 57 S.Ct. 461, 463, 81 L. Ed. 617 (1937)*. "A declaratory judgment is not a theory of recovery." *Commercial Union Ins. Co. v. Walbrook Ins. Co., Ltd., 41 F.3d 764, 775 (1st Cir. 1994)*. The DJA "merely offers an *additional remedy* to litigants." *Nat'l Union Fire Ins. Co. v. Karp, 108 F.3d 17, 21 (2nd Cir. 1997)* (italics in original). A DJA action requires a district court to "inquire whether there is a case of actual controversy within its jurisdiction." *American States Ins. Co. v. Kearns, 15 F.3d 142, 143 (9th Cir. 1994)*.

Declaratory relief is appropriate "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, 1470 (9th Cir.1984)*.

As **[*44]** to a controversy to invoke declaratory relief, the question is whether there is a "substantial controversy, between parties having adverse legal rights, or sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L. Ed. 826 (1941)*. The U.S. Supreme Court has further explained:

> A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Haworth, 300 U.S. at 240-241, 57 S.Ct. at 464 (citations omitted).

The failure of the FAC's claims as a whole demonstrates the absence of an actual controversy subject to declaratory relief. A declaratory relief action "brings to the present a litigable controversy, which otherwise might only be tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc., 655 F.2d 938, 943 (9th Cir. 1981)*. **[*45]** As an equitable remedy, declaratory relief is "dependent upon a substantive basis for liability" and has "no separate viability" if all other causes of action are barred. *Glue-Fold, Inc. v. Slautterback Corp., 82 Cal.App.4th 1018, 1023, n. 3, 98 Cal.Rptr.2d 661 (2000)*.

In the absence of a viable claim, the FAC fails to support declaratory relief. The FAC presents no litigable controversy to be tried in the future. The declaratory relief claim is subject to dismissal.

California Civil Code Section 2932.5

The FAC's sixth claim appears to allege violation of *California Civil Code section 2932.5* ("*section 2932.5*") and notes that "Fannie Mae never recorded its interest in the Deed of Trust and cannot foreclose on the Plaintiff's Property." Defendants construe the claim to allege wrongful foreclosure in absence of a first DOT assignment prior to foreclosure.

Section 2932.5 addresses power of sale under an assigned mortgage and provides:

> Where a power to sell real property is given to a mortgagee, or other encumbrancer, in an instrument intended to secure the payment of money, the power is part of the security and vests in any person who by assignment becomes entitled to payment of the money secured **[*46]** by the instrument. The power of sale may be exercised by the assignee if the assignment is duly acknowledge and recorded.

Defendants argue that deed of trust assignment is not necessary to validate nonjudicial foreclosure in that "by law, the security follows the transfer of the note." *California Civil Code section 2936* provides: "The assignment of a debt secured by mortgage carries with it the security." Defendants point out that a deed of trust assignment provides public notice of transfer in the beneficial interest but is not required for judicial foreclosure in that the trustee or an authorized agent may initiate foreclosure. Defendants are correct. As a reminder, *section 2924(b)(4)* provides that a "person authorized to record the notice of default or the notice of sale" includes "an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee." Defendants are further correct that Ms. Ruiz, as a defaulted borrower, lacks standing to challenge transfer of the first DOT. Ms. Ruiz offers nothing to support a section 2932.5 claim.

Unfair Competition Claim

The FAC's seventh claim **[*47]** purports to allege violations of California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code, §§ 17200, et seq.* The claim alleges that:

1. Defendants "procured or offered false or fraudulently prepared documents to fabricate the missing gaps in the chain of title or to falsely demonstrate compliance with the PSA";
2. "MERS lacked authority to execute an assignment of the Deed of Trust from the original beneficiary to Defendants";
3. MERS and SunTrust "had knowledge that no such authority was ever bestowed upon it by the original lender, yet Defendant SunTrust still caused to be recorded the false documents with the county recorder"; and
4. The "assignment of the Deed of Trust recorded is signed by an individual purporting to be the 'Vice-President' of Defendant MERS" and "this individual did not have the authority or capacity to sign on behalf of Defendant MERS to cause the assignment."

Defendants fault the FAC's lack of facts to substantiate that defendants committed a UCL violation. Defendants note that their PSA compliance is irrelevant in that Ms. Ruiz is not a PSA party. Defendants challenge the FAC's identifying conduct subject to the UCL given the FAC's vague references to **[*48]** "fraudulent" recording and preparation of documents. Defendants point to the absence of facts that recorded documents were fraudulently signed given the conclusory allegation that "this individual did not have the authority or capacity to sign on behalf of Defendant MERS to cause the assignment."

"Unfair competition is defined to include 'unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising.'" *Blank v. Kirwan, 39 Cal.3d 311, 329, 216 Cal.Rptr. 718, 703 P.2d 58 (1985)* (quoting *Cal. Bus. & Prof. Code, § 17200*). The UCL establishes three varieties of unfair competition - "acts or practices which are unlawful, or unfair, or fraudulent." *Shvarts v. Budget Group, Inc., 81 Cal.App.4th 1153, 1157, 97 Cal.Rptr.2d 722 (2000)*. An "unlawful business activity" includes anything that can properly be called a business practice and that at the same time is forbidden by law. *Blank, 39 Cal.3d at 329, 216 Cal.Rptr. 718* (citing *People v. McKale, 25 Cal.3d 626, 631-632, 159 Cal.Rptr. 811, 602 P.2d 731 (1979))*. "A business practice is 'unlawful' if it is 'forbidden by law.'" *Walker v. Countrywide Home Loans, Inc., 98 Cal.App.4th 1158, 1169, 121 Cal.Rptr.2d 79 (2002)* **[*49]** (quoting *Farmers Ins. Exchange v. Superior Court, 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487, 826 P.2d 730 (1992))*.

The UCL prohibits "unlawful" practices "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Superior Court, 27 Cal. App. 4th 832, 838, 33 Cal. Rptr. 2d 438 (1999)*. The UCL "thus creates an independent action when a business practice violates some other law." *Walker, 98 Cal.App.4th at 1169, 121 Cal.Rptr.2d 79*. According to the California Supreme Court, the UCL "borrows" violations of other laws and treats them as unlawful practices independently actionable under the UCL. *Farmers Ins. Exchange v. Superior Court, 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487, 826 P.2d 730 (1992)*.

A fellow district court has explained the borrowing of a violation of law other than the UCL:

> To state a claim for an "unlawful" business practice under the UCL, a plaintiff must assert the violation of any other law. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999)* (stating, "By proscribing 'any unlawful' business practice, section 17200 'borrows' violations of other law and treats them as unlawful **[*50]** practices that the unfair competition law makes independently actionable.") (citation omitted). Where a plaintiff cannot state a claim under the "borrowed" law, she cannot state a UCL claim either. *See, e.g., Smith v. State Farm Mutual Automobile Ins. Co., 93 Cal.App.4th 700, 718, 113 Cal.Rptr.2d 399 (2001)*. Here, Plaintiff has predicated her "unlawful"

> business practices claim on her TILA claim. However, as discussed above, Plaintiff's attempt to state a claim under TILA has failed. Accordingly, Plaintiff has stated no "unlawful" UCL claim.

Rubio v. Capital One Bank, 572 F.Supp.2d 1157, 1168 (C.D. Cal. 2008).

"Unfair" under the UCL "means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cal-Tech Communications, 20 Cal.4th 163 at187, 83 Cal.Rptr.2d 548*. The "unfairness" prong of the UCL "does not give the courts a general license to review the fairness of contracts." *Samura v. Kaiser Found. Health Plan, 17 Cal.App.4th 1284, 1299, 22 Cal. Rptr. 2d 20* & n. 6, *17 Cal. App. 4th 1284, 22 Cal.Rptr.2d 20 (1993)*.

The "fraudulent" **[*51]** prong under the UCL requires a plaintiff to "show deception to some members of the public, or harm to the public interest," *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc., 178 F.Supp.2d 1099, 1121 (C.D. Ca. 2001)*, or to allege that "members of the public are likely to be deceived," *Medical Instrument Development Laboratories v. Alcon Laboratories, 2005 U.S. Dist. LEXIS 41411, 2005 WL 1926673, at *5 (N.D. Cal. 2005)*.

"A plaintiff alleging unfair business practices under these statutes [UCL] must state with reasonable particularity the facts supporting the statutory elements of the violation." *Khoury v. Maly's of California, Inc., 14 Cal.App.4th 612, 619, 17 Cal.Rptr.2d 708 (1993)*.

The FAC fails to establish that defendants engaged in unlawful, unfair or fraudulent business practices under the UCL. In the absence of violation of a borrowed law, a UCL claim fails in that it cannot rest on purported deficiencies in foreclosure or related matters. The FAC lacks viable statutory or common law claims and lacks reasonable particularity of facts to support a UCL claim. Reliance on other invalid claims or "robo-signing" fails to support a viable UCL claim. Furthermore, the FAC lacks particularity of fraudulent circumstances, **[*52]** such as a misrepresentation, for a UCL claim, especially given failure of fraud-sounding claims, as discussed above. The FAC lacks facts to describe how consumers were deceived and to hint at a wrong subject to the UCL to warrant the UCL claim's dismissal.

Defendants also challenge the FAC's failure to allege that Ms. Ruiz suffered an injury cognizable under the UCL.

California Business and Professions Code section 17204 limits standing to bring a UCL claim to specified public officials and a private person "who has suffered injury in fact and has lost money or property as a result of the unfair competition." "This provision requires [plaintiff] to show that she has lost 'money or property' sufficient to constitute an 'injury in fact' under Article III of the Constitution, *see* *Birdsong v. Apple, Inc., 590 F.3d 955, 959-60 (9th Cir.2009)*, and also requires a 'causal connection' between [defendant's] alleged UCL violation and her injury in fact, *Hall v. Time Inc., 158 Cal.App.4th 847, 70 Cal.Rptr.3d 466, 471-72 (2008)*." *Rubio v. Capital One Bank, 613 F.3d 1195, 1204-1205 (9th Cir. 2010)*.

Business and Professions Code *section 17203* addresses UCL relief and provides in pertinent part:

> Any **[*53]** person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments . . . as may be necessary to restore to any person in interest any **money or property**, real or personal, which may have been acquired by means of such unfair competition. (Bold added.)

"In a suit under the UCL, a public prosecutor may collect civil penalties, but a private plaintiff's remedies are 'generally limited to injunctive relief and restitution.'" *Kasky v. Nike, Inc., 27 Cal.4th 939, 950, 119 Cal.Rptr.2d 296, 45 P.3d 243 (2002)* (quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999))*.

Defendants correctly note the FAC's absence of facts of Ms. Ruiz' money or property allegedly lost due to a UCL violation or unfair competition given that her alleged damages are "self-inflicted" and arise from her default. The property's purported decrease in value is not attributable to defendants. Defendants are correct that the FAC fails to establish a causal connection between purported fraudulent documents and Ms. Ruiz' injury. The FAC lacks facts to support plaintiffs' **[*54]** standing to seek UCL relief to warrant dismissal of the UCL claim.

Punitive Damages

Defendants further seek to strike, pursuant to *F.R.Civ.P. 12(f)*, the FAC's punitive damages allegations in the absence of sufficient supporting allegations. This Court will analyze defendants' request to strike punitive damages allegations under *F.R.Civ.P. 12(b)(6)* standards given the decision of *Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 971 (9th Cir. 2010)* ("We therefore hold that *Rule 12(f)* does not authorize district courts to strike claims for damages on the ground that such claims are precluded as a matter of law.") The FAC makes sporadic references punitive damages, and its prayer seeks punitive damages.

California Civil Code section 3294 ("*section 3294*") provides that in an action "for breach of an obligation not arising from contract," a plaintiff may seek punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." *Cal. Civ. Code, § 3294(a)*. *Section 3294(c)(1)-(3)* defines:

> 1. "Malice" as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by **[*55]** the defendant with a willful and conscious disregard of the rights and safety of others";
> 2. "Oppression" as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights"; and
> 3. "Fraud" as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

"Although the court will apply the substantive law embodied in *section 3294*, 'determinations regarding the adequacy of pleadings are governed by the Federal Rules of Civil Procedure.'" *Jackson v. East Bay Hosp., 980 F.Supp. 1341, 1353 (N.D. Cal. 1997)*.

Punitive damages are "available to a party who can plead and prove the facts and circumstances set forth in Civil Code *section 3294*." *Hilliard v. A.H. Robbins Co., 148 Cal.App.3d 374, 392, 196 Cal.Rptr. 117 (1983)*. "To support punitive damages, the complaint . . . must allege ultimate facts of the defendant's oppression, fraud, or malice." *Cyrus v. Haveson, 65 Cal.App.3d 306, 316-317, 135 Cal.Rptr. 246 (1976)*. Pleading the language in *section 3294* "is not objectionable **[*56]** when sufficient facts are alleged to support the allegation." *Perkins v. Superior Court, 117 Cal.App.3d 1, 6-7, 172 Cal.Rptr. 427 (1981)*.

In *G.D. Searle & Co. v. Superior Court, 49 Cal.App.3d 22, 29, 122 Cal.Rptr. 218 (1975)*, the California Court of Appeal explained punitive damages pleading:

> When the plaintiff alleges an intentional wrong, a prayer for exemplary damage may be supported by pleading that the wrong was committed willfully or with a design to injure. . . . When nondeliberate injury is charged, allegations that the defendant's conduct was wrongful, willful, wanton, reckless or unlawful do not support a claim for exemplary damages; such allegations do not charge malice. . . . When a defendant must produce evidence in defense of an exemplary damage claim; fairness demands that he receive adequate notice of the kind of conduct charged against him. (Citations omitted.)

"Allegations that the acts . . . were 'arbitrary, capricious, fraudulent, wrongful and unlawful,' like other adjectival descriptions of such proceedings, constitute mere conclusions of law . . ." *Faulkner v. California Toll Bridge Authority, 40 Cal.2d 317, 329, 253 P.2d 659 (1953)*; *see* *Lehto v. Underground Constr. Co., 69 Cal. App. 3d 933,* *944, 138 Cal. Rptr. 419 (1997)* **[*57]** (facts and circumstances of fraud should be set out clearly, concisely, and with sufficient particularity to support punitive damages); *Smith v. Superior Court, 10 Cal.App.4th 1033, 1042, 13 Cal.Rptr.2d 133 (1992)* (punitive damages claim is insufficient in that it is "devoid of any factual assertions supporting a conclusion petitioners acted with oppression, fraud or malice."); *Brousseau v. Jarrett, 73 Cal.App.3d 864, 872, 141 Cal.Rptr. 200 (1977)* ("conclusory characterization of defendant's conduct as intentional, willful and fraudulent is a patently insufficient statement of 'oppression, fraud, or malice, express or implied,' within the meaning of *section 3294*").

Punitive damages are never awarded as a matter of right, are disfavored by the law, and should be granted with the greatest of caution and only in the clearest of cases. *Henderson v. Security Pacific National Bank, 72 Cal.App.3d 764, 771, 140 Cal.Rptr. 388 (1977)*.

Defendants are correct that the FAC seeks punitive damages based on vague, conclusory allegations and lacks facts that defendants acted with requisite malice, oppression or fraud to support punitive damages claims. The FAC merely makes stray references to "fraudulent, **[*58]** oppressive, and malicious" with no facts to support such conclusions. The FAC lacks sufficient allegations of defendants' wrongdoing to impose punitive damages on defendants. Moreover, dismissal of plaintiffs' claims warrants dismissal of punitive damages claims.

Attempt At Amendment

As discussed above, the FAC's global claims are barred legally and as insufficiently pled, and Ms. Ruiz is unable to cure the FAC's claims by allegation of other facts and thus is not granted an attempt to amend. Moreover, this Court surmises that Ms. Ruiz brought this action in absence of good faith and seeks to exploit the court system to delay or to vex defendants' foreclosure of the property. Mr. Ruiz' unsuccessful attempt to remand this action bolsters such conclusion. The test for maliciousness is a subjective one and requires the court to "determine the . . . good faith of the applicant." *Kinney v. Plymouth Rock Squab Co., 236 U.S. 43, 46, 35 S. Ct. 236, 59 L. Ed. 457 (1915)*; *see Wright v. Newsome, 795 F.2d 964, 968, n. 1 (11th Cir. 1986)*; *cf. Glick v. Gutbrod, 782 F.2d 754, 757 (7th Cir. 1986)* (court has inherent power to dismiss case demonstrating "clear pattern of abuse of judicial process"). A lack of good faith or malice **[*59]** also can be inferred from a complaint containing untrue material allegations of fact or false statements made with intent to deceive the court. *See Horsey v. Asher, 741 F.2d 209, 212 (8th Cir. 1984)*. An attempt to vex or delay provides further grounds to dismiss this action.

CONCLUSION AND ORDER

For the reasons discussed above, this Court:

1. DISMISSES with prejudice this action against defendants;

2. DIRECTS the clerk to enter judgment in favor of defendants SunTrust Mortgage, Inc., Mortgage Electronic Registration Systems, Inc., and Federal National Mortgage Association and against plaintiff Florida Ruiz in that there is no just reason to delay to enter such judgment given that the Ms. Ruiz' claims against these defendants and their alleged liability are clear and distinct from claims against and liability of other defendants. *See F.R.Civ.P. 54(b)*;

3. ORDERS Ms. Ruiz, no later than July 31, 2012, to file papers to show cause why this Court should not dismiss this action against any remaining defendants, including The Wolf Firm.

This Court ADMONISHES Ms. Ruiz that this Court will dismiss this action against any remaining defendants if Ms. Ruiz fails to comply with this order and fails to [*60] file timely papers to show cause why this Court should not dismiss this action against any remaining defendants.

IT IS SO ORDERED.

Dated: July 24, 2012

/s/ Lawrence J. O'Neill

UNITED STATES DISTRICT JUDGE

In re Haynes & Boone

Court of Appeals of Texas, First District, Houston

July 26, 2012, Opinion Issued

NO. 01-12-00341-CV

Reporter
376 S.W.3d 839 *; 2012 Tex. App. LEXIS 6078 **

IN RE HAYNES AND BOONE, LLP AND PATRICK L. HUGHES, Relators

Subsequent History: Released for Publication August 23, 2012.

Prior History: RX.COM, Inc. v. O'Quinn, 766 F. Supp. 2d 790, 2011 U.S. Dist. LEXIS 11024 (S.D. Tex., 2011)

Core Terms

federal court, state court, federal issue, patent, federal law, state-law, cases, legal malpractice claim, exercise jurisdiction, federal jurisdiction, antitrust, disputed, anti trust law, subject-matter, embedded, exclusive jurisdiction, cause of action, Sherman Act, federal patent law, malpractice claim, federal question, trial court, patent law, legal malpractice, federal-question, state-court, mandamus, federal district court, malpractice action, federal interest

LexisNexis® Headnotes

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN1[] **Common Law Writs, Mandamus**

A party requesting mandamus relief must meet two requirements. First, it must show that the trial court clearly abused its discretion. Second, it must show that it has no adequate remedy by appeal. The relators carry the burden of demonstrating their right to mandamus relief.

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

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN2[] **Regulated Practices, Private Actions**

The legal authorities establishing federal jurisdiction to decide federal antitrust claims do not preclude state courts from exercising jurisdiction over state-law malpractice claims with embedded federal antitrust issues.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction

HN3[] **Jurisdiction Over Actions, Concurrent Jurisdiction**

The general principle of state-court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication. A court begins its analysis with the presumption that state courts enjoy concurrent jurisdiction. Jurisdiction may be exclusively confined to the federal courts by either explicit or implicit Congressional directive. Thus, the Supreme Court of the United States has held that the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

HN4[] **Sherman Act, Jurisdiction**

Legal scholarship suggests that the legislative history of the Sherman Act indicates that exclusive jurisdiction was not intended.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

The cardinal policy undergirding the Sherman Act is maximizing consumer welfare through the promotion of economic competition.

Torts > Malpractice & Professional Liability > Attorneys

HN6[] **Malpractice & Professional Liability, Attorneys**

The policy undergirding the state-law tort of legal malpractice is to compensate an injured private party for its losses.

Counsel: [1]** For RELATOR: David Beck, Douglas Pritchett Jr., Michael E. Richardson, Alex Benjamin Roberts, Beck Redden & Secrest, Houston, TX; Craig Smyser, Smyser, Kaplan & Veselka L.L.P., Houston, TX.

For REAL PARTY IN INTEREST: Vincent L. Marable, III, Paul Webb, P.C., Wharton, TX; Williams F. Hagans, Hagans, Burdine, Montgomery & Rustay, P.C., Houston, TX; Joseph D. Jamail, Jamail & Kolius, Houston, TX.

Judges: Panel consists of Justices Massengale, Brown, and Huddle. Justice Brown, concurring.

Opinion by: Michael Massengale

Opinion

[*840] Original Proceeding on Petition for Writ of Mandamus

This original proceeding concerns a legal malpractice claim relating to the handling of an antitrust matter.[1] The relators, **[*841]** Haynes and Boone, LLP and Patrick L. Hughes, are defendants in the malpractice suit. The real parties in interest, Rx.com, Inc. and its founder Joe S. Rosson, filed the suit alleging that the relators (and others) harmed them by failing to timely file an antitrust suit within the limitations period.

The relators contend that the suit presents embedded federal issues in the form of Sherman Act claims which must be proved to prevail on the malpractice cause of action and thus constitute a "case within the case." These federal issues are the basis for relators' invocation of exclusive federal subject-matter jurisdiction over the malpractice claim. They thus argue that Texas state courts lack subject-matter jurisdiction to entertain such claims. These arguments were presented in a plea to the jurisdiction, which the trial court denied. The relators then filed a petition for writ of mandamus to seek review of that ruling.

We conclude that the trial court correctly denied the plea and that Texas courts may exercise jurisdiction over legal malpractice claims related to antitrust matters. Accordingly, we deny the petition.

Background

Prior to the filing of the malpractice suit at issue in this original proceeding, Rx.com filed an antitrust complaint in federal district **[**3]** court against various pharmacy benefit manager defendants. In addition to state-law claims that were later abandoned, the complaint included three causes of action under the Sherman Act: agreement in restraint of trade in violation of *Section 1*; conspiracy to monopolize in violation of *Section 2*; and attempted monopolization in violation of *Section 2*. *See* *15 U.S.C. §§ 1*, *2*. The antitrust suit was dismissed on limitations grounds, and the Fifth Circuit Court of Appeals affirmed that judgment on appeal. *See* *Rx.com v. Medco Health Solutions, Inc., 322 Fed. Appx. 394 (5th Cir. 2009)*.

The real parties in interest sued Rx.com's former lawyers, including the relators, for legal malpractice in connection with the failure to timely file the antitrust suit. The petition was originally filed in a Texas state district court. The defendants removed the case to federal court, arguing that federal-question jurisdiction applied to the legal malpractice claims because of embedded federal questions relating to the original antitrust claims. *See* *Rx.com, Inc. v. O'Quinn, 766 F. Supp. 2d 790, 793 (S.D. Tex. 2011)*. The federal district court analyzed the question of whether the legal malpractice claims were **[**4]** ones "arising under" federal law, *28 U.S.C. § 1331*, applying the standard articulated by the United States Supreme Court in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)*, and considering whether the malpractice claims "necessarily raise a stated federal issue [that is] actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Rx.com, 766 F. Supp. 2d at 794* (quoting *Grable, 545 U.S. at 314, 125 S. Ct. at 2368*). Relying in significant measure upon the Fifth Circuit's application of the *Grable* standard to a legal malpractice claim in *Singh v. Duane Morris LLP, 538 F.3d 334 (5th Cir. 2008)*, the federal court concluded that two of the necessary elements—a substantial federal interest and a lack of disruption to the balance of federal and state judicial responsibilities—were not present. Accordingly, the federal district court found that federal-question jurisdiction did not exist, and the case was remanded to state court. *See* *Rx.com, 766 F. Supp. 2d at 797*.

[*842] Following the remand to state court, two new opinions **[**5]** were issued in other cases, which the relators contend provided supervening authority to support their contention that the case belongs in federal court. In

[1] At the time relators filed their mandamus petition, the underlying case was styled *Rx.com, Inc. and Joe S. Rosson v. John M. O'Quinn & Associates, PLLC d/b/a The O'Quinn Law Firm, John M. O'Quinn & Associates, L.L.P., Laminack,* ***[**2]*** *Pirtle & Martines, L.L.P., Richard M. Laminack, Thomas W. Pirtle, Haynes & Boone, L.L.P., and Patrick Hughes*, No. 2010-66863, in the 80th Judicial District of Harris County, Texas. The respondent is the Honorable Larry Weiman.

USPPS, Ltd. v. Avery Dennison Corp.—a case in which federal subject-matter jurisdiction was apparently undisputed due to the diversity of the parties—the Fifth Circuit applied the *Grable* test to determine that a state-law legal malpractice claim arose under federal patent law so as to invoke the exclusive appellate jurisdiction of the Federal Circuit.[2] Accordingly, the *USPPS* appeal was transferred to the Federal Circuit.[3]

Then the Supreme Court of Texas held, in *Minton v. Gunn*, that the federal courts have exclusive subject-matter jurisdiction over a malpractice claim arising out of legal representation in a patent infringement action. *See* 355 S.W.3d 634, 646 (Tex. 2011), *petition for cert. filed*, No. 11-1118 (U.S. Mar. 9, 2012). The *Minton* case originated in state court and was dismissed on a motion for summary judgment. *See* *id. at 638*. However, in addition to granting federal jurisdiction over cases arising under federal patent law, 28 U.S.C. § 1338(a) also specifically prohibits state courts from exercising jurisdiction over the same category of cases.[4] The claimant thus raised a subject-matter jurisdiction objection on appeal, and that argument was ultimately vindicated by the Supreme Court, which concluded, "based upon the specific facts of this case,"[5] that the **[**7]** embedded federal question "triggered exclusive federal patent jurisdiction," requiring dismissal of the case without considering its merits. *Minton, 355 S.W.3d at 646-47*.

Relying primarily on *USPPS* and *Minton*, the relators re-urged their arguments in the trial court by filing a plea to the jurisdiction. As part of the argument presented **[*843]** to the trial court, the relators contended that "determining whether Rx.com would have prevailed will entail litigation of the full panoply of factual and legal issues attending to a Sherman Act claim." The trial court denied the plea,[6] and the relators filed their mandamus petition, seeking relief from the trial court's continuing exercise of subject-matter jurisdiction over the case.

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[2] *See* *USPPS, Ltd. v. Avery Dennison Corp., 647 F.3d 274, 277-82 (5th Cir. 2011)*; *28 U.S.C. § 1295(a)(1)* ("The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a final decision of a district court of the United States . . . in any civil action arising under . . . any Act of Congress relating to patents . . . .").

[3] *See* *USPPS, 647 F.3d at 284*. Notably, two judges of the Federal Circuit subsequently concurred in the judgment affirming the trial court in *USPPS* while noting their disagreement with their court's precedents applying *Grable*, which they characterized **[**6]** as turning what "would otherwise be a 'clearly wrong' transfer decision into one that is 'plausible,'" thus requiring their court "to accept the transfer and resolve the merits of the appeal." *Id. at 1350* (O'Malley, J., concurring) (quoting *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817-19, 108 S. Ct. 2166, 2178-79, 100 L. Ed. 2d 811 (1988))*.

[4] *See* *28 U.S.C. § 1338(a)* ("No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents . . . ."). This statute, expressly depriving state courts of jurisdiction over claims arising under federal patent law, was amended in 2011. *See* Act of Sept. 16, 2011, § 19(a), 125 Stat. 331. The prior version of the statute provided: "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents . . . . Such jurisdiction shall be exclusive of the courts of the states in patent . . . cases." Act of June 25, 1948, ch. 646, 62 Stat. 931.

[5] The Supreme Court specifically disavowed a broad interpretation of its holding such that "all legal malpractice suits arising out of patent litigation" might be considered "to fall under the exclusive patent law jurisdiction of the federal courts." *Minton v. Gunn, 355 S.W.3d 634, 646 (Tex. 2011)*, *petition for cert. filed*, No. 11-1118 (U.S. Mar. 9, 2012). The Court indicated that **[**8]** "any state litigant asserting a legal malpractice action to recover for damages resulting from his patent attorney's negligence in patent prosecution or litigation must also satisfy all four elements of the *Grable* test to place his claim under exclusive federal jurisdiction." *Id*.

[6] The relators filed a motion in the trial court to stay proceedings pending our resolution of the mandamus petition, and in that context the parties disputed the significance of our request for a response to the relators' petition. Mandamus relief (other than temporary relief) cannot be granted unless the court receives or requests a response. ***Tex. R. App. P. 52.4***. **[**9]** But regardless of whether the court has preliminarily decided that a petition may be meritorious, a response often aids the efficient use of judicial resources by inviting the real party in interest to offer its own legal analysis and perspective of the challenged action. Accordingly, the mere request for a response does not imply any preliminary judgment about the merits of the petition. ***Rule 52.8*** does not suggest otherwise—that rule provides that "*[i]f* the court is of the tentative opinion that relator is entitled to the relief sought or that a serious question concerning the relief requires further consideration . . . the court *must* request a response if one has not been filed." ***Tex. R. App. P. 52.8(b)(1)*** (emphasis supplied).

Analysis

HN1[] A party requesting mandamus relief must meet two requirements. First, it must show that the trial court clearly abused its discretion. *In re Prudential Ins. Co., 148 S.W.3d 124, 135 (Tex. 2004)* (orig. proceeding). Second, it must show that it has no adequate remedy by appeal. *Id. at 135-36*. The relators carry the burden of demonstrating their right to mandamus relief. *See* *Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 305 (Tex. 1994)* (orig. **[**10]** proceeding).

We will focus our analysis on the relators' contention that the trial court has abused its discretion by exercising subject-matter jurisdiction over this legal malpractice case. The relators' arguments rely on *USPPS* and *Minton*, as well as other cases involving legal malpractice in the patent-law context,[7] as precedents for applying the *Grable* standard to determine when a state-law cause of action "arises under" federal law because of an embedded federal issue.

As explained below, the relators' argument wrongly assumes the relevance in this circumstance of the "arising under" standard as applied in *Grable* and its progeny. Because there is no nexus between the "arising under" standard and the question of whether federal courts have exclusive jurisdiction over the embedded federal antitrust issues, we reject relators' suggestion that the *Grable* standard provides the appropriate frame of analysis. Instead, applying the standard of *Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 101 S. Ct. 2870, 69 L. Ed. 2d 784 (1981)*, **[**11]** we conclude that *HN2*[] the legal authorities establishing federal jurisdiction to decide federal antitrust claims do not preclude state courts from exercising jurisdiction over state-law malpractice claims with embedded federal antitrust issues.

I. *Grable* and its specific application relating to patent law

In *Grable*, the United States Supreme Court analyzed whether the claim presented in that case was one "arising under the Constitution, laws, or treaties of the United States" for purposes of federal-question jurisdiction as provided in *28 U.S.C. § 1331*. The claim at issue was a suit to **[*844]** quiet title originally filed in state court, and it was subsequently removed to federal court on the grounds that the case presented a question of federal tax law. *Grable, 545 U.S. at 311, 125 S. Ct. at 2366*. If the case could have been originally brought in federal district court, then removal of the case from state court to federal court was proper under *28 U.S.C. § 1441(a)*. *See* *id. at 312, 125 S. Ct. at 2366*. Under *Grable*, in order for a state-law claim with an embedded federal question to "aris[e] under the Constitution, laws, or treaties of the United States" such that federal courts have subject-matter **[**12]** jurisdiction over that claim pursuant to *section 1331*, the state-law claim must (1) raise a stated federal issue that is (2) actually disputed and (3) substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities. *See* *id. at 314, 125 S. Ct. at 2368*.

Because *Grable* is an application of the "arising under" standard of *28 U.S.C. § 1331*, the rule articulated in that case has special application with respect to patent cases, as federal courts have exclusive jurisdiction over all cases "arising under" patent law pursuant to *28 U.S.C. § 1338(a)*, and the "arising under" language of that statute has been interpreted to apply in the same way that it does for purposes of *section 1331*.[8] Thus, the United States Court of Appeals for the Federal Circuit has applied the *Grable* standard to determine whether patent issues embedded within state-law legal malpractice claims arose under federal patent law, so as to permit federal courts to exercise jurisdiction over the claims.[9] The Federal Circuit precedents in this area have concerned whether federal

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[7] *E.g.,* *Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P., 504 F.3d 1262 (Fed. Cir. 2007)*; *Immunocept, LLC v. Fulbright & Jaworski, LLP, 504 F.3d 1281 (Fed. Cir. 2007)*.

[8] *See* *Christianson, 486 U.S. at 808-09, 108 S. Ct. at 2173-74*; *Air Measurement, 504 F.3d at 1271*.

courts could exercise subject-matter jurisdiction over the state-law **[**13]** legal malpractice claims, and they have not been directly concerned with whether the state courts could exercise concurrent jurisdiction over such claims.

The authority of a state court to exercise jurisdiction over a legal malpractice claim involving patent issues was the central issue presented in *Minton v. Gunn. Minton* is procedurally distinguishable from the Federal Circuit precedents because it involved Texas state courts deciding whether a legal malpractice claim arose under federal patent law, not to determine whether a federal court could exercise jurisdiction over the claim, but to determine whether the state courts were forbidden from exercising jurisdiction over the claim. In contrast to *section 1331*, which merely describes an affirmative grant of power for federal courts to exercise jurisdiction over cases "arising under" federal law,[10] *section 1338(a)* both grants power for federal **[*845]** courts to exercise jurisdiction over cases "arising under" patent law[11] and also has a converse effect on the jurisdiction of state courts, which are specifically forbidden from exercising jurisdiction over the same scope of claims.[12] Thus the issue presented in *Minton* was not merely whether the federal courts were authorized to exercise jurisdiction over the **[**15]** claim. That issue had to be considered, but only as a necessary part of the analysis of whether the state courts were prohibited by *section 1338(a)* from exercising jurisdiction over the claim. The Supreme Court of Texas applied the *Grable* test and held in *Minton* that the particular legal malpractice claim at issue arose under federal patent law. Because federal jurisdiction is exclusive over claims arising under federal patent law, *28 U.S.C. § 1338(a)*, the state courts could not exercise subject-matter jurisdiction.

The relators in this original proceeding present yet a different scenario. Their argument is similar to the issue presented **[**16]** in *Minton*, insofar as we are asked to decide whether the state courts are forbidden from exercising jurisdiction over a state-law legal malpractice claim because of an embedded federal question. However, the embedded federal issue in this case involves ***antitrust law*** instead of patent law. Accordingly, the *Grable* analysis is only relevant to this proceeding if, as in the context of patent law, state courts are forbidden to exercise jurisdiction over any claims "arising under" federal ***antitrust law***.

II. Presumed concurrent jurisdiction of state courts

HN3[] "The general principle of state-court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication." *Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78, 101 S. Ct. 2870, 2875, 69 L. Ed. 2d 784 (1981)*. We begin our analysis with "the presumption that state courts enjoy concurrent jurisdiction." *Id. at 478, 101 S. Ct. at 2875*. Jurisdiction may

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[9] In *Air Measurement Technologies, Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P*., a legal malpractice claim was removed from state court, and the plaintiffs appealed the interlocutory decision to deny a remand back to state court. *See 504 F.3d 1262, 1265 (Fed. Cir. 2007)*. The federal district court applied the *Grable* test to determine that legal malpractice claim arose under patent law for purposes of *28 U.S.C. § 1338(a)*. *See id. at 1267*. Because the Federal Circuit agreed that federal jurisdiction could be exercised pursuant to *§ 1338(a)*, the district court's refusal to remand the case was affirmed. *See id. at 1273*; *see also 28 U.S.C. § 1447(c)* ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."). Similarly, the Federal Circuit found that *28 U.S.C. § 1338(a)* jurisdiction could be exercised over another legal malpractice claim involving federal patent **[**14]** issues in *Immunocept, LLC v. Fulbright & Jaworski, LLP, 504 F.3d 1281 (Fed. Cir. 2007)*.

[10] *See 28 U.S.C. § 1331* ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

[11] *See 28 U.S.C. § 1338(a)* ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks.").

[12] *See id*. ("No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights.").

be exclusively confined to the federal courts by either explicit or implicit Congressional **[**17]** directive. *See id*. Thus, the Supreme Court of the United States has held that "the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Id*.; *see also* *Tafflin v. Levitt, 493 U.S. 455, 459-60, 110 S. Ct. 792, 795, 107 L. Ed. 2d 887 (1990)*.

Relators have produced no authority that Congress explicitly granted federal courts exclusive jurisdiction of all cases "arising under" the federal antitrust laws. Congress did grant federal district courts "original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." *28 U.S.C. § 1337(a)*. In addition, the Clayton Act authorizes a private cause of action to be pursued in federal court for injury to "business or property by reason of anything forbidden in the antitrust laws," *15 U.S.C. § 15(a)*, including the specific right to seek "injunctive relief . . . against threatened loss or damage **[*846]** by a violation of the antitrust laws," *15 U.S.C. § 26*. With specific reference to the Clayton **[**18]** Act's authorization of injunctive relief to be obtained from "any court of the United States having jurisdiction over the parties," the Supreme Court has stated that "[t]his right to sue . . . is granted in terms which show that it is to be exercised only in a 'court of the United States.'" *Gen. Inv. Co. v. Lake Shore & M.S. Ry. Co., 260 U.S. 261, 287, 43 S. Ct. 106, 117, 67 L. Ed. 244, 1 Ohio Law Abs. 162 (1922)*. Subsequent cases have relied on *General Investment* for the proposition that federal antitrust claims are within the exclusive jurisdiction of the federal courts,[13] despite suggestions[14] that this rule appears to be at odds with the modern understanding that "[i]t is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Gulf Offshore, 453 U.S. at 479, 101 S. Ct. at 2875-76*; *see also* *Martinez v. California, 444 U.S. 277, 283 n.7, 100 S. Ct. 553, 558 n.7, 62 L. Ed. 2d 481 (1980)*.

The principle that "federal antitrust claims are within the exclusive jurisdiction of the federal courts" only has been suggested in connection with actual federal antitrust causes of action, and the relators have provided us no example of the rule ever being applied to the broader universe of all claims "arising under" federal ***antitrust law***.[15] Nor have the relators demonstrated any alternative basis for inferring that scope of exclusive federal jurisdiction

[13] *E.g.*, *Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 379, 105 S. Ct. 1327, 1331, 84 L. Ed. 2d 274 (1985)*; *see also* *Miller v. Granados, 529 F.2d 393, 395 (5th Cir. 1976)* ("[T]he jurisdiction conferred by Congress on federal courts under the **[**19]** Sherman Act is exclusive.").

[14] *See, e.g.*, *Tafflin v. Levitt, 493 U.S. 455, 470-71, 110 S. Ct. 792, 801, 107 L. Ed. 2d 887 (1990)* (Scalia, J., concurring) (characterizing the analysis in *General Investment as* "less than compelling"); *Vill. of Bolingbrook v. Citizens Utils. Co., 864 F.2d 481, 484-85 (7th Cir. 1988)* ("One may doubt whether in light of *Mitsubishi [Motors Corp. v. Soler Chrysler—Plymouth, Inc., 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)]* antitrust is still an exclusive province of the federal courts.").

[15] All of the case law provided to us by the relators involved or otherwise made specific reference to federal antitrust causes of action. *See* *Tafflin, 493 U.S. at 462, 110 S. Ct. at 796-97* (in context **[**21]** of holding that state courts have concurrent jurisdiction over civil RICO actions, noting that the Supreme Court has "interpreted *§ 4* of the Clayton Act to confer exclusive jurisdiction on the federal courts" (citing *Gen. Inv., 260 U.S. at 286-88, 43 S. Ct. at 116-17*)); *Marrese, 470 U.S. 373, 379, 105 S. Ct. 1327, 84 L. Ed. 2d 274* (in context of holding that a federal court must consider "the preclusive effect of a state court judgment in a subsequent lawsuit involving federal antitrust claims within the exclusive jurisdiction of the federal courts," noting that "[a]lthough federal antitrust claims are within the exclusive jurisdiction of the federal courts [citing *General Investment*], the Court of Appeals ruled that the dismissal of petitioners' complaints in state court barred them from bringing a claim based on the same facts under the Sherman Act"); *Hathorn v. Lovorn, 457 U.S. 255, 266 n.18, 102 S. Ct. 2421, 2429 n.18, 72 L. Ed. 2d 824 (1982)* (in context of holding that state courts are authorized to decide whether the Voting Rights Act applies to a proposed change in voting procedures, noting that "although state courts lack jurisdiction to entertain suits brought pursuant to *§ 4* of the Clayton Act, *15 U.S.C. § 15*, they often decide **[**22]** issues concerning the federal antitrust laws in other contexts"); *Freeman v. Bee Mach. Co., 319 U.S. 448, 450, 63 S. Ct. 1146, 1147, 87 L. Ed. 1509, 1943 Dec. Comm'r Pat. 771 (1943)* (after contract claim was removed to federal court, "respondent moved to amend its declaration by adding a complaint for treble damages under *§ 4* of the Clayton Act"); *Blumenstock Bros. Advertising Agency v. Curtis Pub. Co., 252 U.S. 436, 441, 40 S. Ct. 385, 387 (1920)* (in context of suit for treble damages under *§ 7* of the Sherman Act, observing that "the controversy concerns subject-matter limited by federal law, for which recovery can be had only in the federal courts").

[*847] based upon an "unmistakable implication from legislative history," or "a clear incompatibility between state-court jurisdiction and federal interests."[16] *Gulf Offshore, 453 U.S. at 478, 101 S. Ct. at 2875*. To the contrary, ***HN4***[] legal scholarship suggests **[**20]** that "[t]he legislative history of the Sherman Act indicates that exclusive jurisdiction was not intended." Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509, 510 n.13 (1957) (citing S. Doc. No. 147, 57th Cong., 2d Sess. 311-13, 317, 320-21, 334 (1903)). And we perceive no clear incompatibility between state-court jurisdiction over the legal malpractice claim at issue and federal interests. ***HN5***[] The cardinal policy undergirding the Sherman Act is maximizing consumer welfare through the promotion of economic competition.[17] By contrast, ***HN6***[] the policy undergirding the state-law tort of legal malpractice is to compensate an injured private party for its losses. *See* *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 299 S.W.3d 106, 122 (Tex. 2009)*. State-court adjudication of claims alleging injuries resulting from legal malpractice does not threaten to undermine the federal interest in preventing restraints on free competition.

The claims at issue in this case are state-law malpractice claims, and they are not causes of action created or specifically authorized by federal antitrust laws.[18] An analysis applying *Grable* and *Minton* would inform the question of whether the malpractice claim may "arise under" federal ***antitrust law*** pursuant to *28 U.S.C. § 1337(a)* and therefore be a candidate for concurrent federal subject-matter jurisdiction. But absent authority that state courts are prohibited from exercising jurisdiction over all claims "arising under" federal ***antitrust law***, the *Grable* analysis does not determine whether the malpractice claim is subject to exclusive federal jurisdiction. The relators thus have made no showing that federal jurisdiction over these claims is exclusive to federal courts to the exclusion of otherwise presumed concurrent state-court jurisdiction.

We conclude that the relators have failed to demonstrate a clear abuse of the trial court's discretion. *See* *Canadian Helicopters, 876 S.W.2d at 305*; *Walker, 827 S.W.2d at 837*. To the contrary, we conclude that the trial court is properly exercising jurisdiction over the state-law malpractice claim.[19]

[*848] Conclusion

We conclude that Texas courts are not prohibited from exercising jurisdiction over the state-law legal malpractice claims in this case. Because we conclude that no clear abuse of discretion has been shown, we express no opinion

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[16] The relators' petition focuses on the *Grable* test and its consideration of whether the exercise of federal jurisdiction over an overlying state-law claim would disturb "any congressionally approved balance of federal and state judicial responsibilities." *Grable, 545 U.S. at 314, 125 S. Ct. 2368*; *Minton, 355 S.W.3d at 640*. Accordingly, their arguments are oriented towards justifying the federal interest in adjudicating the claim. The more appropriate question is whether state courts may exercise their presumed concurrent jurisdiction without offending some federal interest.

[17] *See,* ***[**23]*** *e.g.,* *Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2212, 176 L. Ed. 2d 947 (2010)*; *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 2713, 168 L. Ed. 2d 623 (2007)*; *see generally* ROBERT H. BORK, THE ANTITRUST PARADOX 50-71 (1993 ed.).

[18] *Cf.* *Wilshire Oil Co. v. Riffe, 409 F.2d 1277, 1284 (10th Cir. 1969)* (distinguishing federal **[**24]** antitrust claim from employer's common-law right to recover antitrust fine from employees whose conduct occasioned the fine).

[19] We also note that a conclusion that federal courts have exclusive subject-matter jurisdiction over this malpractice claim would be diametrically opposed to the prior ruling in this same dispute that "federal question jurisdiction does not exist in this case, and removal was not proper on this basis." *Rx.com, Inc. v. O'Quinn, 766 F. Supp. 2d 790, 793, 797 (S.D. Tex. 2011)*. If we granted the relief sought by the relators, the real parties in interest would face the circumstance of having to re-file their claims in federal district court after one federal district judge has already ruled that there is no federal subject-matter jurisdiction over the claim. A federal court—perhaps even the same federal district judge—might then be forced to either exercise jurisdiction **[**25]** or effectively leave the real parties judicially homeless, shunned by both state and federal courts refusing to exercise jurisdiction to resolve their claims on the merits. Such "jurisdictional ping-pong" is undesirable due to its tendency to "undermine public confidence in our judiciary" and "squander private and public resources." *Christianson, 486 U.S. at 818-19, 108 S. Ct. at 2179*.

about what circumstances would permit a private litigant to obtain review of the denial of a plea to the jurisdiction by means of a petition for writ of mandamus due to the alleged inadequacy of the remedy of appeal from a final judgment.

Accordingly, we deny the petition for writ of mandamus.

Michael Massengale

Justice

Concur by: Harvey Brown

Concur

CONCURRING OPINION

I join in the Court's opinion holding that federal courts do not have exclusive jurisdiction over this case. The Court holds, and I agree, that regardless of whether federal courts have jurisdiction over cases like this one, relators **[**26]** have not established that such jurisdiction would be exclusive of, rather than concurrent with, state courts' jurisdiction. I write separately only to address another approach to the issue. Specifically, like the federal district court that considered this issue before us,[1] I would hold that, under the existing record, relators have not established two prerequisites to the existence of federal jurisdiction over this case: (1) the existence of a "substantial" federal question and (2) harmony with the careful balance between federal and state courts. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)* (setting forth four-part test for embedded-federal-question jurisdiction). Because federal courts do not have jurisdiction over this case, they necessarily do not have exclusive jurisdiction.

Embedded-Federal-Question Jurisdiction

The jurisdictional provisions of the United States Code grant federal district courts original jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States." This is often referred to as "federal question jurisdiction" or "arising **[**27]** under jurisdiction." *28 U.S.C. § 1331*. An action "aris[es] under" federal law when (1) federal law creates the cause of action or (2) in some rare cases, when a cause of action created by state law nevertheless turns on a substantial question of federal law. *See Grable, 545 U.S. at 312, 125 S. Ct. at 2366-67* (noting that federal-question jurisdiction over state-law claim is less common); *see also Empire Healthchoice Assur., Inc. v. McVeigh, 547 U.S. 677, 699, 701, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006)* (describing category of cases as "special and small" and "slim"); Lonny S. Hoffman, *Intersections of State and Federal Power*: *State Judges, Federal Law, and the "Reliance Principle"*, *81 Tul. L. Rev. 283, 298 (2006)* ("routine efforts to come within this statutory head of jurisdiction should be rejected in favor of allowing the state court to apply and interpret the applicable federal law"). The second type of federal-question jurisdiction is often referred to as embedded-federal-question jurisdiction.

The questions in this legal malpractice suit—arising out of relators' prosecution of **[*849]** a Sherman Act claim in federal court—are whether federal question jurisdiction exists over this state-law action and, if so, whether that **[**28]** jurisdiction is exclusive. Under this record, I answer the first question in the negative, and therefore do not need to reach the second question (although I join in the Court's answer to that question). Answering the first question requires a four-part inquiry: (1) do real-party plaintiffs' legal malpractice claims require resolution of an

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[1] *RX.com, Inc. v. O'Quinn, 766 F. Supp. 2d 790, 795-97 (S.D. Tex. 2011)*.

issue of ***antitrust law*** under the Sherman Act; if so, is that antitrust issue (2) actually disputed and (3) substantial; and (4) will federal jurisdiction disturb the balance of federal and state judicial responsibilities. *See Grable, 545 U.S. at 312-14, 125 S. Ct. at 2366-68*; *see also Minton v. Gunn, 355 S.W.3d 634, 640 (Tex. 2011)*, *petition for cert. filed*, No. 11-1118 (U.S. March 9, 2012). Requiring an affirmative answer to each of these four inquiries is necessary to ensure that reference to an embedded federal issue is not "a password for opening federal courts" to any state malpractice action "embracing a point of federal law." *Grable, 545 U.S. at 314*.

Relators' plea to the jurisdiction fails to satisfy two of these elements. First, the record before us does not establish the existence of a "substantial" federal question. Second, relators have **[**29]** not demonstrated that affording federal courts jurisdiction over malpractice actions like this one would not upset the careful balance between federal and state courts.

A. The record does not show a substantial, disputed federal issue

Relators' petition in this Court is premised primarily on their broad interpretation of *Minton* and its application of the standards articulated in *Grable*. Relators contend that, under *Minton*, they have shown the presence of an "actually disputed" and "substantial" federal issue (the second and third factors under *Grable*) merely by asserting that they are contesting whether the real-party plaintiffs could have prevailed on their underlying Sherman Act claim. They characterize this fact as being "absolutely dispositive." But that conclusion is not compelled by *Minton* for several reasons. First, while *Minton* involved a meaningful legal and factual dispute over intersecting patent law doctrines, relators have not demonstrated that the federal issues here require anything more than the application of established federal law to factually-disputed claims. Second, the *Minton* court expressly limited its holding to the facts of that case, and the circumstances favoring **[**30]** federal jurisdiction in *Minton* are not present here.

1. *Minton* turned on a substantial, legally and factually disputed issue of federal patent law

In *Minton*, the Texas Supreme Court held that federal courts had exclusive jurisdiction over a legal malpractice lawsuit arising out of the defendants' handling of a patent claim. *Minton, 355 S.W.3d at 640-47*. Relators construe *Minton* as a sea-change in the doctrine of embedded-federal-question jurisdiction, essentially eliminating *Grable's* "actually disputed" and "substantial" federal issue requirements when the federal issue arises from an area of federal law in which Congress has created claims that may originate only in federal courts. But the *Minton* Court did not presume a "substantial" federal question merely because the malpractice action before the Court would require the application of federal patent law; instead, the Court determined that the federal issue in that case was, in fact, substantial and actually disputed.

The federal issue in *Minton* was whether the "experimental use" exception would have excused Minton's patent claim from the statutory on-sale bar against patents filed more than one year after the patented **[*850]** invention is **[**31]** sold. *Id. at 638*. The application of patent law's "experimental use" doctrine was dispositive of Minton's malpractice action: Minton's sole assertion of negligence was premised on his attorneys' failure to timely plead and brief the experimental use exception in the federal patent litigation. *Id. at 642*. The Court recognized the "strong interest in having federal patent law applied uniformly." *Id. at 645*; *see also 28 U.S.C. § 1295(a)* (vesting federal circuit with exclusive jurisdiction over patent appeals). Despite all of this—a state-law claim that depended entirely on the interaction between a federal statute and a federal-common-law exception to that statute in an area of law in which the courts have recognized a strong interest in uniform federal interpretation and application—the *Minton* Court expressly noted that whether the federal issue was sufficiently substantial to justify exclusive federal jurisdiction was a "close" call. *Id. at 643*. If *Minton* was a close call, this is an easy one.

2. Relators have not shown a substantial federal issue that is both legally and factually disputed

Minton instructs that in order for a disputed federal issue to be substantial there must be more **[**32]** than factual disputes regarding the application of the federal laws to the case—there must also be a legal dispute.[2] *Id. at 644* (stating that plaintiff was required to prove that federal issue was "legally and factually viable"); *see also id. at 642-43* ("the legal and factual viability" of federal issue was "clearly in dispute"). It is the construction of the law—not its application, which is often left to the jury—in which the expertise of federal judges is particularly helpful and uniformity is needed. A dispute over the application of the law to the facts of the case is insufficient to open the doors to the federal courthouse. *See Grable, 545 U.S. at 315* ("meaning of the federal [law]" must be actually in dispute); *id. at 316* (observing that the Court in *Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986)*, "assumed that federal law would have to be applied to resolve the claim" but nevertheless determined that federal jurisdiction was unavailable). The *Grable* Court rejected the "expansive view that mere need to apply federal law in a state-law claim will suffice to open the 'arising under' door." *Grable, 545 U.S. at 313*. Instead, it twice stated that **[**33]** the issue is whether there is a dispute "respecting the validity, construction or effect of [federal] law." *Id*. (quoting *Shulthis v. McDougal, 225 U.S. 561, 569, 32 S. Ct. 704, 56 L. Ed. 1205 (1912)*.

[*851] Relators rely on certain defenses asserted by the antitrust defendants in the underlying Sherman Act lawsuit as establishing a substantial federal issue.[3] Even if we were to look at its defenses in the original lawsuit,[4] relators have not demonstrated on this record that those defenses implicate a legal dispute involving the validity or construction of federal ***antitrust law***, as opposed to the mere application of such law to the facts of this case. The mere fact that the "case within the case" is based on Sherman Act claims supports a fair inference that federal issues may arise in the course of the litigation. These may include the issues identified in relators' plea to the jurisdiction and may include disputes that are primarily legal in nature or disputes that are more fact-oriented. But at this point we can only speculate; the record does not establish that these defenses **[**35]** would require anything other than a "fact-bound and situation-specific" analysis under generic principles of antitrust litigation. *See Empire Healthchoice, 547 U.S. at 701, 126 S. Ct. at 2137* (stating that "fact-bound and situation-specific" federal questions

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[2] In *Minton*, there was a factual dispute regarding the applicability of the experimental use exception to the on-sale bar to patentability of the invention. The court of appeals' opinion reveals that there was also, however, a legal dispute. *Minton v. Gunn, 301 S.W.3d 702, 709 (Tex. App.—Fort Worth 2010)*, *rev'd on other grounds*, *355 S.W.3d 634 (Tex. 2011)* (noting that dispute was "predominately one of fact"). In the court of appeals, the parties disagreed on the standard that applies for determining when testing is sufficient to constitute an experimental use. The plaintiff contended that "experimental use is supported by any testing needed to convince the inventor that the invention is capable of performing its intended purpose in its intended environment." *Id. at 712 n. 46*. The court of appeals disagreed and held that the testing must relate to a claimed feature of the patented invention. Applying this standard, the court of appeals concluded that the testing evidence offered by the inventor did "not, as a matter of **[**34]** law, support experimental use." *Id. at 712*. Because the court of appeals affirmed a no-evidence summary judgment on this basis, the disputed legal issue was critical to the ultimate issue in the case. In contrast, in this case, there is no evidence of a significant, disputed legal issue in the plea to the jurisdiction.

[3] To the extent relators rely on expert reports they provided this Court after oral argument, we may not consider evidence not before the trial court at the time of the plea to the jurisdiction hearing. *See In re Taylor, 113 S.W.3d 385, 392 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding)* (stating that, in mandamus proceedings, we "focus on the record that was before the trial court" and exclude from our consideration filings "that were not part of the trial court record at the time of the hearing on the motion that is the subject of the original proceeding."). Even if I **[**36]** were to consider these reports, it is still not clear to me that there is a substantial federal question; relators' motion for summary judgment (which real-party plaintiffs filed after oral argument and was also filed after the ruling on the plea to the jurisdiction) is not based on any arguments under the Sherman Act.

[4] Real-party plaintiffs contend that we cannot consider this evidence under the well-pleaded complaint rule, a federal standard that limits subject-matter-jurisdiction inquiries to the face of the plaintiff's complaint. *See Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 10, 103 S. Ct. 2841, 2847, 77 L. Ed. 2d 420 (1983)* ("the *plaintiff's* complaint establishes that the case 'arises under' federal law"). Arguably, the inquiry here could be governed by the Texas procedure that permits challenges to the existence of jurisdictional facts in a plea to the jurisdiction. *See Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226-27 (Tex. 2004)*. Because the documents on which relators rely do not demonstrate a substantial, disputed federal issue, I need not decide this issue.

are insufficient to create arising-under jurisdiction); Bennett v. Sw. Airlines Co., 484 F.3d 907, 910 (7th Cir. 2007) ("What the Court said about *Grable* in *Empire Healthchoice* can be said here too. We have a fact-specific application of rules that come from both federal and state law rather than a context-free inquiry into the meaning of a federal law.").

3. *Minton* is an expressly limited holding

Although this case, like *Minton*, is **[**37]** a malpractice action arising out of the prosecution of a federal cause of action, that fact does not, alone, establish a substantial federal issue. The Supreme Court rejected that kind of sweeping displacement of state-law claims in *Grable. See* Grable, 545 U.S. at 314, 125 S. Ct. at 2368 (rejecting "single, precise, all-embracing" test for determining embedded federal jurisdiction) (quoting Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 821, 108 S. Ct. 2166, 2180, 100 L. Ed. 2d 811 (1988) (Stevens, J., concurring); id. at 317-18, 125 S. Ct. at 2370 (describing *Merrell Dow* as disclaiming "any bright-line rule" and explaining that "questions of jurisdiction over state-law claims require 'careful judgments'" and a "contextual enquiry"); Merrell Dow, 478 U.S. at 808, 106 S. Ct. at 3232 (rejecting use of a "single, precise definition" **[*852]** to determine arising-under jurisdiction). Consistently, the *Minton* Court expressly limited the scope of its holding, stating that it would not "cause all legal malpractice suits arising out of patent litigation to fall under the exclusive patent law jurisdiction of the federal courts," and cautioning that the opinion "should only be construed as conferring exclusive **[**38]** federal patent jurisdiction based upon the specific facts of this case." Minton, 355 S.W.3d at 646. Furthermore, the Court noted that "any state litigant asserting a legal malpractice action to recover for damages resulting from his patent attorney's negligence in patent prosecution or litigation must also satisfy all four elements of the *Grable* test to place his claim under exclusive federal jurisdiction," and that "[i]n the context of state-based legal malpractice claims, plaintiffs will not always be able to meet such a burden." *Id*.

In addition to the absence from the record of a substantial *legal* dispute over federal law, several other key facts favorable to federal jurisdiction in *Minton* are not present here. First, ***antitrust law*** does not present the same heightened need for uniformity and predictability presented by questions of patent validity. *See, e.g.,* USPPS, Ltd. v. Avery Dennison Corp., 647 F.3d 274, 284 (5th Cir. 2011) (observing that special federal interest exists in developing uniform body of patent law, and that interest is protected by "Congress's grant of exclusive appellate jurisdiction over patent cases to [federal circuit] court."); *see also* USPPS, Ltd. v. Avery Dennison Corp., 676 F.3d 1341, 1350 (Fed. Cir. 2012) **[**39]** (Prost, J., concurring) (contending that Federal Circuit's approach to legal malpractice cases comports with *Grable* because "substantive patent law issues" implicated in such cases are necessarily substantial).

Second, patent law's "experimental use" exception to the on-sale bar was the fulcrum of the *Minton* action—the failure to properly plead and brief the "experimental use" doctrine was the sole act of negligence Minton pleaded, and Minton alleged that failure, alone, caused him to lose his patent claim—and that issue was brought to a head in the trial court through summary judgment proceedings. Minton, 355 S.W.3d at 642. Here, the negligent conduct pleaded is failure to file the underlying litigation timely; the Sherman Act defenses relators identify (which were pleaded by the defendants in the underlying action) are, under this record, only some of the issues that may be relevant to proving the causation element of real-party plaintiffs' malpractice claim. *Cf.* id. at 646-47 (favorably citing *Roof Tech. Servs., Inc. v. Hill, 679 F.Supp.2d 749, 754 (N.D. Tex. 2010)* (explaining that state legal malpractice action involving attorney's "failure to meet deadlines and communicate with **[**40]** [his] client" and in which "[p]atent issues are merely floating on the periphery" did not trigger exclusive federal patent jurisdiction), and Genelink Biosciences, Inc. v. Colby, 722 F. Supp. 2d 592, 601 (D.N.J. 2010) (holding that where state malpractice claim was based on missed deadlines, and not on the validity of the actual patent itself, there was no patent issue triggering exclusive federal patent law jurisdiction)).

4. Conclusion on the "substantial federal issue" element

A substantial contested federal issue is one that involves "a serious federal interest in claiming the advantages thought to be inherent in a federal forum" and "an important issue of federal law" that is "both dispositive of the case and . . . controlling in numerous other cases." *Grable, 545 U.S. at 313, 315, 125 S. Ct. 2367-68*; *Empire Healthchoice, 547 U.S. at 700, 126 S. Ct. at 2137*. It is also central to the parties' dispute. *See* *Grable, 545 U.S. at 312, 320,* ***[*853]*** *125 S. Ct. at 2367, 2371* (disputed federal issue was "at the heart of the state-law title claim"); *Empire Healthchoice, 547 U.S. at 699 n.5, 126 S. Ct. at 2136* (describing the classic federal-question jurisdiction claim as one "predicated on the centrality **[**41]** of a federal issue"); *see also* *Minton, 355 S.W.3d at 645*; Hoffman, *81 Tul. L. Rev. at 300* (stating that disputed federal issue "may not be some minor point of federal law, but instead vital, relevant, and significant . . . to a wide range of persons and behavior" and "an issue is of widespread import").[5] Thus, relators' burden to show a substantial issue is not a light one. They must demonstrate both the issue's importance in the suit itself and in the greater scheme of the development of the law. Relators have failed to carry this burden to show a clear abuse of the trial court's discretion warranting mandamus relief.

B. Relators have not shown that recognizing federal jurisdiction here would not disrupt the careful balance between federal and state courts

Relators likewise fail to satisfy the fourth, and arguably most important, prong of the *Grable* test. *See* *Grable, 545 U.S. at 310, 125 S. Ct. at 2365* (stating that "the national interest in providing a federal forum" for the federal issue involved in case was "sufficiently substantial to support the exercise of federal-question jurisdiction" without distorting the "division of labor between state and federal courts"); *see also* *Minton, 355 S.W.3d at 644*. Specifically, relators ask this Court to hold that an action traditionally pursued in state court now belongs (exclusively) in federal court, despite a federal district court's determination that it lacked any **[**43]** (much less exclusive) jurisdiction over the case. But they have not demonstrated that such a holding would not disturb the balance of judicial responsibility Congress has struck between federal and state courts under the procedural posture of this case.

Federal courts have limited jurisdiction. And federal courts have expressed concern that the doors to their courts should not be opened too wide for claims that are traditionally handled by state courts—like legal malpractice claims—under the doctrine of embedded-federal-question jurisdiction. *See* *Grable, 545 U.S. at 319, 125 S. Ct. at 2371* (finding jurisdiction only after determining that recognizing federal-question jurisdiction over actions like that before Court "would not materially affect, or threaten to affect, the normal currents of litigation" by introducing flood of state claims into federal courts). Here a federal court has already rejected relators' contention that federal courts have jurisdiction over this case. Congress elected to make a federal court's determination that a case should be remanded generally non-reviewable. *28 U.S.C. § 1447(d)*; *Schexnayder* ***[*854]*** *v. Entergy La., Inc., 394 F.3d 280, 283 (5th Cir. 2004)*. To allow **[**44]** a state court to second-guess a federal court that has already remanded a case because it determined that it lacked jurisdiction would be contrary to Congress's intent in limiting review of remand determinations. If a federal court decides to close its doors to a claim, a state court should not force the federal courthouse door open.

"[T]here must always be an assessment of any disruptive portent in exercising federal jurisdiction." *Grable, 545 U.S. at 314, 125 S. Ct. at 2368*. Here that assessment counsels against a state-court declaration that, contrary to the

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[5] This requirement, known as the centrality requirement,

> addresses whether the plaintiff's claim is "federal enough" to justify invocation of federal question jurisdiction. Centrality asks how much—an assessment ill-suited to a cut-and-dried rule. It calls for a standard that . . . tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation. Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules. Standards allow the decisionmaker **[**42]** to take into account all relevant factors or the totality of the circumstances. We should not be surprised or disappointed, then, if the centrality inquiry does not always yield litmus-like answers. The nature of the inquiry requires nuance and balancing.

Richard D. Freer, *Of Rules and Standards*: *Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, *82 Ind. L.J. 309, 320 (2007)*.

prior decision of a federal court upon removal, federal courts—and federal courts alone—bear the burden of providing a remedy for a state-law cause of action merely because federal law may be applied to an element of the claim.

Conclusion

Courts should attempt to avoid "upsetting the state-federal line drawn (or at least assumed) by Congress." *Grable, 545 U.S. at 314, 125 S. Ct. at 2368*. Legal malpractice claims are on the side of the line that is "ordinarily resolved in state courts." *Empire Healthchoice, 547 U.S. at 683, 126 S. Ct. at 2127*. Therefore, in deciding whether *28 U.S.C. § 1331* grants federal courts arising-under jurisdiction, **[**45]** courts "should await a clear signal from Congress" that it intends to displace state courts of this task. *Id*. Because no such signal exists here, I would conclude that the trial court did not abuse its discretion in denying the plea to the jurisdiction on the record before it.

I therefore concur in the Court's opinion.

Harvey Brown

Justice

Cornucopia Prods., LLC v. Dyson, Inc.

United States District Court for the District of Arizona

July 27, 2012, Decided; July 27, 2012, Filed

No. CV 12-00234-PHX-NVW; No. CV 12-00924-PHX-NVW

Reporter

881 F. Supp. 2d 1086 *; 2012 U.S. Dist. LEXIS 104753 **; 2012-2 Trade Cas. (CCH) P77,995

Cornucopia Products, LLC, Plaintiff, vs. Dyson, Inc. and Dyson, Ltd., Defendants. Dyson Technology Limited; Dyson, Inc., Plaintiffs, vs. Cornucopia Products, LLC, Defendant.

Subsequent History: Motion denied by, Request denied by, Count dismissed at, Motion to strike denied by, As moot *Cornucopia Prods., LLC v. Dyson, Inc., 2012 U.S. Dist. LEXIS 132984 (D. Ariz., Sept. 18, 2012)*

Prior History: *Cornucopia Prods., LLC v. Dyson Inc., 2012 U.S. Dist. LEXIS 104750 (D. Ariz., July 27, 2012)*

Core Terms

patent, fan, air, nozzle, bladeless, antitrust, slit, ring, infringement, air flow, sham, motion to dismiss, patent office, translation, counterclaim, discharging, retailers, baseless, lawsuit, allegations, customers, omission, blades, patent-holder, invention, assembly, spacers, surface, threats, tilt

Counsel: **[**1]** For Cornucopia Products LLC (2:12-cv-00234-NVW), Plaintiff: Andrew P Lahser, LEAD ATTORNEY, Law Office of Andrew P Lahser PLC, Fountain Hills, AZ; Keith Clark Ricker, LEAD ATTORNEY, Cassett Ricker Law PLLC, Phoenix, AZ.

For Dyson Technology Limited, Dyson Incorporated, Consol Plaintiffs: Eric Michael Fraser, William J Maledon, LEAD ATTORNEYS, Osborn Maledon PA, Phoenix, AZ; Joseph A Calvaruso, Richard F. Martinelli, LEAD ATTORNEYS, Orrick Herrington & Sutcliffe LLP - 52nd St - New York, NY, New York, NY; Robert Allan Rosenfeld, Robert S Shwarts, Russell Paul Cohen, LEAD ATTORNEYS, Orrick Herrington & Sutcliffe LLP - San Francisco, CA, San Francisco, CA.

For Dyson Incorporated, Defendant: Eric Michael Fraser, William J Maledon, LEAD ATTORNEYS, Osborn Maledon PA, Phoenix, AZ; Joseph A Calvaruso, Richard F Martinelli, LEAD ATTORNEYS, Orrick Herrington & Sutcliffe LLP - 52nd St - New York, NY, New York, NY; Robert A Rosenfeld, Robert S Shwarts, LEAD ATTORNEYS, Russell P Cohen, Orrick Herrington & Sutcliffe LLP - San Francisco, CA, San Francisco, CA.

For Dyson Limited, Defendant: Eric Michael Fraser, William J Maledon, LEAD ATTORNEYS, Osborn Maledon PA, Phoenix, AZ; Joseph A Calvaruso, Richard **[**2]** F Martinelli, LEAD ATTORNEYS, Orrick Herrington & Sutcliffe LLP - 52nd St - New York, NY, New York, NY; Robert Allan Rosenfeld, Robert S Shwarts, Russell Paul Cohen, LEAD ATTORNEYS, Orrick Herrington & Sutcliffe LLP, San Francisco, CA.

For Cornucopia Products LLC, Consol Defendant: Keith Clark Ricker, LEAD ATTORNEY, Cassett Ricker Law PLLC, Phoenix, AZ.

For Dyson Technology Limited, Dyson Incorporated (2:12-cv-00924-NVW), Plaintiffs: Eric Michael Fraser, William J Maledon, LEAD ATTORNEYS, Osborn Maledon PA, Phoenix, AZ; Robert A Rosenfeld, Robert S Shwarts, Russell P Cohen, LEAD ATTORNEYS, Orrick Herrington & Sutcliffe LLP - San Francisco, CA, San Francisco, CA; Joseph A Calvaruso, Richard F. Martinelli, Orrick Herrington & Sutcliffe LLP - 52nd St - New York, NY, New York, NY.

For Cornucopia Products LLC, Defendant: Keith Clark Ricker, LEAD ATTORNEY, Cassett Ricker Law PLLC, Phoenix, AZ.

Judges: Neil V. Wake, United States District Judge.

Opinion by: Neil V. Wake

Opinion

[*1089] ORDER

Before the Court are the "Dyson Defendants' Motion to Dismiss Pursuant to *Rule 12(b)(6)* and *Rule 9(b)*" (Doc. 19) and "Cornucopia's 12(b)(6) Motion to Dismiss and Alternative 12(f) Motion to Strike" (Doc. 37). For the reasons stated below, the **[**3]** Court will: (i) deny Cornucopia's motion to dismiss as moot; (ii) deny Cornucopia's alternative motion to strike on its merits; (iii) grant Dyson's motion to dismiss Cornucopia's antitrust and tortious interference claims, in part with prejudice and in part without prejudice; and (iv) deny Dyson's motion as to Cornucopia's declaratory judgment claims.

I. LEGAL STANDARD

To state a claim for relief under *Fed. R. Civ. P. 8(a)*, a plaintiff must make "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citations omitted). This "short and plain statement" must also be "plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*.

"Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. at 1950*. A claim is plausible if it contains "[f]actual allegations [sufficient] to raise a right to relief above the speculative level," *Twombly, 550 U.S. at 555*, **[**4]** and to permit a reasonable inference that the defendant is liable for the conduct alleged, *Iqbal, 129 S. Ct. at 1949*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Rather, the plaintiff must at least "allege sufficient facts to state the elements of [the relevant] claim." *Johnson v. Riverside Healthcare Sys., LP, 534 F.3d 1116, 1122 (9th Cir. 2008)*.

In evaluating a motion to dismiss, the Court accepts all of Plaintiffs' plausible factual allegations as true and construes the pleadings in a light most favorable to them. *Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005)*. The Court generally does not look beyond the complaint, but the Court may take judicial notice of matters of public record, even if not alleged in the complaint. *Lee v. City of L.A., 250 F.3d 668, 688-89 (9th Cir. 2001)*.

II. THE VARIOUS DYSON ENTITIES

At the outset, certain confusion should be cleared up regarding the various Dyson parties. Cornucopia has sued Dyson Ltd. (the U.K.-based parent company) and Dyson Inc. (a U.S. subsidiary) based on four of "Dyson's" U.S. patents. The true owner of the four patents in question, however, is Dyson Technology **[**5]** Ltd.

Cornucopia has not sued Dyson Technology. However, Dyson Inc. says that it is Dyson Technology's licensee with respect to the four patents. Further, Dyson Technology (along with Dyson Inc.) is a plaintiff in a countersuit brought against Cornucopia for patent infringement. By stipulation of the parties, the Court consolidated Dyson's countersuit with Cornucopia's original action. Thus, all relevant parties are now before the Court, and the Court will treat Cornucopia's complaint as if it named Dyson Technology.

On the current record, it is clear that Dyson Technology applied for and received the patents in question. However, Cornucopia's allegations potentially implicate all three Dyson entities. At this stage, it is **[*1090]** not possible to separate them. Thus, all references to "Dyson" below are to the three Dyson companies collectively, unless otherwise noted.

III. FACTS

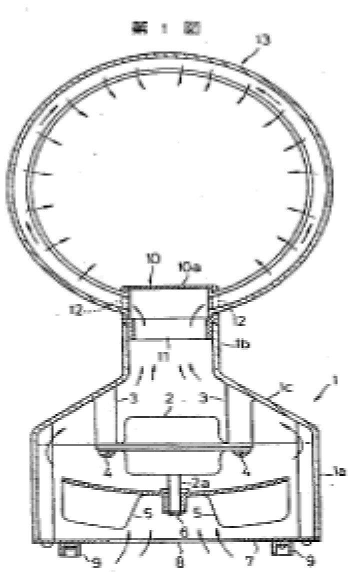
The following facts are drawn from Cornucopia's complaint, as well as matters subject to judicial notice, such as the patents in suit and their file histories. *See, e.g.,* Coinstar, Inc. v. Coinbank Automated Sys., Inc., 998 F. Supp. 1109, 1114 (N.D. Cal. 1998) (taking judicial notice of patents and their file histories). **[**6]** The facts alleged in Cornucopia's complaint are assumed to be true for purposes of Dyson's motion to dismiss.

A. The Japanese Bladeless Fan Patent

In 1981, the Japanese patent office issued patent number S56-167897, which disclosed a "bladeless fan" as follows (according to Cornucopia's translation):

> An electric fan, comprising: a base stand that holds fan blades and a motor that drives the fan blades, and a wind discharge ring with a ring shaped slit that is supported on the base stand, has a hollow shape that receives the wind created by the fan blades from the base stand, and discharges wind therefrom.

(Doc. 1 ¶ 7.) In relevant part, the Japanese patent depicted its invention through the following figures:



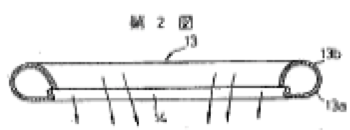


Figure 1 depicts a cross-section of the entire fan, which is not truly bladeless. The lower portion of the apparatus conceals a fan which draws air from underneath the base, as denoted by the arrowed lines surrounding the number 8, and pushes it into what the patent calls — according to Cornucopia's translation — the "wind discharge ring" (item 13), where one might expect a traditional fan's blades to be located. The parties here refer to this ring as a "nozzle."

Figure 2 is a cutaway **[**7]** view of the nozzle. As figure 2 shows, the nozzle is a hollow tube with an annular slit (item 14) — as if one had taken a hose, sliced it open lengthwise, rolled it back into a hose shape with one side of the slice slightly overlapping the other side, and then curled the entire thing into shape of a ring. As the fan inside the base fills the nozzle with air, the air escapes from the nozzle through the slit (and presumably toward the user), as depicted by the two shorter arrowed lines in figure 2 (and the inward-pointing arrows arranged radially over item 13 in figure 1).

The four longer arrowed lines in figure 2 appear to depict air from behind the fan **[*1091]** being pulled into the open ring and forward. According to Cornucopia's translation of the Japanese patent, "'the actual amount of wind [generated by the fan] is much higher than the amount of wind directly discharged from the slit.'" (Doc. 1 ¶ 12 (bracketed material inserted).)

How the fan accomplishes this feat is somewhat in question. Cornucopia's complaint claims that the Japanese fan induces the "Coanda effect." (*See id.*) The Coanda effect is "[t]he tendency of a gas or liquid coming out of a jet to travel close to the wall contour **[**8]** even if the wall's direction of curvature is away from the jet's axis." *McGraw-Hill Dictionary of Scientific and Technical Terms* 416 (6th ed. 2003). The Coanda effect can supposedly "entrain" — grab and pull along — surrounding air, thus increasing the flow of air beyond what is being pushed out of the "jet."

The Coanda effect necessarily requires a curved surface downstream from the "jet" — in this case, downstream from the slit through which air escapes the nozzle. The Japanese patent's figures do not disclose such a surface, nor does Cornucopia quote any text from the Japanese patent regarding the Coanda effect. As far as the figures disclose, it appears that the nozzle and slit are designed to push air both forward and inward, with nothing downstream from the slit. Conceivably, this could create a low-pressure zone within the nozzle, thus pulling air from behind the nozzle forward. However, nothing in the figures discloses the necessary physical shape downstream from the slit to take advantage of the Coanda effect.

B. Dyson's Bladeless Fan Patents

1. The '449 Patent: A Bladeless Fan with a "Diffuser"

In September 2009, Dyson (specifically, Dyson Technology) filed U.S. patent application **[**9]** number 12/560,232, titled simply "fan," a preferred embodiment of which was proposed in these figures (among others):

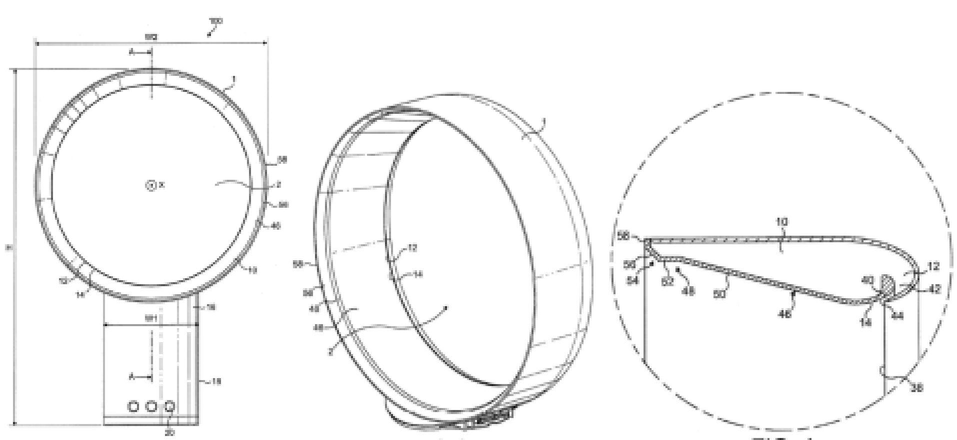


FIG. 1 FIG. 2 FIG. 4

Like the Japanese fan, a bladed fan — an impeller in the preferred embodiment — hides within the base (figure 1, item 18) which draws air from around the base and pushes that air into a hollow nozzle (figures 1 and 2, item 1). The cross-section of the nozzle resembles an upside down airfoil, with the trailing edge of the "wing" pointing in the direction that the fan blows air (figure 4). As the impeller fills the ring casing with air, air escapes out of the ring casing through the forward-facing slit (figure 4, item 38).

Dyson's application proposed one independent claim that is relevant here. That **[*1092]** independent claim (claim 1) describes a bladeless fan with, among other features, a "nozzle extending about an axis to define an opening through which air from outside the fan assembly is drawn by the air flow emitted from the mouth [*i.e.*, the slit through which air escapes from the 'nozzle']." (FH449 at 19.) [1] This appears to describe the same effect as claimed in the Japanese patent, although it is not clear whether Dyson is relying on lower air pressure, the Coanda effect, **[**10]** or both. The proposed specification (not the claims) describes a preferred embodiment that includes a Coanda surface (FH449 at 9) — which is the curve sloping away from the direction in which air escaping the slit would most naturally travel (figure 4, item 14).

Claim 1 also described "a diffuser portion tapering away from" the mouth (*id.*), referring to the angles **[**11]** formed by figure 4, items 38, 46, 48, 50, 52, 54, 56, and 58 in relation to each other and in relation to the nozzle's axis (figure 1, item x), leading to the inverted airfoil shape. In apparent contrast to the Japanese patent's tube-shaped nozzle, the airfoil shape supposedly focuses, smoothes, and accelerates the airflow emerging from the slit.

Dyson included a copy of the Japanese patent with this application. Dyson also included an English translation of that patent's abstract, which read as follows:

> PURPOSE: To improve the safety and stableness of the fan by providing an air discharging ring shaped in a hollow cylinder form to receive an air stream produced by vanes and having an annular slit to discharge the received airstream therethrough.
>
> CONSTITUTION: The air around a base 1 is suctioned thereinto by the rotation of the vanes 5 of the fan, and then sent upward within the base 1 to a neck piece 10, where it is divided into two air discharging ports 12 so that it can flow within the air discharging ring 13. The air flowing [within?] the air discharging ring 13 is then discharged through the annular slit 14. In this instance, the slit 14 is designed to be so narrow as to provide **[**12]** a strong air stream. Such a strong air stream can stir the air with in the air discharging ring 13 and as a result of this, the air is sensed to flow out of the entire space surrounded by the air discharging ring 13.

(*Id.* at 57; *see also* Doc. 20-1 at 76.)

The Japanese patent came up elsewhere in the application as well. For example, Dyson included the international search report that resulted from its counterpart international application (filed under the Patent Cooperation Treaty the previous month). The report cited the Japanese patent and described it as "the most relevant state of the art with regard to" Dyson's proposed claim 1. The report noted that the only material difference between the invention disclosed in the Japanese patent and Dyson's invention was the "diffuser portion" that supposedly focuses and evens out airflow coming from the nozzle. The report concluded that the diffuser "is **[*1093]** merely one of several straightforward possibilities from which the skilled person would select" to improve the fan's "cooling effect," and therefore "[did] not involve an inventive step." (FH449 at 85; *see also* Doc. 20-1 at 82.)

Finally, Dyson mentioned the Japanese patent in the background section **[**13]** of its proposed specification:

> Other types of fan are described in US 2,488,467, US 2,433,795, and JP 56-167897. The fan of US 2,433,795 has spiral slots in a rotating shroud instead of fan blades. The circulator fan disclosed in US 2,488,467 emits airflow from a series of nozzles and has a large base including a motor and a blower or fan for creating the air flow.

(FH449 at 5.)

The Patent Office approved Dyson's application in April 2011, issuing it as U.S. Patent No. 7,931,449. All of the proposed language quoted above from the application ended up in the issued patent.

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[1] This section contains citations to the file histories of Dyson's patents. These file histories are thousands of pages long, and the Court granted leave for Dyson to file them as PDFs on a CD-ROM, rather than on CM/ECF. Given that, the Court cannot cite to the file histories using a CM/ECF document and page number. In addition, although each patent's file history is contained within its own PDF, none of these PDFs is consecutively paginated from beginning to end (*e.g.*, with Bates numbers). Citations are therefore formatted as in this example, "FH449 at 19" — where "FH" represents "file history"; "449" is the last three digits of the patent number (in this case, U.S. Patent No. 7,931,449); and "19" represents the nineteenth page in the PDF submitted on CD-ROM, regardless of whether that page displays some other page number.

2. The '166 Patent: Adding "Spacers"

In November 2009, Dyson filed patent application number 12/622,844, again titled "fan." This application largely resembled that which became the '449 patent, but focused primarily on adding small tabs, called "spacers," to the nozzle, as depicted by the features labeled 26, 260, 266, and 360 in in these figures:

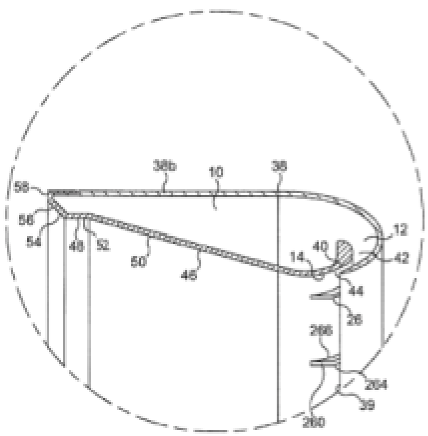

FIG. 4

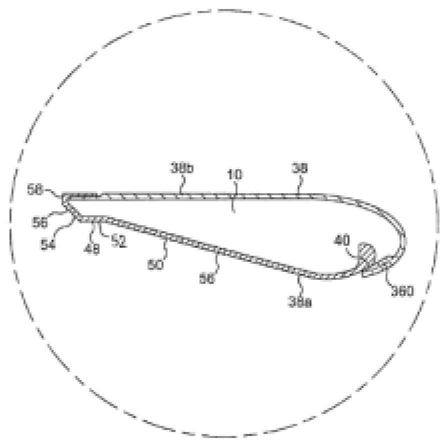

FIG. 5

Dyson asserted that these spacers "even the output of air flow" and ensure "that a user should not experience a variation in the intensity of the air flow over time due to product aging or a variation from one fan assembly to another fan assembly due to variations in manufacture." **[**14]** (FH166 at 7.)

This application proposed two independent claims: one describing the entire fan assembly, and the other describing just the "nozzle," but both calling for "spacers." Echoing the '449 patent, both claims also called for a "nozzle defining an opening through which air from outside the fan assembly is drawn by the air flow emitted from the mouth." (*Id.* at 22, 24.) Unlike the '449 patent, this application contained a separate, dependent claim explicitly based on the Coanda effect, calling for "a Coanda surface located adjacent to the [slit] and over which the [slit] is arranged to direct the air flow" (*id.* at 24) — *i.e.*, item 14 of figure 4.

This application, like the application for '449 patent, disclosed the Japanese patent in full with an English translation of its abstract. (*Id.* at 38.) And mimicking the **[*1094]** '449 patent almost verbatim, the background section of this application's proposed specification contained the following mention of the Japanese patent:

> Other types of fan or circulator are described in US 2,488,467, US 2,433,795, and JP 56-167897. The fan of US 2,433,795 has spiral slots in a rotating shroud instead of fan blades. The circulator fan disclosed in US 2,488,467 **[**15]** emits airflow from a series of nozzles and has a large base including a motor and a blower or fan for creating the air flow.

(*Id.* at 6.)

At one point the application process, the patent examiner tentatively rejected most of Dyson's application in light of the Japanese patent and a U.S. patent not relevant here. (*Id.* at 148.) Nonetheless, the Patent Office ultimately approved this application, issuing it as U.S. Patent No. 8,092,166 in January 2012. All of the proposed language quoted above from the application ended up in the issued patent.

3. The '111 Patent: Adding a "Flexible Sealing Member"

In March 2010, Dyson filed patent application number 12/715,076, titled "fan assembly." This application somewhat resembled that which became the '449 patent, but focused primarily on the impeller inside the fan base, rather than the shape of the nozzle. The proposed patent's single independent claim discloses a "flexible sealing member"

(FH111 at 61) which prevents air pushed by the impeller into the nozzle from flowing back into the impeller or the fan base. A dependent claim, echoing the '449 patent, adds the possibility that "the nozzle extends about an axis to define an opening through which **[**16]** air from outside the fan assembly is drawn by the air flow emitted from the mouth." (*Id.* at 62.) Additional dependent claims add the possibility that "the nozzle comprises a Coanda surface located adjacent the mouth and over which the mouth is arranged to direct the air flow" and "the nozzle comprises a diffuser located downstream of the Coanda surface." (*Id.* at 63.)

Like the application for '449 patent, this application disclosed the Japanese patent in full with an English translation of its abstract. (*Id.* at 148.) The proposed specification also contained the following discussion of the Japanese patent:

> Some fans, sometimes known as air circulators, generate a cooling flow of air without the use of rotating blades. Fans such as those described in US 2,488,467 and JP 56-167897 have large base body portions including a motor and an impeller for generating an air flow in the base body. The air flow is channeled from the base body to an air discharge slot from which the air flow is projected forward towards a user. The fan of US 2,488,467 emits airflow from a series of concentric slots, whereas the fan of JP 56-167897 channels the airflow to a neck piece leading to a single air discharging **[**17]** slot.

(*Id.* at 40.)

The Patent Office approved this application in July 2011, issuing it as U.S. Patent No. 7,972,111. All of the proposed language quoted above from the application ended up in the issued patent.

4. The '379 Patent: Adding the Ability to Tilt Without Toppling

In March 2010, Dyson filed patent application number 12/716,613, titled "fan assembly." This device generally resembled that of the '449 patent, but focused primarily on the fan's ability to tilt the "nozzle" upwards and downwards while keeping the fan's center of gravity in the same place — thus preventing the titled fan from being less stable than a fully upright fan. Its independent claims, as amended, nonetheless called for a "nozzle extending about **[*1095]** an opening through which air from outside the nozzle is drawn by the air flow emitted from the mouth [of the nozzle]." (FH379 at 1360, 1362.)

Like Dyson's previous applications, this application disclosed the Japanese patent in full with an English translation of its abstract. (FH379 at 146.) Unlike the previous applications, Dyson's proposed specification contained no discussion of the Japanese patent.

The Patent Office approved this application in November 2011, issuing **[**18]** it as U.S. Patent No. 8,052,379. All of the proposed language quoted above from the application ended up in the issued patent.

C. Cornucopia's Allegations

Cornucopia, in its complaint, claims that Dyson began selling bladeless fans in the United States in October 2009, [2] and Dyson's bladeless fans were the only bladeless fans available in U.S. retail stores until Cornucopia entered the market in January 2012.

In Dyson's preliminary injunction papers, Dyson says that it saw the Cornucopia bladeless fan for the first time a few weeks after Cornucopia filed this lawsuit in February 2012. (Doc. 33 at 6.) But according to Cornucopia, even before its fan came on the market, Dyson "made specific threats to Cornucopia's customers (bladeless fan retailers)

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[2] At the preliminary injunction hearing, it became clear that Dyson began selling bladeless fans in the United States in March 2010, rather than October 2009. The difference is immaterial for present purposes.

and suppliers (bladeless fan manufacturers) that Dyson would sue those customers and suppliers if they deal with Cornucopia." (Doc. 1 ¶ 24.) Cornucopia further claims that —

> Dyson threatens retailers such as Target and Bed, Bath, and Beyond **[**19]** with liability/inconvenience if they sell any competing bladeless fan, such as Cornucopia's.
> For example, in April 2011 a Dyson sales representative at the Ace Hardware tradeshow in Chicago, Illinois told a representative of Cornucopia that Dyson would sue if Cornucopia entered the bladeless fan market.
> Similarly, a Dyson sales representative told Laura Kerlagon, a representative of Big Wall, that Dyson would pursue litigation if Cornucopia entered the market.
> Dyson substantiates its threats of United States enforcement litigation by pointing to its extensive international enforcement activities.
>
> For example, Dyson brought a patent infringement claim in China against a Chinese manufacturer, *Yongkang Yixuan*. Dyson and its outside lawyers publish[ed] the successful outcome of that case in order to intimidate those it threatens with United States patent litigation.
> According to news reports, Dyson brought a similar claim in Korea.
> In fact, a recent article reports that Dyson is "embroiled in 15 lawsuits involving copycat bladeless fans."
> * * *
> In approximately July or August 2011, a Cornucopia representative travelled to Northern California to meet with a retail buyer for Walmart.
>
> Upon seeing **[**20]** a prototype and learning that Cornucopia's bladeless fan was available at a price fitting Walmart's buying structure, the Walmart buyer was excited. In fact, he asked Cornucopia's representative to fill out the paperwork Walmart requires of its distributors that same day.
>
> **[*1096]** Shortly thereafter, Walmart's Northern California buyer told Cornucopia that Walmart was no longer interested.
> Upon information and belief, a more senior Walmart buyer from Arkansas told the Northern California buyer that Dyson had threatened to remove Dyson vacuums from Walmart stores if Walmart brought in competing bladeless fans.
> * * *
> On information and belief . . . Dyson threatens retailers with lawsuits if they stock other bladeless fans like Cornucopia's. Dyson also threatens to withhold its vacuums from retailers if they stock competing bladeless fans.

(*Id.* ¶¶ 39-42, 48-51, 71 (emphasis removed).) Cornucopia does not say whether Dyson's alleged threats point to any specific patent, or whether Dyson has referred generically to all of its patents relating to bladeless fans.

As these allegations imply, Cornucopia sells its fan for less than Dyson sells its corresponding product. The complaint does not allege Cornucopia's **[**21]** selling price. It does allege, however, that Dyson sells its product at a much higher price than bladed fans:

> Because consumers that want the safety and performance provided by a bladeless fan are not willing to substitute a standard fan, Dyson's bladeless fans are much more expensive than standard fans. Standard fans in the United States typically retail at low price; for example, $10. Dyson's bladeless fan, on the other hand, is much more expensive, retailing for more than $250.

(*Id.* ¶ 18.)

Based on the foregoing, Cornucopia asserts the following claims for relief:

> • illegal monopolization (or attempted monopolization) in violation of *section 2* of the Sherman Act (*15 U.S.C. § 2*) and Arizona's antitrust act (*A.R.S. §§ 44-1401 to -1416*), based on either a *Walker Process* fraud theory or a *PRE* "sham litigation" theory (both discussed in more detail below);
> • intentional interference with business expectancy under Arizona common law; and
> • declaratory judgment of invalidity or non-infringement of Dyson's patents.

Dyson has now moved to dismiss all claims. Dyson has also filed its own infringement suit against Cornucopia (CV12-0924), since consolidated with this action. Dyson's countersuit alleges **[**22]** infringement of the '379 and '166 patents — *i.e.*, the "tilting" and "spacers" patents — as well as two design patents not relevant here. Dyson has not alleged infringement of the '449 or '111 patents — the "diffuser" and "flexible sealing member" patents.

IV. CORNUCOPIA'S MOTION TO DISMISS/MOTION TO STRIKE

Cornucopia has moved to dismiss Dyson's separately-filed-but-since-consolidated infringement action, arguing that it is, in substance, a compulsory counterclaim that should have been filed under *Fed. R. Civ. P. 13* in response to Cornucopia's complaint — rather than as a separate lawsuit. Cornucopia primarily argues that enforcing such a procedural formality will prevent potential res judicata problems:

> At its most basic, Cornucopia's claim is that Dyson is using illegally obtained patents (and related enforcement actions) to monopolize the bladeless fan market. If [Dyson filed its countersuit as a counterclaim and] Cornucopia was awarded judgment [on] that claim, Dyson could not simply file a new infringement action based on some other patent from the same bladeless fan patent estate.

(Doc. 37 at 6-7.)

Dyson responds that it needed to file a separate suit because Dyson Technology **[*1097]** owns **[**23]** the patents in question, and Cornucopia had not sued Dyson Technology. More importantly, however, Dyson concedes that consolidating the countersuit converts its separate complaint substantially into a counterclaim:

> As a substantive matter, [Dyson Technology] and Dyson, Inc.'s decision to file a separate lawsuit and immediately seek to consolidate it with the existing case is perfectly consistent with the reasons for the rule governing compulsory counterclaims. *Rule 13* aims to prevent multiplicity of litigation and to promptly bring about resolution of disputes before the court. By immediately marking the patent litigation as related to the antitrust case and obtaining a stipulation to consolidation, [Dyson Technology] and Dyson, Inc. achieved those goals.

(Doc. 40 at 9.) At oral argument, counsel for Dyson further stated: "[L]et me be clear on that from our standpoint. . . . [W]e did not assert that [the '449 and '111 patents] were infringed by the current Cornucopia product, and we don't intend to do so." (Doc. 54 at 104.)

Cornucopia's lawsuit plainly puts the '449 and '111 patents in play, including with a request for declaratory judgment of non-infringement. But for the issue of which **[**24]** Dyson entities are the proper defendants, infringement of those patents is an obvious compulsory counterclaim for Dyson. Failure to plead such infringement as a counterclaim would mean that "the claim is waived and the party is precluded by principles of res judicata from raising it again." *Mitchell v. CB Richard Ellis Long Term Disability Plan, 611 F.3d 1192, 1201 (9th Cir. 2010)*. Cornucopia's motion therefore seeks to frame this case procedurally such that Dyson can be deemed to have waived any current or future claim against Cornucopia based on the '449 or '111 patents.

Given Dyson's concession that filing a separate action and then seeking immediate consolidation effects the purposes of *Rule 13*, and given Dyson's more explicit concession at oral argument, Cornucopia's motion to dismiss is moot and will be denied as such. Although Dyson's separate complaint is not formally a counterclaim, the Court treats Dyson's concessions as consent to have its separate complaint treated as if Rule 13 applied. Thus, the Court deems Dyson to have waived any claim against Cornucopia under the '449 or '111 patents as they might relate to the Cornucopia fan at issue in this case, just as if Dyson **[**25]** had filed an answer and counterclaims but omitted any claim based on the '449 or '111 patents.

As for Cornucopia's alternative motion to strike, it will likewise be denied. Cornucopia targets certain paragraphs of Dyson's separate complaint that accuse Cornucopia of copying both the substance and the visual details on Dyson's competing fan. Cornucopia alleges that these allegations have nothing to do with Dyson's patents. However, the allegations may be relevant to Dyson's claim of design patent infringement. They will not be stricken.

V. ANTITRUST CLAIMS

A. *Walker Process*

1. Generally

By nature, a patent is a monopoly, and a patent-holder can generally enforce its rights under an unexpired patent without fear of antitrust liability. *Simpson v. Union Oil Co., 377 U.S. 13, 24, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964)*. However, in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, the Supreme Court held that if a patent-holder "obtained [its] patent by knowingly and willfully misrepresenting facts to the Patent Office[, such behavior] would be sufficient **[*1098]** to strip [it] of its exemption from the antitrust laws." *382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. Later case law permits the plaintiff to make an alternative showing — that, **[**26]** whether or not the patent-holder obtained the patent by fraud, "the infringement suit was a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068 (Fed. Cir. 1998)* (internal quotation marks omitted). This alternative showing is a separate theory of relief that, although sometimes conflated with *Walker Process* fraud, is governed by different standards and will be analyzed separately. [3]

Nonetheless, if a plaintiff can make one of these showings, and make a showing of monopolization or attempted monopolization under the Sherman Act, the plaintiff can recover antitrust damages, including treble damages. *Walker Process, 377 U.S. at 173, 177-78*. Federal Circuit law now governs the patent-specific portions of such a claim, while regional circuit law governs the antitrust-specific portion of the claim. *Nobelpharma, 141 F.3d at 1068*.

2. Ripeness of the Claim

A *Walker Process* claim "is typically raised as a counterclaim by a defendant in a patent infringement suit." *Id. at 1067*. This case, by contrast, uses *Walker Process* offensively. **[**27]** Whether Cornucopia can raise this claim offensively is a matter of Federal Circuit law because it overlaps with how a patent-holder may enforce its patents. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 375 F.3d 1341, 1358 (Fed. Cir. 2004)*, *rev'd on other grounds*, *546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006)*. Under Federal Circuit law, "the standards . . . developed for determining jurisdiction in a Declaratory Judgment Action of patent invalidity . . . define the minimum level of 'enforcement' necessary to expose the patentee to a[n offensive] *Walker Process* claim . . . ." *Id.* Those standards require a situation in which "a patentee asserts rights under a patent based on certain identified ongoing or planned activity of another party, and where that party contends that it has the right to engage in the accused activity without license." *SanDisk Corp. v. STMicroelectronics, Inc., 480 F.3d 1372, 1381 (Fed. Cir. 2007)*. For a *Walker Process* claim specifically, however, "[t]hreats of patent litigation against customers, based on a fraudulently-procured patent, with a reasonable likelihood that such threats will cause the customers to cease dealing with their supplier" suffice to bring a claim without waiting **[**28]** to be sued on the patent. *Hydril Co. LP v. Grant Prideco LP, 474 F.3d 1344, 1350 (Fed. Cir. 2007)*.

Cornucopia claims that it has standing to assert an offensive *Walker Process* claim because Dyson has threatened Cornucopia and its customers with patent litigation, but Cornucopia does not say whether Dyson has threatened litigation based on any specific patent. A fair reading of Cornucopia's complaint, assuming its allegations to be true, suggests Dyson tells retailers that its patent estate covers all bladeless fans. Yet now that push has come to shove, Dyson accuses Cornucopia of infringing only two of the four relevant patents.

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[3] *See* Part V.B, *infra.*

As to those two patents — the '379 ("tilting") and '166 ("spacers") patents — Cornucopia plainly has standing because the threat of an infringement suit based on those patents has become a reality. Cornucopia's *Walker Process* claim, to the extent it relies on the '379 and '166 patents, **[*1099]** is now substantively indistinguishable from a typical *Walker Process* counterclaim.

But it appears to be a question of first impression whether Cornucopia can go forward with a *Walker Process* claim based on the '449 and '111 patents, which Dyson has waived. Perhaps Dyson might continue **[**29]** to use those patents (as part of its entire bladeless fan patent estate) to threaten Cornucopia's customers and suppliers in its alleged attempt to corner the entire bladeless fan market, and perhaps that "is the kind of economic coercion that the antitrust laws are intended to prevent." *Hydril, 474 F.3d at 1350*. However, not surprisingly, the Court could locate no case in which a party brought a *Walker Process* claim based on a patent which the patent-holder chose not to enforce against the party bringing the claim. Further, the Federal Circuit has shown special concern for protecting "quiescent patent owners against unwarranted litigation." *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc., 846 F.2d 731, 736 (Fed. Cir. 1988)*, *overruled on other grounds by* *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)*. Thus, there is no viable *Walker Process* claim as to the '449 and '111 patents.

3. Fraud on the Patent Office

Even if the case were otherwise as to the '449 and '111 patents, Cornucopia's *Walker Process* claim is subject to dismissal as to all four patents for independent reasons. Cornucopia's *Walker Process* claim fails on the elements of intent and materiality.

a. Intent Generally

To **[**30]** establish fraud on the Patent Office, a party asserting a *Walker Process* claim may assert "either a fraudulent misrepresentation or a fraudulent omission," but regardless, there must be clear and convincing "evidence [of] a clear intent to deceive the examiner and thereby cause the PTO to grant an invalid patent." *Nobelpharma, 141 F.3d at 1070*. Further, with regard to allegedly fraudulent omissions, "there must be evidence of intent separable from the simple fact of the omission." *Dippin' Dots, Inc. v. Mosey, 476 F.3d 1337, 1347 (Fed. Cir. 2007)*.

"Because direct evidence of deceptive intent is rare, a district court may infer intent from indirect and circumstantial evidence. However, to meet the clear and convincing evidence standard, the specific intent to deceive must be the single most reasonable inference able to be drawn from the evidence." *Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 1290 (Fed. Cir. 2011)* (en banc) (internal quotation marks omitted). [4]

Examples of evidence sufficient to show *Walker Process* fraud include deleting references to on-point prior art from a patent application with no adequate explanation, *Nobelpharma, 141 F.3d at 1062, 1072*; failing to include prior art known to the patent applicant through multiple personal demonstrations of that art, *Unitherm, 375 F.3d at 1360-61*; and failing to include a full translation of a foreign patent where that patent "was the only document in the initial application that, if fully understood by the patent examiner, would have resulted in a denial of the application," *Kaiser* ***[*1100]*** *Found. Health Plan, Inc. v. Abbott Labs., Inc., 552 F.3d 1033, 1051 (9th Cir. 2009)*.

By contrast, *Walker Process* claims have failed on the intent element where the information that allegedly should have been provided to the Patent Office would have been cumulative of what was submitted, and where documents

[4] *Therasense* discusses inequitable conduct, which — before *Therasense* — operated on a similar but looser standard than *Walker Process* fraud. *Therasense*, however, raised inequitable conduct to match the standard for *Walker* ***[**31]*** *Process* claims based on omissions. *See* George G. Gordon & Stephen A. Stack, *Aligning Antitrust and Patent Law: Side Effects from the Federal Circuit's Cure for the Inequitable Conduct "Plague" in* Therasense, 26 Antitrust 88, 88-90 (Fall 2011).

showed that the patent examiner had considered the relevant references, **[**32]** *C.R. Bard, Inc. v. M3 Systems, Inc., 157 F.3d 1340, 1365-67 (Fed. Cir. 1998)*; or where the omission itself was the only evidence of fraudulent intent, *Dippin' Dots, 476 F.3d at 1340-41, 1347-48*.

b. Materiality Generally

In addition to intent, a party claiming *Walker Process* fraud must also make "a clear showing of reliance, *i.e.*, that the patent would not have issued but for the misrepresentation or omission." *Nobelpharma, 141 F.3d at 1071*. Materiality is generally established by showing that omitted or misrepresented prior art (or other relevant information) would have required the examiner to reject the application. *See* *Kaiser Found. Health Plan, 552 F.3d at 1052* (material omission where foreign patent, if fully understood, disclosed the invention); *Dippin' Dots, 476 F.3d at 1340* (material omission of evidence of sales made more than one year before the patent priority date, thus implicating *35 U.S.C. § 102(b)*'s on-sale bar); *Unitherm, 375 F.3d at 1361* (material omission that someone else had already invented precisely the same process); *Nobelpharma, 141 F.3d at 1072* (material omission of a book containing on-point prior art).

c. No Materiality as to '111, '166, and '379 Patents

Three **[**33]** of Dyson's patents may be easily dispensed with on materiality grounds alone. The innovations disclosed in the '111, '166, and '379 patents are, respectively, the "flexible sealing member" to improve the impeller's efficiency, "spacers" to reinforce the nozzle, and the ability to tilt while keeping the center of gravity constant. Cornucopia's complaint contains no allegation that the Japanese patent discloses any such features. Rather, Cornucopia focuses on the Japanese patent's disclosure of the ability to blow more air than the fan blows purely under its own power by pulling air from behind the ring forward. But although Dyson includes this effect in each of these patents (either as a dependent claim or a limitation of an independent claim), Cornucopia has offered no reason to believe that understanding the Japanese patent's disclosure of the air-pulling effect would have led the patent examiner to reject the "flexible sealing member," the "spacers," or the ability to tilt without toppling. Those innovations stand independent of the air-pulling effect.

Further, as to the '166 patent specifically, the file history shows that the patent examiner considered and adequately understood **[**34]** the Japanese patent. The patent nonetheless eventually issued.

Accordingly, Cornucopia has alleged nothing to support the materiality element of its *Walker Process* claim as to the '111, '166, '379 patents.

d. No Intent as to '449 Patent

The international search report included with Dyson's '449 patent application negates any inference that Dyson had a specific intent to deceive the Patent Office by failing to offer a full translation of the Japanese patent. Cornucopia's theory rests on the notion that Dyson formed some sort of plan to disclose the existence of the Japanese patent but distract the U.S. patent examiners' attention from its relevance. However, the international search report discusses in English the very issues that Cornucopia believes Dyson attempted to withhold from the Patent **[*1101]** Office — and indeed, opines that Dyson's invention is *not* patentable over the Japanese patent (just as Cornucopia believes). Disclosing such a document is not the behavior of a party intending to deflect the Patent Office's attention from the true meaning of the Japanese patent. Cornucopia's *Walker Process* claim therefore fails on the intent element with respect to the '449 patent.

4. Leave to Amend

As **[**35]** noted, there is no *Walker Process* claim based on a patent that the patent-holder has chosen not to enforce. Here, Dyson has waived its right enforce the '449 and '111 patents against Cornucopia's current fan. Accordingly, leave to amend would be futile as to the '449 and '111 patents.

Leave to amend as to the '449 patent is also futile because the file history definitively refutes any inference that Dyson intended to deceive the Patent Office. Leave to amend is similarly futile as to the '166 patent, whose file history shows that the patent examiner considered the Japanese patent, understood it, and nonetheless eventually issued the patent — thus refuting the materiality element of the *Walker Process* claim.

This leaves only the '379 "tilting" patent. As to that patent, Cornucopia offered at oral argument additional language from its translation of the Japanese patent: "The electric fan according to Claim 1 wearing the wind discharge ring is supported in a manner such that the angle of elevation can be adjusted on the base stand." (Doc. 54 at 117.) This is insufficient to show that the Japanese patent anticipated the invention taught in Dyson's '379 patent, which requires "a center of **[**36]** gravity located so that when the base is located on a substantially horizontal support surface, a projection of the center of gravity on the support surface is within the footprint of the base when the body is in a fully tilted position." '379 Patent, col. 13, ll. 22-26. If the Japanese patent disclosed such a feature, it is difficult to understand why Cornucopia would not plead it.

Notably, Cornucopia has consistently released only snippets of its translation. It has not submitted its full translation. This choice strongly implies that the facts necessary to Cornucopia's claim do not exist. *See, e.g., O'Brien v. DiGrazia, 544 F.2d 543, 546 (1st Cir. 1976)* ("A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim. But when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist."). Nonetheless, the Court does not so conclude at this point. Cornucopia's *Walker Process* claim as to the '379 patent will be dismissed without prejudice to moving for leave to amend within fourteen days. *See Fed. R. Civ. P. 15(a)(2)*; *LRCiv 15.1*. [5]

B. "Sham" Litigation

"[I]rrespective of the patent applicant's conduct before the PTO, an antitrust claim can also be based on [an] allegation that a suit . . . is subjectively and objectively baseless" — or in other words, that "the infringement suit was a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Nobelpharma., 141 F.3d at 1068, 1071-72*. This is sometimes referred to as a *PRE* claim, shorthand for *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, in which the Supreme Court affirmed that "sham" litigation **[*1102]** is not shielded from the antitrust laws, but tightened the definition of "sham" litigation to require that (1) "the lawsuit [is] objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and (2) "the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor through the use of the governmental *process* — as opposed to the *outcome* **[**38]** of that process — as an anticompetitive weapon." *508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* (emphasis in original; citations omitted; some alterations incorporated).

Cornucopia asserts that it has stated a claim under this theory based on Dyson's foreign enforcement efforts (mostly in China and Korea), combined with the allegation that "a Dyson representative threatened that Cornucopia would be sued for patent infringement before Dyson had ever seen Cornucopia's product." (Doc. 38 at 13.) Cornucopia here refers to paragraph 40 of its complaint, which states: "[I]n April 2011 a Dyson sales representative at the Ace Hardware tradeshow in Chicago, Illinois told a representative of Cornucopia that Dyson would sue if Cornucopia entered the bladeless fan market."

Cornucopia has not cited, nor could the Court locate, any authority finding "sham" litigation based on foreign enforcement actions. Arguably, one cannot determine whether Dyson's foreign efforts are "objectively baseless in

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[5] This disposition moots **[**37]** any consideration of Dyson's argument that Cornucopia's *Walker Process* claim does not meet *Rule 9(b)*'s heightened pleading standard.

the sense that no reasonable litigant could realistically expect success on the merits" because those efforts rely on foreign rights under foreign law in a foreign legal system. What might be "objectively baseless" for a litigant **[**39]** suing in the United States on a United States patent might nonetheless be objectively justifiable for the same litigant suing on an otherwise identical patent in a foreign legal system — and vice versa. On the other hand, Cornucopia's complaint admits that at least some of Dyson's foreign enforcement efforts have succeeded, and it is difficult to see how successful foreign litigation could be objectively baseless. Thus, whether or not foreign enforcement efforts could satisfy the "objectively baseless" test, Cornucopia in this case cannot base its *PRE* claim on Dyson's foreign lawsuits.

Dyson's threat to sue "before Dyson had ever seen Cornucopia's product," standing alone, fares no better. Although "sham" threats of litigation against the market competitor can constitute a potential antitrust violation, *see Sosa v. DIRECTV, Inc., 437 F.3d 923, 938 (9th Cir. 2006)*; *Globetrotter Software, Inc. v. Elan Computer Group, Inc., 362 F.3d 1367, 1376 (Fed. Cir. 2004)*, Cornucopia has offered no authority showing that a single threat from a sales representative at a trade show suffices.

However, Cornucopia has also alleged that Dyson repeatedly communicated "sham" threats of litigation to Cornucopia's **[**40]** customers and suppliers in the United States, warning them of liability if they deal with Cornucopia. A few courts have held that threats to a competitor's customers and suppliers can supply the basis for "sham" litigation liability. *See, e.g., Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358, 1367 (5th Cir. 1983)*; *Alexander v. Nat'l Farmers Org., 687 F.2d 1173, 1200-01 (8th Cir. 1982)*; *Johnson v. Con-Vey/Keystone, Inc., 856 F. Supp. 1443, 1448 (D. Or. 1994)*; *Oahu Gas Serv., Inc. v. Pac. Res., Inc., 460 F. Supp. 1359, 1386 (D. Haw. 1978)*. This is a thinly developed area of law, but there is no clear reason why antitrust liability could never apply in such circumstances. *See* 1 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 205, at 280-82 (3d ed. 2006) (discussing the scenario). The key element to be proven is, like "sham" litigation itself, that patent-holder acted in bad faith — *i.e.*, that the **[*1103]** threat was objectively baseless and subjectively undertaken for the purpose of stifling competition. *See id.*

In these unique circumstances, however, Cornucopia's claim based on Dyson's threats to customers and suppliers states no claim. Whatever threats Dyson communicated to others, **[**41]** the Court has now seen Dyson's lawsuit against Cornucopia. Whether or not it is meritorious, it is not objectively baseless, at least as to one of Dyson's design patents. Accordingly, Cornucopia has failed to state a "sham litigation" claim and it will be dismissed. This dismissal will be without leave to amend, given the futility of amendment. [6]

VI. STATE-LAW INTERFERENCE CLAIM

Dyson challenges Cornucopia's tortious interference claim as preempted. "[F]ederal patent law preempts state-law tort liability for a patentholder's good faith conduct in communications asserting infringement of its patent and warning about potential litigation." *Globetrotter Software, Inc. v. Elan Computer Group, Inc., 362 F.3d 1367, 1374 (Fed. Cir. 2004)*. Thus, "to avoid preemption, bad faith must be alleged **[**42]** and ultimately proven, even if bad faith is not otherwise an element of the tort claim." *Id.* (internal quotation marks omitted). The "bad faith" required for such a claim mirrors the "objectively baseless" prong of the *PRE* test. *Id. at 1377*. As noted above, Cornucopia cannot state a claim for such "bad faith." Accordingly, Cornucopia's state-law tortious interference claim will be dismissed without leave to amend.

VII. DECLARATORY JUDGMENT CLAIM

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[6] This disposition moots any consideration of the parties' arguments about the relevant antitrust market and applies equally to Cornucopia's state-law antitrust claim (Count III). "Arizona ***antitrust law*** is interpreted in accordance with federal law." *Cal. E. Labs., Inc. v. Gould, 896 F.2d 400, 403 (9th Cir. 1990)*; *Brooks Fiber Commc'ns v. GST Tucson Lightwave, Inc., 992 F. Supp. 1124, 1130 (D. Ariz. 1997)*.

Cornucopia requests a declaration of non-infringement or invalidity of all four Dyson patents. As explained, Dyson has counterclaimed for infringement on only the '166 and '379 patents (plus two design patents). Accordingly, Cornucopia's declaratory judgment claim is indisputably ripe as to the '166 and '379 patents. As to the '449 and '111 patents, Cornucopia's declaratory judgment claim is not mooted as a matter of law by Dyson's election not to enforce those patents. According to the complaint, Dyson has made generalized threats to retailers about bladeless fans. Voluntary cessation of challenged conduct does not automatically or usually moot a case. *Log Cabin Republicans v. United States, 658 F.3d 1162, 1166-67 (9th Cir. 2011)*; *Chem. Producers & Distribs. Ass'n v. Helliker, 463 F.3d 871, 875-78 (9th Cir. 2006)*. **[**43]** Cornucopia has therefore stated a controversy sufficient for declaratory relief with respect to the '166 and '379 patents.

IT IS THEREFORE ORDERED that "Cornucopia's 12(b)(6) Motion to Dismiss and Alternative 12(f) Motion to Strike" (Doc. 37) is DENIED.

IT IS FURTHER ORDERED that "Dyson Defendants' Motion to Dismiss Pursuant to *Rule 12(b)(6)* and *Rule 9(b)*" (Doc. 19) is GRANTED IN PART and DENIED IN PART as follows:

1. Cornucopia's antitrust claims (Counts I, II, and III) are —

    a. DISMISSED with prejudice to the extent they assert a *Walker Process* antitrust theory based on Dyson's conduct in obtaining U.S. **[*1104]** Patent Nos. 7,931,449, 8,092,166, and/or 7,972,111;

    b. DISMISSED without prejudice to the extent they assert a *Walker Process* antitrust theory based on Dyson's conduct in obtaining U.S. Patent No. 8,052,379; and

    c. DISMISSED with prejudice to the extent they assert a "sham litigation" antitrust claim.

2. Cornucopia's state-law tortious interference claim (Count IV) is DISMISSED with prejudice.
3. Dyson's motion is otherwise DENIED.

IT IS FURTHER ORDERED that any motion for leave to amend as to Cornucopia's *Walker Process* antitrust theory based on Dyson's conduct in obtaining U.S. Patent No. 8,052,379 **[**44]** must be filed by August 10, 2012.

Dated this 27th day of July, 2012.

/s/ Neil V. Wake

Neil V. Wake

United States District Judge

End of Document

In re Fresh & Process Potatoes Antitrust Litig.

United States District Court for the District of Idaho

July 27, 2012, Decided; July 27, 2012, Filed

Case No. 4:10-MD-2186-BLW

Reporter

2012 U.S. Dist. LEXIS 106666 *; 2012 WL 3067580

IN RE: FRESH AND PROCESS POTATOES ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: ALL ACTIONS.

Prior History: *Simon v. United Potato Growers of Idaho, Inc. (In re Fresh & Process Potatoes Antitrust Litig.), 744 F. Supp. 2d 1381, 2010 U.S. Dist. LEXIS 119817 (J.P.M.L., Oct. 13, 2010)*

Core Terms

potatoes, conspiracy, join, dehydration, allegations, grading, venture, growers, joint venture, purchasers, fresh, entity, plaintiffs', complaints, amended complaint, motion to dismiss, participated, cooperative, reasonable inference, conspirator, defendants', pretextual, supplies, prices, teams, summary judgment motion, factual allegations, summary judgment, supply-reduction, marketing

LexisNexis® Headnotes

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

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

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

The standards governing *Fed. R. Civ. P. 12(b)(6)* motions are familiar. These motions test the legal sufficiency of a complaint. *Fed. R. Civ. P. 8(a)(2)* requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, it must set forth more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

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

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN2[] Motions to Dismiss, Failure to State Claim

The United States Supreme Court has identified two working principles that underlie Twombly. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. *Fed. R. Civ. P. 8* marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. Providing too much in the complaint may also be fatal to a plaintiff. Dismissal may be appropriate when the plaintiff has included sufficient allegations disclosing some absolute defense or bar to recovery. If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other evidence on summary judgment establishes the identical facts.

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

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

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

HN3[] Motions to Dismiss, Failure to State Claim

A dismissal without leave to amend is improper unless it is beyond doubt that the complaint could not be saved by any amendment. The Ninth Circuit has held that in dismissals for failure to state a claim, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts. The issue is not whether plaintiff will prevail but whether he is entitled to offer evidence to support the claims.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN4[] Conspiracy to Monopolize, Sherman Act

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, prohibits any contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. To state a claim under *§ 1*, the plaintiffs must plead facts that plausibly suggest (1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually injures competition. Additionally, for each individual defendant, plaintiff must allege that the defendant had a conscious commitment to a common scheme designed to achieve an unlawful object.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN5[] Conspiracy to Monopolize, Sherman Act

A marketing agent is not liable for the acts of its alleged principal in a *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, conspiracy unless the agent (1) had knowledge of its supplier's purpose to restrain trade; (2) intended to restrain trade itself rather than simply earn its usual and customary commission; and (3) contributed materially to the restraint.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

HN6[] **Conspiracy to Monopolize, Sherman Act**

Concerted action under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, does not turn simply on whether the parties involved are legally distinct entities. Rather, substance, not form, should determine whether an entity is capable of conspiring under *§ 1*. So the fact that two companies may have organized themselves under a single umbrella or into a structured joint venture is not dispositive. Instead, the relevant functional inquiry is whether there is a conspiracy between separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

HN7[] **Conspiracy to Monopolize, Sherman Act**

Copperweld holds that the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, In other words, in that case, the parent and subsidiary could not conspire because they acted as a single entity and it takes two to conspire. The parent and subsidiary have a complete unity of interest; their general corporate actions are guided or determined not by two separate consciousnesses, but one. Courts interpreting Copperweld have held that it does not follow from Copperweld that subsidiary entities are automatically liable under *§ 1* for any agreements to which the parent is a party. As a matter of well-settled common law, a subsidiary is a distinct legal entity and is not liable for the actions of its parent or sister corporations simply by dint of the corporate relationship.

Counsel: [*1] For Brigiotta's Farmland Produce and Garden Center, Inc., Plaintiff: Robert W Finnerty, LEAD ATTORNEY, PRO HAC VICE, Girardi and Keese, Los Angeles, CA; Allan Steyer, PRO HAC VICE, D Scott Macrae, PRO HAC VICE, Robert W Biederman, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Arthur N Bailey, Jr, PRO HAC VICE, San Francisco, CA; Bonny E Sweeney, PRO HAC VICE, Carmen A Medici, PRO HAC VICE, ROBBINS GELLER RUDMAN & DOWD LLP, San Diego, CA; Bruce S Bistline, Philip Howard Gordon, GORDON LAW OFFICES, Boise, ID; Daniel M Cohen, PRO HAC VICE, Cuneo, Gilbert, and LaDuca, Alexandria, VA; Douglas A Millen, PRO HAC VICE, Steven A Kanner, PRO HAC VICE, Freed Kanner London & Millen LLC, Bannockburn, IL; Eugene A Spector, PRO HAC VICE, Jay S Cohen, PRO HAC VICE, Jeffrey L Spector, PRO HAC VICE, Spector Roseman Kodroff & Willis, P.C., Philadelphia, PA; Hollis Salzman, PRO HAC VICE, Jay L Himes, PRO HAC VICE, William V Reiss, PRO HAC VICE, LABATON SUCHAROW LLP, New York, NY; James J Pizzirusso, PRO HAC VICE, Michael Hausfeld, PRO HAC VICE, HAUSFELD LLP, Washington, DC; Jon T King, PRO HAC VICE, Michael P Lehmann, PRO HAC VICE, Hausfeld LLP, San Francisco, CA; Kimberly **[*2]** A Kralowec, PRO HAC VICE, The Kralowec Law Group, San Franciso, CA; Mark A Griffin, PRO HAC VICE, Keller Rohrback L.L.P., Seattle, WA; Mindee J Reuben, PRO HAC VICE, Steven A Asher, PRO HAC VICE, WEINSTEIN KITCHENOFF & ASHER LLC, Philadelphia, PA; Ronald J Aranoff, PRO HAC VICE, Bernstein Liebhard LLP, New York, NY.

For J R Mazzola, Inc, Plaintiff: Gregory P Hansel, Joshua R Carver, LEAD ATTORNEYS, PRO HAC VICE, Preti Flaherty Beliveau & Pachios LLP, Portland, ME; Randall B Weill, LEAD ATTORNEY, PRO HAC VICE, Preti Flaherty, Portland, ME.

For United Potato Growers of Idaho, Inc., United Potato Growers of America, Inc., United II Potato Growers of Idaho, Inc., Albert T Wada, Wada Farms Potatoes, Inc., Wada-Van Orden Potatoes, Inc., Wada Farms Marketing Group, LLC., Michael Cranney, doing business as Cranny Farms, Cornelison Farms, Inc., Lance Funk, doing business as Lance Funk Farms, Raybould Brothers Farms, LLC, Wada Farms, Inc., Defendants: Steven B Andersen, LEAD ATTORNEY, HOLLAND & HART, Boise, ID; James E Hartley, PRO HAC VICE, HOLLAND & HART, Denver, CO.

For Dole Fresh Vegetables, Inc., Dole Food Co., Defendants: Stephen R Thomas, LEAD ATTORNEY, MOFFATT THOMAS BARRETT ROCK & FIELDS, **[*3]** Boise, ID; Daniel G Swanson, PRO HAC VICE,Samuel G Liversidge, PRO HAC VICE, GIBSON DUNN & CRUTCHER, LLP, Los Angeles, CA.

For Blaine Larsen Farms, Inc., Driscoll Potatoes, Inc., Defendants: Monte N Stewart, Belnap Stewart Taylor & Morris PLLC, Boise, ID; Robert Rosenfeld, PRO HAC VICE, Stephen Bomse, PRO HAC VICE, Orrick Herrington & Sutcliffe LLP, San Francisco, CA.

For Potandon Produce, LLC., Defendant: Christopher Emrich Ondeck, Matthew McBurney, Crowell and Moring, LLC, Washington, DC; John Michael Avondet, Beard St. Clair P.A., Idaho Falls, ID; Michael D Gaffney, BEARD ST CLAIR GAFFNEY PA, Idaho Falls, ID; Winston V Beard, BEARD ST CLAIR GAFFNEY MCNAMARA CALDER, Idaho Falls, ID.

For General Mills, Inc., Defendant: Richard C Boardman, LEAD ATTORNEY, PERKINS COIE, Boise, ID.

For Snake River Plains Potatoes, Inc., Defendant: Steven B Andersen, LEAD ATTORNEY, HOLLAND & HART, Boise, ID; Gregory L Crockett, HOPKINS RODEN CROCKETT HANSEN & HOOPES, Idaho Falls, ID; James E Hartley, PRO HAC VICE, HOLLAND & HART, Denver, CO.

For Rigby Produce, Inc., Defendant: Bart M Davis, LEAD ATTORNEY, Idaho Falls, ID; Monte N Stewart, Belnap Stewart Taylor & Morris PLLC, Boise, ID; Robert Rosenfeld, PRO **[*4]** HAC VICE, Stephen Bomse, PRO HAC VICE, Orrick Herrington & Sutcliffe LLP, San Francisco, CA.

For Pleasant Valley Potato, Inc., Defendant: James E Hartley, PRO HAC VICE, HOLLAND & HART, Denver, CO; John Michael Avondet, Beard St. Clair P.A., Idaho Falls, ID; Steven B Andersen, HOLLAND & HART, Boise, ID.

For RD Offutt Co., Defendant: Albert P Barker, Barker Rosholt & Simpson LLP, Boise, ID; Peter J Schwingler, PRO HAC VICE, William L Greene, PRO HAC VICE, LEONARD STREET AND DEINARD, Minneapolis, MN.

For Idahoan Foods, LLC, Defendant: Neil D McFeeley, LEAD ATTORNEY, EBERLE BERLIN KADING TURNBOW & MCKLVEEN, CHARTERED, Boise, ID; James A Wilson, PRO HAC VICE, VORYS SATER SEYMOUR AND PEASE LLP, Columbus, OH.

For Bayer CropScience LP, A Delaware Limited Partnership, Defendant: Brad P Miller, LEAD ATTORNEY, HAWLEY TROXELL ENNIS & HAWLEY, Boise, ID; Eric P Enson, PRO HAC VICE, Jones Day, Los Angeles, CA; Jeffrey Alan LeVee, PRO HAC VICE, JONES DAY REAVIS & POGUE, Los Angeles, CA.

For Cedar Farms, LLC, Pro Fresh, LLC, KCW Farms, Inc., Kim Wahlen, Defendants: Steven B Andersen, LEAD ATTORNEY, HOLLAND & HART, Boise, ID.

For Wada Family, LLC, Defendant: Steven B Andersen, LEAD ATTORNEY, HOLLAND & HART, **[*5]** Boise, ID.

For Ronald D. Offutt, Jr., Defendant: Albert P Barker, LEAD ATTORNEY, Barker Rosholt & Simpson LLP, Boise, ID; Brian E McGovern, McCarthy, Leonard & Kaemmerer, L.C., Chesterfield, MO.

Judges: Honorable B. Lynn Winmill, Chief United States District Judge.

Opinion by: B. Lynn Winmill

Opinion

MEMORANDUM DECISION AND ORDER

INTRODUCTION

In December 2011, this Court granted certain defendants' motions to dismiss, though it allowed plaintiffs to amend as to four defendants: (1) Potandon Produce LLC, (2) United II Potato Growers of Idaho, Inc. (United II), (3) Idahoan Foods, LLC, and (4) R.D. Offutt Co. Plaintiffs filed amended complaints against these defendants and also named a new individual defendant - Ronald D. Offutt, Jr. All these defendants have moved to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*. *See* Dkts. 180, 182, 183, 194. The Offutt defendants also moved for summary judgment on two discrete factual issues. *See* Dkt. 180. For the reasons explained below, the Court will deny all pending motions to dismiss and will deem the motion for summary judgment moot.

ALLEGED FACTS[1]

Plaintiffs, who are both direct and indirect potato purchasers, contend that defendants illegally agreed to reduce the supply of potatoes in order to raise prices. Plaintiffs assert that the alleged scheme started when potato growers in Idaho formed a cooperative called United Potato Growers of Idaho (UPGI). The Idaho potato growers, along with potato farmers in several other states, then established United Potato Growers of America (UPGA) as an umbrella cooperative.

Plaintiffs assert that the cooperatives were created for the purpose of increasing the price of potatoes through supply management. Plaintiffs allege that defendants implemented their plan by, among other things, agreeing to limit potato acreage, and by paying farmers to either destroy existing potatoes or refrain from growing additional potatoes in order to reduce the overall number of potatoes available for sale to direct purchasers. Plaintiffs contend that defendants' supply reduction program caused potato prices to be fixed, raised, maintained, and/or stabilized. Accordingly, plaintiffs contend that defendants' actions **[*7]** violate established antitrust laws.

LEGAL STANDARD

HN1[] The standards governing *Rule 12(b)(6)* motions are familiar. These motions test the legal sufficiency of a complaint. *Conley v. Gibson, 355 U.S. 41, 46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. *Federal Rule of Civil Procedure 8(a)(2)* requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss "does not need detailed factual allegations," it must set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id. at 555*. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id. at 570*. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id. at 556*. The plausibility standard is not akin to a "probability **[*8]** requirement," but it asks for more than a sheer possibility that a

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[1] More detailed facts specific to each moving defendant are set forth below. Additionally, a fuller statement of facts relating **[*6]** to non-moving defendants is contained in the Court's December 2, 2011 Order. *See* Dkt. 159, at 21-23.

defendant has acted unlawfully. *Id.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id. at 557*.

In a more recent case, ***HN2***[] the Supreme Court identified two "working principles" that underlie *Twombly*. *See Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. *Id.* "*Rule 8* marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id. at 679*. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

Providing too much in the complaint may also be fatal to a plaintiff. Dismissal may be **[*9]** appropriate when the plaintiff has included sufficient allegations disclosing some absolute defense or bar to recovery. *See Weisbuch v. County of L.A., 119 F.3d 778, 783, n. 1 (9th Cir. 1997)* (stating that "[i]f the pleadings establish facts compelling a decision one way, that is as good as if depositions and other . . . evidence on summary judgment establishes the identical facts").

HN3[] A dismissal without leave to amend is improper unless it is beyond doubt that the complaint "could not be saved by any amendment." *Harris v. Amgen, Inc., 573 F.3d 728, 737 (9th Cir. 2009)* (issued two months after *Iqbal*). [2] The Ninth Circuit has held that "in dismissals for failure to state a claim, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 247 (9th Cir. 1990)*. The issue is not whether plaintiff will prevail but whether he "is entitled to offer evidence to support the claims." *Diaz v. Int'l Longshore & Warehouse Union, 474 F.3d 1202, 1205 (9th Cir. 2007)* **[*10]** (citations omitted).

ANALYSIS

Plaintiffs allege that defendants violated *§ 1* of the Sherman Act, which ***HN4***[] prohibits "any contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. To state a claim under *§ 1*, plaintiffs must plead facts that plausibly suggest "(1) an agreement or conspiracy among two or more persons or distinct business entities, (2) by which the persons or entities intend to harm or restrain competition, and (3) which actually injures competition." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 507 (9th Cir. 1989)*. Additionally, for each individual **[*11]** defendant, plaintiff must allege that *that* defendant had "'a conscious commitment to a common scheme designed to achieve an unlawful object.'" *Monsanto Co. v. Spray-Rite Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* (citation omitted).

In this round of *Rule 12(b)(6)* motions, the moving defendants fall into two categories: Potandon is a marketer defendant and the others are "dehydrator defendants." The Court will first address Potandon's motion, and then turn to the dehydrator defendants' motions.

1. The Marketer Defendant - Potandon

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[2] The Court has some concern about the continued vitality of the liberal amendment policy adopted in *Harris v. Amgen*, based as it is on language in *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, suggesting that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim. . .." Given *Twombly* and *Iqbal*'s rejection of the liberal pleading standards adopted by *Conley,* it is uncertain whether the language in *Harris v. Amgen* has much of a life expectancy.

Unlike many of the defendants in this action, Potandon does not grow potatoes. It sells potatoes and onions to major retailers, club stores, wholesalers, produce distributors and restaurant chains. It is also the marketing agent for several grower defendants.

Plaintiffs' theory is that Potandon joined and participated in the supply-reduction/price-fixing conspiracy by assisting growers in "flow-control" efforts. As plaintiffs explain it, flow control is exactly what it sounds like - controlling the number of potatoes that flow into the marketplace. The underlying economics are simple - keep supply levels such that they do not exceed demand, which will, in turn, ensure that **[*12]** prices do not drop. *See IPC* [3] ¶¶ 224-25 (quoting a March 2007 UPGI newsletter, which explains: "'Flow controls are based upon sound economic princip[le]s . . . if daily offerings (supplies) DO NOT exceed buyers' needs (demand), buyers begin calling salesman searching for product. When salespeople DO NOT have the product available, they raise the price.'").

The Court dismissed plaintiff's original complaints against Potandon primarily because plaintiffs had not alleged Potandon was directly involved in flow-control efforts. Both amended complaints cure this deficiency. The indirect purchasers now allege that Potandon directly participated in flow-control efforts by changing the grade assigned to potatoes based on supply levels, rather than the actual quality of the potatoes. More specifically, the indirect purchasers allege:

> Potandon knowingly participated in the flow control and output restriction scheme through intentionally imposing pretextual and inconsistent grading controls **[*13]** on the fresh potatoes it sold. Throughout the Class Period, Potandon's principals met on a weekly basis in Snake River Valley, Idaho, to discuss flow control issues, including the amount of potatoes to be sold on the fresh potato market.
> As a result of these weekly meetings, and in order to reduce the number of potatoes sold on the fresh potato market when fresh potatoes supplies were high, Potandon management instructed the Potandon operations team to grade potatoes more rigorously. Potandon's employee oversaw the more rigorous grading of the potatoes in Potandon's own packing sheds,[[4]] as well as the packing sheds of other growers, including Larsen Farms and Driscoll Potatoes. Potandon's application of the more rigorous grading standards while supplies were high facilitated the conspirators' objective of reducing the supply of potatoes to the fresh potato market. Potandon thereby reduced the supply of fresh potatoes to the market by intentionally participating in the flow control and output restrictions.

IPC ¶¶ 226-27. The direct purchaser plaintiffs allege similar facts regarding pretextual grading:

> One of the methods used by Potandon to control the flow of potatoes to the market **[*14]** in concert with its growers was "grading" - the process of modifying quality criteria in order to increase or reduce the flow of potatoes into the market. Following their meeting with Potandon's constituent growers, Potandon executives would direct Potandon's Director of Idaho Operations with regard to the appropriate grading standard. Potandon would gather its Quality Assurance (QA) personnel and the Director of Operations would instruct the QA personnel regarding the grading standard to be employed and whether to adjust the flow of potatoes on to the market, based on the information acquired during the weekly growers meeting.
>
> If there were excessive quantities of potatoes in the growers' sheds, Potandon would direct its QA personnel to use stricter quality guidelines in order to reduce the volume of potatoes available for sale. Conversely, if the quantities of stored potatoes were comparatively low, Potandon would instruct its QA personnel to use less rigid quality guidelines and thus permit larger numbers of potatoes to enter the market. By judicious use of this

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[3] Throughout this decision, IPC refers to the indirect purchasers' Second Consolidated Amended Class Action Complaint (Dkt. 164). DPC refers to the direct purchasers' Second Amended Class Action Complaint (Dkt. 163).

[4] The parties dispute whether Potandon owns packing sheds. *See, e.g., Potandon Reply*, Dkt. 214, at 6-7; *Indirect Purchaser Opp.*, Dkt. 206, at 13-14. For purposes of resolving this motion, the Court will accept as true the allegation that Potandon has its "own packing sheds." *See IPC* ¶ 226 (quoted above); *DPC* ¶ 99 (alleging Potandon supracompetitively raised prices "both *in its own sheds* and through its growers' sheds.") (emphasis added).

> "grading" strategy, Potandon and its constituent growers were able to ensure that the price of potatoes was maintained **[*15]** at supracompetitive levels.

DPC ¶¶ 101-02*; see also id.* ¶¶ 95-103.

With these allegations, the Court can reasonably infer that Potandon joined and participated in the conspiracy.

Potandon complains that there is no allegation directly showing that it agreed to join the conspiracy. As Potandon puts it, "there is no allegation that Potandon signed a United membership agreement or contract, or was an incorporator founder, or member of United . . . ." *Reply*, Dkt. 214, at 3. But plaintiffs may rely on circumstantial evidence of an agreement - so long as these evidentiary allegations allow the Court to reasonably infer that Potandon joined the conspiracy. *See generally* *Twombly, 550 U.S. at 556* ("a claim requires a complaint with enough factual matter (taken as **[*16]** true) to suggest that an agreement was made"); *Burtch v. Milberg Factors, Inc., 662 F.3d 212, 225 (3d Cir. 2011)* ("To adequately plead an agreement, a plaintiff must plead either direct evidence of an agreement or circumstantial evidence. The question then becomes whether these alleged facts make it plausible that Appellees had an agreement . . . .") (internal citation omitted). Here, viewing the allegations regarding pretextual grading in the light most favorable to plaintiffs, it is reasonable to infer that Potandon joined and participated in the conspiracy.

Potandon next argues that it did not pretextually grade potatoes and contends that plaintiffs' allegations to the contrary are absurd. At this stage, the Court will accept as true plaintiffs' allegation that Potandon arbitrarily graded potatoes based on supply levels rather than the actual quality of the potatoes. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal, 556 U.S. at 679*. The Court does not find the pretextual grading allegations, or plaintiffs' theory regarding Potandon, to be patently illogical **[*17]** or absurd, as Potandon argues.

The Court is also unpersuaded by Potandon's argument that the complaint fails because there is an obvious, alternative explanation for Potandon's otherwise lawful conduct. True, Potandon grades potatoes according to their quality, and there is no dispute that this is a lawful activity. But plaintiffs do not simply allege that Potandon graded potatoes and then ask the Court to infer some nefarious purpose for lawful grading. Rather, plaintiffs directly allege that Potandon adjusted its grading standards based on supply levels, rather than quality. Potandon does not offer any independent lawful reason for pretextually grading potatoes.

Because plaintiffs have successfully alleged Potandon directly participated in the conspiracy, the Court need not address the agency theories of liability in detail. [5] Briefly, however, the Court finds plaintiffs' factual allegations sufficient under a "marketing agent" theory. Under this theory, Potandon argues that plaintiffs failed to allege that Potandon intended to restrain trade itself, as opposed to simply earning its usual and customary commission. *See generally* 7 Herbert Hovenkamp & Philip E. Areeda, *Fundamentals of* ***[*18]*** ***Antitrust Law*** ¶ 1474c (3d ed. 2010) ***HN5***[] (marketing agent not liable for the acts of its alleged principal in a *§ 1* conspiracy unless the agent (1) had "knowledge of its supplier's purpose to restrain trade," (2) "intended to restrain trade itself rather than simply earn its usual and customary commission,"and (3) contribute[d] materially to the restraint."). The complaint does not say this in so many words. But it is reasonable to infer such intent based on the pretextual grading allegations.

2. The Dehydrator Defendants

The dehydrator defendants include United II, R.D. Offutt, Ronald D. Offutt, Jr., and Idahoan Foods, LLC. Plaintiffs allege that in March 2007, R.D. Offutt Co. partnered with United II to create the Idahoan Foods joint venture. The deal allegedly included the following components: (1) UPGI formed United II, which is a second cooperative made up of some UPGI members; (2) R.D. Offutt contributed potato processing plants to the venture; (3) United II and

[5] Additionally, in responding to this round of motions, plaintiffs do not appear to rely on a single-entity theory of liability. The Court will therefore not address that issue.

R.D. Offutt own Idahoan Foods, which is a limited **[*19]** liability company; (4) Idahoan Foods acquired a company (Idaho Fresh-Pak) that had four dehydration plants; and (5) United II's grower-owners supply all the potatoes for Idahoan Foods' Idaho and Nevada plants. *DPC* ¶¶ 146-48, 369-70; *see also IPC* ¶¶ 131, 137, 147-48.

Plaintiffs allege that Idahoan Foods was created as part of the overall scheme to reduce supplies and elevate prices. As plaintiffs put it, the "joint venture enabled potato growers to offload surplus potatoes into the dehydration market and further reduce supplies, thus facilitating and contributing to the price-fixing scheme . . . ." *DPC* ¶ 146; *see also IPC* ¶132. The plaintiffs also allege that UPGI explicitly and publicly stated the joint venture's purpose. *See, e.g., DPC* ¶ 379; *IPC* ¶¶ 132-33. For example, the complaints allege that "UPGI discussed the joint venture in its March 2007 newsletter and stated, 'United of Idaho [UPGI] feels that the current dehy strategy being implemented is critical to United's overall mission of supply management." *IPC* ¶ 133; *DPC* ¶ 379.

What the earlier complaints did not do was plausibly allege that R.D. Offutt and United II viewed the transaction similarly, or entered into it for the same **[*20]** reasons. Thus, the Court dismissed the complaints. As explained below, the amended complaints cure this deficiency.

A. United II

Turning first to United II, plaintiffs now plausibly allege that United II made a conscious commitment to join the conspiracy. The most significant new allegation is that United II's stated corporate purpose, as articulated in its articles of incorporation, is "'to stabilize potato prices and supplies in the State of Idaho . . . ." *DPC* ¶ 30; *IPC* ¶ 138. This statement undercuts United II's insistence that it did nothing more than form a joint venture to participate in the dehydration market. If that were the case, one might expect the statement of corporate purpose to say something like, "United II's purpose is to compete in the dehydration market." It is also noteworthy that UPGI - an alleged conspirator - has the same statement of corporate purpose as does United II. *See DPC* ¶ 217; *IPC* ¶ 203.

And while United II's statement of corporate purpose, standing alone, is not necessarily sufficient to support an inference that it joined the underlying conspiracy, it puts plaintiffs' other allegations on a new footing. Specifically, earlier complaints contained fairly **[*21]** extensive allegations regarding *UPGI's* (not United II's) view of the joint venture. As the Court explained in its earlier order, just because UPGI viewed the transaction one way did not mean that United II shared that view. But now we have two companies with virtually identical statements of corporate purpose, and one company was created right at the time UPGI announced the use of a dehydration venture as part of its supply-management plan. So it becomes far more reasonable to infer that these two companies had a shared vision for the joint venture.

Moreover, the direct purchaser plaintiffs have fleshed out their complaints with new allegations regarding United II. [6] Among other things, these plaintiffs now allege that:

- United II requires its members to abide by UPGI's supply management policies, including acreage restrictions. *DPC* ¶ 372.

- United II board members had discretion to "siphon off" up to three percent of United II members' top quality fresh potatoes to processors in order to "balance the fresh pipeline" by taking fresh potatoes off the market. *Id.* ¶¶ 373-74.

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[6] The direct purchasers' new allegations regarding **[*23]** United II are more extensive than the indirect purchasers'. The indirect purchasers basically just add United II's statement of corporate purpose, along with an allegation showing that United II's board is populated with numerous UPGI members. United II argues that both new complaints are deficient, but does not directly argue that if the direct purchasers' complaint survives, the indirect purchasers' complaint should not. *See, e.g., United II Reply*, at 3 n.5 (noting that the direct purchaser complaint is more extensive than the "minimal allegations made by the indirect purchaser plaintiffs"). Regardless, however, even the indirect purchasers' minimal new allegations are just enough to nudge their claim against United II across the line from "possible" to "plausible."

- United II also encouraged its members to commit an additional five to 10 percent of fresh potatoes for dehydration. **[*22]** *Id.* ¶ 376.
- Thus, according plaintiffs, United II board members sought to divert as much as 13% of its members' fresh potatoes into the less profitable processed potato market in order to protect returns in the fresh potato market.

Under these alleged facts, the Court may reasonably infer that United II joined and participated in the conspiracy.

Finally, the Court is not persuaded by United II's argument that plaintiffs have done nothing more than allege that United II participated in a pro-competitive joint venture. To be sure, the mere formation of a joint venture - standing alone - would not support a conclusion that the venturers consciously committed to a common scheme designed to achieve an unlawful objective. Additionally, an ordinary purchase contract is not sufficient to bind a party to a conspiracy. *See, e.g., Rick-Mik Enters, Inc. v. Equilon Enters., LLC, 532 F.3d 963, 976 (9th Cir. 2008)*. But as discussed, plaintiffs have successfully alleged that United II did more than form a joint venture or enter into an ordinary purchase contract. They have plausibly alleged that United II joined the conspiracy alleged in the complaint.

B. The Offutt Defendants' Motion to Dismiss

Plaintiffs have also plausibly alleged that the Offutt defendants joined the supply-management conspiracy.

The Court dismissed the earlier complaints against corporate defendant R.D. Offutt because it was unclear if R.D. Offutt had committed itself to the supply management conspiracy, as opposed to simply entering into the dehydration venture for its own lawful, independent reasons **[*24]** - namely, to acquire potatoes for dehydrators. In their amended complaints, however, the direct purchasers allege that in March 2007 - precisely at the time when the dehydration venture was being formed - "R.D. Offutt explicitly agreed to join UPGI . . . thereby affirming his commitment to UPGI's potato supply manipulation agenda - and agreed to reduce supply as a result." *DPC* ¶ 144. The direct purchasers base this allegation on a March 2007 UPGI newsletter, which included the following report about the dehydration venture:

> United of Idaho (United I) is also forming a separate cooperative called United II which will offer to potato growers (who are currently members or decide to become members of United I) preferred stock in United II. . . . This new United II cooperative will partner with Ron D. Offutt Company (RDO) to form a newly combined company, which is yet to be officially named, but is currently known as "NewCo." Once the combined deal is accomplished, . . . NewCo will be a consolidated dehydration company with United II owning and contributing the Idahoan plants and RDO owning and contributing its plants in North Dakota, Nevada, and Idaho. *Ron Offutt has also agreed to join* ***[*25]*** *United.*

Mar. 2007 UPGI Bulletin, Dkt. 208-3, at 2 (internal paragraph divisions omitted; emphasis added); *see generally Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005)* (court may examine documents referred to in the complaint without transforming the motion to dismiss into a motion for summary judgment).

The indirect purchasers take a somewhat different tack with regard to Offutt defendants. They allege that the Offutt defendants *actually* joined - not just agreed to join - UPGI and, moreover, that Ron Offutt was a "founding member." *See IPC* ¶¶ 143, 145. These allegations prompted the Offutt defendants' motion for summary judgment and that motion, in turn, prompted the indirect purchasers to disavow their allegations that the Offutt defendants had *in fact* joined UPGI, or that Ron Offutt was as founding member of the cooperative. The direct purchasers also cross-moved for relief under *Rule 56(d)*, asking for additional time to conduct discovery on the membership question.

The upshot of all these motions is that for 12(b)(6) purposes, plaintiffs are left with an allegation that Ron Offutt *agreed* to join UPGI. (The direct purchasers used the "agreed to join" language in their complaint, **[*26]** while the indirect purchasers refer to the March 2007 newsletter quoted above, which uses the "agreed to join" language.) The Offutt defendants did not move for summary judgment on that factual allegation.

The Court finds even this lesser allegation significant. The fact that UPGI announced Mr. Offutt's agreement to join UPGI right at the time the joint venture was being formed makes it reasonable for the Court to infer that the Offutt defendants entered the underlying conspiracy (even in the absence of actually joining UPGI) - particularly when this new allegation is viewed alongside plaintiffs' other factual allegations.

Specifically, plaintiffs also allege that R.D. Offutt is a large, North Dakota-based grower, with 60,000 acres devoted to potatoes. *See IPC* ¶ 144; *DPC* ¶ 140. As plaintiffs point out, R.D. Offutt thus has at least a theoretical motive to join a conspiracy aimed at stabilizing potato prices in the fresh-potato market. *See generally* *Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)* (recognizing that in complex antitrust litigations, "motive and intent play leading roles").

Further, R.D. Offutt sent representatives to a November 2004 meeting regarding the formation **[*27]** of regional and national cooperatives. Thus, R.D. Offutt presumably had knowledge of UPGI's key purpose - to reduce potato supply so as to maintain and increase potato prices.

Before the amendment, these allegations did little more than suggest that R.D. Offutt had the opportunity to join the conspiracy. But when these allegations are considered in context with the new allegation - that Ron Offutt agreed to join UPGI - the Court finds it reasonable to infer that the Offutt defendants joined the underlying supply-management conspiracy - even if their names did not appear on UPGI's membership records.

The Offutt defendants argue that the allegation about "agreeing to join" UPGI is insufficient because plaintiffs fail to allege what Mr. Offutt *did* or *said* to indicate such an agreement. The Court is not persuaded. This argument would be persuasive if plaintiffs did nothing more than allege that Mr. Offutt agreed to join UPGI in March 2007. But these allegations are not made in a factual vacuum. Rather, plaintiffs supplied detailed facts about the March 2007 dehydration venture, R.D. Offutt's role in it, prior knowledge of UPGI's goals, and the like. Given this factual context, the allegation **[*28]** that the Offutt defendants agreed to join the conspiracy (and, more specifically, viewed the dehydration venture as a tool of the conspiracy) is plausible. No additional factual detail is necessary at this stage. *See* *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)* (citing *Twombly, at 565 n.10*); *see also* *In re TFT-LCD (Flat Planel) Antitrust Litig., 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008)* (granting plaintiffs leave to amend complaint, indicating that "plaintiffs need not plead each defendant's involvement in the alleged conspiracy in elaborate detail, but must simply include allegations specific to each defendant alleging that defendant's role in the alleged conspiracy").

C. The Offutt Defendants' Motion for Summary Judgment

As noted above, the Offutt defendants asked the Court to grant partial summary judgment on two discrete allegations: (1) that Ron Offutt never joined UPGI; and (2) the R.D. Offutt Company never joined UPGI. On reply, however, the Offutt defendants suggest that the Court need not rule on its motion for summary because plaintiffs "disavowed allegations that R.D. Offutt Company joined UPGI - the allegations that gave rise to the motion for summary **[*29]** judgment." *Reply*, Dkt. 215, at 4. The Court concurs with this assessment because, as discussed, plaintiffs have plausibly stated a claim against the Offutt defendants by alleging that "Ron Offutt *agreed to join* United." The Offutt defendants did not move for summary judgment on that issue. The Court therefore deems the motion for summary judgment - along with defendants' cross-motion for relief under *Rule 56(d)* - moot.

D. Idahoan Foods

The Court will deny Idahoan Foods' motion to dismiss because plaintiffs have now plausibly alleged that Idahoan is an "instrumentality" of its owners (R.D. Offutt and United II) in the supply-reduction conspiracy. *See DPC* ¶ 162 [7]; *see generally* Am. Needle, Inc. v. NFL, 560 U.S. 183, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010).

This Court dismissed earlier complaints against Idahoan primarily because plaintiffs had not pled **[*30]** "evidentiary factual allegations tying Idahoan to the scheme alleged in the complaint other than the fact of the dehydration joint venture agreement." *See Dec. 2, 2011 Order,* Dkt. 159, at 55. The amended complaints cure this deficiency by fleshing out allegations regarding the dehydration venture, as well as the joint venture partners - R.D. Offutt and United II. Specifically, as the Court explained above, in earlier complaints, plaintiffs had plausibly alleged that UPGI (but not United II or R.D. Offutt) viewed the dehydration venture as a critical component of the supply-reduction plan. But the amended complaints plausibly allege that R.D. Offutt and United II viewed the dehydration venture the same way, entered the horizontal supply-reduction conspiracy, and used the Idahoan venture to further that conspiracy.

Idahoan argues that it cannot be liable for the actions of its owners - R.D. Offutt and United II - because it is a separately incorporated legal entity. *See Idahoan Reply*, Dkt. 217, at 3. Two Supreme Court cases - *Copperweld* and *American Needle* - guide the Court's analysis of this argument. *See* Am. Needle, Inc. v. NFL, 560 U.S. 183-, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-69, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

The **[*31]** central teaching of both cases is that ***HN6***[] "concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities." *Am. Needle, 130 S. Ct. at 2209*. Rather, "'substance, not form, should determine whether a[n] ... entity is capable of conspiring under § 1.'" *Id. at 2211* (quoting *Copperweld, 467 U.S. at 773 n. 21*). So the fact that two companies may have organized themselves "under a single umbrella or into a structured joint venture" is not dispositive. *130 S. Ct. at 2212*. Instead, the "relevant functional inquiry is whether there is a conspiracy between 'separate economic actors pursuing separate economic interests,' such that the agreement 'deprives the marketplace of independent centers of decisionmaking.'" *Robertson v. Sea Pines Real Estate Cos., 679 F.3d 278 (4th Cir. 2012)* (citing *Am. Needle, 130 S. Ct. at 2212* and *Copperweld, 467 U.S. at 769*)).

The Supreme Court recently applied these concepts in *American Needle*. There, the National Football League formed a corporate joint venture - National Football League Properties (NFLP) - to manage the NFL's intellectual property. The NFLP initially granted nonexclusive licenses to several vendors to sell **[*32]** apparel with team insignias. Later, it granted an exclusive license to Reebok - thus excluding the plaintiff, who sued for antitrust violations. *Am. Needle, 130 S. Ct. at 2211*. The Court held that the licensing activities of the NFLP constituted concerted action within the meaning of *§ 1* of the Sherman Act. The Court concluded that "[a]lthough NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned." *Id. at 2213*. Therefore, "[t]hirty-two teams operating independently through the vehicle of the NFLP are not like the components of a single firm that act to maximize the firm's profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being." *Id. at 2215*. As a result, the Court held that the NFL teams and the NFLP were appropriately subject to suit under *§ 1* for NFLP's licensing activities. *See also* United States v. Sealy, 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967).

Here, plaintiffs allege a similar scenario. Viewing the complaints as a whole, both plaintiffs allege that R.D. Offutt and United **[*33]** II are separately controlled, potential competitors with economic interests distinct from Idahoan's financial well-being. *See Am. Needle, 130 S. Ct. at 2215*. They have also plausibly alleged that when R.D. Offutt and United II make decisions for Idahoan, they allegedly "capture individual economic benefits separate and apart

[7] The indirect purchasers do not use the term "instrumentality" in describing Idahoan (and this term comes from the Supreme Court's decision in *American Needle*, which will be discussed). But, like the direct purchasers, they allege evidentiary facts supporting a conclusion that Idahoan was an instrumentality of its owners. *See, e.g., IPC* ¶¶ 130-49, 299, 329-36.

from" Idahoan's profits. *See id.* That is, according to plaintiffs, when Idahoan accepts potatoes that could have gone into the fresh-potato marketplace, it furthers the supply-reduction scheme. Thus, plaintiffs have plausibly alleged that the "members of a legally single entity violated *§ 1* [because] . . . the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *Am. Needle, 130 S. Ct. at 2209* (citing, among other cases, *Sealy, 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238*). Under these allegations, Idahoan is subject to suit under*§ 1* of the Sherman Act.

Idahoan argues that *Copperweld* compels a different result. ***HN7***[] *Copperweld* held that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *§ 1* of the Sherman Act." *467 U.S. at 771*. In other words, in that case, the **[*34]** parent and subsidiary could not conspire because they acted as a single entity and it takes two to conspire. *See id.* (the parent and subsidiary "have a complete unity of interest . . . their general corporate actions are guided or determined not by two separate consciousnesses, but one").

Courts interpreting *Copperweld* have held that "it does not follow from *Copperweld* that subsidiary entities are *automatically* liable under *§ 1* for any agreements to which the parent is a party. As a matter of well-settled common law, a subsidiary is a distinct legal entity and is not liable for the actions of its parent or sister corporations simply by dint of the corporate relationship." *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 341 n.44 (3d Cir. 2010)* (emphasis added); *see also* Mitchael v. Intracorp, Inc., 179 F.3d 847, 857 (10th Cir. 1999).

Idahoan points to these decisions to support its argument that because it is a separately incorporated LLC, it cannot be held liable as a conspirator based on the actions of its owners. [8] This argument is not persuasive, however, because, the Court has not concluded that Idahoan is potentially liable in this case based *solely* on the fact that its owners **[*35]** are alleged conspirators. Rather, as instructed by both *Copperweld* and *American Needle*, the Court has looked beyond this corporate relationship "in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *Am. Needle, 130 S. Ct. at 2209*. And, as already discussed, the plaintiffs have plausibly alleged that Idahoan was, in reality, "a formalistic shell for ongoing concerted action." *Id. at 2215*.

Idahoan's remaining arguments in favor of dismissal are also unavailing.

First, the Court is not persuaded that plaintiffs must do still more to plausibly **[*36]** allege a § 1 claim against Idahoan. For example, Idahoan notes that plaintiffs do not allege that Idahoan disposed of surplus potatoes or paid a premium for fresh potatoes when it really only needed dehydrated-grade potatoes. *See Idahoan Mem.*, Dkt. 183-1, at 10. But under *American Needle,* they key is that Idahoan's decisions "reflect not only an interest" in its "profits but also an interest in" the venturers' individual profits. *130 S. Ct. at 2215*. In other words, Idahoan does not necessarily have to act *against* its own interests to be an instrumentality of the conspiracy, and plaintiffs have now plausibly alleged that the entire point of the dehydration venture was to further the supply-management conspiracy.

Second, the Court is not persuaded by Idahoan's argument that it did not join the conspiracy because it was not involved in 2004, when the cooperative first formed. A conspirator can theoretically join an ongoing conspiracy at any time and plaintiffs have plausibly alleged that Idahoan joined the conspiracy in 2007, despite not being involved in the early stages. *Cf. United States v. Green, 523 F.2d 229, 233 (2d Cir. 1975)* ("The fact that new members joined the conspiracy as **[*37]** time went on and old members may have dropped out does not preclude a finding that a single, ongoing conspiracy existed.").

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[8] Idahoan points out that in its earlier order, the Court stated that it would not disregard the separate corporate form of another defendant - Potandon. *See Dec. 2, 2011 Order*, Dkt. 159, at 45 ("Potandon - a separate corporate entity - cannot be implicated in the conspiracy based solely on the fact that one of its owners was an alleged conspirator.") (citing *In re Ins. Brokerage Antitrust Litig., 618 F.3d at 341 n.44*). But the defendants are distinguishable because plaintiffs did not plausibly allege that Potandon was created and operated as an instrumentality of the conspiracy.

Third, the Court is not convinced that plaintiffs' amended complaints contradict earlier ones. *See Idahoan Mem.*, Dkt. 183-1, at 7-9. Here, Idahoan focuses mainly on plaintiffs' earlier allegation that Idahoan "was formed 'to create a broad network of potato processing plants with convenient access to markets and to customers.'" *Original DPC,* Dkt. 39, ¶ 122; *Original IPC*, Dkt. 63, ¶ 156. This allegation does not appear in the amended complaints.

Idahoan seems to be arguing that plaintiffs are locked into alleging that Idahoan is pro-competitive because of this allegation. *See Idahoan Mem.*, Dkt. 183-1, at 8. But all along, plaintiffs have alleged that the dehydration venture was a component of the overall conspiracy. *See, e.g., Original DPC Comp.* ¶ 124 ("Through its United II/North American Foods joint venture, UPGI has devised an admitted means of furthering its supply-reduction and price-fixing efforts."). Thus, the Court cannot conclude that plaintiffs' amended complaints contradict its earlier ones.

In sum, plaintiffs have plausibly alleged that Idahoan is subject **[*38]** to suit under *American Needle*. The Court will therefore deny Idahoan's motion to dismiss.

ORDER

IT IS ORDERED THAT:

1. All pending motions to dismiss (Dkts. 180, 182, 183, 194) are **DENIED.**

2. Defendant R.D. Offutt Co. and Ronald Offutt's Motion for Partial Summary Judgment (Dkt 180) is **MOOT.**

DATED: **July 27, 2012**

/s/ B. Lynn Winmill

Honorable B. Lynn Winmill

Chief U. S. District Judge

Mueller v. Wellmark, Inc.

Supreme Court of Iowa

July 27, 2012, Filed

No. 10-0010

Reporter

818 N.W.2d 244 *; 2012 Iowa Sup. LEXIS 83 **; 2012 WL 3194162

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

Subsequent History: Related proceeding at *In re Blue Cross Blue Shield Antitrust Litig., 908 F. Supp. 2d 1373, 2012 U.S. Dist. LEXIS 177691 (J.P.M.L., Dec. 12, 2012)*

Decision reached on appeal by *Mueller v. Wellmark, Inc., 861 N.W.2d 563, 2015 Iowa Sup. LEXIS 21 (Iowa, Feb. 27, 2015)*

Related proceeding at *Chicoine v. Wellmark, Inc., 894 N.W.2d 454, 2017 Iowa Sup. LEXIS 38, 2017 WL 1417831 (Iowa, Apr. 21, 2017)*

Related proceeding at *Abbas v. Iowa Ins. Div., 893 N.W.2d 879, 2017 Iowa Sup. LEXIS 39, 2017 WL 1417808 (Iowa, Apr. 21, 2017)*

Prior History: **[**1]** Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge. Plaintiffs appeal the dismissal of claims alleging defendants engaged in unlawfully discriminatory and anticompetitive conduct against chiropractors in violation of insurance statutes and the Iowa Competition Law.

Love v. Blue Cross & Blue Shield Ass'n, 2008 U.S. Dist. LEXIS 96604 (S.D. Fla., Apr. 19, 2008)

Disposition: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Core Terms

preferred provider, chiropractors, provider, chiropractic, insurance commissioner, district court, plaintiffs', exemption, regulations, settlement, private cause of action, summary judgment, insurer, healthcare, competition law, state action, licensed, provisions, settlement agreement, antitrust claim, anti trust law, discriminatory, rates, amended petition, antitrust, coverage, plans, violations, approving, immunity

LexisNexis® Headnotes

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

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] Involuntary Dismissals, Failure to State Claims

A reviewing court reviews a trial court's ruling on a motion to dismiss for the correction of errors at law. A motion to dismiss may be granted when a petition's allegations, taken as true, fail to state a claim upon which relief may be granted.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

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

HN2[] Summary Judgment, Evidentiary Considerations

A reviewing court reviews a trial court's grant of summary judgment for correction of errors at law. Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. The evidence is viewed in the light most favorable to the nonmoving party. However, when a motion for summary judgment is properly supported, the nonmoving party is required to respond with specific facts that show a genuine issue for trial.

Healthcare Law > ... > Health Insurance > Reimbursement > General Overview

HN3[] Health Insurance, Reimbursement

Iowa Code § 514F.2 (2009) prevents health insurers from utilizing preferred provider arrangements to limit payments "on a basis solely related" to the provider's license.

Governments > Legislation > Statutory Remedies & Rights

HN4[] Legislation, Statutory Remedies & Rights

Not all statutory violations give rise to a private cause of action. A private statutory cause of action exists only when the statute, explicitly or implicitly, provides for such a cause of action.

Governments > Legislation > Statutory Remedies & Rights

HN5[] Legislation, Statutory Remedies & Rights

Seeman set forth a four-factor test to determine whether a statute provides a private cause of action: (1) Is the plaintiff a member of the class for whose benefit the statute was enacted?; (2) Is there any indication of legislative intent, explicit or implicit, to either create or deny such a remedy?; (3) Would allowing such a cause of action be consistent with the underlying purpose of the legislation?; (4) Would the private cause of action intrude into an area over which the federal government or a state administrative agency holds exclusive jurisdiction? The Seeman court modified the four-factor federal test articulated in Cort. If any one of those factors is not satisfied, there is no implied cause of action.

Business & Corporate Compliance > ... > Regulators > State Insurance Commissioners & Departments > Rules & Regulations

Healthcare Law > ... > Health Insurance > Reimbursement > General Overview

HN6[] **State Insurance Commissioners & Departments, Rules & Regulations**

Iowa Code § 514F.3 (2009) directs the insurance commissioner to adopt rules for preferred provider contracts and organizations concerning but not limited to preferred provider arrangements and participation requirements, health benefit plans, and civil penalties.

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

HN7[] **Trade Practices & Unfair Competition, State Regulation**

Iowa Code § 553.6(4) (2009) provides that the Iowa Competition Law shall not be construed to prohibit activities or arrangements expressly approved or regulated by any regulatory body or officer acting under authority of "this state." *Iowa Code § 553.6(4) (2009)*.

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

HN8[] **Trade Practices & Unfair Competition, State Regulation**

Private anticompetitive conduct is exempt from federal antitrust laws if: (1) the conduct is undertaken pursuant to a clearly articulated and affirmatively expressed state policy and (2) the policy is actively supervised by the state itself.

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

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

HN9[] **Trade Practices & Unfair Competition, State Regulation**

The general rule is that exemptions from coverage of competition laws are to be narrowly applied. The state action exemption is an affirmative defense as to which a defendant bears the burden of proof. Whether the state action exemption is established is a question of law for a court.

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

HN10[] **Trade Practices & Unfair Competition, State Regulation**

For an "activity or arrangement" to be exempt from antitrust laws, a defendant must establish that it was "expressly approved or regulated" by a regulatory body or an officer acting under state authority. *Iowa Code § 553.6(4) (2009)*. To put it another way, the alleged anticompetitive practice must be expressed as state policy and actively supervised by the state. Rubber stamp approval of private action does not constitute state action.

Business & Corporate Compliance > ... > Regulators > State Insurance Commissioners & Departments > Rules & Regulations

Healthcare Law > ... > Health Insurance > Reimbursement > General Overview

HN11[] **State Insurance Commissioners & Departments, Rules & Regulations**

See *Iowa Code § 514F.3 (2009)*.

Healthcare Law > ... > Health Insurance > Reimbursement > General Overview

HN12[] **Health Insurance, Reimbursement**

See *Iowa Admin. Code r. 191-27.1*.

Healthcare Law > ... > Health Insurance > Reimbursement > General Overview

HN13[] **Health Insurance, Reimbursement**

See *Iowa Admin. Code r. 191-27.3(1)*.

Healthcare Law > ... > Health Insurance > Reimbursement > General Overview

HN14[] **Health Insurance, Reimbursement**

Iowa Admin. Code r. 191-27.3(2) provides, "A preferred provider arrangement shall not unfairly deny health benefits for medically necessary covered services." *Iowa Admin. Code r. 191-27.3(3)* provides that the regulations will cover preferred provider arrangements even when not sponsored by licensed insurers. a. A provision that if a covered person receives emergency services specified in the preferred provider arrangement and cannot reasonably reach a preferred provider, emergency services rendered during the course of the emergency will be reimbursed as though the covered person had been treated by a preferred provider, subject to any restriction which may govern payment by a preferred provider for emergency services.

Healthcare Law > ... > Health Insurance > Reimbursement > General Overview

HN15[] **Health Insurance, Reimbursement**

See *Iowa Admin. Code r. 191-27.4(1)*-(2).

Healthcare Law > ... > Health Insurance > Reimbursement > General Overview

HN16[] **Health Insurance, Reimbursement**

See *Iowa Admin. Code r. 191-27.5(1)*-(3).

Healthcare Law > ... > Health Insurance > Reimbursement > General Overview

HN17[] **Health Insurance, Reimbursement**

Iowa Admin. Code r. 191-27.6 states that a health insurer subject to "this chapter" shall be subject to and is required to comply with all other applicable laws and rules and regulations of "this state." *Iowa Admin. Code r. 191-27.7* indicates that civil penalties for violation of "this chapter" shall be imposed in the amount, and pursuant to the procedure, set forth in *Iowa Code § 507B.6*, *Iowa Code § 507B.7*, and *Iowa Code § 507B.8*. Lastly, *Iowa Admin. Code r. 191-27.8* contains certain whistleblower-type protections: "27.8(1) A health care insurer shall not prohibit a participating provider from or penalize a participating provider for discussing treatment options with covered persons, irrespective of the health care insurer's position on the treatment options, or from advocating on behalf of covered persons within the utilization review or grievance processes established by the health care insurer or a person contracting with the health care insurer. 27.8(2) A health care insurer shall not penalize a provider because the provider, in good faith, reports to state or federal authorities any act or practice by the health care insurer that, in the opinion of the provider, jeopardizes patient health or welfare."

Counsel: Glenn L. Norris of Hawkins & Norris, P.C., Des Moines; Steven P. Wandro of Wandro, Baer & McCarthy, P.C., Des Moines; and Harley C. Erbe of Erbe Law Firm, Des Moines, for appellants.

Hayward L. Draper, Thomas H. Walton, and Patrick B. White of Nyemaster Goode, PC, Des Moines, for appellees.

Judges: WATERMAN, Justice.

Opinion by: WATERMAN

Opinion

[*247] WATERMAN, Justice.

In this complex interlocutory appeal from a putative class action, we must decide whether the district court correctly granted several dispositive motions. Plaintiffs are doctors of chiropractic who allege they have been victimized by the discriminatory practices of Iowa's largest health insurer, Wellmark, Inc. [1] The plaintiffs claim Wellmark wrongfully imposes restrictions and pays lower rates for chiropractic services than for equivalent services offered by medical doctors or osteopathic physicians. Plaintiffs allege that **[**2]** Wellmark not only has violated various insurance regulatory statutes, but also has engaged in unlawful conspiracy and monopolization in violation of the Iowa Competition Law.

First, the district court granted Wellmark's motion to dismiss claims brought under Iowa's insurance regulatory statutes because no private cause of action is provided therein. We affirm that ruling based on *Seeman v. Liberty Mutual Insurance Co., 322 N.W.2d 35, 42-43 (Iowa 1982)*. The proper forum for raising alleged violations of those regulatory statutes is through administrative proceedings in the Iowa Division of Insurance.

[1] Plaintiffs filed suit against Wellmark, Inc. d/b/a Wellmark Blue Cross and Blue Shield of Iowa and Wellmark Health Plan of Iowa, Inc., which is the Health Maintenance Organization of Wellmark, Inc. The defendants will be collectively referred to as Wellmark.

Second, the district court granted Wellmark's motion for summary judgment on plaintiffs' antitrust claims based on the "state action" exemption found in *Iowa Code section 553.6(4) (2009)*. We reverse in part because the summary judgment record fails to establish the challenged conduct falls within the exemption.

Third, the district court **[**3]** granted summary judgment on claims alleging Wellmark breached its obligations under a judicially approved national class action settlement in *Love v. Blue Cross Blue Shield Ass'n, No. 03-21296-CIV, 2008 U.S. Dist. LEXIS 96604 (S.D. Fla. Apr. 19, 2008)*. We affirm because the record contains no evidence Wellmark's implementation of the *Love* settlement violated the Iowa Competition Law.

Fourth, we affirm summary judgment on several specific antitrust claims for reasons explained below. We remand the remaining claims and defenses for further proceedings.

I. Background Facts and Proceedings.

This litigation began in December 2007 when Steven A. Mueller, D.C., filed a **[*248]** breach-of-contract claim against Wellmark over a $17,376 billing dispute. On May 20, 2008, plaintiffs filed a first amended petition adding plaintiffs, Bradley J. Brown, D.C.; Mark A. Kruse, D.C.; Kevin D. Miller, D.C.; and Larry E. Phipps, D.C. Plaintiffs are doctors of chiropractic who have billed for services provided to patients enrolled in Wellmark health insurance plans. Their amended pleading asserted class action claims on behalf of a putative "class **[**4]** of Iowa-licensed doctors of chiropractic who are citizens of the State of Iowa as of the date of filing." [2] Plaintiffs sought damages and injunctive relief against Wellmark, alleging discriminatory and anticompetitive practices that harmed chiropractic doctors. Division I contained the new class action claims, and Division II retained Mueller's individual claim. This appeal only concerns the class action claims in Division I.

Wellmark's business consists of selling health insurance plans to employer groups and providing administrative services to assist others who provide health insurance coverage, such as self-funded governmental entity plans. Wellmark is one of a dozen health insurers in the state, but retains the largest market share. Wellmark creates a network of preferred health care providers, including doctors **[**6]** of chiropractic, medical doctors, and osteopathic doctors, and incentivizes its members to use its preferred provider panel. Wellmark develops its preferred provider panel by entering into contracts with providers that govern the terms and conditions of treatment as well as fee schedules, at times on a take-it-or-leave-it basis. Preferred providers must adhere to these contracts to receive compensation from Wellmark for services provided to Wellmark's members. Preferred provider arrangements are

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[2] The chiropractic profession has special significance to this state:

> Chiropractic was founded in Iowa in 1895 by D.D. Palmer, a Canadian immigrant. Palmer was a practitioner of magnetic healing; he had no formal medical training but was well read in both anatomy and physiology. He devoted a great deal of time to the study of the spine and eventually concluded that all disease was the result of abnormal spinal function. Palmer performed his first adjustment in 1895. Subsequent to his initial successes, Palmer's popularity increased and in 1896 he founded the first school of chiropractic in Davenport, Iowa, now known as the Palmer College of [C]hiropractic. One of Palmer's first patients gave the profession its name by combining the Greek words "chiro" (hand) and "praktikos" **[**5]** (done by).
>
> . . . .
>
> In 1906 Palmer's son, B.J. Palmer, took over the school and is credited with the development of the chiropractic profession. By 1910 the Palmer School had courses in X-ray studies and was the first to use this new technology to detect spinal misalignments. In 1935 B.J. Palmer established a research clinic at the school and is credited with developing a prototype of the electroencephalogram or EEG.

Kristyn S. Appleby & Joanne Tarver, *Medical Records Review* § 5.16, at 5-74 (4th ed. 2010). Palmer College of Chiropractic is "[k]nown throughout the profession as The Fountainhead [because it] changed the world as the first institution to offer chiropractic education." Palmer College of Chiropractic, *Palmer at a Glance*, *http://www.palmer.edu/PalmerAtAGlance/(last* visited June 12, 2012).

expressly encouraged by the Iowa legislature as a health care cost control mechanism. *See Iowa Code § 514F.2*. The legislature has directed the Iowa Insurance Commissioner to regulate these preferred provider arrangements. *Id. § 514F.3*.

Stated simply, the plaintiffs in this lawsuit allege Wellmark has employed preferred provider arrangements in an unlawfully discriminatory and anticompetitive manner in violation of statutory insurance provisions and state antitrust laws.

Division I of the first amended petition contains five counts, spanning forty pages. **[*249]** Count I provides factual background for the claims that follow. Count II seeks declaratory relief based upon allegations that Wellmark engages **[**7]** in discriminatory practices that violate insurance regulatory provisions contained in the Iowa Code that prevent health insurers from taking actions "on a basis solely related to the [chiropractor's] license." *Iowa Code § 514F.2*; *accord Iowa Code §§ 509.3(6)*, *514.7*, *514.23(2)*, *514B.1(5)*. Count III pleads Wellmark entered into a contract, combination, or conspiracy to unlawfully restrain trade against chiropractors in violation of *section 553.4* of the Iowa Competition Law. Count III seeks money damages. Count IV also seeks money damages, alleging Wellmark "abused [its] monopoly power in the relevant geographic and product markets" to injure plaintiffs in violation of *section 553.5* of the Iowa Competition Law. [3] Count V repleads the statutory insurance violations alleged in Count II, but seeks injunctive relief.

Division I of the first amended petition alleges Wellmark engaged in substantially similar unlawful conduct for each count in ways that

> (a) violate the various provisions of H.F. 2219 (1986 (71 G.A.) ch. 1180)) in their contracts and dealings with chiropractors and chiropractic patients in order to diminish and restrict the care for human ailments by chiropractors for which payment will be made by the Wellmark Defendants;
>
> (b) impose definitions of "chiropractic" and "medical necessity" contrary to *Chapter 151, Code of Iowa* (2007) in order to diminish and restrict the care for human ailments by chiropractors for which payment will be made by the Wellmark Defendants;
>
> (c) usurp the authority of the Iowa General Assembly, to the detriment **[**9]** of Iowa chiropractors and the treatment and therapy offered to their patients, in requiring the use of and promulgating standards and rules of practice for "Chiropractic Assistants," a category of health care practitioner found nowhere in the present Code of Iowa in Chapters 147 through 158 or elsewhere, and in limiting the employment of certain modes of physiotherapy if not applied by chiropractors or "chiropractic assistants;"
> (d) impose maximum fee schedules to which chiropractors must agree with defendants and with each other in order to provide diagnostic and treatment services for their patients in Iowa;
> (e) prescribe fees for chiropractic services which are discriminatory to doctors of chiropractic in relation to the fees for other health care practitioners for the same or similar services;
>
> (f) prescribe limitations upon and make optional the coverage of diagnostic and treatment services of chiropractors while not imposing the same standards and practices to the coverage of diagnostic and treatment services of other practitioners of health care in Iowa licensed under the chapters of *Title IV, subtitle 3, of the Code of Iowa* **[*250]** [Chapters 147 through 158];

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[3] Wellmark is a purchaser of health services on behalf of its members. *See Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922, 925 (1st Cir. 1984)* ("Blue Shield in essence 'buys' medical services for the account of others . . . ."). Wellmark is thus a "monopsonist," not a monopolist, as plaintiffs plead. See Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and* ***[**8]*** *Its Practice* § 1.2(b), at 14 (4th ed. 2011). "A monopsonist is a monopoly buyer rather than seller." *Id.* "Although most antitrust litigation of market power offenses has involved monopoly sellers rather than buyers, monopsony can impose social costs on society similar to those caused by monopoly." *Id.* The distinction is not relevant for the issues decided in this opinion, but may be relevant under other substantive areas of ***antitrust law***. *See id.* at 14-16.

(g) agree with over 95% of **[**10]** all Iowa Doctors of Medicine (M.D.'s) and Doctors of Osteopathy (D.O.'s) in active practice to numerous items of preferential treatment, discriminatory to plaintiff, as found in Section 7 of a Settlement Agreement dated April 27, 2007, . . . [*See* *Love, No. 03-21296, 2008 U.S. Dist. LEXIS 96604 (S.D. Fla. Apr. 19, 2008)*];

(h) enter into agreements with various subdivisions of the State of Iowa to limit or exclude chiropractic coverage from health plans offered to employees of various subdivisions of the State of Iowa, based upon the encouragement of and false information provided by the Wellmark Defendants.

Wellmark moved to dismiss plaintiffs' class action claims on several grounds. Wellmark asserted plaintiffs' insurance claims were within the exclusive jurisdiction of the Iowa Insurance Commissioner and the insurance provisions plaintiffs relied upon do not create a private cause of action. As to plaintiffs' Iowa Competition Law claims, Wellmark alleged (1) it was immune from liability pursuant to *Iowa Code section 553.6(4)*, which exempts "activities or arrangements expressly approved or regulated" by the state; (2) plaintiffs "failed to adequately plead an antitrust injury and therefore lack standing"; and (3) **[**11]** plaintiffs "failed to adequately plead facts plausibly suggesting the existence of an agreement to restrain trade." Plaintiffs resisted all grounds. [4]

On October 22, 2008, the district court granted Wellmark's motion to dismiss plaintiffs' statutory insurance claims, but not their antitrust claims. As to the statutory insurance claims, the district court found no implied cause of action:

The second, third, and fourth factors of **[**12]** the *Seeman* test establish that there is no implied right of action under these statutes. Thus plaintiffs' request for declaratory ruling based on alleged violations of these statutes, their request for injunctive relief based on these statutes, and any damages claims based thereon must be dismissed, because there is no private right of action and jurisdiction rests exclusively with the Commissioner of Insurance.

The district court determined the antitrust claims needed further record development before a ruling could be made:

At this early stage of the proceedings, the court cannot find, as a matter of law, that the pricing schedules are regulated within the meaning of the statutory exemption. The court has considered the authorities cited by Wellmark, and the different rationales stated therein for finding an exemption to the antitrust laws in cases against insurers. However, many of these cases were decided either at summary judgment, or on a full record made after an evidentiary hearing.

The district court also determined plaintiffs sufficiently pleaded an antitrust injury and conspiracy under Iowa notice pleading standards. The district court ordered the "claims in Division I of the **[**13]** First Amended **[*251]** Petition based on violations of *Iowa Code Sections 514F.2*, *509.3(6)*, *514.7*, *514.23(2)*, and *514B.1(5)* and other statutes enacted in 1986 Iowa Acts Chapter 1180 are Dismissed" and directed plaintiffs to recast their petition to allege only the antitrust claims.

Plaintiffs' second amended petition did not substantially conform to the district court's order, prompting Wellmark to file a second motion to dismiss or strike, which the district court granted in part. Plaintiffs responded with a third amended petition alleging only the antitrust violations in Division I. Wellmark answered and counterclaimed.

On March 16, 2009, Wellmark moved for summary judgment on Division I (the class action claims) of the third amended petition. [5] Wellmark argued: (1) "The factual record . . . shows that the alleged discriminatory actions

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[4] Wellmark supported its motion with numerous exhibits, including 1986 Iowa Acts ch. 1180 (H.F. 2219), which enacted the insurance provisions relied on by plaintiffs; an affidavit by Wellmark's associate general counsel and assistant board secretary, Michele Druker, attesting Wellmark's preferred provider contracts require insurance commissioner approval; preferred provider agreement prototypes from 2007 and 2001 stamped "Approved" by the insurance commissioner; and the insurance commissioner's administrative regulations governing preferred provider agreements, Iowa Admininstrative Code rule 191—27. The parties stipulated the court should consider these exhibits along with plaintiffs' resistance and supporting exhibits in ruling on Wellmark's motion to dismiss.

[5] On April 6, 2009, shortly after Wellmark's motion for summary judgment, the district court severed Division I (the class action claims) from Division II (Dr. Mueller's individual claim) pursuant to the parties' stipulation. Division II remained under the existing

plead by Plaintiffs as anti-trust claims . . . fall within the exclusive jurisdiction of the Iowa Insurance Commissioner pursuant to *Iowa Code § 553.6(4)*"; and (2) "Several of the allegations contained in Plaintiffs' *Third Amendment* to Petition are contrary to undisputed fact." The motion contained fourteen pages of "undisputed facts" that were supported by **[**14]** 185 pages of affidavits and exhibits, including affidavits by Michele Druker, associate general counsel; Sheryl Nuzum, group leader of network economics; and Linda Blake, group leader for individual and small business underwriting. The affidavits explain that Wellmark submits all provider forms incidental to preferred provider arrangements to the insurance commissioner for approval and that Wellmark bases its provider reimbursement rates on the Resource-Based Relative Value System (RBRVS) and Relative Value Units (RVUs) federally mandated for Medicare. [6] The RVUs assigned by Medicare require different reimbursement rates for spinal manipulation by chiropractors and by M.D.s and D.O.s, recognizing differences in overhead, training, and malpractice risks among those professions. The Nuzum affidavit noted the different reimbursement rates "are common knowledge in the health care business and would be known by the Iowa Insurance Commissioner when she approves Wellmark's preferred provider arrangements with chiropractors." The exhibits in the summary **[*252]** judgment record include Wellmark's 2001 and 2007 prototype practitioner agreements, policy forms and manuals incorporated into the agreements, **[**15]** insurance commissioner notices approving Wellmark's 2001 and 2007 practitioner agreements, and Wellmark's standard form to administer a governmental entity plan.

Plaintiffs resisted all grounds for summary judgment. Plaintiffs denied forty-five of Wellmark's forty-eight paragraphs of undisputed fact. Most denials stated: "Deny. This paragraph contains inadmissible legal conclusions, opinions without adequate foundation, speculation, and argument. It also fails to state how the affiant [Druker or Nuzum] has or could have personal knowledge of the facts asserted. *Iowa R. Civ. P. 1.981(5)*." Plaintiffs **[**17]** supported their resistance with two exhibits containing eighty-nine pages of illustrative Wellmark fee schedules for chiropractors and other medical providers.

Wellmark filed supplementary affidavits to demonstrate its affiants had personal knowledge over the facts asserted. Plaintiffs objected that the supplemental affidavits are hearsay, speculative, and lack adequate foundation. Plaintiffs also filed three additional exhibits, Mueller's 1994 participating provider agreement, a 2007 letter documenting provider form amendments, and a letter from Wellmark's vice president indicating Wellmark will begin using the RVU system in 2009.

The district court held a reported hearing on July 31, 2009. On September 18, the district court entered summary judgment dismissing plaintiffs' remaining antitrust claims. Both plaintiffs and Wellmark filed motions to amend the ruling. The district court granted Wellmark's motion to add additional findings of undisputed fact and statutory analysis and denied plaintiffs' motion.

The district court ruled plaintiffs' alleged anticompetitive conduct was exempt from the Iowa Competition Law, under *section 553.6(4)*. The district court applied the two-prong federal **[**18]** "state action" immunity test, concluding:

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case number. The district court ordered plaintiffs to file a recasted third amended petition including only Division I, which would be separately docketed. This is an appeal of the separately docketed case.

[6] In 1989, President George H.W. Bush enacted legislation mandating the Center for Medicare and Medicaid Services (CMS), a federal agency within the United States Department of Human Health and Services, to calculate provider reimbursement rates under the RBRVS. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6102, 103 Stat. 2106 (1989) (codified as amended at *42 U.S.C. § 1395w-4 (2006)*). Dr. William Hsiao, a professor of medicine at Harvard, oversaw a research team, which published the RBRVS in 1988. Ann Marie Marciarille & J. Bradford DeLong, *Bending* ***[**16]*** *the Health Cost Curve: The Promise and Peril of the Independent Payment Advisory Board*, *22 Health Matrix 75, 106 n.127 (2012)*. The system attempts to determine rates based upon "the time, effort, skill and stress involved in the[] services." *Id.* The Relative Value Scale Updating Committee (RUC), a group of thirty-one private physicians from different specialties, submits recommendations to the CMS concerning revised values. American Medical Association, *The RVS Update Committee*, *http://www.ama-assn.org/ama/pub/physician-resources/solutions-managing-your-practice/coding-billing-insurance/medicare/the-resource-based-relative-value-scale/the-rvs-update-committee.page* (last visited June 12, 2012). CMS then accepts or rejects the RUC's recommendations. *Id.*

> In short, the legislature has expressly regulated the activities of Wellmark vis-à-vis provider contracts with chiropractors (and other medical providers). The first prong of the state action exemption is met in this case as to claims arising under the provider agreements.
>
> Turning to the second prong, the court must consider whether this state policy is actively supervised by the state, with special attention paid to whether decisions are made by state authorities or by the private parties themselves. The Insurance Commissioner has enacted comprehensive rules for insurers' agreements with providers under Chapter 514F, which are contained in Chapter 191 of the Iowa Administrative Code, Section 27. Of significance, the rules require approval of prototype preferred provider agreements. *191 I.A.C. 27.5(3)*. It is undisputed that Wellmark submits its prototype preferred provider agreements with chiropractors to the Insurance Commissioner for approval, and that they have in fact been approved. Many of the allegations in the petition relate to provisions of the provider agreements, or to physical medicine guides that are incorporated into the provider **[**19]** agreements. . . . The court concludes that the provider agreements challenged in this case are actively supervised by a state agency, the Iowa Insurance Commissioner.

With respect to the *Love v. Blue Cross Blue Shield* settlement, the only alleged anticompetitive conduct not approved by the insurance commissioner, the district court granted summary judgment in favor of Wellmark. The district court found the settlement exempt under the *Noerr-Pennington* doctrine and, alternatively, found no genuine issue of material fact as to **[*253]** whether the settlement discriminated against chiropractors. The district court reasoned:

> Under the *Noerr-Pennington* doctrine, settlement agreements approved by a court are immune from antitrust liability, absent a sham. . . . The Love Settlement Agreement, and the court order approving it, appear genuine and valid. Plaintiffs have submitted no countervailing evidence that the settlement is a sham. The court in that case found that the settlement was an arm's length transaction, and that it is reasonable, adequate, and is not the result of collusion between the parties. As such, it is shielded from antitrust liability under *Noerr*.
>
> Secondly, there is no factual basis **[**20]** for an antitrust claim concerning Section 7 of the Love Settlement Agreement. Wellmark's Assistant General Counsel, Michelle Druker, submitted a spreadsheet containing every item contained in Section 7 of the settlement agreement. This sets forth a series of procedural requirements, such as availability of fee schedules, reduced precertification requirements, greater notice of policy and procedure changes, etc. Most of the items are being applied to agreements with chiropractors. Some are not applicable. Plaintiffs submitted no opposing affidavits controverting these facts.

Plaintiffs filed an application for interlocutory appeal, which we granted.

II. Standard of Review.

HN1[] "We review a district court's ruling on a motion to dismiss for the correction of errors at law." *Dier v. Peters, 815 N.W.2d 1, 4 (Iowa 2012)*. A motion to dismiss may be granted when the petition's allegations, taken as true, fail to state a claim upon which relief may be granted. *Geisler v. City Council, 769 N.W.2d 162, 165 (Iowa 2009)* (citing *Iowa R. Civ. P. 1.421(1)(f)*).

HN2[] We review the district court's grant of summary judgment for correction of errors at law. *Emp'rs Mut. Cas. Co. v. Van Haaften, 815 N.W.2d 17, 22 (Iowa 2012)*. **[**21]** "Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* However, "[w]hen a motion for summary judgment is properly supported, the nonmoving party is required to respond with specific facts that show a genuine issue for trial." *Green v. Racing Ass'n of Cent. Iowa, 713 N.W.2d 234, 245 (Iowa 2006)*; *accord* *Iowa R. Civ. P. 1.981(5)*.

III. Whether the District Court Properly Dismissed Plaintiffs' Claims Brought Under the Insurance Statutes for Lack of a Private Cause of Action.

Plaintiffs' first amended petition alleged Wellmark's preferred provider contracts, administration of the Iowa State University health plan, and participation in the *Love* settlement violated *Iowa Code sections 509.3(6)*, [7] *514.7*, [8] *514.23(2)*, [9] *514B.1(5)(c)*, [10] **[*254]** and *514F.2*. [11] ***HN3***[] *Section 514F.2* prevents health insurers from utilizing preferred provider arrangements to limit payments "on a basis solely related" to the provider's license—the nub of plaintiffs' claims. The provisions were enacted together in H.F. 2219 in 1986. *See* 1986 Iowa Acts ch. 1180. **[**22]** Wellmark moved to dismiss these claims, arguing H.F. 2219 does not create a private cause of action.

HN4[] Not all statutory **[**24]** violations give rise to a private cause of action. A private statutory cause of action exists "only when the statute, explicitly or implicitly, provides for such a cause of action." *Sanford v. Manternach, 601 N.W.2d 360, 371 (Iowa 1999)*. Plaintiffs concede H.F. 2219 does not expressly create a private cause of action. The issue is whether those provisions implicitly created a private right to sue. *Marcus v. Young, 538 N.W.2d 285, 289 (Iowa 1995)*.

In our seminal case, ***HN5***[] *Seeman v. Liberty Mutual Insurance Co.*, we adopted a four-factor test to determine whether a statute provides a private cause of action:

1. Is the plaintiff a member of the class for whose benefit the statute was enacted?
2. Is there any indication of legislative intent, explicit or implicit, to either create or deny such a remedy?
3. Would allowing such a cause of action be consistent with the underlying purpose of the legislation?
4. Would the private cause of action intrude into an area over which the federal government or a state administrative agency holds exclusive jurisdiction?

Marcus, 538 N.W.2d at 288 (citing *Seeman, 322 N.W.2d at 38*). The *Seeman* court modified the four-factor federal test articulated in *Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct. 2080, 2088, 45 L. Ed. 2d 26, 36-37 (1975)*. **[**25]** *Seeman, 322 N.W.2d at 40*. "If any one of these factors is not satisfied, there is no implied cause of action." *Kolbe v. State, 625 N.W.2d 721, 727 (Iowa 2001)*; *see also* *Touche Ross & Co. v. Redington, 442 U.S. 560, 575, 99 S. Ct. 2479, 2489, 61 L. Ed. 2d 82, 96 (1979)* ("The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.").

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[7] *Iowa Code § 509.3(6)* ("A policy of group health insurance may limit or make optional the payment or reimbursement for lawful diagnostic or treatment service by all licensees under chapters 148 and 151 on any rational basis which *is not solely related to the license* under or the practices authorized by chapter 151 . . . . (Emphasis added.)).

[8] *Iowa Code. § 514.7(3)* ("A group subscriber contract may limit or make optional the payment or reimbursement for lawful diagnostic or treatment service by all licensees under chapters 148 and 151 *on any rational basis which is not solely related to the license* under or the practices authorized by chapter 151 or is not dependent upon a method of classification, categorization, or description based upon differences in terminology used by different licensees in describing human ailments or their diagnosis or treatment." (Emphasis added.)).

[9] *Iowa Code § 514.23(2)* ("A corporation organized and governed by this chapter which becomes a mutual insurer under this section shall continue as a mutual insurer to *be governed by the provisions of section 514.7* and **[**23]** shall also be governed by *section 509.3*, subsection 6." (Emphasis added.)).

[10] *Iowa Code § 514B.1(5)(c)* ("A prepaid group plan of health care services may limit or make optional the payment or reimbursement for lawful diagnostic or treatment service by all licensees under chapters 148 and 151 *on any rational basis which is not solely related to the license* under or the practices authorized by chapter 151 or is not dependent upon a method of classification, categorization, or description based upon differences in terminology used by different licensees in describing human ailments or their diagnosis or treatment." (Emphasis added.)).

[11] *Iowa Code § 514F.2* (permitting provider agreements "provided these systems do not limit or make optional payment or reimbursement for health care services *on a basis solely related to the license* under or the practices authorized by chapter 151 or on a basis that is dependent upon a method of classification, categorization, or description based upon differences in terminology used by different licensees under the chapters of Title IV, subtitle 3, of the Code in describing human ailments or their diagnosis or treatment") (emphasis added)).

Seeman is particularly analogous because it analyzed whether insurance provisions in the same subtitle of the Code as those contained in H.F. 2219 created a **[*255]** private cause of action. 322 N.W.2d at 36. In that case, David Seeman sued Liberty Mutual Insurance Co., claiming the insurance company unreasonably delayed payment on the settlement of his workers' compensation claim. *Id.* Seeman brought his lawsuit under section 507B.4 of the Insurance Trade Practices Act, which prohibits unfair methods of competition and deceptive acts by insurance companies. *Id. at 40*. Although we found individual claimants were within the class of persons the Act was intended to benefit, we declined to find a private cause of action because we determined the legislature intended the Insurance Trade Practices Act to **[**26]** be "regulatory in nature." *Id. at 42*. We reasoned there was no existing remedy prior to the legislation for an insurer's bad-faith failure to settle an insurance claim, and the legislative history stated the " 'purpose of the chapter is to *regulate* trade practices.' " *Id. at 41-42* (quoting *Iowa Code section 507B.1* (emphasis added)). Moreover, the chapter provided the insurance commissioner with specified administrative powers to investigate, adjudicate, remedy, and sanction prohibited acts of unfair practices. *Id. at 42*; *see also* *Stotts v. Eveleth, 688 N.W.2d 803, 808-09 (Iowa 2004)* (holding no private cause of action exists when "*Iowa Code section 272.2* gives the board the exclusive authority to '[e]nforce rules adopted by the board through revocation or suspension of a license, or by other disciplinary action against' a teacher"); *Young, 538 N.W.2d at 289* (relying on the existence of administrative remedies in *Iowa Code chapter 22*, the Open Records Act, to find no private cause of action). Plaintiffs' statutory insurance claims fail here for the same reasons as those under *Seeman*.

The legislature enacted H.F. 2219 to benefit chiropractors as well as consumers. But, in light of *Seeman*, **[**27]** the history of H.F. 2219, and the available administrative remedies, we conclude the remaining factors do not support recognition of a private cause of action. Accordingly, the district court properly dismissed plaintiffs' statutory insurance claims.

Prior to H.F. 2219, chiropractors were excluded from Iowa statutes regulating health insurance coverage. Judge Stuart, a former Iowa Supreme Court Justice, summarized the state of Iowa law on this issue in 1980:

> *Chapter 514 of the Iowa Code* clearly expresses a policy excluding chiropractic services from coverage by health care service corporations. Throughout that chapter, the state legislature repeatedly stated precisely the particular services covered. No mention is ever made of chiropractors, the practice of chiropractic or *Chapter 151 of the Iowa Code* which governs aspects of the practice of chiropractic, including licensing. The Court believes that the omission of any mention of chiropractic coverage in *Chapter 514* directly suggests that the legislature intended to prohibit coverage of their activities by health care service corporations.

Health Care Equalization Comm. of the Iowa Chiropractic Soc'y v. Iowa Med. Soc'y, 501 F. Supp. 970, 989-90 (S.D. Iowa 1980), **[**28]** *aff'd*, *851 F.2d 1020 (8th Cir. 1988)*. The subsequent 1986 amendments expressly sought to "provid[e] for optional payment by corporations subject to *chapters 509*, *514*, and 514B for services performed by chiropractors." 1986 Iowa Acts ch. 1180. Plaintiffs contend this history indicates the legislature intended to provide chiropractors private rights of enforcement. We disagree.

Before H.F. 2219 was enacted, chiropractors had no statutory or common law remedy if health care insurers declined to cover their services. In *Seeman*, we found chapter 507B did not create a private cause of action, in part because, before **[*256]** that chapter's enactment, individuals had no private common law or statutory remedy against insurers for the conduct proscribed by that chapter. *322 N.W.2d at 41-42*. We reasoned that, if the legislature wanted to create a private cause of action when none previously existed, presumably it would have done so expressly. *See id.* The same logic applies here with even greater force. H.F. 2219 was enacted four years after our decision in *Seeman*. We presume the legislature was aware of our holding in *Seeman* refusing to recognize a private cause of action in related insurance provisions. **[**29]** *Welch v. Iowa Dep't of Transp., 801 N.W.2d 590, 600 (Iowa 2011)* (" 'The legislature is presumed to know the state of the law, including case law, at the time it enacts a statute.' " (quoting *State v. Jones, 298 N.W.2d 296, 298 (Iowa 1980)))*. Given that timing, we decline to infer from legislative silence in the 1986 amendments the intent to provide chiropractors or other licensed health care professionals a private right of action for violation of the insurance statutes.

Plaintiffs in this case are suing under insurance statutes regarded under *Seeman* as "essentially regulatory in nature." *322 N.W.2d at 42*. We reach the same conclusion here as in *Seeman*: The legislature "intended only to invest the insurance commissioner with administrative enforcement power . . . . Accordingly, we hold that the legislature implicitly intended the insurance commissioner's powers to be the exclusive means of enforcing" the statute. *Id. at 43*. The legislature provided the insurance commissioner with extensive administrative powers over health insurance practices. ***HN6***[] *Iowa Code section 514F.3* directs the insurance commissioner to "adopt rules for preferred provider contracts and organizations" concerning "but **[**30]** not . . . limited to . . . preferred provider arrangements and participation requirements, health benefit plans, and civil penalties." The legislature explained its reasoning:

> Presently, preferred provider organizations, i.e., arrangements wherein a health benefit plan provides for treatment by select providers, are *unregulated*. This bill would authorize the division of insurance to adopt rules *regulating* those entities, in particular, to adopt the national association of insurance commissioners' model provision.

H.F. 2307, 72d G.A., Reg. Sess. § 604 Explanation (Iowa 1988) (emphasis added). This history confirms the legislature intended H.F. 2219 to be regulatory in nature.

Pursuant to the legislature's authorization, the insurance commissioner has adopted administrative rules regulating preferred provider arrangements and detailing administrative enforcement powers. *See* Iowa Admin. Code r. 191—27 (governing preferred provider arrangements). The insurance commissioner determined civil penalties for violating preferred provider arrangements regulations "shall be imposed in the amount, and pursuant to the procedure, set forth in *Iowa Code sections 507B.6*, *507B.7*, and *507B.8*." *Id.* **[**31]** r. 191—27.7. The operative statutes and rules authorize the insurance commissioner to issue charges, hold hearings, and levy civil penalties up to $50,000 for improper preferred provider arrangements, all subject to judicial review. *See Iowa Code §§ 507B.6-8*. *Seeman* relied on such administrative procedures in holding the Insurance Trade Practices Act did not create an implied private cause of action. *322 N.W.2d at 42* (citing *Iowa Code sections 507B.6*, *507B.7*, *507B.8*, the enforcement powers in the Insurance Trade Practices Act).

Section 514F.3 specifically commands the insurance commissioner to adopt rules and procedures to regulate preferred provider arrangements. Plaintiffs attempt to **[*257]** distinguish *Seeman* by arguing in that case the legislature enacted the administrative remedies, while here the insurance commissioner promulgated the regulations and administrative remedies. This is a distinction without a difference for determining whether an implied private right of action exists. We rejected this distinction in *Eveleth*, which held "*[s]ection 272.2* clearly suggests that this provision was intended to be a regulatory measure designed to provide the board with authority to suspend or **[**32]** revoke a teacher's license in those situations when violations of its provisions occur." *688 N.W.2d at 809*; *see also Rowen v. LeMars Mut. Ins. Co. of Iowa, 230 N.W.2d 905, 909 (Iowa 1975)* ("When the legislature has given an administrative agency jurisdiction to entertain the particular controversy, we have held the jurisdiction is exclusive and must be exhausted before resort to the courts . . . .").

Plaintiffs are not left without a remedy absent an implied cause of action. Plaintiffs may use chapter 17A administrative remedies to enforce H.F. 2219—they must simply turn to the insurance commissioner first. Plaintiffs may petition the commissioner for a declaratory order as to the legality of Wellmark's allegedly discriminatory activities. *See Iowa Code § 17A.9*. Plaintiffs could then seek judicial review of the ruling. *Id.* Wellmark's exhibits show H.F. 2219 has been the subject of at least two administrative proceedings resulting in declaratory rulings.

Plaintiffs under certain circumstances also may initiate "contested case" proceedings under chapter 17A to obtain an evidentiary hearing for their alleged grievances. *Id. § 17A.2(5)* (defining "contested case" as a "proceeding including **[**33]** but not restricted to ratemaking, price fixing, and licensing in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing"); *see, e.g., Lifeline Ambulance, Inc. v. Iowa Ins. Div., 505 N.W.2d 186, 187 (Iowa 1993)* (reviewing insurance commissioner contested-case ruling to uphold an HMO's decision to terminate a group health insurance plan under *section 514B.17*).

Finally, plaintiffs can petition for "other agency action" pursuant to *section 17A.2(2)*, which also is subject to judicial review. *Iowa Code § 17A.19(10)*; *see also* *Travelers Indem. Co. v. Comm'r of Ins., 767 N.W.2d 646, 650 (Iowa 2009)* (insurance commissioner's adjudication of a workers' compensation premium dispute reviewed as "other agency action").

The insurance commissioner oversees a uniform, statewide scheme to regulate preferred provider arrangements and other health insurer activities. [12] The insurance commissioner is permitted to utilize his expertise and specialization to make an administrative record to resolve disputes within his jurisdiction. On judicial **[*258]** review of the commissioner's ruling, the commissioner **[**34]** will be a party and the reviewing court's adjudication will apply statewide to the health insurance industry. We do not believe the legislature intended to create a private cause of action to allow civil juries to second-guess conduct approved by the insurance commissioner and subject to judicial review from administrative proceedings.

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

IV. Whether the District Court Erred by Applying the State Action Exemption, *Iowa Code Section 553.6(4)*, to Grant Summary Judgment Against Plaintiffs on Their State Antitrust Claims.

Plaintiffs' third amended petition alleges that discriminatory provisions in Wellmark's preferred provider arrangements constitute a conspiracy to restrain trade against chiropractors in violation of *section 553.4* and an abuse of monopoly power in violation of *section 553.5*. Plaintiffs' alleged anticompetitive conduct can be grouped into three categories: (1) procedural requirements and conditions of treatment, (2) fee payment schedules, and **[**36]** (3) administration of state self-funded group plans that typically have identical preferred provider panels.

Wellmark moved for summary judgment, asserting its preferred provider arrangements are exempt from plaintiffs' antitrust claims pursuant to *section 553.6(4)*. ***HN7***[] This section provides that the Iowa Competition Law "shall not be construed to prohibit . . . activities or arrangements expressly approved or regulated by any regulatory body or officer acting under authority of this state." *Iowa Code § 553.6(4)*. The district court granted Wellmark's motion, and we now are called upon to review the correctness of this ruling.

We have applied the so-called "state action" exemption of *section 553.6(4)* in two prior cases. *Nw. Bell Tel. Co. v. Iowa Utils. Bd., 477 N.W.2d 678, 685-86 (Iowa 1991)*; *Neyens v. Roth, 326 N.W.2d 294, 298-99 (Iowa 1982)*. As we noted in those two cases, ***HN8***[] private anticompetitive conduct is exempt from federal antitrust laws if (1) the conduct is undertaken pursuant to a " 'clearly articulated and affirmatively expressed' " state policy and (2) the policy is " 'actively supervised' " by the state itself. *See* *Nw. Bell, 477 N.W.2d at 685* (quoting *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 943, 63 L. Ed. 2d 233, 243 (1980)*); **[**37]** *Neyens, 326 N.W.2d at 298* (same). We also observed in *Neyens* that the Iowa Competition Law has a uniformity clause. *See* *Iowa Code § 553.2* (stating that the Iowa Competition Law "shall be construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose"); *Neyens, 326 N.W.2d at 298*; *see also* *Comes v. Microsoft Corp., 646 N.W.2d 440, 452 (Iowa 2002)*

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[12] New legislation, effective July 1, 2012, prohibits health insurers from imposing larger copayments for chiropractic services than for services by medical doctors or osteopaths. 2012 Iowa Legis. Serv. H.F. 2465, § 36 (West 2012) (to be codified at *Iowa Code § 514C.29*) ("[A] policy, contract, or plan providing for third-party payment or prepayment of health or medical expenses shall not impose a copayment or coinsurance amount on an insured for services provided by a doctor of chiropractic licensed pursuant to chapter 151 that is greater than the copayment or coinsurance amount imposed on the insured for services provided by a person engaged in the practice of medicine and surgery or osteopathic medicine and surgery under chapter 148 for the same or a similar diagnosed condition even if a different nomenclature is used to describe the condition for which **[**35]** the services are provided."). Legislation and regulations administered by the Iowa Insurance Division have uniform applicability statewide. By contrast, plaintiffs' allegations in this litigation target the conduct of a single health insurer.

(Cady, J., dissenting) (noting that in *section 553.2*, the legislature provided "a specific rule of construction" for interpreting the Iowa Competition Law); *Nw. Bell, 477 N.W.2d at 686*.

HN9[] "The general rule is that exemptions from coverage of competition laws are to be narrowly applied." *Neyens, 326 N.W.2d at 298*. The state action exemption is an affirmative defense as to which the defendant bears the burden of proof. *See Nw. Bell, 477 N.W.2d at 685* **[*259]** ("The first prong of the state action exemption requires a *showing* . . . .") (Emphasis added.); *see also F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 638, 112 S. Ct. 2169, 2179, 119 L. Ed. 2d 410, 425 (1992)* ("[T]he party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of **[**38]** the price-fixing or ratesetting scheme."); *Yeager's Fuel, Inc. v. Penn. Power & Light Co., 22 F.3d 1260, 1266 (3d Cir. 1994)* ("[S]tate action immunity is an affirmative defense as to which [party asserting immunity] bears the burden of proof."); Louis Altman & Malla Pollack, *1 Callmann on Unfair Competition, Trademarks and Monopolies* § 4:4, at 4-62 (4th ed. Supp. 2012) ("State action immunity is an affirmative defense, and the defendant has the burden of establishing its eligibility for that defense."). Whether the state action exemption is established is a question of law for the court. *Trigen Okla. City Energy Corp. v. Okla. Gas & Elec. Co., 244 F.3d 1220, 1225 (10th Cir. 2001)*; *TEC Cogeneration, Inc. v. Fla. Power & Light Co., 76 F.3d 1560, 1567 (11th Cir.)*, *modified*, *86 F.3d 1028 (11th Cir. 1996)*.

Plaintiffs argue that we should apply the state action exemption to this case as it is currently interpreted by the federal courts. *See Ticor Title Ins. Co., 504 U.S. at 634, 638, 112 S. Ct. at 2177, 2179, 119 L. Ed. 2d at 423, 425* (holding that, for the exemption to apply, "the potential for state supervision [must be] realized in fact" and "the State [must] exercise[] sufficient independent **[**39]** judgment and control so that the details of the rates or prices [are] established as a product of deliberate state intervention, not simply by agreement among private parties"). Wellmark counters that we should apply the "plain language" of the Iowa version of the exemption. Both sides argue that they would prevail even under the other side's legal interpretation of the exemption.

We agree with plaintiffs that, even accepting Wellmark's view of the state action exemption, it does not apply here. Different governmental reviews are for different purposes. When a library checks in a book, it is verifying that the book was returned, not approving the contents of the book. When the county grants a marriage license, it is indicating that the couple may be lawfully married, not that they are necessarily a good match. So too here, the present record indicates that, when the insurance division approves Wellmark's preferred provider forms, it is indicating those forms comply with the legal requirements of chapter 514F and its implementing regulations. It is not comparing specific chiropractor rates to physician rates, which are not even actually disclosed in those forms. Although Wellmark uses **[**40]** the RBRVS system created for Medicare to reimburse chiropractors, Wellmark retains discretion to apply a "Wellmark determined adjustment factor" to alter the rates. Wellmark did not disclose this adjustment factor to the insurance commissioner.

It is true that the State of Iowa encourages health insurers to enter into preferred provider arrangements and requires a prototype of any such arrangement to be submitted for prior review by the insurance division. *See Iowa Admin. Code r. 191—27.5(3)*. It is also true that Wellmark submitted its preferred provider forms to the division and that those forms were approved.

[*260] Nonetheless, ***HN10***[] for the "activity or arrangement" to be exempt from the antitrust laws, Wellmark must establish that it was "expressly approved or regulated" by a regulatory body or an officer acting under state authority. *Iowa Code § 553.6(4)*. To put it another way, the alleged anticompetitive practice must be " 'expressed as state policy' " and " 'actively supervised by the state.' " *Nw. Bell, 477 N.W.2d at 685* (citation omitted); *Neyens, 326 N.W.2d at 298-99*; *see also Cal. Retail Liquor Dealers, 445 U.S. at 105, 100 S. Ct. at 943, 63 L. Ed. 2d at 243*; *A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 260 (3d Cir. 2001)* **[**41]** ("It is the conduct that violates the antitrust laws that states must 'actively supervise' in order for *Parker* immunity to attach."). "Rubber stamp approval of private action does not constitute state action." *A.D. Bedell, 263 F.3d at 260*.

Wellmark has not established the insurance division reviews preferred provider agreements in order to regulate the rates paid to different classes of health care providers such as doctors and chiropractors. Rather, it appears the review is designed to assure fair and equitable access to the preferred provider network and to protect nonparticipants in the network. *See, e.g.*, *Iowa Admin. Code rs. 191—27.4* (allowing but limiting incentives for use of preferred providers), 27.5 (listing participation requirements). In short, the purpose of the insurance division's review is to regulate the overall relationship between preferred provider participants and nonparticipants, not to monitor rates paid to or conditions imposed upon different categories of preferred provider panelists. This is consistent with the authority conferred by the underlying statute, which provides:

> ***HN11***[] The commissioner of insurance shall adopt rules for preferred provider contracts and organizations, **[**42]** both those that limit choice of specific provider and those that do not. The rules adopted shall include, but not be limited to, the following subjects: preferred provider arrangements and participation requirements, health benefit plans, and civil penalties.

Iowa Code § 514F.3.

Thus, the initial section of the relevant regulations explains:

> ***HN12***[] The purpose of this chapter is to encourage health care cost containment while preserving quality of care by allowing health care insurers to enter into preferred provider arrangements and by establishing minimum standards for preferred arrangements and the health benefit plans associated with those arrangements.

Iowa Admin. Code r. 191—27.1. As this section reveals, the underlying purpose of the chapter is to set minimum standards, not to regulate rate differentials. The next section of the regulations sets forth a series of definitions. *Id.* r. 191—27.2. The third section then states what a preferred provider arrangement shall contain "at a minimum":

HN13[] A preferred provider arrangement shall at minimum:

> *a.* Establish the amount and manner of payment to the preferred provider. The amount and manner of payment may include capitation payments for preferred **[**43]** providers.
>
> *b.* Include mechanisms which are designed to minimize the cost of the health benefit plan. These mechanisms may include among others:
> (1) The review or control of utilization of health care costs.
> (2) A procedure for determining whether health care services rendered are medically necessary.
>
> **[*261]** c. Ensure reasonable access to covered services available under the preferred provider arrangement.

Id. r. 191—27.3(1). Hence, a preferred provider arrangement must establish an amount and manner of payment, and a procedure for determining medical necessity, and presumably would be rejected by the insurance division if lacked these items. But, there is no indication that the insurance division reviews and approves the actual rates of payment or regulates the specific terms of access to chiropractors as compared with physicians. [13] By way of analogy, our appellate *rule 6.903(2)* requires the appellant to file a brief containing a table of contents, a table of authorities, a statement of the issues, a routing statement, a statement of the case, a statement of the facts, an argument section, and a conclusion. Our clerk's office typically rejects briefs that do not meet these minimum standards, **[**44]** but this does not mean that by filing the brief the clerk approves of the appellant's argument.

The remaining regulations generally are intended to protect nonparticipants and participants who use noncovered services from unfair discrimination. Thus, ***HN14***[] rule 27.3(2) provides, "A preferred provider arrangement shall not unfairly deny health benefits for medically necessary covered services." Rule 27.3(3) provides that the regulations will cover preferred provider arrangements even when not sponsored by licensed insurers. Rule 27.4 enshrines additional nondiscrimination protections:

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[13] The fee schedules that Wellmark submitted were merely "Illustrative," according to the charts, comparing "Facility" and "Non-Facility" and "PPO/Indemnity" and "HMO."

> *HN15*[] **27.4(1)** A health care insurer may issue a health benefit plan which provides for incentives for covered persons to use the health care services of a preferred provider. The policies or subscriber agreements shall contain at least all of the following provisions:
>
> *a.* A provision that if a covered person receives emergency services specified in the preferred provider arrangement and cannot reasonably reach a preferred provider, emergency services rendered **[**45]** during the course of the emergency will be reimbursed as though the covered person had been treated by a preferred provider, subject to any restriction which may govern payment by a preferred provider for emergency services.
>
> *b.* A provision which clearly identifies the differentials in benefit levels for health care services of preferred providers and benefit levels for health care services of nonpreferred providers.
>
> **27.4(2)** If a health benefit plan provides differences in benefit levels payable to preferred providers compared to other providers, such differences shall not unfairly deny payment for covered services and shall be no greater than necessary to provide a reasonable incentive for covered persons to use the preferred provider.

So does rule 27.5:

> *HN16*[] **27.5(1)** A health care insurer may place reasonable limits on the number or classes of preferred providers which satisfy the standards set forth by the health care insurer, provided that there is no discrimination against providers on the basis of religion, race, color, national origin, age, sex or marital status.
>
> **27.5(2)** Notwithstanding any other provision of this chapter, a health care insurer may issue policies or subscriber agreements **[**46]** which provide benefits for health care services only if the services have been rendered by a preferred provider, provided the program has met all standards imposed by the commissioner **[*262]** for availability and adequacy of covered services.
>
> **27.5(3)** A health care insurer shall file with the commissioner for the commissioner's prior review a prototype of any preferred provider arrangement and of the health care plan's policy, contract, or subscriber agreement associated with the arrangement, together with any changes in the prototype. Use of the prototypical preferred provider arrangement and health care plan's policy, contract, or subscriber agreement is conditioned upon approval of these documents by the commissioner.

HN17[] Rule 27.6 states that "[a] health insurer subject to this chapter shall be subject to and is required to comply with all other applicable laws and rules and regulations of this state." Rule 27.7 indicates that civil penalties for violation of this chapter "shall be imposed in the amount, and pursuant to the procedure, set forth in *Iowa Code sections 507B.6*, *507B.7*, and *507B.8*." Lastly, rule 27.8 contains certain whistleblower-type protections:

> **27.8(1)** A health care insurer shall **[**47]** not prohibit a participating provider from or penalize a participating provider for discussing treatment options with covered persons, irrespective of the health care insurer's position on the treatment options, or from advocating on behalf of covered persons within the utilization review or grievance processes established by the health care insurer or a person contracting with the health care insurer.
>
> **27.8(2)** A health care insurer shall not penalize a provider because the provider, in good faith, reports to state or federal authorities any act or practice by the health care insurer that, in the opinion of the provider, jeopardizes patient health or welfare.

These regulations are not directed to the regulation of rate differentials for particular services. Their purpose, rather, is to insure that health insurers do not abuse their overall relationship with patients and providers through the use of preferred provider plans. Thus, if a clinic decided to sue Wellmark under the Iowa Competition Law alleging that Wellmark had engaged in prohibited *section 553.5* monopolization by excluding it from a preferred provider arrangement, the *section 553.6(4)* state action exemption might well apply. **[**48]** [14] But, it does not appear that

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[14] This point is illustrated by *Health Care Equalization Committee of the Iowa Chiropractic Society v. Iowa Medical Society, 851 F.2d 1020 (8th Cir. 1988)*. In that case, chiropractors sued Wellmark's predecessor for antitrust violations, challenging its refusal

the legislature has decided generally to remove the setting of reimbursement rates by health insurance companies from the operations of the marketplace or from claims under the Iowa Competition Law.

A United States Supreme Court decision is on point. In *Patrick v. Burget*, an Oregon physician who had lost privileges at a hospital for allegedly anticompetitive reasons brought suit under the antitrust laws. 486 U.S. 94, 96-98, 108 S. Ct. 1658, 1660-61, 100 L. Ed. 2d 83, 89-90 (1988). Oregon, like other states, had a state-mandated **[*263]** and state-regulated peer-review process, which the hospital had followed in attempting to terminate the physician's privileges. *Id. at 97, 101-102, 108 S. Ct. at 1661, 1663-64, 100 L. Ed. 2d at 89-90, 92-93*. Nonetheless, the Supreme Court rejected the state action defense in a unanimous decision because the record showed that the various state agencies did not review the merits of individual peer-review decisions, as opposed to overall peer-review procedures. As the Supreme Court put it, "The Health Division's statutory authority over peer review relates only to a hospital's procedures; that authority does not encompass the actual decisions made by hospital peer-review committees." *Id. at 102, 108 S. Ct. at 1664, 100 L. Ed. 2d at 93*. Here, likewise, the regulatory scheme does not address the fairness of specific **[**50]** rates paid to chiropractors vis-à-vis doctors.

As noted by the parties, Wellmark filed a lengthy submission on Friday, July 27, 2001, which the division stamped "approved" on the very next business day, Monday, July 30. This did not occur because the division's employees took shortcuts in their work. It happened because the scope of review called for by the law and the regulations was limited. Wellmark offered no affidavit or depostion testimony of the insurance commissioner or any employee of the insurance division involved in approving Wellmark's submissions. The insurance division conducted no hearing. There is no evidence in this record the insurance division has ever rejected or required revisions to the reimbursement rates or terms of access in a health insurer's preferred provider arrangement. Nor does the record reflect the insurance division has ever requested additional information concerning rate differentials. We conclude Wellmark failed to establish a regulatory review sufficient to exempt Wellmark under section 553.6(4) from an antitrust lawsuit alleging that it conspired with physicians to underpay chiropractors or impose unfair terms on them.

To a large extent, the affidavits **[**51]** submitted by Wellmark are an effort to defend the merits of its pricing decisions rather than an attempt to show that the state reviews and regulates those prices. For example, the Nuzum affidavit explains for fifteen paragraphs how Wellmark uses the RBRVS system and why it is fair to chiropractors. In the last paragraph, the affiant attempts to tie everything together by stating:

> The total amounts available for provider reimbursement by Wellmark are ultimately determined by state regulations requiring that provider fees be high enough to provide reasonable access for members to each provider type, including chiropractors.

Thus, Wellmark's theory of implicit rate approval asserts that the company has to pay chiropractors enough because if chiropractor fees were too low, chiropractors would not join the preferred provider arrangement, and there would not be "reasonable access to covered services," as required by rule 191—27.3(1). In this indirect way, according to Wellmark, the insurance division regulates rates. We do not believe this satisfies section 553.6(4). Demonstrating that regulations provide, in some indirect way, an incentive for Wellmark to compensate chiropractors adequately **[**52]** is different from demonstrating the insurance commissioner in fact regulated and approved the specific rate differentials at issue here.

Under Wellmark's reasoning, even if all the health insurance companies doing business in Iowa had engaged in a blatant horizontal conspiracy to cap the rates they paid for chiropractic care, no one could seek redress under the antitrust laws because of the state action exemption. Thus, health insurance companies in Iowa would **[*264]** be free to engage in the kind of conduct for which ordinary citizens go to jail. For the foregoing reasons, we reverse the

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to include chiropractic services in health care service plans. *Health Care Equalization Comm., 851 F.2d at 1022*. The court found the state action exemption available, noting that under state law at that time, "the exclusion of chiropractors from health care service plans was not merely contemplated by the State of Iowa, but compelled." *Id. at 1026*. The Eighth Circuit thus found the state action exemption applied, not because some state regulation existed in the general area, but because the decisions being challenged as anticompetitive were directly covered by regulation. Nowadays state law mandates the inclusion rather than the exclusion of chiropractic services, *see, e.g.*, Iowa Code section 514.7(3), **[**49]** but the conceptual point remains the same.

district court's summary judgment granting Wellmark a blanket exemption under *section 553.6(4)* from charges that it engaged in anticompetitive price-fixing or term-fixing schemes.

V. Whether the District Court Correctly Granted Summary Judgment on Claims Relating to the *Love v. Blue Cross Blue Shield* Settlement.

Plaintiffs' third amended petition alleges Wellmark conspired to restrain trade against chiropractors by entering into an agreement with over ninety-five percent of Iowa medical and osteopathic doctors to "numerous items of preferential treatment, discriminatory to plaintiff, as found in Section 7 of **[**53]** a Settlement Agreement dated April 27, 2007." The *Love v. Blue Cross Blue Shield* settlement resulted from a national class action by all medical and osteopathic doctors against the state Blue Plans, including Wellmark. *See* *Love, No. 03-21296-CIV, 2008 U.S. Dist. LEXIS 96604 (S.D. Fla. Apr. 19, 2008)*. The settlement was not reviewed or approved by the Iowa Insurance Commissioner and thus is not subject to immunity under *section 553.6(4)*. The district court granted summary judgment in favor of Wellmark, finding no genuine issue of material fact as to whether Wellmark discriminated against chiropractors when implementing the *Love* settlement. We agree with the district court's ruling.

The order approving the *Love* settlement agreement states in part:

> E. The Court has held a hearing to consider the fairness, reasonableness, and adequacy of the Settlement, has been advised of all objections to the Settlement and has given fair consideration to such objections.
> F. The Settlement is the product of good faith, arm's length negotiations between the Representative Plaintiffs and the Signatory Medical Societies and their counsel, on one hand, and the Blue Parties and their counsel, on the other hand.
>
> G. The Settlement, as provided **[**54]** for in the Settlement Agreement, is in all respects fair, reasonable, adequate, is not the product of collusion between the Parties, and is otherwise proper and in the best interests of the Class.

Druker's affidavit in support of Wellmark's motion states:

> No term of the Love Settlement Agreement binds Wellmark not to extend to chiropractors the same or similar terms, or to deny chiropractors the benefit of any perceived advantageous changes in business practices, as are provided to M.D.'s and D.O.'s under that agreement.

As the district court accurately described, Druker also

> submitted a spreadsheet containing every item contained in Section 7 of the settlement agreement. This sets forth a series of procedural requirements, such as availability of fee schedules, reduced precertification requirements, greater notice of policy and procedure changes, etc. Most of the items are being applied to agreements with chiropractors. Some are not applicable.

Accordingly, Wellmark's record evidence presents facts demonstrating Wellmark does not provide preferential treatment to medical and osteopathic doctors as a result of the *Love* settlement.

Plaintiffs' resistance fails to set forth facts that show **[**55]** Wellmark has implemented the *Love* settlement in a manner discriminatory to chiropractors. *See* *Green, 713 N.W.2d at 245*. In response to Druker's affidavit, which was incorporated into **[*265]** Wellmark's statement of undisputed facts, plaintiffs stated:

> Denied. This is legal argument In Exhibit 7 the class is defined as "any and all Physicians, Physician Groups and Physician Organizations . . . ." According to the Settlement Agreement, U 1.85, " 'Physician' means an individual duly licensed by a state licensing board as a Medical Doctor or Doctor of Osteopathy and shall include both Participating Physicians and Non-Participating Physicians." The State of Iowa recognizes that a Doctor of Chiropractic is a "Physician." *Iowa Code § 135.1(4) (2007)*: " 'Physician' means a person licensed to practice medicine and surgery, osteopathic medicine and surgery, osteopathy, chiropractic, podiatry or optometry under the laws of this state." Chiropractors were deliberately excluded from the Agreement, Exhibit 7.

Plaintiffs' response merely acknowledges the *Love* settlement did not include chiropractors; it does not controvert Wellmark's record evidence. Plaintiffs offered no affidavit testimony or other evidence **[**56]** to controvert Wellmark's evidence showing it implemented the *Love* settlement in a nondiscriminatory manner.

Accordingly, we conclude the plaintiffs failed to generate a genuine issue of material fact precluding summary judgment on their claims based on the *Love* settlement.

VI. Other Defenses to State Antitrust Claims.

Wellmark raised several other defenses to plaintiffs' Iowa Competition Law claims in the dispositive motions it filed below. Generally, the district court did not reach those defenses, because it disposed of the claims on the grounds already discussed. With three exceptions, we believe those defenses should be addressed further on remand.

First, we believe the district court properly rejected Wellmark's argument that the plaintiffs did not suffer an actionable "antitrust injury." [15] Wellmark takes the position that, because the plaintiffs are suiing as disadvantaged *sellers* rather than disadvantaged *buyers*, they have not suffered an injury "of the type sought to be compensated by antitrust laws." *Southard v. Visa U.S.A., Inc., 734 N.W.2d 192, 199* (Iowa 2007 (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 538, 103 S. Ct. 897, 908-09, 74 L. Ed. 2d 723, 738 (1983))*. **[**57]** The antitrust laws are as concerned about abuse of monopsony power to pay prices below a competitive level as they are about abuse of monopoly power to charge prices above a competitive level. The seller to the monopsony has been harmed as much as the buyer from the monopoly. *See W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 104-05 (3d Cir. 2010)* (holding that a hospital had alleged antitrust injury based on its receipt of artificially depressed reimbursement rates from a dominant insurer and noting that "the defendants' argument reflects a basic misunderstanding of the antitrust laws"); *see also Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 322, 127 S. Ct. 1069, 1076, 166 L. Ed. 2d 911, 920 (2007)* ("The kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and claims of monopsonization."). Hence, we reject Wellmark's "antitrust injury" defense.

Second, by contrast, plaintiffs' counsel conceded at oral argument before **[*266]** us that his clients cannot pursue a claim against Wellmark **[**58]** for *unilaterally* deciding to pay chiropractors less. We agree. *See W. Penn Allegheny Health Sys., Inc., 627 F.3d at 103* (concluding that, if the insurer had been "acting alone, [the health care provider] would have little basis for challenging the reimbursement rates[, and a] firm that has substantial power on the buy side of the market (*i.e.*, monopsony power) is generally free to bargain aggressively when negotiating the prices it will pay for goods and services"). Merely paying less (because one is a monoponist) or charging more (because one is a monopolist) does not violate the antitrust laws. There must be some prohibited conspiracy or exclusionary conduct as well. *See Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP., 540 U.S. 398, 407, 124 S. Ct. 872, 879, 157 L. Ed. 2d 823, 836 (2004)* (stating that "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is . . . not unlawful" and "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of an anticompetitive *conduct*"). Accordingly, we affirm the summary judgment in favor of Wellmark on any claim that Wellmark's pricing decisions violated **[**59]** *section 553.5 of the Iowa Code*.

Third, Wellmark urges us to separately uphold the dismissal of certain claims related to treatment conditions contained in the preferred provider agreements. Wellmark contends those claims are "waived" because plaintiffs failed either here or below to rebut Wellmark's evidence demonstrating that the conditions were nondiscriminatory. In its summary judgment order, the district court found Wellmark's facts were undisputed, although it did not specifically grant summary judgment on that basis because it decided that all the antitrust claims were barred by *section 553.6(4)*.

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[15] Wellmark reurges this argument on appeal as an alternative ground for affirming dismissal of the antitrust claims.

We agree with Wellmark that it is entitled to dismissal of these claims. We therefore affirm the summary judgment as to plaintiffs' allegations that (1) Wellmark "arbitrarily imposed riders on the policies of patients" seeking spinal treatment when the patient had prior chiropractic care, (2) promulgated "standards and rules of practice for 'Chiropractic Assistants,' " and (3) imposed a definition of "chiropractic" to restrict covered chiropractic treatments.

Blake's affidavit in support of Wellmark's motion states:

> With regard to "riders" that limit coverage when a member discloses preexisting **[**60]** joint or bone conditions, whether such an exclusion or policy amendment will be sought is determined by written underwriting guidelines. These guidelines make no distinction between prior conditions that were treated by a chiropractor as opposed to those that were treated by other medical professionals.

Druker's affidavit states:

> Wellmark does not and has not ever implemented standards and rules of practice for "Chiropractic Assistants" or created a limitation that certain modes of physiotherapy must be applied by "Chiropractic Assistants".

Wellmark also showed that its definition "chiropractic" was based on Iowa law.

Plaintiffs' resistance challenged only the admissibility and competency of Wellmark's affidavits. Plaintiffs conceded Wellmark uses the statutory definition of "chiropractic" in its provider forms. Plaintiffs identified no evidence to avoid summary judgment on these claims. We therefore affirm summary judgment here.

Apart from the three areas we have just discussed, we conclude that any other defenses that Wellmark may have to the Iowa Competition Law claims would be better addressed on remand.

[*267] VII. Disposition.

For the reasons stated, we affirm the district court's ruling granting **[**61]** Wellmark's motion to dismiss plaintiffs' statutory insurance claims. We reverse the summary judgment granted to Wellmark that was based upon the state action exemption. We affirm the district court's summary judgment dismissing claims that Wellmark violated *section 553.5* of the Iowa Competition Law with respect to any unilateral payment decisions regarding chiropractors. We also affirm the district court's summary judgment dismissing claims based on the *Love* settlement, medical spine riders, and definitions of "chiropractic assistant" and "chiropractic." We remand the case for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Superior Offshore Int'l, Inc. v. Bristow Group

United States Court of Appeals for the Third Circuit

March 20, 2012, Argued; July 27, 2012, Opinion Filed

No. 11-3010

Reporter

490 Fed. Appx. 492 *; 2012 U.S. App. LEXIS 15539 **; 2012-2 Trade Cas. (CCH) P77,992; 2012 WL 3055849

SUPERIOR OFFSHORE INTERNATIONAL, INC., a Delaware corporation, on behalf of itself and all others similarly situated, Appellant v. BRISTOW GROUP, INC., a Delaware corporation; ERA HELICOPTERS, LLC., a Delaware, LLC.; SEACOR HOLDINGS, INC., a Delaware corporation; ERA GROUP, INC., a Delaware corporation; ERA AVIATION, INC., a Washington corporation; PHI, INC., a Louisiana corporation

Notice: NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.

PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [1]** On Appeal from the United States District Court for the District of Delaware. (No.1-09-cv-00438). District Judge: Honorable Legrome D. Davis.

Superior Offshore Int'l, Inc. v. Bristow Group Inc., 2011 U.S. Dist. LEXIS 66834 (D. Del., June 23, 2011)

Core Terms

district court, discovery, conspiracy, conversation, defendants', summary judgment, antitrust, prices, factors, helicopter, direct evidence, amended complaint, increased price, concerted action, allegations, conspired, quotation, offshore, marks, circumstantial evidence, additional discovery, price fixing, fix prices, deposition, non-moving, genuine, cases, grant of summary judgment, concerted activity, competitor

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Summary Judgment, Evidentiary Considerations**

Summary judgment is appropriate when there is no genuine dispute as to any material fact such that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. Review of a grant of summary judgment is plenary. In reviewing a district court's grant of summary judgment, an appellate court evaluates the evidence using the same standard as the district court; that is, by viewing the evidence and making reasonable inferences from the evidence in the light most favorable to the non-moving party. At the summary judgment stage the judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. However, a court need not turn a blind eye to the weight of the evidence. In order for a dispute to be genuine, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts but must instead come forward with specific facts showing that there is a genuine issue for trial. Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN2[] **Sherman Act, Claims**

There is an added layer of complexity when determining whether summary judgment is appropriate in an antitrust case as motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. Such difficulties are particularly acute in cases where a plaintiff has failed to put forth direct evidence of conspiracy but is instead relying solely on circumstantial evidence. Although reasonable inferences arising from circumstantial evidence must be drawn in favor of the nonmoving party, what constitutes a reasonable inference in the context of an antitrust case is somewhat different from cases in other branches of the law in that ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Antitrust Act, *15 U.S.C.S. §§ 1-7*, case. The acceptable inferences which an appellate court can draw from circumstantial evidence vary with the plausibility of a plaintiff's theory and the danger associated with such inferences. In antitrust cases, conduct consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN3[] **Sherman Act, Claims**

In order for an antitrust plaintiff to succeed in opposing a motion for summary judgment on a *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Antitrust Act, *15 U.S.C.S. §§ 1-7*, claim, the plaintiff must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

Antitrust & Trade Law > Sherman Act > Claims

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

HN4[] **Sherman Act, Claims**

Section 1 (*15 U.S.C.S. § 1*) of the Sherman Antitrust Act, *15 U.S.C.S. §§ 1-7*, provides: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. *15 U.S.C.S. § 1*. This provision requires a plaintiff to prove two elements: (1) that the defendants engaged in some form of concerted action, and (2) that such action resulted in a restraint on trade or commerce. The term concerted action encompasses the statutory terms contract, combination, or conspiracy and denotes a unity of purpose or a common design and understanding or a meeting of minds or a conscious commitment to a common scheme. A plaintiff may attempt to demonstrate the existence of concerted action in two ways. First, a plaintiff may present direct evidence of concerted action. Second, the plaintiff could show that the defendants engaged in parallel conduct (such as raising prices simultaneously) and that certain other plus factors exist which render this conduct a violation of the Sherman Act.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Types of Evidence > Circumstantial Evidence

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

HN5[] **Sherman Act, Claims**

Given the relatively lighter burden afforded to a plaintiff putting forth direct evidence of concerted action, the difference between direct and circumstantial evidence in an antitrust case assumes heightened significance. Direct evidence in this context is described as evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted, such as a document or conversation explicitly manifesting the existence of the agreement in question. On the other hand, vague statements such as an admonition to competitors to play by the rules do not constitute direct evidence of a conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

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

HN6[] **Sherman Act, Claims**

To make a successful claim under the Sherman Antitrust Act, *15 U.S.C.S. §§ 1-7*, based on conscious parallelism, a plaintiff must show that a defendant's behavior was parallel; that the defendants were conscious of each other's conduct and that this awareness was an element in their decision-making process; and certain plus factors. Plus factors are circumstances under which the inference of rational independent choice is less attractive than that of concerted action.

Antitrust & Trade Law > Sherman Act > Claims

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

HN7[] **Sherman Act, Claims**

In the context of the Sherman Antitrust Act, *15 U.S.C.S. §§ 1-7*, three potential plus factors are: evidence that a defendant had a motive to enter into a price fixing conspiracy; evidence that a defendant acted contrary to its interests; and evidence implying a traditional conspiracy. The first two factors are generally less important as they may indicate simply that the defendants operate in an oligopolistic market, that is, may simply restate the (legally insufficient) fact that market behavior is interdependent and characterized by conscious parallelism. Indeed, when parallel pricing is alleged, these first two factors largely restate the phenomenon of interdependence, and no conspiracy should be inferred from ambiguous evidence or from mere parallelism when a defendant's conduct can be explained by independent business reasons. The third factor encompasses non-economic evidence that there was an actual, manifest agreement not to compete, which may include proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown. This factor is especially important in cases wherein a plaintiff's theory of conspiracy rests on an agreement among oligopolists to fix prices at a supracompetitive level.

Antitrust & Trade Law > Sherman Act > Claims

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

HN8[] **Sherman Act, Claims**

Once the plaintiffs have presented evidence of a defendant's consciously parallel pricing and supplemented this evidence with plus factors, a rebuttable presumption of conspiracy arises. The mere presence of one or more of these plus factors does not necessarily mandate the conclusion that there was an illegal conspiracy between the parties, for the court may still conclude, based upon the evidence before it, that the defendants acted independently of one another, and not in violation of antitrust laws. Overarching issue in considering an antitrust claim brought under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Antitrust Act, *15 U.S.C.S. §§ 1-7*, is whether evidence of parallel conduct was placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. The relevant analysis thus required the District Court to consider all of the available facts to determine if there was a genuine dispute as to whether any alleged parallel pricing activity was the product of a specific agreement, or whether it was simply the result of the defendants' independent business judgment.

Antitrust & Trade Law > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN9[] **Antitrust & Trade Law**

Twombly aligns the standard for ruling on a motion to dismiss and the standard for summary judgment in an antitrust case insofar as a plaintiff relying on circumstantial evidence of an agreement must make a showing at both stages (with well-pled allegations and evidence of record, respectively) of something more than merely parallel behavior, something plausibly suggestive of (not merely consistent with) agreement.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

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

HN10[] **Supporting Materials, Discovery Materials**

An appellate court reviews a district court's denial of a motion for additional discovery under *Fed. R. Civ. P. 56(d)* for abuse of discretion. Appellate courts typically afford trial courts broad discretion to regulate discovery. For this reason, in order to overturn a district court's ruling to limit discovery, an appellate court must generally conclude that there has been an interference with a substantial right, or that the discovery ruling is seen to be a gross abuse of discretion resulting in fundamental unfairness in the trial of the case.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN11[] **Supporting Materials, Discovery Materials**

A district court is obliged to give a party opposing summary judgment an adequate opportunity to obtain discovery. *Fed. R. Civ. P. 56(d)* (formerly *Rule 56(f)*) sets forth the procedure when a party alleges that it does not possess facts necessary to oppose the motion for summary judgment: (d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order. A *Rule 56(d)* motion is the proper recourse of a party faced with a motion for summary judgment who believes that additional discovery is necessary before he can adequately respond to that motion. A properly filed motion must be accompanied by a supporting affidavit detailing what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained. However, because a district court has discretion in acting on Rule 56d motions, this list of factors is not exhaustive. Instead, it simply offers a guide for the district court to follow in exercising its discretion under Rule 56d.

Counsel: William E. Hoese, Esquire (Argued), Joseph C. Kohn, Esquire, Robert J. LaRocca, Esquire, Kohn, Swift & Graf, Philadelphia, PA, Counsel for Appellants.

Andre G. Bouchard, Esquire, Bouchard, Margules & Friedlander, Wilmington, DE; Sean M. Brennecke, Esquire, Klehr, Harrison, Harvey & Branzburg, Wilmington, DE; Jennifer D. Chippendale, Esquire, Donald C. Klawiter, Esquire, Sheppard, Mullin, Richter & Hampton, Washington, DC, Counsel for Appellee Bristow Group Inc.

Steven L. Caponi, Esquire, Elizabeth A. Sloan, Esquire, Blank Rome, Wilmington, DE; Helene D. Jaffe, Esquire (Argued), Proskauer Rose, New York, NY, Counsel for Appellees Era Helicopters LLC, Seacor Holdings Inc., Era Group Inc, and Era Aviation Inc.

Tarak Anada, Esquire, Pauline F. Hardin, Esquire, David G. Radlauer, Esquire, Jones Walker, New Orleans, LA; Comrie B. Flinn, Esquire, Pilar G. Kraman, Esquire, Young, Conaway, Stargatt & Taylor, Wilmington, DE, Counsel for Appellee PHI Inc.

Judges: Before: RENDELL, FISHER, and CHAGARES, Circuit Judges.

Opinion by: CHAGARES

Opinion

[*493] CHAGARES, Circuit Judge.

Superior Offshore **[**2]** International ("SOI") appeals the District Court's grant of summary **[*494]** judgment in favor of the defendants on SOI's antitrust claims related to the defendants' alleged price fixing of helicopter services rates for offshore oil and gas industries. The District Court found that SOI had not shown any evidence of an illegal agreement in violation of the Sherman Antitrust Act (the "Sherman Act"), *15 U.S.C. §§ 1-7*, and denied SOI's request to conduct additional discovery under *Federal Rule of Civil Procedure 56(d)*. We will affirm.

I.

We write solely for the parties' benefit and thus set forth only the facts necessary to our disposition. SOI filed its initial complaint on June 12, 2009, alleging that the defendants conspired to fix prices for their respective helicopter services, which provided air transportation to the oil and gas industries operating in the Gulf of Mexico. Such helicopter services are generally purchased for fixed periods of time through charter agreements that specify a set price plus any additional hourly charges. Collectively, the defendants have approximately a 90% market share in their industry.

The original complaint asserted that between January 1, 2001, and December 31, **[**3]** 2005, in the face of softening demand, the defendants conspired to raise prices by 50%. Of particular importance to SOI was the fact that in the first half of 2001, the defendants instituted two "across-the-board" increases totaling 30%. To bolster its claim that these increases were the result of concerted activity, SOI cited the high concentration of the market, the close-knit community in this business sector (wherein employees often moved between companies), the ongoing investigation by the United States Department of Justice's Antitrust Division into these activities,[1] various quotes by company executives touting their increased profits and the importance of maintaining their respective market share, and the following unattributed quotation in a trade magazine: "If we were to say that the helicopter operators all got together and agreed to these increases, that would be illegal; it would be price fixing. Let's just say that everyone more or less agreed to the necessity of a more or less equal rate hike for everyone." Appendix ("App.") 54. Collectively, the District Court found this evidence was insufficient to state an antitrust claim and dismissed the case. *Superior Offshore Int'l, Inc. v. Bristow Grp., Inc., 738 F. Supp. 2d 505, 510 (D. Del. 2010)*.

Following dismissal of the initial complaint, the District Court allowed SOI to amend its complaint to add allegations that a discussion about price fixing occurred between executives at defendants Bristow Group, Inc. ("Bristow") and PHI, Inc. ("PHI"). The amended complaint, filed on December 2, 2010, alleged that a confidential witness later revealed to be Mike Tuttle had overheard Gene Graves, Bristow's vice president of sales, engage in a conversation in 2001 with "a senior sales and marketing executive of PHI, who [Tuttle] believed may have been Jim [Shugart], PHI Sales Manager." App. 117. Tuttle believed the parties to that conversation discussed raising helicopter rates in unison at their respective companies and at a third company, Era Helicopters, LLC ("Era").[2] Specifically, the amended complaint **[*495]** alleges that Graves did the following in the conversation Tuttle overheard:

> (1) Agreed with PHI to implement a major price increase in [o]ffshore [h]elicopter [s]ervices in the Gulf of Mexico;
>
> (2) Confirmed with PHI that Era had also agreed to make a major **[**5]** price increase at or about the same time;
> (3) Represented that Air Logistics' President Jim Clement authorized Graves to enter into the agreement between Air Logistics, PHI, and Era to implement a major price increase in or about the first half of 2001;
>
> (4) Stressed the importance of Air Logistics, PHI, and Era raising prices *in unison* in order to maintain their respective customer bases; and
> (5) Discussed and agreed on the timing of price increase announcements.

Id. (emphasis in original). The amended complaint also contained the same factual allegations as the original complaint.

Because the District Court found that only the newly added allegations allowed the amended complaint to escape dismissal, it permitted discovery related only to these alleged new facts. The Court allowed the parties to depose Tuttle, Shugart, Graves, and Clement, but refused to allow additional document requests by SOI. Id. at 157.[3]

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[1] On **[**4]** August 4, 2010, the Antitrust Division closed its five-year investigation of potential antitrust violations without taking any action.

[2] Era and related entities Era Aviation, Inc. and Era Group Inc. are wholly owned by defendant SEACOR Holdings.

Ultimately, only Tuttle and Graves were deposed, as it became clear during this period of discovery that Shugart and Clement had not been involved in the conversation that **[**6]** Tuttle heard.

During Tuttle's deposition, he stated that he had overheard a conversation between Graves and an unknown representative from a competitor that he felt "wasn't right," but he could not describe any specifics, including the exact words Graves used. Id. at 204-05. Tuttle indicated that the call had included a discussion of prices and collusive activity to avoid pursuing the other company's customers, and that the conversation worried him because he believed it could create liability for price fixing. He also stated that very shortly after the phone call occurred, all of the defendants raised their rates. However, Tuttle admitted that several details in the amended complaint were incorrect. First, he conceded that Graves could not have been talking to Shugart because Shugart did not work for PHI at the time of **[**7]** the phone call. Tuttle also admitted that Graves could not have mentioned Clement, as alleged in the complaint, because Clement was also no longer employed by PHI. Tuttle further stated that he "couldn't really say that all three" defendants were involved in an agreement to raise prices in unison, although he reiterated his general sense that the "gist" of the conversation he overheard "was price fixing." Id. at 205. In his deposition, Graves denied that such a conversation occurred.

On February 11, 2011, the defendants filed a motion for summary judgment, which SOI opposed with a request for full discovery pursuant to *Federal Rule of Civil Procedure 56(d)*. In his affidavit, SOI's counsel sought production of documents in the following nine categories:

a. Transactional data reflecting prices charged by Defendants for offshore helicopter services, and Defendants' costs;

b. Information, including but not limited to, calendars, day-timers, telephone records, and correspondence, about any meeting, discussion or other communication **[*496]** between and among Defendants concerning the provision of those services;

c. Price sheets, price announcements, and price change letters generated by any Defendant **[**8]** concerning the provision of those services;
d. Information about Defendants' organizational structures;
e. Documents provided to or received from any government agency or representative, including, but not limited to, the Federal Bureau of Investigation, the United States Department of Justice, any law enforcement agency of any state, or any grand jury regarding any investigation into a possible violation of the antitrust laws;
f. Defendants' financial statements relating to offshore helicopter services;
g. Information about Defendants' membership and involvement in the activities of trade associations relating to offshore helicopter services;
h. Documents relating to any internal investigation conducted by any Defendant of actual or potential violations of law or company policy with respect to offshore helicopter services; and
i. Information relating to Defendants' pricing, marketing and sales strategy.

Id. at 336.

The District Court declined to allow additional discovery and granted summary judgment in favor of the defendants, finding that SOI had not offered any evidence to show there was a "contract, combination . . . , or conspiracy" to fix prices. *15 U.S.C. § 1*. The District Court found **[**9]** summary judgment was appropriate despite the lack of full discovery because the only evidence of collusion mentioned in the amended complaint was Tuttle's overheard conversation, and Tuttle's deposition revealed he remembered very little about the nature of that conversation.

SOI now appeals the denial of its *Rule 56(d)* motion and the District Court's grant of summary judgment in favor of the defendants.

II.[4]

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[3] Following SOI's letter request for additional discovery, and the defendants' opposition thereto, the Court issued an Order on December 30, 2010, stating that "[t]he scope of all permitted depositions shall be strictly limited to the allegations set forth in Plaintiff's Amended Complaint ¶¶ 30-32" and that "[d]ocument discovery at this time is not warranted." App. 157.

HN1[] Summary judgment is appropriate when "there is no genuine dispute as to any material fact" such that "the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. Our review of a grant of summary judgment is plenary. *Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976)*. In reviewing a District Court's grant of summary judgment, we evaluate the evidence using the same standard as the District Court; that is, by viewing the evidence and making reasonable inferences from the evidence in the light most favorable to the non-moving party. *Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992)*; *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1230 (3d Cir. 1993)*. **[**10]** "[A]t the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. However, a court need not "turn a blind eye to the weight of the evidence." *BMW, 974 F.2d at 1363*. In order for a dispute to be "genuine," the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts" but must instead "come forward with specific facts showing that there is a *genuine issue for* ***[*497]*** *trial*." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (quotation marks omitted) (emphasis in original). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Id. at 587* (quotation marks omitted).

HN2[] There is an added layer of complexity when determining whether summary judgment is appropriate in an antitrust case because "motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." Id. Such difficulties **[**11]** are particularly acute in cases where, as here, the plaintiff has failed to put forth direct evidence of conspiracy but is instead relying solely on circumstantial evidence. This is so because although "reasonable inferences" arising from circumstantial evidence must be drawn in favor of the nonmoving party, "what constitutes a reasonable inference in the context of an antitrust case . . . is somewhat different from cases in other branches of the law in that '***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case.'" *In re Baby Food Antitrust Litig., 166 F.3d 112, 124 (3d Cir. 1999)* (hereinafter "Baby Food") (quoting *Matsushita, 475 U.S. at 588*). "The acceptable inferences which we can draw from circumstantial evidence vary with the plausibility of the plaintiffs' theory and the danger associated with such inferences." Id. The Supreme Court has held that in antitrust cases, "conduct consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita, 475 U.S. at 588*. Thus, **HN3**[] in order for an antitrust plaintiff to succeed in opposing a motion for summary judgment on **[**12]** a Section 1 claim, the plaintiff "must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." Id.

III.

SOI brought this putative class action under**HN4**[] *§ 1 of the Sherman Act*, which provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. We have held that this provision requires a plaintiff to prove two elements: (1) that the defendants engaged in some form of "concerted action," and (2) that such action resulted in a restraint on trade or commerce. *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 315 (3d Cir. 2010)* (hereinafter "Brokerage").

The term "concerted action" encompasses the statutory terms "contract, combination[,] or conspiracy" and denotes "a unity of purpose or a common design and understanding or a meeting of minds or a conscious commitment to a common scheme." *Id. at 314-15* (quotation marks and punctuation omitted). A plaintiff may attempt to demonstrate the existence of concerted action in two ways. First, a plaintiff may present direct evidence of concerted **[**13]** action. *Id. at 323*. Second, the plaintiff could show that the defendants engaged in parallel conduct (such as raising prices simultaneously) and that certain other "plus factors" exist which render this conduct a violation of the Sherman Act. Id.

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[4] The District Court had jurisdiction pursuant to *28 U.S.C. § 1331*. We have jurisdiction pursuant to *28 U.S.C. § 1291*.

HN5[] Given the relatively lighter burden afforded to a plaintiff putting forth direct evidence of concerted action, the difference between direct and circumstantial evidence in an antitrust case assumes heightened significance. We have described direct evidence in this context as "evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted," Baby Food, 166 F.3d at 118, **[*498]** such as "a document or conversation explicitly manifesting the existence of the agreement in question." Brokerage, 618 F.3d at 324 n.23. On the other hand, we have held that vague statements such as an admonition to competitors to "play by the rules" do not constitute direct evidence of a conspiracy. See InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 156 n.5 (3d Cir. 2003) (holding that "cases require that direct evidence of an illegal agreement be established with much greater clarity" than the ambiguous statements made between **[**14]** bond traders in that case); see also Baby Food, 166 F.3d at 120-21 (rejecting the plaintiffs' contention that they had adduced direct evidence of a conspiracy when they provided statements from employees that they had exchanged pricing information with their peers and superiors, documentary evidence that the defendants knew of their competitors' impending price increases, and an internal memorandum referring to a "truce" between the defendants).

SOI's assertion that Tuttle's testimony constitutes direct evidence of concerted action is unpersuasive. As the District Court explained, Tuttle's deposition testimony reflects that he does not recall the exact words that Graves used during the alleged illicit conversation, but that he simply got a general sense that there was something wrong about the conversation. This vague description of the conversation suggests that Tuttle was drawing his own inferences from the words used by Graves. The District Court properly concluded that it could not accept Tuttle's subjective impression as a conclusive fact. Tuttle's testimony thus is not direct evidence of a conspiracy.

Because this case involves only circumstantial evidence, we must decide whether **[**15]** the District Court correctly determined that SOI did not adduce sufficient evidence of parallel conduct – so-called "conscious parallelism" – and other "plus factors" to survive summary judgment.HN6[] To make a successful claim under the Sherman Act based on conscious parallelism, "a plaintiff must show (1) that the defendants' behavior was parallel; (2) that the defendants were conscious of each other's conduct and that this awareness was an element in their decision-making process; and (3) certain 'plus' factors." In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 n.11 (3d Cir. 2004) (hereinafter, "Flat Glass"). "Plus factors" are "circumstances under which . . . the inference of rational independent choice [is] less attractive than that of concerted action." Lum v. Bank of Am., 361 F.3d 217, 230 (3d Cir. 2004). We have identified HN7[] three potential "plus factors": "(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy." Brokerage, 618 F.3d at 322 (quotation marks omitted). The first two factors are generally less important because they "may **[**16]** indicate simply that the defendants operate in an oligopolistic market, that is, may simply restate the (legally insufficient) fact that market behavior is interdependent and characterized by conscious parallelism." Id. Indeed, when parallel pricing is alleged, these first two factors "largely restate the phenomenon of interdependence," Flat Glass, 385 F.3d at 360, and thus we have held that "no conspiracy should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons." Baby Food, 166 F.3d at 122; see also Brokerage, 618 F.3d at 326 (explaining that "a claim of conspiracy predicated on parallel conduct" is insufficient when "'common economic experience,' or the facts alleged in the complaint itself, show that independent self-interest is an 'obvious alternative explanation' **[*499]** for [the] defendants' common behavior" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 565, 567, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))). The third factor, on the other hand, encompasses "non-economic evidence that there was an actual, manifest agreement not to compete, which may include proof that the defendants got together and exchanged assurances of common action **[**17]** or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown." Flat Glass, 385 F.3d at 360 (quotation marks and citation omitted). This factor is especially important in cases like this one wherein the plaintiff's theory of conspiracy rests on "an agreement among oligopolists to fix prices at a supracompetitive level." Id. at 358.

Our inquiry does not end with the identification of "plus factors." As we explained in Baby Food,

> HN8[] Once the plaintiffs have presented evidence of the defendants' consciously parallel pricing and supplemented this evidence with plus factors, a rebuttable presumption of conspiracy arises. The mere presence of one or more of these 'plus factors' does not necessarily mandate the conclusion that there was an

> illegal conspiracy between the parties, for the court may still conclude, based upon the evidence before it, that the defendants acted independently of one another, and not in violation of antitrust laws.

166 F.3d at 122. The Supreme Court has held that the overarching issue in considering an antitrust claim brought under § 1 of the Sherman Act is whether evidence of parallel conduct was "placed in a context that **[**18]** raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." Twombly, 550 U.S. at 557.[5] The relevant analysis thus required the District Court to consider all of the available facts to determine if there was a genuine dispute as to whether any alleged parallel pricing activity was the product of a specific agreement, or whether it was simply the result of the defendants' independent business judgment.

SOI contends that, even if it does not have direct evidence of a conspiracy, this case should have survived summary judgment because they alleged sufficient "plus **[**19]** factors"[6] to create an inference of impermissible concerted activity. As noted above, the first two "plus factors," motive and action contrary to self-interest, are not especially helpful in price-fixing cases where, as here, there are parallel price increases by competitors in a concentrated market. The three defendants all had a motive to conspire to fix prices, particularly if SOI is correct that demand was lessening for their services, given that joint action would allow them to maintain inflated prices while their customers had no other comparable options in light of the defendants' collective 90% market share. Similarly, although it is against each company's self-interest not to compete, concerted activity would be in their self-interest for the same profit-enhancing reason. The parallel price increases here could just **[*500]** as easily be the result of each company independently analyzing the market and realizing that they needed to charge more in order to make a profit, given that external circumstances indicated that they would be providing fewer services to their customers in the future. Alternatively, given the concentration of the helicopter-services market at issue here, such **[**20]** price increases could have just as easily been the result of "price leadership" as of price fixing. See Flat Glass, 385 F.3d at 359 This obvious business reasons for the defendants' actions casts serious doubt on whether wrongful concerted activity was the real cause of the price increases.

This case thus hinges on whether SOI has produced any evidence suggesting "an actual, manifest agreement not to compete." Id. at 360 (quotation marks omitted). There are two pieces of evidence that could arguably fit here. First, Tuttle's testimony regarding Graves' conversation with a competitor would be evidence of an agreement, although the District Court found Tuttle's deposition testimony so vague that it was essentially worthless. The second piece of evidence suggesting an agreement is the unnamed helicopter operator's remark that despite the fact that universal agreement to the increased rates "would be illegal . . . price-fixing," "everyone more or less agreed to the necessity of a more or less equal rate hike for everyone." In its earlier opinion dismissing the first complaint, **[**21]** the District Court stated that "the relevance of the operator's statement as circumstantial evidence of an agreement is dubious" because

> his statement is ambiguous as to whether he comments on the industry's lawful but interdependent pricing decisions; casual observations about the general convergence of prices among un-named market participants at that time; or perhaps an illegal agreement by un-named actors at some unspecified point in time.

Superior Offshore Int'l, 738 F. Supp. 2d at 513.

We agree with the District Court's thoughtful analysis. These two pieces of evidence are both so vague that they cannot suggest a circumstance in which an "inference of rational independent choice [is] less attractive than that of

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[5] Although Twombly was decided at the motion to dismiss stage, we recently explained that HN9[] Twombly "aligns" the standard for ruling on a motion to dismiss and the standard for summary judgment in an antitrust case insofar as "[p]laintiffs relying on circumstantial evidence of an agreement must make a showing at both stages (with well-pled allegations and evidence of record, respectively) of something more than merely parallel behavior, something plausibly suggestive of (not merely consistent with) agreement." Brokerage, 618 F.3d at 322 (punctuation and citations omitted).

[6] The defendants do not contest that they exhibited parallel behavior by raising prices in a nearly simultaneous fashion.

concerted action." Lum, 361 F.3d at 230. Quite simply, there is insufficient evidence to create a triable issue of fact regarding whether the defendants conspired to fix prices.[7]

IV.

In an attempt to survive summary judgment despite its **[**22]** failure to produce sufficient evidence of concerted activity, SOI argues that it was entitled to the additional discovery it requested pursuant to Federal Rule of Civil Procedure 56(d). **HN10**[] We review a district court's denial of a motion for additional discovery under Rule 56(d) for abuse of discretion. Doe v. Abington Friends Sch., 480 F.3d 252, 256 (3d Cir. 2007); Renchenski v. Williams, 622 F.3d 315, 339 (3d Cir. 2010).

We typically afford trial courts broad discretion to regulate discovery. See Pub. Loan Co., Inc. v. Fed. Deposit Ins. Corp., 803 F.2d 82, 86 (3d Cir. 1986). For this reason, in order to overturn a district court's ruling to limit discovery, we must generally "conclude that there has been an interference with a 'substantial right,' . . . or that the discovery ruling is 'seen to be a gross abuse of discretion resulting in fundamental unfairness in the trial of the **[*501]** case.'" Id. (quoting Marroquin-Manriquez v. I.N.S., 699 F.2d 129, 134 (3d Cir. 1983)).

HN11[] A District Court is "obliged to give a party opposing summary judgment an adequate opportunity to obtain discovery." Dowling v. City of Philadelphia, 855 F.2d 136, 139 (3d Cir.1988) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). **[**23]** Rule 56(d) (formerly Rule 56(f)) sets forth the procedure when a party alleges that it does not possess facts necessary to oppose the motion for summary judgment:

> (d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
> (1) defer considering the motion or deny it;
> (2) allow time to obtain affidavits or declarations or to take discovery; or
> (3) issue any other appropriate order.

A Rule 56(d) motion is "the proper recourse of a party faced with a motion for summary judgment who believes that additional discovery is necessary before he can adequately respond to that motion." Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295, 309 (3d Cir. 2011).

A properly filed motion must be accompanied by "a supporting affidavit detailing 'what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained.'" Abington, 480 F.3d at 257 n.3 (3d Cir. 2007) (quoting Dowling, 855 F.2d at 140). "However, because '[a] district court has discretion in acting on Rule 56[d] motions,' this list of factors **[**24]** is not exhaustive. Instead, it 'simply offer[s] a guide for the district court to follow in exercising its discretion under Rule 56[d].'" Horvath v. Keystone Health Plan E., Inc., 333 F.3d 450, 458 (3d Cir. 2003) (quotation marks and citations omitted).

Here, SOI's counsel filed an affidavit with his Rule 56(d) motion identifying nine types of discovery that SOI needed to respond adequately to the defendants' summary judgment motion. This discovery, the affidavit asserted, "will lead to more information about communications among the Defendants that can be used to prove that Defendants conspired to raise prices for offshore helicopter services in the Gulf of Mexico starting in 2001." App. 335. In denying this request, the District Court stated that SOI had improperly cast a wide "discovery net" because "the foundation for the requests in purely speculative. No facts have been presented that suggest further discovery would remedy Tuttle's conjecture and speculation." Id. at 22.

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[7] Because we hold that SOI did not present sufficient evidence of concerted action, we need not address whether the defendants' conduct "imposed an unreasonable restraint on trade." Brokerage, 618 F.3d at 315 (quotations and citations omitted).

We do not believe the District Court abused its discretion in denying SOI's Rule 56(d) motion. At the outset, it is worth noting that the District Court was well within the bounds of its considerable discretion **[**25]** when it elected to limit discovery to the allegations added to the amended complaint. Having already – correctly – determined that the initial complaint was subject to dismissal absent the new allegations, the District Court afforded SOI an opportunity to demonstrate the truth of the allegations made in the amended complaint. SOI failed to do so. As noted above, Tuttle's vague deposition testimony makes clear that the information included in the amended complaint did not accurately reflect what Tuttle observed. Tuttle could not recall crucial details, including the identity of the person who supposedly conspired with Graves to fix prices. SOI then attempted to ameliorate this deficiency by requesting a plethora of discovery, both in a letter request and again in its Rule 56(d) motion. As the District Court noted, the majority of the **[*502]** discovery sought by SOI "pertain[s] to proof of the alleged parallel pricing conduct [and] industry practices" and would thus be of little relevance to demonstrating the existence of any "plus factors." Id. at 20. It was thus proper to conclude that SOI's affidavit failed to demonstrate how additional discovery would preclude summary judgment.

Moreover, **[**26]** SOI failed to exercise diligence in the discovery process since the inception of this litigation. As the District Court correctly noted, SOI could have sought discovery during the 15-month period after SOI's initial complaint was filed and before the District Court ruled on the defendants' motion to dismiss. Counsel for SOI gave no reason for his failure to seek discovery. Thus, for no discernable reason, SOI squandered its opportunity to take discovery during the significant period of time between the filing of the first motion to dismiss and the District Court's ruling on that motion. Accordingly, we conclude that the District Court did not abuse its discretion in denying SOI's Rule 56(d) motion.

V.

For the foregoing reasons, we will affirm the District Court's grant of summary judgment in favor of the defendants.

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BanxCorp v. Bankrate Inc.

United States District Court for the District of New Jersey

July 30, 2012, Filed

Civil Action No. 07-3398 (ES) (CLW)

Reporter

2012 U.S. Dist. LEXIS 106533 *; 2012-2 Trade Cas. (CCH) P78,003; 2012 WL 3133786

BANXCORP, Plaintiff, v. BANKRATE INC., Defendant.

Notice: NOT FOR PUBLICATION

Subsequent History: Reconsideration granted by Banxcorp v. Bankrate Inc., 2012 U.S. Dist. LEXIS 129098 (D.N.J., Sept. 11, 2012)

Prior History: BanxCorp v. Bankrate Inc., 2011 U.S. Dist. LEXIS 149912 (D.N.J., Dec. 30, 2011)

Core Terms

Bankrate, customer, pricing, conspiracy, competitors, allegations, Antitrust, predatory, price-fixing, Websites, monopoly, markets, argues, co-branding, conspired, products, cartel, pleaded, divide, allocate, listings, Sherman Act, co-conspirators, contracts, relevant market, Advertisements, compete, anticompetitive, network, concerted action

Counsel: **[*1]** For Roberto Cuan, Movant: ROBERTO CUAN, LEAD ATTORNEY, BALESTRIERE FARIELLO, NEW YORK, NY.

For BANXCORP, Plaintiff: LAWRENCE C. HERSH, LEAD ATTORNEY, RUTHERFORD, NJ; NELSON E. CANTER, LEAD ATTORNEY, CANTER LAW FIRM P.C., WHITE PLAINS, NY.

For BANKRATE,INC., a Delaware Corporation, Defendant: ERIC JESSE, LEAD ATTORNEY, LOWENSTEIN SANDLER, ROSELAND, NJ; R. SCOTT THOMPSON, LEAD ATTORNEY, BERNARD JOHN COONEY, MICHAEL J. HAHN, LOWENSTEIN SANDLER PC, ROSELAND, NJ.

For LENDINGTREE LLC, Consol Defendant: SEAN J. KIRBY, SHEPPARD MULLIN RICHTER & HAMPTON LLP, NEW YORK, NY.

Judges: Esther Salas, United States District Judge.

Opinion by: Esther Salas

Opinion

SALAS, DISTRICT JUDGE

This matter is before the Court by way of Bankrate Inc.'s ("Bankrate") Motion to Dismiss BanxCorp's Fifth Amended Complaint ("5AC") pursuant to Fed. R. Civ. P. 12(b)(6). (Defendant Bankrate Inc.'s Brief in Support of its Motion to Dismiss Portions of the Fifth Amended Complaint with Prejudice ("Def. Mov. Br.") at 1, D.E. 306). This Court has jurisdiction pursuant to *28 U.S.C. §§ 1331* and *1337(a)*, as well as *15 U.S.C. §§ 1* and *2*. Venue is proper pursuant to *28 U.S.C. §§ 1391(b)*, *(b)(2)*, as well as *15 U.S.C. §§ 15* and *22*. The Court's decision is based on **[*2]** its review of the briefs and exhibits related to Bankrate's Motion to Dismiss, and the Court hereby decides the Motion without oral argument pursuant to *Fed. R. Civ. P. 78*. For the following reasons, Defendant's Motion to Dismiss is GRANTED in part and DENIED in part.

I. BACKGROUND

A. Parties, Facts, and Procedural History

The underlying issue in this case is whether Defendant Bankrate has engaged in anticompetitive practices in violation of federal and state antitrust laws, resulting in economic injury to Plaintiff BanxCorp. The parties, facts, and procedural history of this case are presented in the Court's December 30, 2011 Opinion dismissing part of the Fourth Amended Complaint ("4AC") and are not rehashed in this Opinion. (*See* "December 30, 2011 Opinion", D.E. 298). However, the Court adds to its detailed account of the history of this case that on December 30, 2011, the Court dismissed the First Claim of the 4AC—alleging the existence of a predatory price-fixing conspiracy between Bankrate and its competitors—because Plaintiff failed "to adequately plead that the purported conspirators agreed to join a predatory price-fixing conspiracy for the purpose of forcing prices below a measure **[*3]** of cost." (*Id.* at 21).

B. Arguments

Bankrate moves to dismiss BanxCorp's First, Second, Third, and Fifth Claims (except as these claims concern Lending Tree). (Def. Mov. Br. at 1).

Bankrate argues that BanxCorp's Sherman Antitrust Act § 1 claim should be dismissed because BanxCorp did not avail itself of its right to amend its predatory price-fixing conspiracy claim in the 4AC to cure the deficiencies identified by the Court in its prior Opinion. Instead, Plaintiff has withdrawn its allegations that Bankrate and its partners conspired to price below cost and replaced those allegations with a new theory that Bankrate and its competitors conspired to divide markets and allocate customers. Bankrate argues that plaintiff has failed to cure the previous deficiencies and therefore the § 1 claim must be dismissed with prejudice. (*Id.* at 6).

Bankrate also argues that the market division and customer allocation theories in BanxCorp's 5AC are new and therefore barred by this Court's December 30, 2011 opinion and Judge Wigenton's September 14, 2009 Opinion. (*Id.* at 7; *see* D.E. 298; D.E. 75).

Next, Bankrate argues that the *§ 1* market division and customer allocation theory claim should be dismissed **[*4]** because, first, the 5AC "lacks any factual allegations 'plausibly suggesting a unity of purpose, a common design and understanding, or a meeting of the minds among Bankrate's partner-competitors to engage in' market division and customer allocation." (Def. Mov. Br. at 8) (citation omitted). Specifically, there is nothing in the contracts Plaintiff refers to that indicates that Bankrate's co-branding partners were prevented from competing in the same market as Bankrate. (*Id.* at 11). Second, Plaintiff does not have standing to bring this claim because "a competitor cannot suffer an antitrust injury where the conspiracy is alleged to have caused prices to increase above competitive levels." (*Id.* at 12).

As to the Sherman Antitrust Act *§ 2* claim, Bankrate argues that the Court must dismiss this claim because Plaintiff has failed to allege that Bankrate engaged in the exclusionary conduct that *§ 2* requires. In the 5AC, BanxCorp simply replaced instances of "average variable cost"—a phrase that it had been using since the beginning of this litigation—with "artificially low prices." (*Id.* at 15). Bankrate makes two separate arguments on this point. First, the latter phrase is of "no legal **[*5]** significance." (*Id.* at 16). Second, to the extent that the phrase means "above-cost prices that are below general market levels," courts have rejected the notion that such pricing inflicts the type of injury cognizable under the antitrust laws. (*Id.*) (citation omitted). To the extent that the phrase includes pricing below average variable cost, as Plaintiff suggests, the phrasing appears calculated to confuse jurors. (*Id.* at 16-18). Moreover, the predatory pricing claim is insufficiently pleaded, supported only with conclusory statements and no evidence of actual predatory prices. (*Id.* at 17-18). And because the theory fails, and Plaintiff does not allege any other type of exclusionary conduct, Plaintiff's *§ 2* claim lacks an essential ingredient—exclusionary conduct—and must likewise fail. (*Id.* at 19-20).

Finally, Bankrate argues that Plaintiff's claims under New Jersey's Antitrust Act must fail because that Act mirrors the Sherman Act, and therefore the claims fail for the same reasons. (*Id.* at 20-21).

In its opposition brief, Plaintiff acknowledges that it has completely abandoned its *§ 1* predatory pricing theory. (Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss Portions **[*6]** of the Fifth Amended Complaint, ("Pl. Opp. Br."), at 1, D.E. 307). Plaintiff then argues that it has adequately pleaded its *§ 1* price-fixing and market allocation claims, which were "previously pleaded and allowed to proceed by this Court." (Pl. Opp. Br. at 10). Specifically, under this Court's decisions in this case, BanxCorp does have standing to sue as Bankrate's competitor. (*Id.* at 6-8). Further, BanxCorp argues that its *§ 1* price-fixing and market allocation conspiracies are sufficiently pleaded under the per se rule and the rule of reason. (*Id.* at 12-17). More than the mode of analysis, what is important here is that the Court recognizes that the challenged restraint impaired competition. (*Id.* at 24). Finally, BanxCorp argues that it has sufficiently pleaded the predatory and exclusionary conduct claims under *§ 2*. (*Id.* at 33).

II. LEGAL STANDARD

On a motion to dismiss under *Rule 12(b)(6)*, "courts are required to accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party." *Phillips v. Cnty. of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008)*; *Burrell v. DFS Servs., LLC, 753 F. Supp. 2d 438, 440 n.1 (D.N.J. Dec. 6, 2010)* **[*7]** (holding that contradictory factual assertions on the part of defendants must be ignored). Courts must "determine whether, under any reasonable reading of the complaint, the Plaintiff may be entitled to relief." *Pinker v. Roche Holdings, Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002)*. But, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Determining whether the allegations in a complaint are "plausible" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. at 679* (citations omitted). "Courts are not required to credit bald assertions or legal conclusions draped in the guise of factual allegations." *McCargo v. Hall, No. 11-553, 2011 U.S. Dist. LEXIS 146449, 2011 WL 6725613, at *1 (D.N.J. Dec. 20, 2011)* (citing *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429 (3d Cir. 1997))*. Although antitrust complaints are to be liberally construed, they are not exempt from the federal rules. *See* *Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 179 (3d Cir. 1988)* **[*8]** (citations omitted). A pleading that offers "labels and conclusions" or a "formulaic recitation of the elements of a cause of action will not do." *Iqbal, 556 U.S. at 678* (citations omitted). Additionally, in evaluating a plaintiff's claims, generally "a court looks only to the facts alleged in the complaint and its attachments without reference to other parts of the record." *Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994)*.

In *Twombly*, the Supreme Court set forth the "plausibility" standard for overcoming a motion to dismiss. *See* *Twombly, 550 U.S. at 556-7*. It refined this approach in *Iqbal.* A complaint satisfies the plausibility standard when the factual pleadings "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 556*). This standard requires showing "more than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint that pleads facts "'merely consistent with a defendant's liability, stops short of the line between possibility and plausibility of entitlement of relief.'" *Id.* (quoting *Twombly, 550 U.S. at 557*).

To determine the **[*9]** sufficiency of a complaint under *Twombly* and *Iqbal*, the Court must take the following three steps:

> First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief."

Burtch v. Milberg Factors, Inc., 662 F.3d 212, 221 (3d Cir. 2011) (citations omitted).

The Court now proceeds with its analysis claim-by-claim, element-by-element under the three-step method set forth by the Third Circuit, granting the motion to dismiss as to the First Claim based on Plaintiff's failure to plausibly allege the "object" of the conspiracy, and denying the motion to dismiss as to the Second, Third, and Fifth claims for relief.

III. DISCUSSION

A. Threshold/Preliminary Matters

As a preliminary matter, Bankrate argues that BanxCorp has abandoned its *§ 1* predatory price-fixing conspiracy theory, in direct contravention of (1) this Court's December 30, 2011 warning that Plaintiff **[*10]** not attempt to "shift its theories of liability this late in the game" and (2) Judge Wigenton's September 14, 2009 opinion prohibiting Plaintiff from adding "additional causes of action or new theories of liability." (Def. Mov. Br. at 7, 11 (citing *BanxCorp v. Bankrate, Inc. ("BanxCorp III"), 2011 U.S. Dist. LEXIS 149912, at *79 (D.N.J. Dec. 30, 2011)* and *BanxCorp v. Bankrate, Inc. ("BanxCorp II"), 2009 U.S. Dist. LEXIS 84151, at *12 (D.N.J. Sept. 14, 2009)*)). As a result, Bankrate argues that the § 1 claim should be dismissed. (Def. Mov. Br. at 7). In opposition, Plaintiff confirms that it has abandoned the predatory price-fixing conspiracy theory in its entirety. (Pl. Opp. Br. at 10). The Court takes this as a voluntary withdrawal with prejudice of Plaintiff's predatory price-fixing theory. *See* *Witcher v. Kerestes, 410 F. App'x 529, 532 (3d Cir. 2011)* ("Given that the District Court once permitted Witcher to amend his complaint and the amendment was, as the District Court observed, substantially similar to the original complaint, we do not find an abuse in discretion in the District Court's disallowance of a second amendment."); *Holmes v. Gates, 403 F. App'x 670, 674 (3d Cir. 2010)* (where plaintiff **[*11]** had three opportunities to amend her complaint and plaintiff did not do so, District Court did not err in dismissing her complaint). However, Plaintiff argues that it advances no new theories of liability in the 5AC, and "[p]rice-fixing and market allocation claims under *§ 1* had been previously pleaded and allowed to proceed by this Court." (Pl. Opp. Br. at 10 (citing 4AC ¶ 280(b)-(d) ("Defendant has illegally restrained trade in the market for Bank Rate Websites in violation of *Section 1 of the Sherman Act* [by] . . . entering into . . . exclusionary agreements with partners and competitors that granted Defendant the sole authority and/or exclusive right to sell rate table listings on the Internet at a fixed price [and] . . . by colluding and entering into agreements to divide markets, and allocate revenues, customers[.]"); 3AC ¶ 117(a) ("Bankrate has illegally restrained trade in the market for Bank Rate Websites in violation of *Section 1 of the Sherman Act* by (a) engaging in predatory pricing and exclusive dealings, and forming a profit-sharing and Price-Fixing Cartel . . . and (b) by colluding and entering into exclusive contracts with LendingTree to . . . divide markets, accounts, **[*12]** [and] customers[.]); *BanxCorp II, 2009 U.S. Dist. LEXIS 84151 at *9-10* (discussing the horizontal price-fixing claim)).

In her September 14, 2009 Opinion, Judge Wigenton found that the *§ 1* price-fixing claim in Plaintiff's Second Amended Complaint was adequately pleaded. It appears that these allegations continued through the 3AC. (*See, e.g.*, 3AC ¶¶ 15, ("More specifically, Bankrate has engaged in predatory pricing and price-fixing agreements with competitors[.]"); ¶ 19(a) ("Bankrate conspired, colluded, and entered into horizontal Cost-Per-Click (herein "CPC") price-fixing and profit-sharing agreements by organizing and becoming the ringleader of an illegal cartel with approximately 100 co-branding partners (the "Price-Fixing Cartel") which also are Bankrate.com's competitors[.]")). These same allegations appear to have persisted through the 4AC. (*See, e.g.*, 4AC ¶ 9 ("The centerpiece of this action is a massive predatory pricing, price-fixing, and market division conspiracy[.]"); ¶ 22 ("This enabled

Defendant to essentially charge any fixed price across its "network" at will . . . by charging supra-competitive fixed prices, as Defendant subsequently did after 2006."); ¶ 24 ("From October 1, 2005 to the present, **[*13]** through its combined price-fixing and predatory pricing practices, Bankrate tripled its Hyperlink CPC prices[.]"); ¶ 28 ("On September 23, 2008 after first entering into a co-branding, price-fixing, market division . . . ."); ¶ 89 ("Hence, while there may have been other interchangeable products in the past, by entering into a price-fixing conspiracy among Bankrate and [its competitors] . . . ."); ¶ 92 ("This is a classic example of a per se violation of *§ 1* involving an agreement between competitors to fix prices, divide markets, and allocate revenues, customers, products and Internet traffic in the relevant market.")). Accordingly, the Court finds that Plaintiff does not plead its *§ 1* price-fixing conspiracy claim for the first time in the 5AC, and that Plaintiff did not, in the past, abandon the claim only to re-plead it here.

As for Plaintiff's market division/customer allocation claim, it appears that although Judge Wigenton forbade Plaintiff from amending portions of the complaint not addressed in her September 14, 2009 Opinion, Judge Arleo later permitted Plaintiff to amend the 3AC and file the 4AC, after Plaintiff filed a motion to amend seeking to expand its market division/customer **[*14]** allocation theory. (*See* Order Granting Motion for Leave to File an Amended Complaint, D.E. 209). BanxCorp did in fact expand its market allocation theory in the 4AC to encompass not only Lending Tree, but also all of the members in Bankrate's "cartel." (*See* 4AC ¶ 19 ("Bankrate conspired, colluded, and entered into horizontal predatory price-fixing, market allocation, and revenue-sharing agreements with competitors by organizing and becoming the ringleader of an illegal cartel[.]"); ¶ 26 ("During the fourth quarter of 2002 Bankrate entered into an exclusive partnership agreement with The Wall Street Journal's WSJ.com website affiliate, suppressing and precluding competition, by granting Defendant the exclusive right to sell WSJ.com's rate table listings on the Internet at a fixed price on a "network" basis, and by dividing markets, and allocating revenues, customers, products[,] and Internet traffic."); *see also* 4AC ¶¶ 9, 17, 19, 27, 92, 109, 133, 156, 164, 216, 228, 280(d)-(f), 281, 305(d)-(f) (demonstrating, generally, that Plaintiff expanded its theory to include Bankrate's co-branding partners). The expanded theory remains in the 5AC. (*See, e.g.*, 5AC ¶¶ 16, 18, 25, 26, 101, 125, **[*15]** 136, 148, 188, 211, 217, 223, 228, 229, 233, 246-48, 253, 258, 297, 323) (demonstrating, generally, that Plaintiff expanded its theory to include Bankrate's co-branding partners).

Thus, BanxCorp's market division/customer allocation theory is not new to the 5AC, and is not being asserted in violation of a court order. Accordingly, the Court will now proceed to evaluate the sufficiency of Plaintiff's claims.

B. Sherman Act § 1: Contract or Conspiracy in Restraint of Trade

1. Legal Standard: Sherman Act, 15 U.S.C. § 1

BanxCorp brings its market division/customer allocation claim under *§ 1 of the Sherman Act*. *Section 1* provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. Thus, plaintiffs asserting a § 1 claim "must allege four elements: '(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action.'" *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 253 (3d Cir. 2010)* **[*16]** (citations omitted). Existence of a "contract, combination . . . or conspiracy" is the hallmark of a § 1 claim. *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 315 (3d Cir. 2010)* (citations omitted). Over the years, courts have limited their attention to two essential elements: (1) that the defendant was a party to a "contract, combination . . . or conspiracy" and (2) that the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade. *See* *Burtch, 662 F.3d at 221* (citing *In re Ins. Brokerage, 618 F.3d at 315*).

As to the first element, plaintiffs must establish the existence of an agreement or "concerted action," and therefore, in order to state a claim for conspiracy to engage in market division/customer allocation, BanxCorp must plead that the defendant and co-conspirators "conspired" to subdivide "some relevant market in which they had previously competed." Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 48, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990) (citations omitted). "Unilateral activity by a defendant, no matter the motivation, cannot give rise to a section 1 violation." InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003). "An agreement exists when there is a unity **[*17]** of purpose, a common design and understanding, a meeting of the minds, or a conscious commitment to a common scheme." West Penn Allegheny Health Sys. v. UPMC, 627 F.3d 85, 99 (3d Cir. 2010) (citing Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)); Howard Hess Dental Labs. Inc., 602 F.3d at 254).

A plaintiff may plead an agreement by alleging direct or circumstantial evidence, or a combination of the two. Direct evidence of a conspiracy is "evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." In re Ins. Brokerage, 618 F.3d at 324 n.23 (citations omitted). "[D]irect evidence of conspiracy, if credited, removes any ambiguities that might otherwise exist with respect to whether the parallel conduct in question is the result of independent or concerted action." Id. at 324. "If a complaint includes non-conclusory allegations of direct evidence of an agreement, a court need go no further on the question of whether an agreement has been adequately pled." West Penn, 627 F.3d at 99 (citing In re Ins. Brokerage, 618 F.3d at 323).

Examples of direct proof of conspiracies that the Third Circuit has found sufficient include:

> (1) **[*18]** a direct threat to the plaintiff from a competitor that if he went into business his competitors would do anything they could to stop him, including cutting prices or supplies;
> (2) advising distributors that a supplier would cut off access if the distributor failed to maintain a certain price level;
> (3) a memorandum produced by a defendant conspirator detailing the discussions from a meeting of a group of alleged conspirators; and
> (4) a public resolution by a professional association recommending that its members withdraw their affiliation with an insurer.

InterVest, 340 F.3d at 162-63 (citations omitted).

In its evaluation of circumstantial evidence in an antitrust case, the Court must apply special considerations so that only reasonable inferences are drawn from the evidence. Id. at 160. The reason is that "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a § 1 case." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Certainly, "an actionable horizontal conspiracy does not require direct communication among the competitors." In re Ins. Brokerage, 618 F.3d at 331. But a § 1 claim of conspiracy "predicated on parallel conduct **[*19]** should be dismissed if 'common economic experience,' or facts alleged in a complaint itself, show that independent self-interest is an 'obvious alternative explanation' for defendants' common behavior." Id. at 326. Thus some courts have denominated certain factors which, if present, may indicate the existence of a conspiratorial agreement. *See* id. at 321. These factors include: "(1) evidence that the defendant had a motive to enter into a [conspiracy]; (2) evidence that the defendant acted contrary to its interests; and (3) 'evidence implying a traditional conspiracy." Id. at 322. Courts have cautioned that the first two factors may indicate that defendants operate "in an oligopolistic market," and because such a market contains very few sellers, each defendant would be aware of each other's actions. In re Baby Food Antitrust Litig., 166 F.3d 112, 122, 135 (1999) ("[E]vidence of action that is against self-interest or motivated by profit must go beyond mere interdependence."). Evidence of the third factor is "non-economic evidence that there was an actual, manifest agreement not to compete, which may include proof that the defendants got together and exchanged assurances of common **[*20]** action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown." In re Ins. Brokerage, 618 F.3d at 322 (citations and quotations omitted).

The second element of a § 1 claim, an unreasonable restraint on trade, is analyzed under either the *per se* standard or the rule of reason standard. Horizontal market division/customer allocation agreements are analyzed under the *per se* standard. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). The *per se* illegality rule applies when a business practice "on its face, has no purpose except stifling competition." *Eichorn v. AT & T Corp., 248 F.3d 131, 143 (3d Cir. 2001)* (citations omitted); *In re Ins. Brokerage, 618 F.3d at 316* (citations omitted) ("A *per se* rule is applied when the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output."). Agreements that fall under established *per se* illegality categories are "conclusively presumed to unreasonably restrain competition." *Id.* (citation and quotations omitted). "Paradigmatic examples are 'horizontal agreements among competitors to fix prices or to divide markets.'" **[*21]** *Id.* (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007))*. *Per se* illegality "is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830 (3d Cir. 2010)* (citations and internal quotation marks omitted).

2. Plaintiff's Failure to Sufficiently Plead the Conspiracy Element of Its Market Division/Customer Allocation Theory

Under the Third Circuit's three-step analysis, the Court begins by taking note of the elements of a conspiracy claim under *§ 1*, which are (1) the existence of an agreement to engage in the alleged scheme, here, market division/customer allocation, and (2) that the conspiracy imposed an unreasonable restraint on trade. *See* *Burtch, 662 F.3d at 221*. Below, because the Court finds that Plaintiff has insufficiently pleaded element one, the Court does not analyze the second element. Before moving to step two of the Third Circuit's three-step analysis, the Court briefly sets forth the standard for Plaintiff's required showing and the parties' arguments as to that showing.

To sufficiently plead **[*22]** the conspiracy element of its claim, Plaintiff must show the existence of an agreement among members of the conspiracy demonstrating "a unity of purpose, a common design and understanding, a meeting of the minds, or a conscious commitment to a common scheme." *West Penn Allegheny Health Sys. v. UPMC, 627 F.3d 85, 99 (3d Cir. 2010)* (citing *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*; *Howard Hess Dental Labs. Inc., 602 F.3d at 254*). The "unity of purpose" must point to the "common scheme" alleged in the complaint. *See id.* In this case, Plaintiff's 4AC alleges that the common scheme was market division/customer allocation. In the antitrust context, "market division/customer allocation" means Plaintiff "had to show that [Bankrate and its co-conspirators] had subdivided some relevant market in which they had previously competed." *Palmer, 498 U.S. at 48*. Although "[t]he case law is clear that a market division need not be an agreement that each firm will stay completely out of the assigned territory of the other[,]" it must require that participants "refrain from . . . (2) selling in one another's territories, (3) soliciting or selling to one another's customers, or (4) **[*23]** expanding into a market in which another participant is an actual or potential rival." 12 Herbert Hovenkamp, ***Antitrust Law*** ¶ 2030 at 210, 214 (2d ed. 2005) (citing *United States v. Topco Assocs., 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*; *United States v. Sealy, Inc., 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967))*.

A party's failure to allege specifics as to the entrance and object of the agreement will lead to the dismissal of a conspiracy claim. *See* *Matsushita, 475 U.S. at 595-96*; *Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 340, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991)* (affirming dismissal of a complaint where evidence indicated that defendants had abolished the featherbedding practice that was the "object of [the] conspiracy"); *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 535, 98 S. Ct. 2923, 57 L. Ed. 2d 932 (1978)* ("The object of the conspiracy was to restrict St. Paul's policyholders to 'claims made' coverage by compelling them to 'purchase medical malpractice insurance from one insurer only, to wit defendant, St. Paul, and that [such] purchase must be made on terms dictated by the defendant, St. Paul.'") (citation omitted); *In re Ins. Brokerage, 618 F.3d at 321*; *Great W. Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 179 (3d Cir. 2010)* ("Specifically, Great Western has **[*24]** failed to allege except in general terms the approximate time when the agreement was made, the specific parties to the agreement . . . the period of the conspiracy, or the object of the conspiracy."); *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204, 226 (3d Cir. 2008)* ("Toledo also presented sufficient evidence that "the objects of and the conduct pursuant to th[e] contract or conspiracy were illegal.").

Under this standard, BanxCorp argues that it has adequately alleged that Bankrate engaged in market division/customer allocation with its partner-competitors, a *per se* violation of *§ 1*. (Pl. Opp. Br. at 8). At its core, BanxCorp's theory rests on agreements between Bankrate and its co-branding partners (*e.g.*, Move, Inc.) to divide markets and allocate customers for the purpose of reducing competition in those markets and ultimately driving up prices. (*See* 5AC ¶¶ 228-230). After clearing competitors from the field, Bankrate could, and did, increase its prices at will, thereby harming consumers. (Pl. Opp. Br. at 19). Bankrate argues that BanxCorp has failed to sufficiently plead that Bankrate and its co-conspirators shared a "unity of purpose" to divide markets or allocate **[*25]** customers. (Def. Mov. Br. at 10). Specifically, Bankrate argues that not one of the co-conspirators agreed to refrain from competing in the same market as Bankrate. (*Id.*). The Court agrees with Defendant.

At step two of the Third Circuit's three-step analysis, the Court identifies allegations that—without factual support—would not be entitled to the assumption of truth because they would be no more than mere conclusions. *See* *Burtch, 662 F.3d at 221*. The following is a list of market division/customer allocation allegations from the First Claim in the 5AC:

> Defendant has illegally restrained trade in the market for Bank Rate Websites in violation of *Section 1 of the Sherman Ac*t as follows:
>
> A. Market Division and Allocation Agreements with Competitors
> (i) Defendant has entered into agreements to divide markets, and allocate customers, products, revenues and Internet traffic with approximately 130 partners and competitors that together control more than 300 websites which compete against each other as well as against Defendant's own Bank Rate Websites Bankrate.com, Interest.com and Bankaholic.com; and
>
> (ii) Defendant has entered into approximately 130 agreements with partners and competitors **[*26]** that granted Defendant the sole authority and/or exclusive right to sell rate table listings on the Internet throughout the United States on behalf of each member of Defendant's cartel, also referred to as a "network." Such agreements constitute a territorial market allocation of products and customers throughout the United States.
> As set forth in more detail above (see paragraphs 207-263) , under the "per se" standard, Plaintiff is able to demonstrate (1) that Bankrate contracted, combined or conspired with others through concerted action, and (2) that Plaintiff was injured as a proximate result of that conspiracy.
> Alternatively, under the "rule of reason" standard, Plaintiff is also able to demonstrate in turn (1) that Bankrate contracted, combined or conspired with others through concerted action; (2) that Plaintiff was injured as a proximate result of that conspiracy; (3) that the combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets; and (4) that the objects of and the conduct pursuant to that contract or conspiracy were illegal.
>
> Defendant's anticompetitive conduct has had a significant adverse effect on competition **[*27]** in the market for Bank Rate Websites, causing direct and proximate harm to the financial service providers—the customers, and to consumers—the end users. In particular, as a result of Defendant's conduct, both financial service providers (the customers) and consumers are denied freedom of choice with respect to Bank Rate Websites: Financial service providers have no effective economic choice but to list their rates with Defendant and consumers have virtually no alternative Bank Rate Website sources other than Defendant's, through its captive Price-Fixing Cartel. Thus, consumers and financial service providers become almost exclusively dependent on Bankrate for access to Bank Rate Websites.

(5AC ¶¶ 297-300).

These allegations are conclusory with respect to the alleged market division/customer allocation conspiracy. They merely allege that Bankrate engaged in market division and customer allocation, yet they fail to allege that Bankrate's co-conspirators agreed not to compete with Bankrate. Without more, these allegations evince no "unity of purpose" among Bankrate and its co-branding partners to divide markets or allocate customers. Such conclusory allegations are not entitled to the **[*28]** presumption of truth. *See* *Burtch, 662 F.3d at 221*. Therefore, the Court proceeds to step three of the Third Circuit's analysis to determine whether these bare allegations are echoed elsewhere in the 4AC by well-pled allegations, and whether those allegations "plausibly give rise to an entitlement for relief." *Id.* In its analysis below, the Court finds that although BanxCorp includes numerous allegations related to dividing markets and allocating customers, Plaintiff fails to adequately plead that the purported conspirators agreed not to compete with each other in a market in which they once competed or were intending to compete, the key requirement under Plaintiff's chosen theory.

The following is a list of allegations in the 5AC related to the nature of the conspirators' agreements from which the Court must determine whether Bankrate and its co-branding partners shared the requisite "unity of purpose":

> 16. Bankrate did not obtain a monopoly in the market for Bank Rate Websites as a result of a superior product. Rather, it created its monopoly through blatant anticompetitive conduct including price fixing, market division, customer, product, revenue and traffic allocation, and partnerships **[*29]** with competitors as described below.
> 18. Bankrate conspired, colluded, and entered into horizontal price-fixing, market allocation, and revenue-sharing agreements with competitors by organizing and becoming the ringleader of an illegal cartel, also referred to as a "network" or "Online Network" with approximately 130 co-branding partners which together control more than 300 partner sites ("Partner Sites"), that compete against each other and against Defendant's own websites Bankrate.com, Interest.com and Bankaholic.com (collectively, the "Price-Fixing Cartel").
> 25. As set forth in more detail below, Plaintiff had regularly provided its BanxQuote rate tables to The Wall Street Journal ("WSJ") for 17 consecutive years, first in print and later also online. During the fourth quarter of 2002 Bankrate entered into an exclusive partnership agreement with The Wall Street Journal and its WSJ.com website affiliate, suppressing and precluding competition, by granting Defendant the exclusive right to sell WSJ.com's rate table listings on the Internet at a fixed price on a "network" basis, and by dividing markets, and allocating revenues, customers, products and Internet traffic.
>
> 101. However, since **[*30]** approximately 1996 Defendant started offering back-office rate aggregation services not merely for free to other independent website operators if they agreed to join its cartel or "network," but even paid these competitors or potential competitors off through co-branding revenue allocation agreements. Therefore, these independent website operators no longer had any incentive or a need to handle their own redundant back-office services.
> 188. Bankrate persuaded Move, Inc. to join its Price-Fixing Cartel entering into a market allocation and revenue-sharing partnership agreement, as evidenced by Defendant's press release issued on September 6, 2007.
>
> 211. As would be required under either the "per se" or "rule of reason" standard, Plaintiff has presented on the record direct evidence that (i) Defendant has entered into agreements to divide markets, and allocate customers, products, revenues and Internet traffic with approximately 130 partners and competitors that together control more than 300 websites which compete against each other as well as against Defendant's own Bank Rate Websites Bankrate.com, Interest.com and Bankaholic.com; and (ii) Defendant has entered into approximately 130 **[*31]** agreements with partners and competitors that granted Defendant the sole authority and/or exclusive right to sell rate table listings on the Internet throughout the United States on behalf of each member of Defendant's cartel, also referred to as a "network."
> 217. With the largest competitors in the market, Bankrate and its more than 130 co-branding partners, coming together in the form of a revenue-sharing market allocation cartel, it became impossible for independent competitors such as Plaintiff to remain in business.
>
> II. THE MARKET ALLOCATION AND PRICE-FIXING CONSPIRACY
>
> A. Defendant's Collusive Market Allocation and Price-Fixing with Competitors
>
> 223. There is enough factual matter, as more fully described below, to prove that Defendant Bankrate and approximately 130 horizontal partners/competitors possessing market power in the relevant market with an approximately 95% market share, (i) have entered into agreements to divide markets, and allocate customers, products, revenues and Internet traffic (ii) have fixed and are fixing prices in the relevant market, (iii) in parallel, by agreement, through acquiescence, and concerted action rather than independent action, (iv) are acting in

> **[*32]** a uniform manner, (v) have severely limited and impeded competition in the relevant market, (vi) have injured and adversely affected Plaintiff, competition, consumers, and financial service providers as a proximate result of the concerted action, (vii) while carrying out a conspiracy with Bankrate as its ringleader.
> 228. Defendant's 130 co-branding partnership agreements granted Bankrate the exclusive right to sell Internet rate table listings to financial service providers nationally [a territorial market allocation of products and customers throughout the United States] on behalf of hundreds of competing websites—at a fixed price—collect fees from customers, and allocate revenues among each competing member of the cartel on a network basis.
>
> 229. Such agreements axiomatically enabled Defendant to control prices, fix prices, decrease prices through fixed pricing and offer free giveaways of Internet rate table listings (at no cost to Defendant's partners). These alliances and practices among competitors effectively nullified competition. Moreover, the resulting territorial market division and allocation of products, customers and revenues between Bankrate and 130 competitors cannot possibly **[*33]** be deemed a unilateral or pro-competitive conduct.
>
> 233. This is a classic example of a per se violation of *§ 1* involving an agreement between competitors to fix prices, divide markets, and allocate revenues, customers, products and Internet traffic in the relevant market.

In each of these paragraphs, BanxCorp fails to adequately allege the conspirators' intention to refrain from competing in the same market as Bankrate. For example, although ¶ 101 alleges that Bankrate and cartel members entered into agreements that no longer provided the members with "any incentive or a need to handle their own redundant back-office services," ¶ 101 does not allege that these members refrained from competition in the market in an effort to reduce their competition with Bankrate. Nor does ¶ 101 allege that Bankrate in any way retreated from a certain market. The same is true of ¶ 228, which alleges that Bankrate obtained the exclusive right to sell rate table listings, but does not allege that Bankrate withdrew or even reduced competition in a market or that, again, the competitor retreated from a market in order to reduce its competition with Bankrate.

As direct evidence in further support of the above **[*34]** allegations, BanxCorp cites to contracts that supposedly demonstrate the requisite division of markets and customers and decisions not to compete in certain markets among Bankrate and its co-branding partners. The Court now evaluates the contracts.

BanxCorp cites to contractual language like the following, which appears in numerous co-branding contracts:

> Bankrate Sells All Other Advertisements. Bankrate shall have the exclusive right to sell and collect fees for advertisements, including Hyperlink Advertisements within Rate Tables and Display Advertisements on the Rate Query Pages, the Rate Results Pages, the Linked Bankrate Site, and, with the exception of the Leaderboard, the Bankrate Content Pages (collectively, the "Bankrate Advertisements"). MSI shall not interfere with Bankrate Advertisements in any manner. At a minimum, MSI shall make available to Bankrate the Display Advertising placements described in Exhibit A. All Bankrate Advertisements shall comply with Bankrate's applicable policies, available at *www.bankrate.com/terms*.

(Ex. 1 to Letter from BanxCorp, D.E. 169-1, at *5) (Contract between Move Sales, Inc. and Bankrate dated July 24, 2007). [1]

2. Exclusivity Obligations.

> i. Exclusivity. During the Term, MSI agrees that it shall not provide, via any MSI Site, information from any third-party that is substantially similar to:
>
> (a) the Rates Pages, Rate Tables, or the Rate/Averages Box related to "mortgage" and "home equity loan and lines of credit" products; or

[1] In support of its argument here, **[*35]** Plaintiff points to certain contracts it attached to or submitted with the 4AC. (*See* Pl. Opp. Br. at 18 n.6).

> (b) Bankrate Financial Content related to "mortgage" and "home equity loan and lines of credit" products. (Ex. 1 to Letter from BanxCorp, D.E. 169-1, at *7) (Contracts between Move Sales, Inc. and Bankrate dated July 24, 2007).

(Pl. Opp. Br. at 17-18 n.6-7 (citing to D.E. 169 Ex. 1 and D.E. 185 Ex. II-G) (reflecting model language found in these contracts and citing to two specific contracts as support)). [2] For two reasons, the Court finds that the exclusivity provisions of these contracts—the only provisions that arguably evince direct evidence of the co-conspirators' intent—fall short of providing adequate support that the purported co-conspirators agreed to refrain from competing in the same market as Bankrate.

First, these provisions do not appear to limit the co-conspirators' ability to post their own rates on their own websites or on the websites of third-parties (*i.e.*, BCRS Data Corp. and RateCatcher are not prohibited under the contracts from posting their own rates). The provisions only appear to limit the co-conspirators' ability to interfere with Bankrate's content or include third-party content on the co-conspirators' own sites. These exclusivity provisions, therefore, show no intention on the part of a co-branding partners to enter agreements requiring them to exit the market. Indeed, the language regarding exclusivity obligations only discusses the co-conspirator's inability to provide some (though not all) third-party information (*i.e.*, "information from any third-party that is substantially similar to: (a) the Rates Pages, Rate Tables, or the Rate/Averages Box related to 'mortgage' and 'home equity loan and lines of credit' products; or (b) Bankrate Financial Content related to 'mortgage' and 'home equity loan **[*37]** and lines of credit' products."). (Ex. 1 to Letter from BanxCorp, D.E. 169-1, at *7, Contract between Move Sales, Inc. and Bankrate dated July 24, 2007).

Second, although the exclusivity provisions explicitly state that the purported co-conspirators "shall not interfere with Bankrate Advertisements in any manner," the contracts are silent on the co-conspirators' ability to post their own rates or advertisements on their own websites. The exclusivity provisions of the contracts—explicitly forbidding the co-branding partner from interfering at all with the prices—clearly fall short of the types of direct evidence set forth in *InterVest. See* *340 F.3d at 162-63* (citations omitted) (listing the following as examples of direct evidence: "(1) a direct threat to the plaintiff from a competitor that if he went into business his competitors would do anything they could to stop him, including cutting prices or supplies; (2) advising distributors that a supplier would cut off access if the distributor failed to maintain a certain price level; (3) a memorandum produced by a defendant conspirator detailing the discussions from a meeting of a group of alleged conspirators; and (4) a public resolution **[*38]** by a professional association recommending that its members withdraw their affiliation with an insurer"). Here, the exclusivity provisions demonstrate only an intention by co-branding partners to allow Bankrate to sell and collect fees for advertisements and to limit third-party content (*i.e.*, mortgage rate tables, and the like) that may appear on a co-branded website. [3]

Plaintiff fails to provide any evidence—direct or circumstantial—plausibly suggesting a unity of purpose, a common design and understanding, or a meeting of the minds among Bankrate's partner-competitors to engage in market division/customer allocation. Accordingly, because the Plaintiff has failed to adequately allege the first element of its § 1 claim, the Court will not address the second element.

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[2] Specifically, in ¶¶ 232 n.49 and 19 n.2, Plaintiff **[*36]** cites to a contract between Bankrate and BCRS Data Corp. (Letter from BanxCorp, Ex. 7, D.E. 170-2, at *33) and a contract between Bankrate and RateCatcher, (*id.* at *42).

[3] The Court also notes that in ¶ 188 of the 5AC, Plaintiff points to a press release in support of its allegation of market division/customer allocation. Plaintiff cites to a hyperlink purportedly pointing to the press release, but does not include the press release in the exhibits attached to the 5AC. The Court is unable to consider the content of the press release because (1) the hyperlink appears to be inactive, (2) the press release does not appear to have been included in the attached exhibits, and (3) no argument has been made that such document would be integral to the complaint. *See* *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997)* ("As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings. However, an exception to the **[*39]** general rule is that a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss into one for summary judgment.") (emphasis omitted) (citations and internal quotations omitted).

Although the Court has found that Plaintiff's § 1 claim based on its market division/customer allocation theory should be dismissed, it will briefly address Bankrate's standing argument.

3. Standing

Bankrate argues that Plaintiff lacks standing to bring its market division/customer allocation claim because the Supreme Court has held "that a competitor cannot, as a matter of law, suffer an antitrust injury from a . . . market/customer allocation agreement because the effect of both is to raise prices." (Def. Mov. Br. at 12). The Court rejects this argument, **[*40]** because the United States Supreme Court has held in favor of a Plaintiff asserting market division/customer allocation, after expressly acknowledging that prices rose due to the agreement. *See, e.g.*, *Palmer v. BRG of Ga., Inc., 498 U.S. 46, 47, 49, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)*.

C. Sherman Act *§ 2*: Monopolization or Attempt to Monopolize

1. Legal Standard: Sherman Act, *15 U.S.C. § 2*

BanxCorp brings its monopoly claim under *§ 2* of the Sherman Act, which provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony." *15 U.S.C. § 2*. The offense of monopoly has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*.

Bankrate appears to challenge BanxCorp's ability to prove only the second element of its monopoly claim. (*See* III.C.2 at 22, *infra*). As to the second element, "the **[*41]** acquisition or possession of monopoly power must be accompanied by some anticompetitive conduct on the part of the possessor." *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007)* (citing *Verizon Commcn's Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004))*. "Anticompetitive conduct may take a variety of forms, but it is generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits." *Id.* (citation omitted). "Conduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive." *Id.* (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 604-05, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985))*. "Conduct that merely harms competitors, however, while not harming the competitive process itself, is not anticompetitive." *Id.* (citing *Brooke Grp., 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* ("It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'") (citations omitted)).

2. Sufficiency of Plaintiff's *§ 2* Monopoly Claim

BanxCorp alleges that Bankrate has obtained a monopoly in the **[*42]** relevant market. Specifically, it alleges:

> Bankrate has monopoly power in the market for Bank Rate Websites, having since 2003 captured and maintained a market share of approximately 95%.
>
> Bankrate is maintaining and extending its monopoly power through the predatory and exclusionary conduct described above, in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*.
> Substantial barriers to entry exist in the relevant market.
> There is no legitimate business justification for Bankrate's monopolization conduct.

> Defendant's anticompetitive conduct has had a significant adverse effect on competition in the market for Bank Rate Websites, causing direct and proximate harm to financial service providers—the customers—and to consumers—the end users.
>
> The anticompetitive actions of Defendant have directly injured BanxQuote in its business and property and its injuries and damages are ongoing.

(5AC ¶¶ 305-10).

Bankrate argues that this claim must be dismissed because Plaintiff has failed to allege that Bankrate engaged in exclusionary conduct as required under *§ 2*. The predatory pricing claim is insufficiently pleaded, supported only with conclusory statements. (Def. Mov. Br. at 17-18). And because the **[*43]** theory fails, and Plaintiff does not allege any other type of exclusionary conduct, Plaintiff's *§ 2* claim lacks an essential ingredient—exclusionary conduct—and must likewise fail. (*Id.* at 19-20). Bankrate appears to challenge only the second element in the monopoly analysis—the willful acquisition or maintenance of monopoly power. (Def. Mov. Br. at 14-20).

The second element requires a showing of maintenance of the monopoly power "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Grinnell, 384 U.S. at 570-71*. Conduct that would satisfy this element includes conduct that would foreclose competition, allow Bankrate to gain a competitive advantage, or destroy a competitor. BanxCorp plausibly pleads the element of unilateral predatory pricing, because "conduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive." *Broadcom, 501 F.3d at 308* (citation omitted). For example, Plaintiff alleges:

> Since the late 1990s Bankrate engaged in an anticompetitive and predatory campaign to cut off Plaintiff's and **[*44]** other competitors' air supply by giving away free rate listings to financial service providers, and by commingling free rate listings with paid rate listings at a significant loss in order to gain a monopoly.

(5AC ¶ 17).

> As mentioned below, the prices for Google.com keywords such as "best CD rate," "money market account," "best mortgage rate," and "best home equity loan rate," ranged from $7.22 per click to $19.35 per click, which is more than double the CPC price that Bankrate charged for its Bank Rate Website CPC rate listings (see paragraph 170).

(*Id.* ¶ 64).

> "We opened our 2008 CPC rate search business with a 20% increase for deposit clicks effective January 1st, 2008. Cost per click or CPC rate search revenue came in at $10.3 million in Q4 2007, compared to $7.4 million in Q4 2006, representing an increase of 39%. The increase was achieved through more CPC clicks, as well as higher CPC rates. As I mentioned, CPC proved to be solid all year long, with CPC revenues for the full fiscal year coming in at $36.9 million, a $10.2 million, or at 38% increase over the $26.7 million we posted for fiscal 2006."

(*Id.* ¶ 78 (quoting, but without providing a citation, Bankrate's Senior Vice President **[*45]** and CFO, Edward DiMaria, during a February 5, 2008, Fourth Quarter 2007 Earnings conference call)).

> According to Bankrate's press release dated October 3, 2005 (*http://investor.bankrate.com/releasedetail.cfm?ReleaseID=236165*), Bankrate's CPC Pricing Program was set up as follows: "The Bankrate cost-per-click pricing is organized in tiers. Pricing in the Bankrate mortgage interest rate tables ranged from $1.75 to $5.25 per click. The CPC pricing for other financial products categories ranged from $1.75 to $6.00 per click."

(*Id.* ¶ 167).

> The CPC rate table listing prices charged to banks by Defendant on behalf of its own websites Bankrate.com, Interest.com and Bankaholic.com, as well as a cartel of hundreds of Bank Rate Website partners, were consistently fixed across Bankrate's "network" and ranged from $3 per click at the end of 2005, to more than $9

> per click in 2010 (an unchallenged series of price increases in excess of 300%), in violation of *Section 1* of the Sherman Act.

(*Id.* ¶ 221). These allegations mention conduct—giving away free rate listings or pricing below some measure of cost—that would certainly impair the opportunities of rivals for whom offering free or below-cost prices **[*46]** was not feasible and who were, as a consequence, excluded from doing business. Taken as true for purposes of this motion, this practice would either foster anticompetitive behavior or not further competition because it would force competitors to suffer losses until either Bankrate or its competitor was driven out of the market. Accordingly, the Court finds that Plaintiff has sufficiently pleaded its monopoly claim based partially on unilateral predatory pricing.

Bankrate argues that this claim must be dismissed because Plaintiff relies on the predatory pricing claim, which this Court found in its December 30, 2011 Opinion to be insufficiently pleaded and was not repleaded under *§ 1* in the 5AC. (Def. Mov. Br. at 17-18). Defendant is mistaken. In its December 30, 2011 opinion, this Court dismissed the *§ 1* predatory pricing conspiracy claim, but rendered no judgment on the claim framed as a unilateral predatory pricing claim. The monopoly claim in the 4AC was partly premised on the predatory-pricing theory. (*See* 4AC ¶ 288 ("Bankrate is maintaining and extending its monopoly power through the predatory and exclusionary conduct described above, in violation of *Section 2* of the Sherman Act, **[*47]** *15 U.S.C. § 2*."); *see also* *BanxCorp III, 2011 U.S. Dist. LEXIS 149912, at *77* ("Under *§ 2*, BanxCorp alleges that Bankrate unilaterally obtained a monopoly or attempted to obtain a monopoly through predatory pricing and exclusionary conduct."). The Court therefore did not prohibit Plaintiff from reasserting that theory as a *unilateral* action theory here under *§ 2* while abandoning the predatory price-fixing conspiracy claim previously brought under *§ 1*.

Because the predatory pricing theory is sufficient to support Plaintiff's *§ 2* monopoly claim, the theory is also sufficient to support the attempted monopoly claim. [4]

D. New Jersey Antitrust Claims

Bankrate argues that BanxCorp's claims under the New Jersey Antitrust Act (*N.J.S.A. § 56:9-1, et. seq.*) fail for the same reasons as under the federal antitrust laws **[*48]** because New Jersey's antitrust laws mirror the federal laws. (Def. Mov. Br. at 20-21). The parties agree that the New Jersey Antitrust Act essentially mirrors the Sherman Antitrust Act. Neither party engages in any substantive analysis under the New Jersey Antitrust Act. (*See* Def. Mov. Br. at 20-21; Pl. Opp. Br. at 40).

"[T]he language of the relevant portions of the New Jersey Antitrust Act is virtually identical to that of the Sherman Antitrust Act and [the] New Jersey Act itself mandates that it 'shall be construed in harmony with the ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws of those states which enact it.'" *St. Clair v. Citizens Fin. Grp., 340 F. App'x 62, 65 n.2 (3d Cir. 2009)*. Thus, courts look to federal jurisprudence on the Sherman Act when analyzing the New Jersey Antitrust Act. *Desai v. St. Barnabas Med. Ctr., 103 N.J. 79, 510 A.2d 662, 671 (N.J. 1986)*; *Patel v. Soriano, 369 N.J. Super. 192, 848 A.2d 803, 826 (N.J. Super. Ct. App. Div. 2004)*. "Accordingly, the state law antitrust claims are only viable if the corresponding federal claims are sufficient." *St. Clair, 340 F. App'x at 65 n.2*.

The elements necessary **[*49]** to make out a successful claim for monopoly under the New Jersey Antitrust Act are identical to the elements of monopoly under *§ 2* of the Sherman Antitrust Act. *Id. at 65-66* ("[T]o state a claim of monopolization in contravention of *Section 2* of the Sherman Act and its analog, the New Jersey Antitrust Act *§ 56:9-4*, a plaintiff must allege: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a

[4] Bankrate does not tailor any of its arguments specifically to Plaintiff's Attempted Monopoly claim. In fact, Defendant argues the following as to the Third Claim: "With predatory pricing no longer pled as a basis for its *§ 2* claims, BanxCorp has not pled any anticompetitive conduct to support its *§ 2* claims and the Court should therefore dismiss BanxCorp's Second and Third Claims for relief." (Def. Opp. Br. at 20).

superior product, business acumen, or historic accident.") (citing *Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc., 159 F.3d 129, 141 (3d Cir. 1998)* and *Patel, 848 A.2d at 829-30*). In the same vein, the elements necessary to make out a successful claim for conspiracy to restrain trade under the New Jersey Antitrust Act are essentially identical to the elements of a successful *§ 1* Sherman Act claim. *Id. at 65* ("To state a claim under either *Section 1* of the Sherman Act or the New Jersey Antitrust Act *§ 56:9-3*, a complainant must allege that two or more entities formed a combination or conspiracy. . . . [A]n allegation of parallel conduct and a bare **[*50]** assertion of conspiracy will not suffice. . . . Furthermore, [w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.") (internal quotations and citations omitted); *N.J. Carpenters Health Fund v. Philip Morris, Inc., 17 F. Supp. 2d 324, 339-40 (D.N.J. 1998)* (overruled on other grounds); *Gregory Mktg. Corp. v. Wakefern Food Corp., 207 N.J. Super. 607, 504 A.2d 828, 832 n.4 (N.J. Law. Div. 1985)* (juxtaposing the language of § 3 of the New Jersey Antitrust Act, *N.J.S.A. § 56:9-3*, to *§ 1 of the Sherman Act*) (overruled on other grounds).

Accordingly, the Court finds that Plaintiff's market division/customer allocation conspiracy claim fails under the New Jersey Antitrust Act because it fails under *§ 1* of the Sherman Antitrust Act. By the same reasoning, the Court finds that Plaintiff's monopoly and attempted monopoly claims, insofar as they are partially based on unilateral predatory pricing, are sufficiently pleaded under the New Jersey Antitrust Act. *See* *TransWeb, LLC v. 3M Innovative Props. Co., No. 10-4413, 2011 U.S. Dist. LEXIS 59095, 2011 WL 2181189, at *20 (D.N.J. June 1, 2011)* (stating, in the context of an **[*51]** attempted monopoly claim asserted under the Sherman and New Jersey Antitrust Acts, that "[b]ecause New Jersey's antitrust statutes are construed in harmony with federal antitrust statutes, the Court need not separately analyze the state law claims") (citing *Dicar, Inc. v. Stafford Corrugated Prods., Inc., No. 05-5426, 2010 U.S. Dist. LEXIS 23667, 2010 WL 988548, at *9 n.7 (D.N.J. Mar. 12, 2010)*; *Only v. Ascent Media Grp., LLC, No. 06-2123, 2006 U.S. Dist. LEXIS 72676, 2006 WL 2865492, at *5, *8 (D.N.J. Oct. 5, 2006))*; *Acme Mkts., Inc. v. Wharton Hardware & Supply Corp., 890 F. Supp. 1230, 1238 n.6, 1242 n.10 (D.N.J.1995))*.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion is GRANTED as to the First Claim and DENIED as to the Second and Third Claims. Further, Defendant's motion is GRANTED in part and DENIED in part as to Fifth Claim. Plaintiff's *§ 1* predatory pricing conspiracy claim is dismissed with prejudice. The Court grants BanxCorp fifteen days to amend its First Claim, and only its First Claim. An appropriate Order will follow.

/s/ Esther Salas

Esther Salas, U.S.D.J.

Am. Eagle Waste Indus. LLC v. St. Louis County

Supreme Court of Missouri

July 31, 2012, Opinion Issued

No. SC92072

Reporter

379 S.W.3d 813 *; 2012 Mo. LEXIS 161 **; 2012 WL 3106074

AMERICAN EAGLE WASTE INDUSTRIES, LLC, et al., Respondents/Cross-Appellants, v. ST. LOUIS COUNTY, MISSOURI, Appellant/Cross-Respondent.

Prior History: [1]** APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY. The Honorable Barbara Wallace, Judge.

Am. Eagle Waste Indus., LLC v. St. Louis County, 2010 U.S. Dist. LEXIS 25588 (E.D. Mo., Mar. 18, 2010)

Core Terms

Haulers, circuit court, damages, two-year, notice, waiting period, trash collection, contracts, political subdivision, waste collection, bids, collection, districts, provide a service, solid waste, two year, entities, legislative intent, unincorporated, environmental regulation, court of appeals, waste management, provisions, implied in law contract, prejudgment interest, measure of damages, private entity, regulation, Ordinance, antitrust

LexisNexis® Headnotes

Environmental Law > Solid Wastes > Disposal Planning

Governments > Local Governments > Duties & Powers

HN1[] **Solid Wastes, Disposal Planning**

Mo. Rev. Stat. § 260.247 sets certain procedural rules for municipalities that expand their municipal waste collection activities into new territory. Prior to the enactment of S. 54 (Mo. 2007), *section 260.247* applied only to cities. S. 54 amended *§ 260.247* to apply to all cities and political subdivisions.

Environmental Law > Solid Wastes > Disposal Planning

Governments > Local Governments > Duties & Powers

HN2[] **Solid Wastes, Disposal Planning**

See *Mo. Rev. Stat. § 260.247*.

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

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

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

The decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Issues of law, however, are reviewed de novo.

Environmental Law > Solid Wastes > Disposal Planning

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Ordinances & Regulations

HN4[] **Solid Wastes, Disposal Planning**

Counties are authorized to enter the business of trash collection, and even to take it out of the hands of private collectors. But enacting an ordinance which would allow the county to do so without following the notice requirement and waiting period in *Mo. Rev. Stat. § 260.247* would bring it out of harmony with the general laws of the state and amount to an attempt to change the policy of the state as declared for the people at large. A charter county's exercise of power that produces this result is impermissible.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN5[] **Preclusion of Judgments, Law of the Case**

The doctrine of law of the case governs successive appeals involving substantially the same issues and facts, and applies appellate decisions to later proceedings in that case. A previous holding constitutes law of the case, precluding relitigation of issues on remand and subsequent appeal. Generally, the decision of an appellate court is the law of the case for all points presented and decided as well as for matters that arose prior to the first adjudication and might have been raised but were not.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN6[] **Preclusion of Judgments, Law of the Case**

The doctrine of law of the case is necessary to ensure uniformity of decisions, protect the parties' expectations, and promote judicial economy. The doctrine is more than merely a courtesy: it is the very principle of ordered jurisdiction by which the courts administer justice. Appellate courts do have discretion to consider an issue when there is a mistake, a manifest injustice, or an intervening change of law. But when there is no demonstrable error in the first decision, law of the case is peculiarly appropriate.

Governments > Legislation > Enactment

HN7[] **Legislation, Enactment**

Mo. Const. art. III, § 23 states that no bill shall contain more than one subject which shall be clearly expressed in its title. This constitutional provision limits the legislature in two distinct but related ways by creating a single subject rule and a clear title requirement. An appellate court will resolve doubts in favor of the procedural and substantive validity of an act of the legislature. Because attacks against legislation based on constitutionally imposed procedural limitations are not favored, the appellate court interprets the procedural limitations of article III, § 23 liberally and will uphold the constitutional validity of a bill unless the act clearly and undoubtedly violates the constitutional limitation.

Governments > Legislation > Enactment

HN8[] **Legislation, Enactment**

A bill's title is constitutionally clear when it indicates in a general way the kind of legislation that was being enacted. However, a title may not be too broad or amorphous such that it fails to identify a single subject.

Governments > Legislation > Enactment

HN9[] **Legislation, Enactment**

A bill will not violate the single subject requirement so long as the matter is germane, connected and congruous. A subject within the meaning of *Mo. Const. art. III, § 23* includes all matters that fall within or reasonably relate to the general core purpose of the proposed legislation. The subject of a bill may be clearly expressed by stating some broad umbrella category when a bill has multiple and diverse topics within a single, overarching subject.

Environmental Law > Solid Wastes > Disposal Planning

Governments > Local Governments > Duties & Powers

HN10[] **Solid Wastes, Disposal Planning**

S.B. 54 (Mo. 2007) includes substantive regulations that directly regulate environmental hazards and establishes administrative procedures to allow for the enforcement of those regulations. *Mo. Rev. Stat. § 256.700* (requiring a fee for surface mining), *Mo. Rev. Stat. § 256.710* (establishing a council to review fees), 260.211 (providing criminal penalties for improper waste disposal), and *Mo. Rev. Stat. § 260.247* (providing a regulatory framework for the division of contracts in solid waste disposal areas). S.B. 54 also amends *Mo. Rev. Stat. § 260.247*, which regulates the process by which a political subdivision expands or enters into solid waste collections services.

Governments > Legislation > Effect & Operation > Retrospective Operation

HN11[] **Effect & Operation, Retrospective Operation**

Mo. Const. art. I, § 13 prohibits the enactment of any law that is retrospective in its operation. Article I, section 13 does not prohibit retrospective laws merely relating to past transactions but rather prohibits laws that operate retrospectively, affecting past transactions to the substantial prejudice of parties interested.

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

Governments > Legislation > Statutory Remedies & Rights

HN12[] **Affirmative Defenses, Waiver**

Waiver is the intentional relinquishment of a known right. One voluntarily proceeding under a statute or ordinance, and claiming the benefits conferred by it, may not question its validity to avoid its burdens.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Estoppel

HN13[] **Affirmative Defenses, Estoppel**

The elements of estoppel are (1) an admission, statement, or act inconsistent with the claim afterwards asserted and sued upon, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party, resulting from allowing the first party to contradict or repudiate the admission, statement, or act.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN14[] **Actual Monopolization, Claims**

Missouri prohibits restraint of trade by monopolization. *Mo. Rev. Stat. § 416.031* (Supp. 2010) states that every contract, combination or conspiracy in restraint of trade or commerce in this state is unlawful. Further, it is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in the state. *Mo. Rev. Stat. § 416.031.2*. But state action is exempted if the arrangements are expressly approved or regulated by any regulatory body or officer acting under statutory authority of Missouri or of the United States. *Mo. Rev. Stat. § 416.041.2*.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Governments > Local Governments > Duties & Powers

HN15[] **Scope, Exemptions**

For a political subdivision to prove its actions should be exempt and assert a successful defense to an antitrust suit, it need show only that it acted pursuant to a clearly articulated and affirmatively expressed state policy that is actively supervised by the state. In Missouri, cities and counties are expressly authorized by statute to provide for the collection and disposal of solid wastes, and they may contract with any person, city, county, common sewer district, political subdivision, state agency or authority to provide those services. *Mo. Rev. Stat. §§ 260.215.1*; 260.215.3(1) (Supp. 2010).

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Governments > Local Governments > Duties & Powers

HN16[] Scope, Exemptions

The Missouri legislature has affirmatively expressed a policy of allowing cities and counties to regulate waste management through *Mo. Rev. Stat. § 260.215*. A county, therefore, is a regulatory body acting under statutory authority for purposes of the state action exemption from the antitrust statute, even if it does not comply fully with *Mo. Rev. Stat. § 260.247*. A county's noncompliance does not mean its actions fall outside the state action exemption—it only means it may have violated the statute by noncompliance.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN17[] Breach of Contract Actions, Elements of Contract Claims

Unlike a contract implied in fact, a contract implied in law is imposed, or created, without regard to the promise of the party to be bound. Thus, a contract implied in law is not actually a contract and, instead, is an obligation to do justice where no promise was ever made or intended. Courts sometimes use the term quasi-contract to refer to this phenomenon. The essential elements of quasi-contract are: (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of the fact of such benefit; and (3) acceptance and retention by the defendant of that benefit under circumstances in which retention without payment would be inequitable.

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

HN18[] Motions to Dismiss, Failure to State Claim

In determining whether a pleading adequately states a claim for relief on a particular basis, the rule is well established in Missouri that the character of a cause of action is determined from the facts stated in the petition and not by the prayer or name given the action by the pleader.

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

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

HN19[] Motions to Dismiss, Failure to State Claim

To properly plead a cause of action, the petition must state allegations of fact in support of each essential element of the cause pleaded. It is the facts stated in the petition, along with the relief sought, which under the Missouri system of code pleading are to be looked at to determine the cause of action, rather than the form of the petition. To be deemed sufficient, a petition need not even label the theory upon which a plaintiff seeks recovery.

Civil Procedure > Appeals > Standards of Review > General Overview

HN20[] Appeals, Standards of Review

An appellate court is primarily concerned with the correctness of the trial court's result, not the route taken by the trial court to reach that result. A trial court judgment will be affirmed if cognizable under any theory, regardless of whether the reasons advanced by the trial court are wrong or not sufficient.

Environmental Law > Solid Wastes > Disposal Planning

Governments > Legislation > Statutory Remedies & Rights

HN21[] **Solid Wastes, Disposal Planning**

By its plain terms, *Mo. Rev. Stat. § 260.247* does not provide an express remedy for its violation. Nevertheless, when a legislative provision protects a class of persons by the requirement or proscription of certain conduct but does not provide a civil remedy for the violation, a court may, if it determines that the remedy is appropriate to further the purpose and ensure the effectiveness of the enactment, accord to an injured member of the class a right of action. If it clearly appears to have been the legislative intent, courts will find implied private causes of action in such cases.

Governments > Legislation > Statutory Remedies & Rights

HN22[] **Legislation, Statutory Remedies & Rights**

A private remedy will not be implied when it does not promote or accomplish the primary goals of the statute. Moreover, courts often have been reticent to recognize private causes of action where the legislature has established remedies via other means of enforcing statutory obligations.

Environmental Law > Solid Wastes > Disposal Planning

Governments > Local Governments > Duties & Powers

Governments > Legislation > Statutory Remedies & Rights

HN23[] **Solid Wastes, Disposal Planning**

The purpose of *Mo. Rev. Stat. § 260.247* is to provide an entity engaged in waste collecting sufficient notice to make necessary business adjustments prior to having its services terminated in a given area. Subsection 3, specifically, shows the legislature's intent to protect the business entities already providing trash collection services. Section 260.247.3 guarantees that previous haulers receive the same amount for which they contracted for two years following a political subdivision's decision to provide services.

Governments > Legislation > Interpretation

HN24[] **Legislation, Interpretation**

When interpreting statutory law, the court must ascertain the intent of the legislature and give effect to that intent if possible. The intent of the legislature may be determined by considering the plain and ordinary meaning of the terms. The construction of statutes is not to be hyper-technical, but instead is to be reasonable and logical and to give meaning to the statutes.

Environmental Law > Solid Wastes > Disposal Planning

Governments > Local Governments > Duties & Powers

HN25[] Solid Wastes, Disposal Planning

See *Mo. Rev. Stat. § 260.247.3*.

Governments > Legislation > Statutory Remedies & Rights

HN26[] Legislation, Statutory Remedies & Rights

For every actionable injury there is a corresponding right to damages, and such injury arises whenever a legal right of plaintiff is violated.

Civil Procedure > Remedies > Damages > Compensatory Damages

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > Lost Profits

Environmental Law > Solid Wastes > Disposal Planning

Governments > Local Governments > Claims By & Against

Governments > Legislation > Statutory Remedies & Rights

HN27[] Damages, Compensatory Damages

The amount of damages to which *Mo. Rev. Stat. § 260.247* entitles a trash collector harmed by its violation is the collector's projected receipts from its contract price, minus any business and operational costs it would have incurred while providing waste collection services, considering all the circumstances.

Civil Procedure > Remedies > Damages > Compensatory Damages

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > Lost Profits

HN28[] Damages, Compensatory Damages

When the measure of damages is net profit, the basis for determining the expected profit should be reasonably certain. In evaluating the sufficiency of evidence to sustain awards of damages for loss of business profits the appellate courts of Missouri have made stringent requirements, refusing to permit speculation as to probable or expected profits, and requiring a substantial basis for such awards.

Environmental Law > Solid Wastes > Disposal Planning

Environmental Law > Solid Wastes > Flow Control

HN29[] Solid Wastes, Disposal Planning

Pursuant to Mo. Rev. Stat. § 260.247, a private entity is entitled to provide trash collection services during the two-year waiting period after a political subdivision decides to expand into an area and provide trash collection services. That period begins to run from the effective date of the notice by certified mail. Sec. 260.247.2. If the political subdivision fails to give the required notice, then the two-year period, by default, begins at least two years from the effective date of the annexation.

Environmental Law > Solid Wastes > Disposal Planning

HN30[] Solid Wastes, Disposal Planning

The purpose of Mo. Rev. Stat. § 260.247's notice requirement is different from that of most other notice requirements. Usually, the purpose of a notice requirement is to apprise the recipient that there is a legal action pending and to ensure that the recipient knows when and where the recipient can be heard regarding the matter—in other words, to effectuate due process. The purpose of § 260.247, however, is to provide an entity engaged in waste collecting sufficient notice to make necessary business adjustments prior to having its services terminated in a given area. Section 260.247 guarantees private businesses nothing less than an unequivocal statement that a political subdivision intends to seize the businesses' client bases and at least two years following that unequivocal statement to wind down its operations.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

HN31[] Judgment Interest, Prejudgment Interest

Mo. Rev. Stat. § 408.020 provides that creditors should recover prejudgment interest at the rate of 9 percent 1) for all moneys after they become due and payable, on written contracts, 2) and on accounts after they become due and demand of payment is made, 3) for money recovered for the use of another, and retained without the owner's knowledge of the receipt, 4) and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made. Prejudgment interest is awarded when the amount due is liquidated or readily ascertainable by reference to recognized standards. Prejudgment interest is not awarded in cases in which the measure of damages is not clear.

Counsel: St. Louis County was represented during arguments by Patricia Reddington and Cynthia L. Hoemann of the county counselor's office in Clayton, MO.

American Eagle was represented by Jane E. Dueker, Nicole S. Zellweger and Crystal K. Hall of Stinson, Morrison Hecker LLP in St. Louis, MO.

The Missouri Municipal League, The Missouri Municipal Attorneys Association and St. Louis County Municipal League, which filed a brief as a friend of the Court, were represented by Kevin M. O'Keefe and Edward J. Sluys of Curtis, Heinz, Garrett & O'Keefe PC in St. Louis, MO and Daniel R. Wichmer of Springfield, MO.

Judges: All concur.

Opinion

[*819] en banc

PER CURIAM

I. Introduction

In 2008, St. Louis County ("County") assumed control of solid waste collection activities in the County's unincorporated areas. Prior to that, waste collection services in those areas had been provided by private entities. Among them were American Eagle Waste Industries, LLC; Meridian Waste Services, LLC; and Waste Management of Missouri, Inc. (collectively, "Haulers"). Following a 2007 amendment to *section 260.247*, which extended hauler-protective business regulations to counties that wish to provide trash collection, Haulers sued County in 2008 for a declaratory judgment that County must comply with *section 260.247*. On appeal, the court of appeals ruled that *section 260.247* applied to County, despite its claim that its status as a charter county made the statute inapplicable.

The case was remanded to the circuit court for further proceedings, and Haulers added the claims on appeal here, including a claim that they suffered money damages as a result of County's failure to comply with the statute. The circuit court found County liable to Haulers on the theory **[**2]** of implied in law contract. After determining damages and assuming a 5-percent profit, the circuit court awarded Haulers $1.2 million in damages. This Court reverses the circuit court's calculation of damages, affirms the judgment in all other respects, and remands the case to the circuit court.

[*820] II. Facts and Procedural History

Each group of Haulers, as private entities, had provided trash collection services to clients in parts of unincorporated St. Louis County prior to December 2006. On December 12, 2006, the St. Louis County council enacted Ordinance No. 23,023, which created significant changes to the charter county's regulation of waste collection in unincorporated areas. Among the changes was the addition of the following two sections:

> **607.1300 Designation of Collection Areas**
>
> 1. The County Executive shall, by January 15, 2008, *establish areas within the unincorporated County for the collection and transfer of waste and recovered materials*. The boundaries of such areas shall be determined after consideration of factors including size, compactness, road system and other relevant considerations.
>
> **607.1310 Grant of Contract**
>
> 1. The County Executive is authorized to advertise for bids or **[**3]** proposals from private or public entities for the provision of services relating to collection and transfer of waste and recovered materials in those areas designated in accordance with Section 607.1300. Such bids or proposals may provide for such services in one or more areas.
> 2. Contracts shall be awarded by order of the County Council to persons that have submitted the most responsible bids or proposals. Such contracts shall require that the person awarded the contract shall comply with all duties imposed by this Waste Management Code; shall provide for exclusive services in the designated area or areas; shall provide for a term not to exceed three (3) years; and shall contain such other terms and conditions approved by the County Counselor.

(Emphasis added). Haulers admit they had actual notice of Ordinance No. 23,023's passage on the day it was enacted. Haulers also received letters from County about one month later notifying them of the changes to the waste management code. The letters, dated January 8, 2007, read in pertinent part:

> Several of the changes made to the Code will have an immediate effect on all waste haulers that provide residential collection service in St. Louis **[**4]** County .... Some of the highlights of the new Code requirements are:
>
> • Establishing basic level of service for [residences] ....
>
> • Basic service level applies throughout St. Louis County.
>
> • Basic service level requirements are to be implemented by January 15, 2007 unless there is a valid contract for service in effect by that date. If a valid contract is in effect, then the implementation date is the later of January 15, 2008 or the expiration of the contract.
>
> • Trash collection districts for unincorporated St. Louis County are to be established and contracts in place by January 15, 2008.
>
> We have scheduled a meeting for Wednesday, January 17, 2007 .... Please come with your ideas of how we can better implement these new provisions and any obstacles you foresee ....

Haulers' representatives appeared at several county council meetings in 2007 and 2008 to comment on Ordinance No. 23,023 and how it should be implemented.

On June 26, 2007, after County had begun implementing its trash collection program, but before trash collection districts for unincorporated St. Louis County had been established, the governor signed into law Senate Bill No. 54, titled:

> **[*821]** An Act to repeal *sections 260.200*, *260.211*, **[**5]** *260.212*, *260.240*, *260.247*, *260.249*, *260.250*, *260.330*, *260.335*, *260.360*, *260.470*, *260.800*, *386.887*, *414.420*, *444.772*, and *643.079, RSMo*, and to enact in lieu thereof thirty-nine new sections relating to environmental regulation, with an effective date and penalty provisions.

HN1[] *Section 260.247* sets certain procedural rules for municipalities that expand their municipal waste collection activities into new territory. Prior to the enactment of S.B. 54, *section 260.247* applied only to "cities." S.B. 54 amended *section 260.247* to apply to all "cities and political subdivisions." The revised version of *section 260.247*, which became effective January 1, 2008, provides:

> ***HN2***[] 1. Any city or political subdivision which annexes an area or enters into or expands solid waste collection services into an area where the collection of solid waste is presently being provided by one or more private entities, for commercial or residential services, ***shall notify the private entity or entities of its intent to provide solid waste collection services in the area by certified mail***.
>
> 2. A city or political subdivision ***shall not commence solid waste collection in such area for at least two years from the effective date [**6] of the annexation or at least two years from the effective date of the notice*** that the city or political subdivision intends to enter into the business of solid waste collection or to expand existing solid waste collection services into the area, ***unless the city or political subdivision contracts with the private entity or entities to continue such services for that period***. If for any reason the city or political subdivision does not exercise its option to provide for or contract for the provision of services within an affected area within three years from the effective date of the notice, then the city or political subdivision shall renotify under subsection 1 of this section.
>
> 3. If the services to be provided under a contract with the city or political subdivision pursuant to subsection 2 of this section are substantially the same as the services rendered in the area prior to the decision to annex the area or to enter into or expand its solid waste collection services into the area, ***the amount paid by the city shall be at least equal to the amount the private entity or entities would have received for providing such services during that period***.

(Emphasis added).

In anticipation of the **[**7]** bidding process to award waste collection contracts for the newly created districts in unincorporated St. Louis County, County held pre-bid meetings on March 6, 2008, and April 21, 2008. Representatives of Haulers attended. Bids for new Trash District 3 opened on March 20, 2008; for new Trash

Districts 1, 5 and 7 on May 14, 2008; and for new Trash Districts 2, 4, 6 and 8 on May 28, 2008. Each group of Haulers submitted at least one bid.

Haulers were not awarded any of the contracts. County awarded the contract for District 3 on April 8, 2008, and the remaining contracts were awarded on June 10 and 17, 2008. The winning bidders began providing waste collection services on July 1, 2008, for District 3, and on September 29, 2008, for the remaining districts.

Haulers filed this lawsuit May 29, 2008, before the contracts were awarded. Their first petition sought a writ of mandamus compelling County to comply with revised *section 260.247*'s notice and two-year waiting period requirements. Alternatively, it sought a declaratory judgment that County's plan to contract with the companies submitting the winning bids violated *section 260.247*. **[*822]** County immediately filed a motion to dismiss for failure **[**8]** to state a claim on which relief could be granted. The circuit court denied the writ and sustained the motion to dismiss on the ground that *section 260.247* could not be constitutionally applied to St. Louis County because its status as a charter county allows it to regulate municipal functions. The circuit court found trash collection to be a "municipal function" within the province of County's ability to regulate.

Haulers appealed, and the court of appeals reversed the dismissal and remanded the cause to the circuit court for further proceedings. *State ex rel. Am. Eagle Waste Indus. v. St. Louis Cnty., 272 S.W.3d 336 (Mo. App. 2008)*. The court of appeals held that dismissal for failure to state a claim was inappropriate because Haulers had invoked principles of substantive law sufficient to entitle them to a declaration of their rights, if any, under *section 260.247*.

The Court went on to address the merits of Haulers' claim and noted that "[t]he fundamental purpose of *section 260.247* is to provide an entity engaged in waste collecting with sufficient notice to make necessary business adjustments prior to having its services terminated in a given area." *Id. at 342*. The court of appeals **[**9]** found *section 260.247* has a general, state wide purpose with which County must comply. The court concluded:

> The County is authorized to enter the business of trash collection, and even to take it out of the hands of private collectors. But enacting an ordinance which would allow the County to do so without following the notice requirement and waiting period in *section 260.247* would bring it "out of harmony with the general laws of the states" and amount to "[an] attempt to change the policy of the state as declared for the people at large.".... The County here can both take over trash collection as it wishes while at the same time *remaining in harmony with the public policy of the state*. Accordingly, we find that the County does not have authority to legislate over the requirements of *section 260.247*.

Id. at 343 (emphasis added) (internal citations and quotations omitted). The court of appeals issued its opinion in October 2008. In January 2009, this Court declined to accept transfer of the appeal.

Haulers subsequently filed an amended petition in the circuit court, adding claims for breach of implied contract, violation of state ***antitrust law***, violation of the *Fifth Amendment's Takings Clause*, **[**10]** and violation of due process under the *Fourteenth Amendment*. County removed the case to the United States District Court for the Eastern District of Missouri in June 2009. The federal court dismissed both federal law claims and remanded the case to state court in March 2010. *Am. Eagle Waste Industries, LLC v. St. Louis Cnty., Mo., No. 4:09-CV-816 CAS, 2010 U.S. Dist. LEXIS 25588, 2010 WL 1049796 (E.D. Mo. March 18, 2010)*.

Back in the circuit court, County again moved to dismiss. The circuit court dismissed Hauler's antitrust count but overruled the motion as to all other counts. Later, Haulers moved for partial summary judgment as to County's liability on its implied in law contract count. The circuit court sustained the motion in September 2010, finding that County was "benefited in that it fully implemented its trash collection program without having to pay the existing haulers" and that County thereby was liable to Haulers on an implied in law contract.

In December 2010, the circuit court heard arguments about the issue of the measure of damages to which Haulers were entitled. The circuit court issued an order in January 2011 holding that "the **[*823]** two year notice period for determining [Haulers'] damages began to **[**11]** run as of ... April 8, 2008 for District 3, and June 10 and 17, 2008 for the remaining Districts," the dates that County signed binding contracts with the new haulers. Finally, the court held that the measure of damages would be "the amount [Haulers would have] *received* for providing such services during [the two-year] period" (emphasis added). Accordingly, the circuit court sustained Haulers' objections to the discovery of any information regarding their profit margins.

Trial was held May 31, 2011, to determine the amount of Haulers' damages that County owed for breach of implied-in-law contract. At the outset, County objected to the use of projected gross revenues as the measure of damages. Only one witness testified at trial: a certified public accountant who gave expert testimony on behalf of Haulers. Relying on Haulers' business records, the accountant testified that, in his opinion, Haulers suffered a combined $23 million in damages. He arrived at this figure by estimating how much gross revenue each Hauler lost by not providing services for the entire two-year waiting period. His calculations were based on estimates of amounts Haulers would have billed rather than amounts Haulers **[**12]** would have received. The number of customers each Hauler would have gained or lost over the 24-month period also figured into his estimates. The accountant admitted he never before had used gross revenues as a measure of business losses. He further testified that he had not audited any of the business records Haulers provided.

The circuit court issued its final judgment, along with findings of fact and conclusions of law, on September 2, 2011. Despite its earlier order that the correct baseline for determining damages was the amount Haulers would have *received* during the two-year waiting period, the circuit court held that the correct measure of damages was the amount of *net profit* Haulers would have realized during the period. The circuit court went on to assume that Haulers would have realized a 5-percent profit margin. Applying this 5-percent profit margin to the $23 million figure to which the expert witness testified, the circuit court concluded that Haulers collectively suffered $1.2 million in damages.

County appeals the circuit court's judgment, and Haulers cross-appeal.

III. Standard of Review

HN3[] "[T]he decree or judgment of the trial court will be sustained by the appellate court **[**13]** unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976)*. Issues of law, however, are reviewed *de novo. Murrell v. State, 215 S.W.3d 96, 102 (Mo. banc 2007)*.

IV. Claims on Appeal and Cross-Appeal

County presents seven claims on appeal and Haulers raise five claims on cross-appeal. These claims can be examined in three groups: threshold issues, substantive appeals from the circuit court, and damage measurements.

County raises four threshold issues, meaning that, if these claims have merit, Haulers' lawsuit should be dismissed. First, County claims *section 260.247* does not apply to its "municipal functions" because it is a charter county. County also argues that S.B. 54, which amended *section 260.247*, is invalid because it violates *article III, section 23 of the Missouri Constitution*, which requires a bill **[*824]** have a clear title and no more than one subject. County next claims that applying *section 260.247* to its waste collection program constitutes invalid retrospective application of the statute. Finally, County **[**14]** believes Haulers waived their right to complain of County's noncompliance with *section 260.247* when they participated in County's bidding process. Haulers counter that law of the case bars each of these from consideration by this Court.

Both County and Haulers appeal substantive rulings from the circuit court's ruling on County's motion to dismiss and Haulers' summary judgment motion in 2010. Haulers argue on cross-appeal that the circuit court erred in dismissing their antitrust claim because County should not receive the "state action" exemption. County claims the circuit court erred in finding County liable on the theory of implied in law contract because, specifically, Haulers failed to show County received a "benefit" from Haulers.

The remainder of both parties' claims takes issue with the circuit court's measurement of damages. County first claims that Haulers should not receive damages because Haulers had actual notice of County's intent to implement a waste collection program on December 12, 2006, and the two-year waiting period began then. County also claims that all of the evidence as to damages provided by Haulers at trial was hearsay and not reasonably reliable. On cross-appeal, **[**15]** Haulers claim that the circuit court erred in declaring the measure of damages under *section 260.247* to be profits and that entering judgment for 5 percent of the amount of gross revenue proven at trial was contrary to the law and against the weight of the evidence. Finally, Haulers argue the circuit court should have awarded Haulers prejudgment interest on their damages pursuant to *section 408.020, RSMo.*

V. Threshold Issues

Haulers argue that each of County's threshold issues are claims that were raised or should have been raised in the circuit court when County filed its motion to dismiss in 2008. As such, Haulers believe these claims constitute law of the case, and this Court should not allow County to relitigate them here. Law of the case doctrine precludes consideration of the first threshold issue: the application of *section 260.247* to County. The other threshold issues, including County's claims regarding *article III, section 23*, the retrospective application of *260.247*, and waiver and estoppel, are denied on the merits.

A. County's Claim that Section 260.247 is Inapplicable

County argues that, as a charter county, it need not comply with *section 260.247*'s notice and two-year waiting **[**16]** period requirements. County asserts that sections of its local code supersede *section 260.247* because both relate to waste management, which is a "municipal function." County believes waste management regulation is reserved to the political subdivision.

The court of appeals previously considered this argument on the merits and discussed the proper interpretation of *section 260.247* at length before rejecting County's position. The court of appeals held:

> ***HN4***[] The County is authorized to enter the business of trash collection, and even to take it out of the hands of private collectors. But enacting an ordinance which would allow the County to do so without following the notice requirement and waiting period in *section 260.247* would bring it "out of harmony with the general laws of the states" and amount to "[an] attempt to change the policy of the state as declared for the people at large. A charter county's exercise of power **[*825]** that produces this result is impermissible."

County then applied for transfer to this Court—an invitation this Court declined.

HN5[] "The doctrine of law of the case governs successive appeals involving substantially the same issues and facts, and applies appellate decisions to **[**17]** later proceedings in that case." *Williams v. Kimes, 25 S.W.3d 150, 153 (Mo. banc 2000)*. A previous holding constitutes "law of the case," precluding relitigation of issues on remand and subsequent appeal. *Id. at 154*. Generally, the decision of an appellate court is the law of the case for all points presented and decided "as well as for matters that arose prior to the first adjudication and might have been raised but were not." *Walton v. City of Berkeley, 223 S.W.3d 126, 129 (Mo. banc 2007)*.

HN6[] The doctrine of law of the case is necessary to ensure uniformity of decisions, protect the parties' expectations, and promote judicial economy. *Id*. The doctrine is "more than merely a courtesy: it is the very principle of ordered jurisdiction by which the courts administer justice." *Davis v. J.C. Nichols Co., 761 S.W.2d 735, 738 (Mo. App. 1988)*. Appellate courts do have discretion to consider an issue when there is a mistake, a manifest injustice, or an intervening change of law. *State v. Johnson, 22 S.W.3d 183, 189 (Mo. banc 2000)*. But when there is no "demonstrable error in the first decision," law of the case is "peculiarly appropriate." *State v. Phillips, 324 S.W.2d 693, 694 (Mo. 1959)*.

This **[**18]** Court declines to consider anew this issue that the parties fully litigated to a final judgment three and a half years ago. County cannot have multiple bites at the apple in attempting to determine this issue favorably. Moreover, the parties—and other Missourians—need the ability to rely on appellate court decisions. Indeed, the court of appeals decision in which these claims first were litigated has been cited as law. *See, e.g., Weber v. St. Louis County, 342 S.W.3d 318 (Mo. banc 2011)* (citing *Am. Eagle Waste Indus., 272 S.W.3d 336*). With no demonstrable error in the first appellate decision, law of the case is "peculiarly appropriate" here.

The parties had every opportunity at that time to present their strongest argument regarding County's status as a charter county and the applicability or inapplicability of *section 260.247*, and the court of appeals fully investigated the arguments and ruled on the issue. This Court holds that it is the law of the case that County was required to adhere to *section 260.247*'s requirements.

B. County's Article III, Section 23 Claims

County claims that S.B. 54 violates the requirements in *article III, section 23 of the Missouri Constitution* that a bill **[**19]** have a single subject and a clear title. ***HN7***[] *Article III, section 23* states that "[n]o bill shall contain more than one subject which shall be clearly expressed in its title." This constitutional provision limits the legislature in two distinct but related ways by creating a single subject rule and a clear title requirement. *See Jackson Cty. Sports Complex Auth. v. State, 226 S.W.3d 156, 161 (Mo. banc 2007)*. "This Court will resolve doubts in favor of the procedural and substantive validity of an act of the legislature." *Hammerschmidt v. Boone Cty., 877 S.W.2d 98, 102 (Mo. banc 1994)*. Because attacks against legislation based on constitutionally imposed procedural limitations are not favored, this Court interprets the procedural limitations of *article III, section 23* liberally and will uphold the constitutional validity of S.B. 54 "unless the act clearly and undoubtedly violates the constitutional limitation." *Id*.

S.B. 54 bore the title "[a]n act to repeal sections ... and to enact in lieu **[*826]** thereof thirty-nine new sections relating to environmental regulation, with an effective date and penalty provisions." ***HN8***[] A title is constitutionally clear when it "indicate[s] in a general way the kind **[**20]** of legislation that was being enacted." *Fust v. Atty General for the State of Mo., 947 S.W.2d 424, 428 (Mo. banc 1997)*. However, a title may not be too broad or amorphous such that it fails to identify a single subject. *St. Louis Health Care Network v. State, 968 S.W.2d 145, 147 (Mo. banc 1998)*. County contends that the title is not sufficiently clear because the title relates to environmental regulations but also includes provisions intended to protect business entities engaged in solid waste management. This Court, in *Corvera Abatement Technologies, Inc. v. Air Conservation Commission*, addressed clear title and single subject challenges to a bill relating to "environmental control." *973 S.W.2d 851 (Mo. banc 1998)*. In that case, this Court held that "environmental control" satisfies the clear title requirement because the title provided sufficient notice of a single subject of legislation in that it showed an intention to "regulate environmental resources through placing substantive standards on certain activities" and, at the same time, "ensure that the purposes of environmental control are accomplished." *Id. at 861-62*. The title showed the legislature's intent to cover "environmental **[**21]** regulation in its plain and ordinary sense." *Id. at 862*.

Consistent with this Court's holding that "environmental control" satisfies the clear title requirement, the title "environmental regulation" of S.B. 54 likewise shows the legislature's intent to protect or manage environmental resources, and it fairly includes provisions to ensure that its purposes are accomplished. *Id*. Ensuring these environmental provisions are accomplished includes regulation of the closely connected solid waste management industry. "Environmental regulation" is a sufficiently clear title for this purpose.

HN9[] A bill will not violate the single subject requirement so long as "the matter is germane, connected and congruous." *Id., citing State v. Mathews, 44 Mo. 523, 527 (1869)*. A "subject" within the meaning of *article III, section 23* "includes all matters that fall within or reasonably relate to the general core purpose of the proposed legislation." *Id*. The subject of a bill may be "clearly expressed by ... stating some broad umbrella category" when a bill has "multiple and diverse topics" within a single, overarching subject. *Jackson Cty. Sports Complex Auth., 227 S.W.3d at 161*.

The original purpose of S.B. 54, **[**22]** and its single subject, is environmental regulation. Therefore, the bill may not include matters not "germane, connected and congruous" to environmental regulation. *Hammerschmidt, 877 S.W.2d at 102*. In *Corvera Abatement Technologies*, Corvera argued that a provision relating to certification and training requirements for asbestos contractors violated this rule because it did not directly regulate the way in which a person should dispose of asbestos. *Id*. This Court rejected Corvera's argument and found that the bill appropriately "includes both substantive provisions that directly regulate environmental hazards and administrative provisions that allow for the enforcement of these and other provisions that protect the environment." *Id*.[1]

Here, County contends that S.B. 54, the purpose of which is environmental **[*827]** regulation, violates the single subject rule because the bill includes regulation **[**23]** of business interests. ***HN10***[] S.B. 54 includes substantive regulations that directly regulate environmental hazards and establishes administrative procedures to allow for the enforcement of those regulations. *See sections 256.700* (requiring a fee for surface mining), 256.710 (establishing a council to review fees), 260.211 (providing criminal penalties for improper waste disposal), and 260.247 (providing a regulatory framework for the division of contracts in solid waste disposal areas). S.B. 54 also amends *section 260.247*, which regulates the process by which a political subdivision expands or enters into solid waste collections services. Just as in *Corvera Abatement Technologies*, the provision including regulation of business interests fairly relates to and is a means of accomplishing environmental control. S.B. 54 satisfies the requirements of *article III, section 23 of the Missouri Constitution*. Accordingly, County's claim is denied on its merits.

C. County's Retrospective Application Claim

Next, County argues that Hauler's attempt to force County to comply with *section 260.247* constitutes an impermissible retrospective application of the statute. The statute became effective January 1, **[**24]** 2008, and County modified its waste collection program in 2006.

HN11[] *Article I, section 13 of the Missouri Constitution* prohibits the enactment of any law that is "retrospective in its operation." *See* Matthew D. Turner, *Retrospective Lawmaking in Missouri: Can School Districts Assert Any Constitutional Rights Against the State? Savannah R-III School District v. Public School Retirement System of Missouri*, *63 Mo. L. Rev. 833, 837 (1998)*. *Article I, section 13* does not prohibit retrospective laws merely relating to past transactions but rather prohibits laws that operate retrospectively, affecting past transactions "to the substantial prejudice of parties interested." *Fisher v. Reorganized School Dist. No. R-V of Grundy Cnty, 567 S.W.2d 647, 649 (Mo. banc 1978)*. Although County enacted its ordinance in 2006, before the statute took effect, County did not contract with the new haulers until April and June of 2008, after the statute took effect. There were no "past transactions" to which the statute applied. County's retrospective application claim is denied.

D. County's Claims of Waiver and Estoppel

County argues that Haulers waived their right to claim damages under *section 260.247* by participating **[**25]** in County's bidding process before insisting that County follow the requirements of *section 260.247*. Alternatively, County claims Haulers should be estopped from claiming damages because of the same action.

HN12[] Waiver is the "intentional relinquishment of a known right." *Richardson v. Richardson, 218 S.W.3d 426, 430 (Mo. banc 2007)*. One voluntarily proceeding under a statute or ordinance, and claiming the benefits conferred by it, may not question its validity to avoid its burdens. *St. Louis Pub. Service Co. v. City of St. Louis, 302 S.W.2d 875, 879 (Mo. banc 1957)*. Haulers had no contract with County and had no contractual rights to relinquish when

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[1] House Bill Nos. 77, 78 and 356 amended, *inter alia*, *sections 292.602* (establishing the Missouri emergency response commission), 292.617 (requiring reports when storing explosives on property), 643.225 (establishing asbestos abatement projects), and 643.228 (requiring training courses for asbestos removers).

they sued County for failing to adhere to *section 260.247*. Further, while Haulers did submit bids to County, the bids were not accepted; as such, Haulers received no "benefit."

HN13[] The elements of estoppel are "(1) an admission, statement, or act inconsistent with the claim afterwards asserted and sued upon, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other **[*828]** party, resulting from allowing the first party to contradict or repudiate the admission, statement, or act." *Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384, 386-87 (Mo. banc 1989)*. **[**26]** County has not shown these elements. County did not take any action on the faith of Hauler's act of supplying bids. In addition, County was not injured by the submission of Hauler's bids. County's claims of waiver and estoppel are denied. Moreover, Haulers had every right to claim that County must comply with *section 260.247*, regardless of their action in submitting a bid.

VI. Substantive Appeals

A. Haulers' Antitrust Claim

In their first amended petition, Haulers claimed that County violated Missouri ***antitrust law*** in creating a monopoly trash district in unincorporated St. Louis County. The circuit court dismissed the claim. Haulers argue the dismissal was in error because County's failure to abide by the notice and two-year waiting period requirements in *section 260.247* means that County did not regulate waste collections pursuant to "authorized" monopoly activity and, thereby, no longer falls under the "state action" exemption to Missouri antitrust laws.

HN14[] Missouri prohibits restraint of trade by monopolization. *Section 416.031, RSMo Supp. 2010*, states that "[e]very contract, combination or conspiracy in restraint of trade or commerce in this state is unlawful." Further, "[i]t is unlawful **[**27]** to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in this state." *Sec. 416.031.2*. But "state action" is exempted if the arrangements are "expressly approved or regulated by ***any*** regulatory body or officer acting under statutory authority of this state or of the United States." *Sec. 416.041.2* (emphasis added).

HN15[] For a political subdivision to prove its actions should be exempt and assert a successful defense to an antitrust suit, it need show only that it acted pursuant to a "clearly articulated and affirmatively expressed state policy" that is "actively supervised" by the state. *L & H Sanitation, Inc. v. Lake City Sanitation, Inc., 769 F.2d 517, 520 (8th Cir. 1985)* (*citing* *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985))*. In Missouri, cities and counties are expressly authorized by statute to provide for the "collection and disposal of solid wastes," and they may contract with "any person, city, county, common sewer district, political subdivision, state agency or authority" to provide those services. *Secs. 260.215.1*; *260.215.3(1), RSMo Supp. 2010*.

Here, ***HN16***[] the Missouri legislature affirmatively expressed a policy of allowing cities and counties to **[**28]** regulate waste management through *section 260.215*. County, therefore, is a regulatory body acting under statutory authority, even if it does not comply fully with *section 260.247*. County's noncompliance does not mean its actions fall outside the state action exemption—it only means it may have violated the statute by noncompliance. Instead of arguing County violated ***antitrust law***, Haulers' claim is that County violated *section 260.247*.

B. Haulers' Claim for Breach of Implied in Law Contract

In their first amended petition following remand, Haulers alleged that, by failing to comply with *section 260.247*'s notice and two-year waiting period requirements, County breached an implied in law contract. It was on this basis the circuit court granted Haulers relief.

HN17[] "Unlike a contract implied in fact, a contract implied in law is imposed, or created, without regard to the promise of the party to be bound .... Thus, a **[*829]** contract implied in law is not actually a contract and, instead, is an obligation to do justice where no promise was ever made or intended." *Johnson v. Estate of McFarlin ex rel. Lindstrom, 334 S.W.3d 469, 474 (Mo. App. 2010)* (citations and quotations omitted). Courts sometimes use **[**29]** the term "quasi-contract" to refer to this phenomenon. *See Karpierz v. Easley, 68 S.W.3d 565, 570 (Mo. App. 2002)*. "The essential elements of quasi-contract are: (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of the fact of such benefit; and (3) acceptance and retention by the defendant of that benefit under circumstances in which retention without payment would be inequitable." *Pitman v. City of Columbia, 309 S.W.3d 395, 402 (Mo. App. 2010)*.

County correctly argues that Haulers cannot succeed because there was no "tangible benefit" conferred on County because of its failure to adhere to *section 260.247*. While Haulers had contracted with clients in unincorporated St. Louis County to provide waste collection services during the two-year period, Haulers never actually provided those services—County allowed another entity to provide them. Haulers did not confer a benefit on County that unjustly enriched County. If Haulers had provided the services and never received compensation from County, Haulers would have an implied in law contract claim. That did not happen here.

C. Implied Private Right of Action

While Haulers have failed to show a claim **[**30]** for implied contract, HN18[] in determining whether a pleading adequately states a claim for relief on a particular basis, "[t]he rule is well established in Missouri that the character of a cause of action is determined from the facts stated in the petition and not by the prayer or name given the action by the pleader." *State ex rel. Conaway v. Consol. Sch. Dist. No. 4 of Iron Cnty., 417 S.W.2d 657, 659 (Mo. banc 1967)*.

HN19[] "To properly plead a cause of action, the 'petition must state allegations of fact in support of each essential element of the cause pleaded.'" *Brock v. Blackwood, 143 S.W.3d 47, 57 (Mo. App. 2004)*, *quoting Duvall v. Lawrence, 86 S.W.3d 74, 80 (Mo. App. 2002)*. "It is the facts stated in the petition, along with the relief sought, which under our system of code pleading are to be looked at to determine the cause of action, rather than the form of the petition." *Memco, Inc. v. Chronister, 27 S.W.3d 871, 875 (Mo. App. 2000)*. To be deemed sufficient, a petition need not even label the theory upon which a plaintiff seeks recovery. *Empiregas, Inc. of Rolla v. Whitson, 902 S.W.2d 347, 348 (Mo. App. 1995)*.

HN20[] An appellate court is "primarily concerned with the correctness of the trial **[**31]** court's result, not the route taken by the trial court to reach that result." *Bus. Men's Assur. Co. of Am. v. Graham, 984 S.W.2d 501, 506 (Mo. banc 1999)*. A trial court judgment will be affirmed if cognizable under any theory, regardless of whether the reasons advanced by the trial court are wrong or not sufficient. *Id*. Applying these principles, this Court will look to the petition to determine whether "it invokes principles of substantive law which entitle the plaintiff to relief and informs the defendant of what the plaintiff will attempt to establish at trial." *Chronister, 27 S.W.3d at 876*, *quoting Whitson, 902 S.W.2d at 348*.[2]

[*830] Here, Haulers' basic claim is not complicated: They argue that, by failing to provide notice and abide by the two-year waiting period, County violated *section 260.247*. While Haulers did not expressly reference a claim for

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[2] *Chronister* is particularly instructive, as the plaintiff there had prevailed at the trial court level based on a petition in which the sole count was titled "Conversion." *Memco, Inc. v. Chronister, 27 S.W.3d 871 (Mo. App. 2000)*. On appeal, the defendant argued that the judgment was based on an unavailable remedy because an action in conversion had not been pleaded or proven properly. *Id. at 873*. In affirming the trial court's judgment, the court of appeals explained that, although the plaintiff had titled his claim as one sounding in conversion, "the facts **[**32]** stated [in the petition] referred to and supported multiple causes of action," *id*., and "[t]he claims asserted in the petition [were] broad enough to state a cause of action for fraud"—the basis on which, the court of appeals found, relief actually had been granted. *Id. at 875*.

relief based on an implied right of action contained in *section 260.247*, the character of that cause of action was adequately determinable from the facts Haulers alleged in their amended petition. Haulers alleged that County violated *section 260.247* and that such violation resulted in damages to Haulers. In particular, an entire section — constituting nearly three full pages—is titled "The County's Actions Are in Violation of State Law." Specific allegations include 1) that County violated the notice provision and timing requirements contained in *section 260.247*; 2) that it acted "in contravention of ... *§260.247*;" and 3) that its actions constituted an "illegal course." Indeed, County was aware **[**33]** that Haulers were asserting a violation of *section 260.247* because it argued the statute did not apply to its actions. Haulers' claim for relief was sufficiently broad to encompass relief based on an implied private right of action for violation of this statute, for they requested "damages in excess of $25,000 plus attorneys' fees, and ... such other and further relief as this Court deems just and proper."

For these reasons, it is proper to treat Haulers' claims as asserting a private right of action for violation of a statute. That raises the legal question of whether a private right of action is created in favor of Haulers under the statute.

HN21[] By its plain terms, *section 260.247* does not provide an express remedy for its violation. Nevertheless, "[w]hen a legislative provision protects a class of persons by the requirement or proscription of certain conduct but does not provide a civil remedy for the violation, *the court may, if it determines that the remedy is appropriate to further the purpose and ensure the effectiveness of the enactment*, accord to an injured member of the class a right of action." *Jensen v. Feely, 691 S.W.2d 926, 928 (Mo. App. 1985)* (emphasis in original). If it **[**34]** clearly appears "to have been the legislative intent," courts will find implied private causes of action in such cases. *Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122, 126 (Mo. banc 1956)*.

This Court has stated, however, that ***HN22***[] "[a] private remedy will not be implied when it does not promote or accomplish the primary goals of the statute." *Shqeir v. Equifax, Inc., 636 S.W.2d 944, 948 (Mo. banc 1982)*. Moreover, courts often have been reticent to recognize private causes of action where the legislature has established remedies via other means of enforcing statutory obligations. *See, e.g., id*. (declining to recognize a private right of action where a statute authorized a state official to impose a penalty on an insurer and to suspend or revoke the insurer's license on the insurer's willful violation of the statute).

This Court previously has found ***HN23***[] the purpose of *section 260.247* is "to provide an *entity* engaged in waste collecting sufficient notice to make necessary business adjustments prior to having its services terminated in a given area." *Weber v. St. Louis County, 342 S.W.3d 318, 323 (Mo. banc 2011)* (emphasis added). Subsection 3, specifically, shows the legislature's intent to protect the business **[**35]** entities already **[*831]** providing trash collection services. *Section 260.247.3* guarantees that previous haulers receive the same amount for which they contracted for two years following a political subdivision's decision to provide services.

The reasons for these protections are obvious. County could easily decide to provide waste collection services in unincorporated parts of the county. Then it might agree to hire Haulers for the two-year waiting period but only if they accept a lower contract price. In that situation, Haulers face the risk of losing business or being forced to renegotiate their contract unexpectedly. Subsection 3 also provides Haulers the opportunity to wind up business in the two-year waiting period if they are not chosen to provide services.

Although the facts here are not those specifically contemplated by the statute, they are simply more extreme. Instead of attempting to renegotiate Haulers' contract for the same services at a lower price and lowering Haulers' expected profits, County has cut Haulers out completely. Haulers received nothing instead of a forced lower contract price.

Moreover, the clear implication of *section 260.247* is that the legislature intended a **[**36]** right to damages in this situation. The legislature intended for Haulers to provide service and receive their contract price for two years following notice. *See secs. 260.247.1 - 260.247.3*. County cannot bypass the requirements of *section 260.247.3* by refusing to hire Haulers completely. The legislature's intention to protect Haulers' contracts for two years following County's notice is clear. Haulers have demonstrated that recognizing an implied private right of action in *section 260.247* promotes the primary goal of the statute and is, therefore, clearly consistent with legislative intent.

Recognizing an implied private remedy for violations of the statute's notice provision or its timing requirements naturally serves to advance that goal. Moreover, unlike other cases in which this Court has declined to recognize an implied cause of action,[3] section 260.247 provides no other enforcement mechanism whereby Haulers' rights can be protected.[4] Under the particular circumstances of this case, Haulers have demonstrated that section 260.247 permits them to pursue a civil remedy against County for County's violation of the statute.

In sum, while the circuit court took an incorrect route in finding County liable through implied in law contract, the court still reached the correct result in finding County liable. Judgment as to liability is affirmed.

VII. Damage Measurement

The only remaining issues before the Court, raised **[**38]** by either party, are how the circuit court ought to have calculated Haulers' damages. The circuit court, in its **[*832]** hearing on damages, excluded evidence of Haulers' expenses or net profit, allowing only evidence of their gross revenue for a two-year period starting April 8, 2008. In its final judgment, the circuit court awarded Haulers 5 percent of their gross revenue for that two-year period.

County claims the circuit court judgment was in error because Haulers are not entitled to any damages as Haulers have no rights under the statute. County also complains that the circuit court chose the wrong date to start the running of damages for the two-year waiting period. Haulers claim on cross-appeal that the circuit court erroneously found damages to be limited to profits instead of awarding total gross revenue lost. Haulers also claim they are entitled to prejudgment interest. To address these claims, this Court first must determine Haulers' rights and obligations under section 260.247.

A. Haulers' Rights under Section 260.247

HN24[] When interpreting statutory law, the court must ascertain the intent of the legislature and give effect to that intent if possible. *Greenlee v. Dukes Plastering Serv., 75 S.W.3d 273, 276 (Mo. banc 2002)*. **[**39]** The intent of the legislature may be determined by considering the "plain and ordinary meaning" of the terms. *Id*. "The construction of statutes is not to be hyper-technical, but instead is to be reasonable and logical and to give meaning to the statutes." *Lewis v. Gibbons, 80 S.W.3d 461, 465 (Mo. banc 2002)*.

Section 260.247, as amended, plainly states that Haulers were entitled to notice, by certified mail, of County's intent to provide waste collection services in the county. Sec. 260.247.1. Equally clear is County's prohibition on commencing waste collection in the area for two years, unless it hired Haulers. Sec. 260.247.2. Subsection 3 sets forth further requirements of County and evidences the legislatures' intent in passing and amending this statute:

> ***HN25***[] If the services to be provided under a contract with the city or political subdivision pursuant to subsection 2 of this section are substantially the same as the services rendered in the area prior to the decision of the city to annex the area or to enter into or expand its solid waste collection services into the area, ***the***

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[3] *See Johnson v. Kraft Gen. Foods, Inc., 885 S.W.2d 334 (Mo. banc 1994)*; **[**37]** *R.L. Nichols Ins., Inc. v. Home Ins. Co., 865 S.W.2d 665 (Mo. banc 1993)*; *Shqeir at 948*.

[4] Section 260.249 purports to provide for administrative penalties when section 260.247 is violated, but it does not apply in this situation. *See* sec. 260.249 (stating that when the director of natural resources determines a provision of sections 260.200 to 260.281 has been violated, he may assess an administrative penalty on the violator). First, the rules used for assessing the penalty clearly contemplate that a violation would cause endangerment to either human health or the environment, whereas here, County's violation only caused harm to a business entity. See 10 CSR 80-2.040(3). Additionally, any penalty assessed "shall be paid to the county in which the violation(s) occurred." 10 CSR 80-2.040(4). County has violated the statute in this situation. It makes no sense for County to pay a penalty to itself.

> ***amount paid by the city shall be at least equal to the amount the private entity or entities would have received* [**40]** for providing such services during that period.

(emphasis added). In other words, if County chose to contract with Haulers during the two-year waiting period, County cannot contract with Haulers for a lower price than they otherwise would have received in that two-year time frame.

Reading all three subsections together, Haulers were *entitled* to continue providing waste collection services for two years. County either could have allowed Haulers to provide services *directly* to clients for that period or could have contracted with Haulers to provide the same services *through* the County for that period—but only if County's contract with Haulers was for the same amount.

Haulers have the right to seek damages from County for the violation of *section 260.247*. To give effect to the legislature's intent and provide the same recovery intended by subsection 3, County must pay Haulers that to which they were entitled: the amount they "would have received" under their contract during the two-year waiting period. *Sec. 260.247.3*. Determining this amount requires this Court to interpret the phrase "would have received."

[*833] *B. Haulers' Amount of Damages*

HN26[] "[F]or every actionable injury there is a corresponding **[**41]** right to damages, and such injury arises whenever a legal right of plaintiff is violated." *Rusk Farms, Inc. v. Ralston Purina Co., 689 S.W.2d 671, 681 (Mo. App. 1985)* (*citing* *Wente v. Shaver, 350 Mo. 1143, 169 S.W.2d 947 (Mo. 1943))*. Because Haulers had a right under *section 260.247* to continue to provide services for two years, and County violated that right, Haulers have a right to damages.

Under *subsection 3 of 260.247*, Haulers, during the two-year waiting period, would have been able to collect "the amount [they] *would have received* for providing such services during that period." *Sec. 260.247.3* (emphasis added). The amount Haulers "would have received" for that two-year waiting period was their contract price for their services. However, Haulers would have been providing the service of trash collection at the time, so they would have had every normal operating expense and business cost during the two-year time period.

In sum, ***HN27***[] the amount to which *section 260.247* entitles Haulers is their projected receipts from their contract price, minus any business and operational costs Haulers would have incurred while providing waste collection services, considering all the circumstances. In other words, **[**42]** the circuit court correctly concluded that Haulers' damages are what would have been their *net profit* during the two-year waiting period.[5] This is in accordance with other damage determinations under Missouri law. *See* *Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc., 155 S.W.3d 50, 55 (Mo. 2005)* ("In general, in calculating lost profits damages, lost revenue is estimated, and overhead expenses tied to the production of that income are deducted from the estimated lost revenue.").

However, the circuit court was incorrect to exclude discovery or evidence of Haulers' expenses or net profit. ***HN28***[] When the measure of damages is net profit, the basis for determining the expected profit should be reasonably certain. "In evaluating the sufficiency of evidence to sustain awards of damages for loss of business profits the appellate courts of this state have made stringent requirements, refusing to permit speculation as to probable or expected profits, and requiring a substantial basis for such awards." *Id. at 54*.

On remand, both parties are allowed to discover, present evidence, and cross-examine regarding these **[**43]** subjects. The measure of damages is the net profit the Haulers' would have realized during the two-year period, considering all the circumstances. Because the parties must present further evidence regarding this issue, the able circuit court can rule on the other evidentiary issues as they arise.

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[5] *See* section VII.C, below, for a discussion of the date the two-year period began.

C. When Damages Began to Accrue under Section 260.247

HN29[] Pursuant to *section 260.247*, a private entity is entitled to provide services during the two-year waiting period after a political subdivision decides to expand into an area and provide trash collection services. That period begins to run "from the effective date of the notice" by certified mail. *Sec. 260.247.2*. If the political subdivision fails to give the required notice, then the two-year period, by default, begins "at least two years from the effective date of the annexation." *Id*.

The circuit court found that the two-year period began on the dates County awarded contracts to companies to provide waste collection services in the newly created **[*834]** trash collection districts: April 8, 2008, for district 3, and June 10 and 17, 2008, for the other districts. The court reasoned that, in the absence of notice by certified mail as required by *section 260.247*, **[**44]** the two-year clock started running on these dates because County "signed binding contracts with the new haulers" and, thus, "County's *intent* [became] absolute" then (emphasis added).

County asserts that this was in error and, instead, that Haulers' dates of "actual notice" were either December 12, 2006, the day County adopted Ordinance No. 23,023, which Haulers learned of the day it was adopted, or January 7, 2007, the date County mailed a letter to the Haulers apprising them that the waste management code had been amended. County argues that under these dates, it is not liable for damages after either December 12, 2008, or January 7, 2009, when the two-year period expired.

HN30[] The purpose of *section 260.247*'s notice requirement is different from that of most other notice requirements. Usually, the purpose of a notice requirement is to apprise the recipient that there is a legal action pending and to ensure that the recipient knows when and where the recipient can be heard regarding the matter—in other words, to effectuate due process. Here "[t]he purpose of *section 260.247* is to provide an entity engaged in waste collecting sufficient notice to make necessary business adjustments prior **[**45]** to having its services terminated in a given area." *Weber, 342 S.W.3d at 323*. *Section 260.247* guarantees private businesses nothing less than an *unequivocal statement* that a political subdivision intends to seize the businesses' client bases and at least two years following that unequivocal statement to wind down its operations.

County never gave the certified notice required by *section 260.247.1* to begin trash collection and did not wait the two-year period to begin trash collection or hire Haulers to continue trash collection. To give effect to the legislature's intention that the two-year waiting period begins running when County gives official notice, Hauler's damages must have started accruing when County provided an *unequivocal statement* that Haulers no longer would be providing trash collection service similar to that provided by certified notice. *See Greenlee, 75 S.W.3d at 276*. This statement could not have occurred on the dates that County proposes, as noted by the circuit court, because County retained the discretion to abandon its program without consequence at that time. The same is true for the dates County held pre-bid meetings and opened the bidding process. County could **[**46]** still retreat from its program or it could comply with the statute and hire Haulers to provide service for two years on those dates. Those actions did not provide an unequivocal statement to Haulers that County was seizing their client bases.

However, when County signed contracts with new haulers to provide trash collection in the new districts, Haulers had an unequivocal statement that County did not intend to comply with the statute. By signing these binding contracts with new haulers on April 8, 2008, for district 3, and June 10 and 17, 2008, for the remaining districts, County manifested its intent to displace Haulers. The circuit court's judgment as to the date the two-year notice period for determining Haulers' damages began to run is affirmed. On remand, Haulers may present evidence of their expected revenue, set off by expenses, costs, and other circumstances, for a two-year period beginning April 8, 2008, for district 3, and June 10 and 17, 2008, for the other districts.

[*835] ***D. Haulers Prejudgment Interest Claim***

Finally, Haulers claim that *section 408.020* provides them the right to collect prejudgment interest. ***HN31***[] *Section 408.020* provides that creditors should recover prejudgment interest **[**47]** at the rate of 9 percent 1) "for all moneys after they become due and payable, on written contracts," 2) "and on accounts after they become due and demand of payment is made," 3) "for money recovered for the use of another, and retained without the owner's knowledge of the receipt," 4) "and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made." Prejudgment interest is awarded when the amount due is liquidated or "readily ascertainable by reference to recognized standards." *St. John's Bank & Trust Co. v. Intag, Inc., 938 S.W.2d 627, 630 (Mo. App. 1997)*. Prejudgment interest is not awarded in cases in which the measure of damages is not clear. *Fohn v. Title Ins. Corp., 529 S.W.2d 1, 5 (Mo. banc 1975)*. Because the measure of damages was disputed and uncertain, *section 408.020* is not applicable. The circuit court's judgment regarding prejudgment interest is affirmed.

VIII. Conclusion

The circuit court's judgment as to the calculation of Haulers' damages is reversed. In all other respects, the judgment is affirmed. The case is remanded.

All concur.

Qsgi, Inc. v. IBM Global Fin.

United States District Court for the Southern District of Florida, West Palm Beach Division

July 31, 2012, Decided; July 31, 2012, Entered on Docket

Case No.: 11-CV-80880-RYSKAMP

Reporter
2012 U.S. Dist. LEXIS 202583 *

QSGI, INC., Plaintiff, v. IBM GLOBAL FINANCING, and INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendants.

Prior History: *QSGI, Inc. v. IBM Global Fin., 2012 U.S. Dist. LEXIS 49601 (S.D. Fla., Mar. 13, 2012)*

Core Terms

antitrust, alleges, mainframe, six-month, market share, mainframe computer, antitrust claim, competitors, purchaser, actual damage, customers, asserts, motion to dismiss, anti trust law, monopolization, Defendants', deceptive, conclusory allegation, factual allegations, anticompetitive, modified, unfair

Counsel: **[*1]** For QSGI, Inc., a Delaware Corporation, Plaintiff: Juan Pablo Bauta, II, Miami, FL; Melissa Damian Visconti, Damian & Valori, LLP, Miami, FL; Case A. Dam, Lanier Law Firm, Spring Grove, IL.

For IBM Global Financing, a division of International Business Machines Corporation, International Business Machines Corporation, Parent to IBM Global Financing, doing business as IBM Global Financing, Defendants: Andrei Harasymiak, Brian M. Jenks, Felicia Einhorn, LEAD ATTORNEYS, PRO HAC VICE, Cravath, Swaine & Moore, LLP, New York, NY; Laura Besvinick, LEAD ATTORNEY, Stroock and Stroock and Lavan, LLP, Miami, FL; Pawan Nelson, LEAD ATTORNEY, PRO HAC VICE, Cravath, Swaine & Moore, LLp, New York, NY; Benjamin H. Diessel, Teena-Ann V. Sankoorikal, PRO HAC VICE, Cravath, Swaine & Moore, LLp, New York, NY; Eric J. Stock, PRO HAC VICE, Hogan Lovells US LLP, New York, NY; Evan R. Chesler, Cravath Swaine & Moore LLP, New York, NY; Richard J. Stark, PRO HAC VICE, Cravath, Swaine & Moore, LLP, New York, NY; Ty Cobb, PRO HAC VICE, Hogan Lovells, US, LLP, Washington, DC.

Judges: KENNETH L. RYSKAMP, UNITED STATES DISTRICT JUDGE.

Opinion by: KENNETH L. RYSKAMP

Opinion

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE

THIS CAUSE comes **[*2]** before the Court pursuant to Defendants International Business Machines Corporation ("IBM") and IBM Global Financing ("IGF")'s (collectively, "Defendants") motion to dismiss the second amended complaint, filed April 16, 2012 **[DE 54]**. Plaintiff QSGI, Inc. ("QSGI," or "Plaintiff") responded on May 11, 2012 **[DE 78]**. Defendants replied on May 21, 2012 **[DE 84]**. This motion is ripe for adjudication.

I. Background

QSGI was engaged in the "business of purchasing, selling and servicing used IBM mainframe computers" throughout the United States, and alleges that purchasers of these mainframe computers must "modify the large and complex mainframes to fit their needs so that they do not overpay for the licensing of the operating system." (2d Am. Compl. ¶¶ 3, 9). QSGI's business model was dependent on modifying and selling the used IBM mainframe computers to fit the computing requirements of the end-user purchaser, such that the purchaser would not have to pay the additional licensing costs that are calculated as a function of the Millions of Instructions Per Second ("MIPS") capacity. (*Id.* ¶¶ 9, 40-42). QSGI alleges that used mainframe computers "are only economically viable to the purchaser provided **[*3]** that they can be modified upon purchase to fit the needs of the new purchaser to avoid overpaying" for the monthly expenses of licensing the operating systems for the "unnecessary MIPS." *Id.* In order to modify and remarket the used mainframe computers, QSGI (and other companies in the product market) require IBM's proprietary micro-code, which QSGI alleges is central to IBM's monopoly power in this market. (*Id.* ¶ 30). QSGI identifies third parties in the used mainframe market that were allegedly adversely affected by the Defendants' activity. (*Id.* ¶ 35).

QSGI alleges that, in or around the summer of 2007, IBM adopted a policy whereby it prohibited the modification of any recently purchased used IBM mainframe computer's MIPS capacity for a period of six months (the "six-month rule"). (2d Am. Compl. ¶ 31). Further, it is alleged that the six-month rule adversely affected QSGI and other companies in the used mainframe computer market. (*Id.* ¶¶ 31-36). QSGI argues that the six-month rule, in effect, did not apply to IGF, as IGF mainframe computers could still be modified by IBM technicians with access to parts and proprietary micro-code prior to shipping the product. (*Id.*) Thus, QSGI asserts **[*4]** that, as a result of the six-month rule, IBM's policy unfairly disadvantaged QSGI and other companies in the used mainframe computer market, because it made their services no longer economically viable, while also effectively granting an exemption to IGF based on their access to proprietary IBM products. (*Id.* ¶¶ 34, 39-42).

QSGI's Second Amended Complaint asserts that IBM's dominance in the new and used IBM mainframe computer product market in the United States, combined with the alleged anticompetitive behavior, the six-month rule, is indicative of attempted monopolization. QSGI alleges that IBM has "directly injured QSGI and every company that is involved in the purchase, service, and sale of used IBM mainframes." (*Id.* ¶ 34). QSGI asserts a violation of the Florida Antitrust Act of 1980, *Fla. Stat. § 542.15, et seq.*, and repackages the same claim as a violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUPTA"), *Fla. Stat § 501.201, et seq.* Defendants move for dismissal with prejudice of both claims.

II. Legal Standard

To state a claim for relief, *Federal Rule of Civil Procedure 8(a)(2)* requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Although the court takes plaintiff's allegations as true, "conclusory allegations, **[*5]** unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1185 (11th Cir. 2003)* (citing *South Florida Water Mgm't Dist. v. Montalvo, 84 F.3d 402, 406 (11th Cir. 1996))*. Further, "a court's duty to liberally construe a plaintiff's complaint in the face of a motion to dismiss is not the equivalent of a duty to re-write it for [him]." *Peterson v. Atlanta Hous. Auth., 998 F.2d 904, 912 (11th Cir. 1993)*.

In order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007))*. A claim will be deemed plausible for the purposes of surviving the motion when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Although extensive detailed factual allegations are not required, "a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . ." *Twombly, 550 U.S. at 555* (alteration in original) (internal quotation marks omitted) (citations omitted). Moreover, the inclusion of plausible factual allegations must exceed a threshold such that the "allegations must be enough to raise a right to relief **[*6]** above the speculative level . . . ." *Id.*

III. Discussion

A. QSGI's Allegations of Antitrust Injury are Insufficient, and Therefore QSGI Lacks Antitrust Standing.

When interpreting the Florida Antitrust Act, this Court must rely on the body of federal case law interpreting the Sherman Act and the federal common law requirements for antitrust standing. *See* *Vitacost.com, Inc. v. Gaia Herbs, Inc., No. 06-81141-CIV, 2007 U.S. Dist. LEXIS 6393, 2007 WL 286262, at *1-2 (S.D. Fla. Jan. 26, 2007)*; *see also* *All Care Nursing Serv. v. High Tech Staffing Servs., 135 F.3d 740, 746 (11th Cir.1998)* ("Federal and Florida antitrust laws are analyzed under the same rules and case law."); *Fla. Stat. § 542.32* ("It is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes."); *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc., 457 So.2d 1028, 1032 (Fla. Dist. Ct. App.1984)* ("The Florida legislature has, in effect, adopted as the law of Florida the body of ***antitrust law*** developed by the federal courts under the Sherman Act."). Thus, analysis of the law under the Sherman Act and federal common law standing doctrine is also applicable to QSGI's state law antitrust claim.

The Eleventh Circuit applies a two-pronged approach in establishing whether a plaintiff has antitrust standing. *See* *Florida Seed Co., Inc. v. Monsanto Co., 105 F.3d 1372, 1374 (11th Cir. 1991)*. First, in order to maintain an antitrust action, a plaintiff **[*7]** must prove an "antitrust injury," which is a showing greater than a mere injury linked to a violation of the antitrust laws. *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1449 (11th Cir. 1991)* (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L. Ed. 2d 701 (1977))*. Antitrust injury is defined as:

> injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations . . . would be likely to cause.

Id. (internal citations and quotations omitted). The plaintiff must prove that there is a public harm that coincides with the antitrust plaintiff's private harm. *Todorov, 921 F.2d at 1449-50*. Thus, if the injury suffered is "inextricably intertwined with the injury that the conspirators [seek] to inflict" or "flows from that which makes defendants' acts unlawful" in the relevant antitrust market, such injury "falls squarely within the area of congressional concern." *Blue Shield of Virginia v. McCready, 457 U.S. 465, 491, 102 S.Ct. 2540, 2555, 73 L. Ed. 2d 149 (1982)*; *Brunswick, 429 U.S. at 489, 97 S.Ct. at 697*.

The second prong of the antitrust standing inquiry is whether the plaintiff is an efficient enforcer of the antitrust laws. *Mun. Utilities Bd. of Albertville v. Alabama Power Co., 934 F.2d 1493, 1499 (11th Cir. 1991)* (citing *Cargill, Inc. v. Monfort, 479 U.S. 104, 110 n.5, 107 S.Ct. 484, 489 n.5, 93 L. Ed. 2d 427 (1986))*. The Eleventh Circuit continues to apply the "target area test." *Monsanto Co., 105 F.3d at 1374* (citing *Austin v. Blue Cross & Blue Shield of Ala., 903 F.2d 1385, 1388 (11th Cir.1990))*; *but see* *Todorov, 921 F.2d at 1450-51, n.19* (noting **[*8]** that "[t]he Supreme Court[1] specifically rejected the 'target area' test that had previously been used in this circuit"). The target area test

[1] The Supreme Court, in *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, and subsequently in *Cargill, 479 U.S. 104, 107 S.Ct. 484, 93 L. Ed. 2d 427*, declined to apply this test, reasoning that it may lead to contradictory and inconsistent results. Instead, the Court identified "other factors in addition to antitrust injury" to determine whether a particular plaintiff was an efficient enforcer of the antitrust laws. *Cargill, 479 U.S. at 111 n.6, 107 S.Ct. at 490 n.6*.

requires that the plaintiff establish that "he is within that sector of the economy endangered by a breakdown of competitive conditions in a particular industry," and that he is "the target against which anticompetitive activity is directed." *Id.* (quoting *National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distribution Co., 748 F.2d 602, 608 (11th Cir. 1984)*, *cert denied sub nom., Patterson v. Buena Vista Distribution Co., 474 U.S. 1013, 106 S.Ct. 544, 88 L. Ed. 2d 473 (1985))*. That is, the test demands that the antitrust plaintiff is among the competitors in the relevant antitrust market against whom defendant's alleged violation is directed. *See Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1493 (11th Cir. 1985)*. Because the instant case turns on a lack of antitrust injury, the second prong of establishing antitrust standing is unnecessary.

Where an antitrust plaintiff merely alleges harm to an individual competitor, not harm to competition generally, antitrust injury has not been established and dismissal is warranted. *See Spanish Broad. Sys. Of Fla., Inc. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1069 (11th Cir. 2004)*. Absent factual allegations of antitrust injury, an antitrust claim will fail under the pleading standards prescribed by *Twombly* and *Iqbal. See Iqbal, 556 U.S. at 678-79, 129 S.Ct. at 1949*; *Twombly, 550 U.S. at 555, 127 S.Ct. at 1965*. Without factual allegations, not merely conclusory ones, there cannot be a plausible claim to relief on an antitrust claim that could withstand **[*9]** dismissal. *See, e.g., NicSand, Inc. v. 3M Co., 507 F.3d 442, 451 (6th Cir. 2007)* ("[A] 'naked assertion' of antitrust injury, the Supreme Court has made clear, is not enough; an antitrust claimant must put forth factual 'allegations plausibly suggesting (not merely consistent with)' antitrust injury." (quoting *Twombly, 550 U.S. at 557, 127 S.Ct. at 1959*)).

The alleged antitrust violation at issue here is IBM's monopolization or attempted monopolization of the alleged used IBM mainframe computer market. In order for QSGI to establish a proper claim, QSGI must assert that IBM willfully acquired or maintained market power in the relevant market.[2] QSGI must establish sufficient antitrust injury, that is, that the injury flowed from IBM's willful acquisition or maintenance of monopoly power in the relevant market. Although QSGI has pleaded harm to itself, it has failed to plead harm to competition. QSGI's wholly conculsory and inconsistent allegations related to competitive harm in the relevant product and geographic market does not raise QSGI's "right to relief above the speculative level." *Twombly, 550 U.S. at 555, 127 S.Ct. at 1965*.

QSGI alleges that the six-month rule has resulted in the bankruptcy of QSGI and harmed other businesses in the used mainframe computer market. Further, QSGI alleges that "[a]t all **[*10]** times material hereto IBM and IGF had monopoly power . . . demonstrated by its 90% market share" and IBM currently "commands approximately 90 percent of the market." (2d Am. Compl. ¶¶ 75, 29.) These allegations suggest that there has not been an increase in Defendants' market share and thus are not indicative of attempted monopolization. Moreover, QSGI, in a wholly conclusory fashion, alleges that IBM and IGF have "increased their market share of used IBM mainframes to approximately 100%." (*Id.* at ¶ 83). There are several issues with this allegation. First, this allegation is inconsistent with the preceding allegation that IBM had a 90% market share "at all times material hereto." (*Id.* at ¶ 75). Second, this also is an inconsistent allegation when considering that other competitors are still operating in the relevant product market. (*Id.* at ¶ 35). This Court "need not accept facts that are internally inconsistent, facts that run counter to facts which the court may take judicial notice of, conclusory allegations, unwarranted deductions, or mere legal conclusions." *U.S., ex rel. Carroll v. JFK Med. Ctr., No. 01-8158-CIV, 2002 U.S. Dist. LEXIS 28169, 2002 WL 31941007, at *2 (S.D. Fla. Nov. 15, 2002)*; *Campos v. Immigration and Naturalization Service, 32 F.Supp.2d 1337, 1343 (S.D.Fla.1998)*.

QSGI has also not sufficiently pleaded cognizable harm to competition **[*11]** based on its allegations pertaining to harm against competitors in the used IBM mainframe computer market. Although QSGI asserts that other competitors in the used IBM mainframe computer market were "adversely effected [sic] by the sixth-month [sic] rule in a manner similar to QSGI," this conclusory allegation is not rooted in fact and is at odds with some of the allegations in QSGI's Second Amended Complaint. (2d Am. Compl. ¶ 35). QSGI lists eight competitors, all of which are still in business,[3] and QSGI does not assert that any of these companies have lost market share as a result of

[2] Although not alleged in QSGI's Second Amended Complaint, this in effect is an alleged *15 U.S.C. § 2* violation.

[3] *See* (DE 54, p.13) (listing the eight competitors' websites that are still operating in the used IBM mainframe computer market).

the six-month rule. It is possible that some of the non-IBM competitors absorbed QSGI's market share upon its dissolution, which cannot be considered harm to competition. *See George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 140 (2d Cir. 1998)* (affirming dismissal for lack of antitrust standing where "plaintiff has failed to plead its own market share" or the "market share purportedly absorbed by" the defendant's alleged coconspirator). QSGI's pleading largely alleges injury only to itself and does not allege antitrust injury. *Todorov, 921 F.2d at 1449*.

Finally, QSGI has not alleged perceivable harm to customers as a result of IBM's six-month rule with sufficient particularity. Although QSGI **[*12]** alleges that certain customers would have been able to purchase used IBM mainframe computers at a QSGI-quoted price "but for the enactment of the six-month rule," the naked assertions that attempt to buttress the claim are unsupported and conclusory. (2d Am. Compl. ¶¶ 50-60). QSGI solely alleges that the end-user purchaser can no longer purchase used IBM mainframe computers for a "significantly lower amount from QSGI" and must now purchase the products from IBM and IGF at supra-competitive prices. (*Id.* at ¶¶ 59-62). QSGI fails to allege why the customers did not buy these products from QSGI or what the customers ultimately ended up doing. QSGI's allegations are quite vague and unclear as to whether the customers purchased used IBM mainframe computers from IBM, IGF or one of the other used IBM mainframe competitors still in the market, whether they paid a higher price, whether it included related services, maintenance, or software, or whether they elected not to purchase a used IBM mainframe computer from *any* supplier. Moreover, as Defendants correctly assert, even if some customers bought used mainframe computers from IBM or IGF, such does not necessarily indicate that the customers **[*13]** paid supra-competitive prices. Because these products are quite specialized and tailored to the needs of the end-user purchaser, it is expected that they would be priced differently than that quoted by QSGI, and that the expenditure of a larger amount may also include a more powerful computer, or a more extensive maintenance plan. (*Id.* at ¶¶ 9-10).

QSGI fails to allege the necessary harms to competition and actual anticompetitive effects. QSGI's conclusory allegations largely assert its own injury, that is "bankruptcy, damages and resulting lack of competition," and attempt to construct an antitrust claim out of the ruins of its failed business model. (Opp. at ¶ 10). Thus, QSGI's conclusory allegations are "not entitled to be assumed true" under the post-*Twombly* pleading requirements, and QSGI's assertions are insufficient to establish antitrust injury. *See Todorov, 921 F.2d at 1449*; *Spanish Broad. Sys. Of Fla., Inc., 376 F.3d 1065, 1069*. Because QSGI has failed to plead changes in IBM's market share with particularity, and has made insufficient allegations of harm to both competition and consumers, QSGI's antitrust claim is dismissed with prejudice.[4] *See, e.g., Mantz v. TRS Recovery Servs., No. 11-80580-CIV, 2011 U.S. Dist. LEXIS 129332, 2011 WL 5515303 (S.D. Fla. Nov. 8, 2011)* (dismissing complaint with prejudice after single opportunity **[*14]** to amend where permitting an additional opportunity to amend would be futile).

B. QSGI Fails to State a valid FDUTPA Claim.

FDUTPA provides that "unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce" are unlawful. *Fla. Stat. § 501.204*. In order to state a claim under the FDUTPA, plaintiff must establish three elements "(1) a deceptive or unfair practice, (2) causation, and (3) actual damages." *Siever v. BWGaskets, Inc., 669 F.Supp.2d 1286, 1292 (M.D. Fla. 2009)*. Deception occurs "if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment," which requires "a showing of probable, not possible, deception that is likely to cause injury to a reasonable relying consumer." *Silver v. Countrywide Home Loans, Inc., No. 11-12282, 483 Fed. Appx. 568, 2012 WL 2052949 (11th Cir. June 8, 2012)* (quoting *Zlotnick v. Premier Sales Grp., Inc., 480 F.3d 1281, 1284 (11th Cir.2007))*. When a plaintiff's FDUTPA claim is based on the same allegations as its antitrust claim, failure to establish a violation of the ***antitrust law*** is sufficient to conclude that the plaintiff has also

[4] Although QSGI alleges antitrust injury based on IBM's six-month rule beginning in 2007, QSGI made no effort to preserve relevant documents in anticipation of a potential lawsuit. QSGI has admitted to the destruction of documents in a storage facility in Minnesota in 2009, and now QSGI has essentially no documentation or information to establish a basis for a proper antitrust claim. *See* (Plaintiff's Response to IBM's Motion to Compel Compliance with March 16, 2012 Order and For Sanctions for Noncompliance (May 7, 2012, ECF No. 70)).

failed to state a FDUTPA claim. *See* *JES Props. Inc. v. USA Equestrian, Inc., No. 802CV1585T24MAP, 2005 U.S. Dist. LEXIS 43122, 2005 WL 1126665, at *19 (M.D. Fla. May 9, 2005)*.

QSGI's FDUTPA allegations are a repackaging of its monopolization claims, based on its assertion that by "enact[ing] **[*15]** the six-month rule" IBM "engaged in an unfair and deceptive act." (2d Am. Compl. ¶ 65). This allegation is embedded within QSGI's primary antitrust claim, in the assertion that IBM used its "monopoly power to enact the six-month rule." (*Id.*) In QSGI's Response to IBM's Motion to Dismiss, QSGI asserts that the FDUTPA claim is "dependent upon a finding that [Defendants] unfairly monopolized the market for used IBM mainframes." (DE 78, ¶11). Since this Court has found no violation of the Florida Antitrust Act, and QSGI's FDUTPA claim is based on the same allegations as the antitrust claim, this Court finds that QSGI has also failed to state a FDUTPA claim.

QSGI's FDUTPA claim also fails because QSGI fails to plead actual damages. Actual damages are measured by "the difference in the market value of the product or service in the condition in which it was delivered according to the contract of the parties," except where the product is rendered valueless due to defect, whereby the purchase price becomes "the appropriate measure of damages." *Jovine v. Abbott Laboratories, Inc., 795 F.Supp.2d 1331, 1344 (S.D. Fla. 2011)* (quoting *Rollins, Inc. v. Heller, 454 So.2d 580, 585 (Fla. Dist. Ct. App. 1984))*. Under FDUTPA, actual damages do not include consequential damages. *See* *Eclipse Med., Inc. v. Am. Hydro-Surgical Instruments, Inc., 262 F.Supp.2d 1334, 1357 (S.D. Fla. 1999)* (citing *Nyquist v. Randall, 819 F.2d 1014, 1017 (11th Cir. 1987))*.

QSGI alleges that it suffered actual damages when its entire **[*16]** inventory of used IBM mainframes, valued at $4,000,000.00, was rendered "effectively worthless" and its $10,000,000.00 investment in Qualtech was sold for $3,000,000.00 as a result of the six-month rule. (2d Am. Compl. ¶ 72). QSGI has neither alleged any delivery of used mainframe computers by IBM pursuant to a contract nor asserted any other allegations that establish actual damages. QSGI could not have been deceived by IBM in its acquisition of used mainframes, as QSGI acquired used mainframes from other sources in the open market. (*Id.* ¶ ¶ 30, 34). Thus, QSGI's alleged damages are not actual damages compensable under the FDUTPA, and therefore this claim is dismissed.

IV. Conclusion

THE COURT, being fully advised and having considered the pertinent portions of the record, hereby

ORDERS AND ADJUDGES that Defendants' Motion To Dismiss With Prejudice, filed April 16, 2012 **[DE 54]**, is GRANTED WITH PREJUDICE, as explained herein. The Clerk of Court shall CLOSE this case and deny any pending motions as moot.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 31 day of July, 2012.

/s/ Kenneth L. Ryskamp

KENNETH L. RYSKAMP

UNITED STATES DISTRICT JUDGE

Suwannee Am. Cement LLC v. Zurich Ins. Co.

United States District Court for the Southern District of New York

August 2, 2012, Decided; August 3, 2012, Filed

11 Civ. 3899 (LLS)

Reporter

885 F. Supp. 2d 611 *; 2012 U.S. Dist. LEXIS 109316 **; 2012-2 Trade Cas. (CCH) P77,999; 2012 WL 3155897

SUWANNEE AMERICAN CEMENT LLC, VCNA PRESTIGE READY-MIX FLORIDA, INC., and VOTORANTIM CIMENTOS NORTH AMERICA, INC., Plaintiffs, - against - ZURICH INSURANCE COMPANY, LTD., ZURICH AMERICAN INSURANCE COMPANY, and AMERISURE INSURANCE COMPANY, Defendants.

Core Terms

advertising, advertising injury, manufacturers, conspiracy, antitrust, Concrete, insured, Cement, underlying action, Defendants', coverage, prices, misappropriation, indirect, conceal, increased price, purchasers, policies, anticompetitive, costs, duty to defend, class action, allegations, plaintiffs', complaints, felony

Counsel: **[**1]** For Suwannee American Cement LLC, a Delaware limited liability company, VCNA Prestige Ready-Mix Florida, Inc., a Delaware corporation, Votorantim Cimentos North America, Inc., a Delaware corporation, Plaintiffs: Eugene Killian, Jr., LEAD ATTORNEY, Killian & Salisbury, P.C., Iselin, NJ; David Allan Gauntlett, James A. Lowe, PRO HAC VICE, Gauntlett & Associates, Irvine, CA.

For Zurich Insurance Company, Ltd., a Swiss corporation, Zurich American Insurance Company, a New York corporation, Defendants: Andrew J Sloniewsky, Antonia B. Ianniello, PRO HAC VICE, Steptoe & Johnson, LLP (DC), Washington, DC; Matthew J. Gaul, Steptoe & Johnson LLP, New York, NY.

For Amerisure Insurance Company, a Michigan corporation, Defendant: Courtney Elizabeth Scott, LEAD ATTORNEY, Tressler, L.L.P., New York, NY; Abraham Sandoval, Donald E Elder, PRO HAC VICE, Tressler LLP (Chicago), Chicago, IL.

Judges: LOUIS L. STANTON, U.S.D.J.

Opinion by: LOUIS L. STANTON

Opinion

[*612] OPINION AND ORDER

Plaintiff cement manufacturers seek declaratory relief and damages from defendant insurers' refusal to defend them against two antitrust suits prosecuted in the U.S. District Court for the Southern District of Florida, which alleged that plaintiffs fixed prices, **[**2]** allocated customers, restricted supply, and concealed their conspiracy in violation of the Sherman Act, Clayton Act, and the Florida Deceptive and Unfair Trade Practices Act. Defendants' and plaintiffs' cross-motions for summary judgment raise the dispositive question whether clauses covering liability for inflicting "personal and advertising injury" required the insurers to defend the manufacturers against allegations that to conceal their antitrust conspiracy they publicly misstated that market forces, rather than anticompetitive conduct, drove them to increase their prices.

BACKGROUND

In the fall of 2009, direct purchasers and indirect purchasers of cement and concrete filed class action antitrust lawsuits against manufacturers of concrete in Florida, charging them with conspiratorial price-fixing. The direct purchaser class actions were consolidated into the "Direct Purchaser Action," and the indirect purchaser class actions into the "Indirect Purchaser Action," both in the U.S. District Court for the Southern District of Florida. The present plaintiffs (or a predecessor) were among the defendants in both actions, although Suwannee and VCNA were later dismissed from both suits. Both **[**3]** consolidated class actions (the "Underlying Actions") were settled while this motion was pending, so this case concerns only whether the insurers must bear all or part of the costs of defending them.

A. Allegations in the Underlying Actions

The Direct Purchaser Action alleges that the manufacturers engaged in the following anticompetitive actions:

> 1. This case arises from an unlawful conspiracy among vertically-integrated manufacturers of Portland cement ("Cement") and ready-mix concrete and concrete block (together, "Concrete"), to fix, raise, stabilize, and/or maintain prices of and allocate customers and markets for Cement and Concrete in the State of Florida, in violation of *Section 1 of the Sherman Act* and *Section 4 of the Clayton Act*. **[*613]** As a result of this illegal conspiracy, Defendants charged supra-competitive prices for Cement and Concrete sold throughout the State of Florida, thereby injuring Plaintiffs and members of the proposed Classes (defined below). . . .
>
> 5. Defendants conspired to fix the prices of Cement and Concrete at artificially-inflated levels by agreeing on the amount and timing of price increases, restricting supply, allocating customers and territories, and attempting **[**4]** to eliminate competition from the ICPs, among other anticompetitive acts.

Direct Purchaser Second Am. Compl. ¶¶ 1,5. That complaint in paragraphs 100 through 144 elaborates (as does the third amended complaint of the Indirect Purchasers, ¶¶ 1-3,5,124) on the manufacturers' anticompetitive acts and describes the purpose of their false statements on which this present case rests:

> 212. During the Class Period, Defendants repeatedly attributed dramatic price increases to rising fuel and input costs, when in fact these costs did not justify the price increases, or to Cement and Concrete shortages or plant shutdowns, which were in fact artificially-created or nonexistent. These statements were a pretext to conceal Defendants' conspiracy to fix prices of Cement and Concrete.
>
> 213. Defendants' purported reasons for price increases of Cement and Concrete were materially false and misleading and were made for the purpose of concealing Defendants' anticompetitive scheme as alleged in this Complaint.
>
> 214. Plaintiffs and members of the Classes reasonably relied on the Defendants' materially false or misleading explanations for increases in the prices of Cement and Concrete, and plaintiffs and members **[**5]** of the Classes were lulled into believing that the increases were the result of normal competitive market forces, rather than the product of Defendants' collusive activity.

Id. at ¶¶ 212-214 (emphases added).

Those allegations are echoed in the Indirect Purchasers' complaint, ¶¶ 225-26 and particularly ¶ 224(emphasis added):

> 224. During the Class Period, Defendants repeatedly attributed dramatic price increases to rising fuel and input costs, when in fact these costs did not justify the price increases. These statements were a pretext to conceal Defendants' conspiracy to fix prices of Cement and Concrete.

The Underlying Actions claimed that the manufacturers' statements concealed the anticompetitive conspiracy; not that they were misappropriated from some other author, or published to stimulate sales. Yet the latter is the rationale concocted by the manufacturers to require the insurance companies to defend them against the conspiracy charges in the Underlying Actions.

B. The Insurance Policies

All of the plaintiffs seek coverage under two sets of insurance policies: a master commercial general liability policy issued by defendant Zurich Insurance Company ("Zurich") covering the years November **[**6]** 1, 2003 through November 1, 2009, and local commercial general liability policies issued by defendant Zurich American Insurance Company, Ltd. ("Zurich American") covering the period August 1, 2005 through November 1, 2009. Suwannee also seeks coverage under a general commercial liability policy issued by defendant Amerisure Insurance Company ("Amerisure") covering the period April 30, 2004 through April 30, 2005.

1. The Zurich American and Amerisure Policies

The policies issued by Zurich American and Amerisure both define "personal and **[*614]** advertising injury" in the following provision (in identical language because it is an industry standard form):

> 14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
>
> > a. False arrest, detention or imprisonment;
> > b. Malicious prosecution;
> > c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
> >
> > d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages **[**7]** a person's or organization's goods, products or services;
> > e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
> > f. The use of another's advertising idea in your "advertisement"; or
> > g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

Facially, none of those include violations of the federal antitrust laws.

The manufacturers argue that the complaints in the Underlying Actions impose the insurers' duty to defend under subdivision (f) of the "advertising injury" clause because they cover "use of another's advertising idea in your "advertisement."' Specifically, the manufacturers contend that their public misstatements can be viewed as "advertisements" expressing the "advertising idea" of promoting concrete sales by offering false innocuous explanations of their conspiratorially-fixed high prices for concrete. The manufacturers say that it could be, and the clause would cover, that they got that idea from another co-conspirator: thus their use of it would be "the use of another's advertising idea in [their] 'advertisement.'"(The defendant insurers say, and I hold, that in any event the clause does not apply when **[**8]** the "other" acquiesces in its use.)

2. The Zurich Policy

The Zurich policy provides in relevant part:

> **5.12.1 Exclusions**

> This extension[1] does not apply to: . . .
> c) Advertising Injury arising out of the willful violation of criminal or penal statute, regulation or ordinance committed by or with the knowledge or consent of the Insured.

Endorsement No. 11 to the Zurich Policy pp. 1-2.

Conspiracies in restraint of trade are illegal, and every person who engages in one is guilty of a felony under *15 United States Code § 1*.

DISCUSSION

Under New York law, "The duty to defend is triggered whenever the allegations in the complaint fall within the risk covered by the policy; thus, if, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured." *City of Johnstown, N.Y. v. Bankers Standard Ins. Co., 877 F.2d 1146, 1148 (2d Cir. 1989)* (internal quotation marks and brackets omitted). Florida law is similar. *Eastpointe Condo. I Ass'n v. Travelers Cas. & Sur. Co. of Am.., 664 F. Supp. 2d 1281, 1285-86 **[*615]** (S.D. Fla. 2009)* **[**9]** (applying Florida law), aff'd *379 F. App'x 906 (11th Cir. 2010)* ("An insurer's duty to defend is based entirely on the facts and legal theories alleged in the pleadings and claims against the insured," and "As long as the complaint alleges facts which create potential coverage under the policy, a duty to defend is triggered.").

Every court that has examined the issues in this case has concluded that the advertising injury clauses in similar policies do not provide coverage for the defense of the underlying antitrust suits. Not all of the reasons given in all of the lawsuits fit this case sufficiently to merit much discussion in this case, which is disposed of by two clear principles.

A. The Words "Of Another" Mean They Were Misappropriated

To impose the duty to defend under the Zurich and Amerisure policies, the Underlying Actions must plead injury arising out of the manufacturers' "use of another's 'advertising idea' in their advertisement." There is no injury in the use if the "other" consents to it. For there to be the necessary injury, the idea must be misappropriated, i.e., wrongfully taken or made use of "without authority or right," *Am. Employers' Ins. Co. v. DeLorme Pub. Co., 39 F. Supp. 2d 64, 77 (D. Me. 1999)* **[**10]** (internal quotation marks omitted). Thus there is no Advertising Injury here: even if the idea of the false public statements came from a co-conspirator, they were used with his permission. There was no misappropriation.

As stated by the Seventh Circuit Court of Appeals in an identical case, it is

> . . . clear that coverage is limited to liability to the "other" whose advertising idea is used by the insured without the "other's" permission. That is what "misappropriation" is; . . . the understanding [is] that using someone else's idea with that someone's consent is not misappropriation.

Rose Acre Farms v. Columbia Cas. Co., 662 F.3d 765, 768-769 (7th Cir. 2011) (alterations mine).

The District Court in Rose Acre held;

> The policy states that the advertising injury must arise out of one of the enumerated "offenses'—in this case, 'the use of another's advertising idea in your "advertisement.' We are hard-pressed to understand how use of a co-defendant's idea, as opposed to one of the plaintiffs, could be considered an 'offense.' Thus, to adopt Rose Acre's interpretation of the term 'of another,' the Court would effectively be required to re-write the insurance contract, which (as even Rose **[**11]** Acre concedes) courts are loathe to do.

---

[1] The "Advertising Injury" coverage was an addition ("extension") to the general commercial liability coverage and was contained in a November 30, 2005 amendment to the Zurich policy.

Rose Acre Farms, 772 F.Supp.2d 994 (S.D. Ind. 2011), aff'd *662 F.3d 765*.

The Underlying Actions do not allege that the manufacturers used the idea of another, much less misappropriated it, and neither Zurich American nor Amerisure had a duty to defend them against those actions. See *Champion Lab., Inc. v. Am. Home Assur. Co., 09-Civ-7251 (AJS), 2010 U.S. Dist. LEXIS 65498, 2010 WL 2649848 at * 5 (N.D. Ill. Jun. 30, 2010)* ("Under Illinois law, the use of an another's advertising idea "occurs when a business wrongfully takes a competitor's idea about the solicitation of business.' ... no where in the Aftermarket Filters Antitrust Litigation class action complaints do the direct or indirect purchasers accuse Champion of using Purolator's, another competitor's, or plaintiffs' advertising ideas to sell their engine filters"); *Trailer Bridge, Inc. v. Illinois Nat. Ins. Co., 657 F.3d 1135, 1139 (11th Cir. 2011)* ("We reject Trailer Bridge's contention that the use of a co-defendant's (and alleged co-conspirator's) idea-as opposed to the idea of a plaintiff in the underlying antitrust action-could **[*616]** qualify as an 'offense' under the Policy.").

B. The Criminal Acts Exclusion Forecloses [12] Coverage Under the Zurich Policy**

Under New York law, policy exclusions "must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction." *Seaboard Sur. Co. v. Gillette Co., 64 N.Y.2d 304, 311, 476 N.E.2d 272, 275, 486 N.Y.S.2d 873 (1984)*. The burden rests on the insurer to establish that the pleadings to be defended are "cast solely and entirely within the policy exclusions" and are not subject to any other reasonable interpretation which would allow coverage. Id. Similarly, under Florida law, "Where the application of one or more policy exclusions applies to the face of the complaint, no duty to defend exists, even if the complaint alleges facts that would otherwise give rise to a covered claim." *Chicago Title Ins. Co. v. Northland Ins. Co., 31 So. 3d 214, 216 (Fla. Dist. Ct. App. 2010)*.

The criminal acts exclusion in the Zurich policy is specific and clear: it excludes coverage for "Advertising Injury arising out of the willful violation of criminal or penal statute, regulation or ordinance committed by or with the knowledge or consent of the insured."

As stated of the similar provision in Rose Acre **[**13]** Farms:

> Furthermore, the policy does not apply to advertising injury that is "caused by or at the direction of the insured with the knowledge that the act [triggering liability] would violate the rights of another and would inflict 'personal and advertising injury'" or that "arise [es] out of a criminal act committed by or at the direction of any insured." Participation in a conspiracy to violate federal ***antitrust law*** is both deliberate and criminal, and is thus excluded from coverage by both provisions.

662 F.3d at 769 (brackets in original).

It of course may be true that an insurer may have to defend a whole suit where only part of its claims are covered by the policy, but in this case as in *Rose Acre Farms*, "the antitrust suit for which Rose Acre wants a defense makes no claim that the policy could be thought to cover." Ibid.

It makes no difference that the acts for which the manufacturers may be liable have both civil and criminal consequences, and were in Florida pursued only in civil actions. The acts are felonious: "Every person who shall make any contract or engage in any combination or conspiracy . . . shall be deemed guilty of a felony." Section 1 of the Sherman Act, *15 U.S.C. § 1*, **[**14]** reads:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Thus, the acts for which the manufacturers seek a defense are statutorily deemed felonies regardless of whether the Underlying Actions are civil or criminal, and the policy excludes coverage for advertising injury arising out of a criminal violation.

C. Other Reasons

Other courts rejecting claims for defenses of antitrust lawsuits under advertising injury clauses gave additional reasons.

[*617] *Trailer Bridge, Inc. v. Illinois Nat. Ins. Co., 09-CV-1135 (MCR), 2010 U.S. Dist. LEXIS 73970, 2010 WL 2927424 at *5 (M.D. Fla. Jul. 22, 2010)* (brackets in original), aff'd, *657 F.3d 1135 (11th Cir. 2011)* pointed out that the underlying actions did not claim **[**15]** that the "advertising idea" came from another entity, and its purpose was to conceal the conspiracy, not to increase sales. The injury in the underlying actions was antitrust injury, not advertising injury:

> Thus, it is apparent the underlying plaintiffs allege their injuries were caused by higher prices arising from price-fixing, not from the use of another's advertising idea in Trailer Bridge's advertisement. None of the damages sought by the underlying plaintiffs in the Antitrust Complaint are payments requested "because of" an advertising injury, but instead were strictly for antitrust injuries.

*2010 U.S. Dist. LEXIS 73970, [WL] at *7*; see also *Champion Labs., 2010 U.S. Dist. LEXIS 65498, 2010 WL 2649848 at *5* (the underlying antitrust complaints "allege that the engine filter manufacturers were in collusion to fix the price of the engine filters and that the indirect and indirect purchasers' damages arise from the artificial price increases. As such, the plaintiffs' damages in the underlying lawsuit do not arise out of Champion wrongfully taking defendants' or plaintiffs' advertising ideas") ; *Rose Acre Farms, 772 F. Supp. 2d at 1001-1002* ("[T]he Underlying Complaints simply do not allege any injury arising out of any advertising activity **[**16]** on the part of Rose Acre,").

A similar analysis would apply here (the underlying complaints insisted that the purpose of the misstatements was to conceal the conspiracy, pp. 3-4 above), but is unnecessary since the clauses cannot apply in the first place, absent any proof or likelihood of misappropriation.

Sound underwriting principles disfavor indemnification for the insured's intentional misdeeds and criminal acts and, as observed in Rose Acre Farms: "It is hardly likely that parties to an insurance contract would seek to cover such a serious risk [as antitrust litigation] indirectly through an 'advertising injury' provision aimed at misappropriation and other intellectual-property torts." *662 F.3d at 768* (bracketed insertion mine).

CONCLUSION

The motions of defendants Zurich American and Zurich (Dkt. No. 37) and defendant Amerisure (Dkt. No, 40) are granted, and plaintiffs' motions (Dkt. Nos. 46 and 49) are denied.

The Clerk is directed to enter judgment dismissing the complaint with prejudice, with costs and disbursements to the defendants according to law.

Dated: New York, New York

August 2, 2012

/s/ Louis L. Stanton

LOUIS L. STANTON

U.S.D.J.

Franklin County Sheriff's Office v. St. Albans City Police Dep't

Supreme Court of Vermont

August 3, 2012, Filed

No. 11-266

Reporter
2012 VT 62 *; 192 Vt. 188 **; 58 A.3d 207 ***; 2012 Vt. LEXIS 61 ****; 2012 WL 3139694

Franklin County Sheriff's Office v. St. Albans City Police Department

Prior History: **[****1]** On Appeal from Superior Court, Franklin Unit, Civil Division. Robert A. Mello, J.

Disposition: Affirmed.

Core Terms

bid, pricing, predatory, municipal, entities, law enforcement service, protected interest, police service, commerce, proposals, competitors, zone

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

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

HN1[] **Standards of Review, Clearly Erroneous Review**

An appellate court will uphold the trial court's findings unless clearly erroneous. Vt. R. Civ. P. 52(a)(2). Its review of the court's legal conclusions is de novo.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Constitutional Law > The Judiciary > Case or Controversy > General Overview

HN2[] **Justiciability, Case & Controversy Requirements**

Vermont courts are limited to deciding actual cases or controversies. An element of the case-or-controversy requirement is that a plaintiff must have standing—that is, must have suffered a particular injury that is attributable to the defendant and that can be redressed by a court of law. To bring a case, a plaintiff must show (1) injury in fact, (2) causation, and (3) redressability.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN3[] **Justiciability, Standing**

Standing embodies a prudential component of self-imposed judicial limits. Under the principles of prudential standing, a plaintiff's complaint must fall within the zone of interests protected by the law invoked, which requires inquiry into the substance of a plaintiff's claim.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN4[] **Standing, Injury in Fact**

An injury for standing purposes means the invasion of a legally protected interest, not a generalized harm to the public.

Governments > Local Governments > Police Power

Governments > Police Powers

HN5[] **Local Governments, Police Power**

The legislature has created a limited number of governmental entities which are authorized to provide law enforcement services. Constables, municipal police departments, sheriffs' offices, and the Vermont State Police may provide law enforcement services within the state. *Vt. Stat. Ann. tit. 17, § 2646(7)* (appointment or election of constables); *Vt. Stat. Ann. tit. 24, § 1936a* (constable law enforcement authority); *Vt. Stat. Ann. tit. 24, §§ 1931*, *1935* (municipal police departments); *Vt. Stat. Ann. tit. 24, § 291a* (sheriffs' departments); *Vt. Stat. Ann. tit. 20, §§ 1812*, 1911-1915 (state police). No private actors are involved. Municipalities may enter into agreements for the provision of police services. *Vt. Stat. Ann. tit. 24, § 1938* (Cities, towns, incorporated villages, the University of Vermont, sheriffs, and state agencies may enter into agreements to provide for intermunicipal police services).

Governments > Local Governments > Police Power

HN6[] **Local Governments, Police Power**

Vt. Stat. Ann. tit. 24, § 1938 states that various municipalities "may" enter into agreements for the provision of police services, and does not mandate a bidding process. In construing this statute, a court presumes that the legislature intended the plain and ordinary meaning of the statute. The plain, ordinary meaning of the word "may" indicates that a statute is permissive, not mandatory. Thus, municipalities have discretion to enter into agreements for the provision of law enforcement services and may choose the provider in their own manner.

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

HN7[] **Anticompetitive & Predatory Practices, Predatory Pricing**

The Vermont Consumer Fraud Act prohibits engaging in predatory pricing because it is an unfair method of competition in commerce. *Vt. Stat. Ann. tit. 9, §§ 2461c(a)*, *2453*. Commerce is generally defined as the interchange of goods and commodities, especially on a large scale.

Antitrust & Trade Law > General Overview

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

HN8[] **Antitrust & Trade Law**

The United States Supreme Court has noted that federal ***antitrust law*** rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of the economic resources, the lowest prices, the highest quality and the greatest material progress, and that the policy unequivocally laid down by the federal law is competition. Similarly, Vermont's predatory pricing statute is designed to protect the integrity of a competitive marketplace. *Vt. Stat. Ann. tit. 9, § 2461c(a)* (proscribing acts that tend to create or maintain a monopoly or otherwise harm competition); *Vt. Stat. Ann. tit. 9, § 2451* (stating that the purpose of Vt. Stat. Ann. ch. 63 is to complement enforcement of federal law concerning unfair competition).

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

HN9[] **Anticompetitive & Predatory Practices, Predatory Pricing**

There is simply no unrestrained interaction of competitive forces in the Vermont law enforcement market that would require regulation by the predatory pricing statute. It is the protection of competition, rather than the protection of competitors, that antitrust laws are designed to protect, and the statutory scheme relating to law enforcement embraces no element of competition in an open marketplace. This is because the universe of entities that can provide police services is narrowly limited to state actors, and the "market" in which the services are contracted for is wholly restricted.

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

HN10[] **Anticompetitive & Predatory Practices, Predatory Pricing**

Predatory pricing occurs when a firm bites the bullet and forgoes present revenues to drive a competitor from the market, with the intent to recoup lost revenues through higher profits when it succeeds in making the environment less competitive. Predatory pricing in its orthodox form exists where a single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market, or perhaps to deter potential entrants from coming in.

Headnotes/Summary

Summary

Appeal by sheriff's office from judgment in favor of police department in predatory pricing suit brought by sheriff's office. Superior Court, Franklin Unit, Civil Division, *Mello*, J., presiding. *Affirmed*.

Headnotes

VERMONT OFFICIAL REPORTS HEADNOTES

VT1.[] 1.

Constitutional Law > Standing > Generally

Vermont courts are limited to deciding actual cases or controversies. An element of the case-or-controversy requirement is that a plaintiff must have standing — that is, must have suffered a particular injury that is attributable to the defendant and that can be redressed by a court of law. To bring a case, a plaintiff must show (1) injury in fact, (2) causation, and (3) redressability.

VT2.[] 2.

Parties > Generally > Standing

Standing embodies a prudential component of self-imposed judicial limits. Under the principles of prudential standing, a plaintiff's complaint must fall within the zone of interests protected by the law invoked, which requires inquiry into the substance of a plaintiff's claim.

VT3.[] 3.

Constitutional Law > Standing > Injury in Fact

An injury for standing purposes means the invasion of a legally protected interest, not a generalized harm to the public.

VT4.[] 4.

Police > Generally > Authority

The Legislature has created a limited number of governmental entities which are authorized to provide law enforcement services. Constables, municipal police departments, sheriffs' offices, and the Vermont State Police may provide law enforcement services within the state. No private actors are involved. Municipalities may enter into agreements for the provision of police services. *17 V.S.A. § 2646(7)*; *20 V.S.A. §§ 1812*, 1911-1915; *24 V.S.A. §§ 291a*, *1931*, *1935*, *1936a*, *1938a*.

VT5.[] 5.

Constitutional Law > Standing > Standing Not Found

A sheriff's office lacked constitutional standing to assert a predatory pricing claim against a police department in part because it had no legally protected right to “fair competition” with other statutorily created government entities to provide police services to a town. The town was under no obligation to entertain bids for police services in the first instance, or to award the contract to the lowest bidder. *9 V.S.A. § 2461c*; *24 V.S.A. § 1938*.

VT6.[] 6.

Municipal Law > Services > Particular Cases

The statute pertaining to intermunicipal police services states that various municipalities “may” enter into agreements for the provision of police services, and does not mandate a bidding process. The plain, ordinary meaning of the word “may” indicates that a statute is permissive, not mandatory; thus, municipalities have discretion to enter into agreements for the provision of law enforcement services and may choose the provider in their own manner. *24 V.S.A. § 1938*.

VT7.[] 7.

Statutes > Generally > Unambiguous Statutes and Plain Meaning

In construing a statute, a court presumes that the Legislature intended the plain and ordinary meaning of the statute.

VT8.[] 8.

Commerce > Particular Subjects > Unfair Competition

The Vermont Consumer Fraud Act prohibits engaging in predatory pricing because it is an unfair method of competition in commerce. Commerce is generally defined as the interchange of goods and commodities, especially on a large scale. *9 V.S.A. §§ 2453*, *2461c(a)*.

VT9.[] 9.

Constitutional Law > Standing > Standing Not Found

A sheriff's office lacked constitutional standing to assert a predatory pricing claim against a police department which bid to provide police services to a town, as no commerce existed so as to provide the sheriff's office with a legally protected interest. The provision of police services in Vermont occurred outside the realm of commerce because it involved no interchange of goods or commodities on the open market; it was a governmental function provided only by governmental entities for the benefit of the public. *9 V.S.A. §§ 2453*, *2461c(a)*.

VT10.[] 10.

Parties > Generally > Standing

A sheriff's office lacked prudential standing to assert a predatory pricing claim against a police department which bid to provide police services to a town, as its alleged injuries did not fall within the zone of interests to be protected by the predatory pricing statute. The “competitors” were all statutorily created entities, meaning that one entity could not lower its prices so as to put another out of business, nor could potential entrants be deterred from entering the “market” because the statutory scheme allowed no new entrants. *9 V.S.A. § 2461c*.

VT11.[] 11.

Commerce > Particular Subjects > Unfair Competition

The United States Supreme Court has noted that federal ***antitrust law*** rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of the economic resources, the lowest prices, the highest quality and the greatest material progress, and that the policy unequivocally laid down by the federal law is competition. Similarly, Vermont's predatory pricing statute is designed to protect the integrity of a competitive marketplace. *9 V.S.A. §§ 2451*, *2461c(a)*.

VT12.[] 12.

Commerce > Particular Subjects > Unfair Competition

There is simply no unrestrained interaction of competitive forces in the Vermont law enforcement market that would require regulation by the predatory pricing statute. It is the protection of competition, rather than the protection of competitors, that antitrust laws are designed to protect, and the statutory scheme relating to law enforcement embraces no element of competition in an open marketplace: this is because the universe of entities that can provide police services is narrowly limited to state actors, and the “market” in which the services are contracted for is wholly restricted. *9 V.S.A. § 2461c*.

VT13.[] 13.

Commerce > Particular Subjects > Unfair Competition

Predatory pricing occurs when a firm bites the bullet and forgoes present revenues to drive a competitor from the market, with the intent to recoup lost revenues through higher profits when it succeeds in making the environment less competitive. Predatory pricing in its orthodox form exists where a single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market, or perhaps to deter potential entrants from coming in.

Counsel: *Pietro J. Lynn* and *Sean M. Toohey* of *Lynn, Lynn & Blackman, P.C.*, Burlington, for Plaintiff-Appellant.

Geoffrey H. Hand and *Rebecca E. Boucher* of *Dunkiel Saunders Elliott Raubvogel & Hand PLLC*, Burlington, for Defendant-Appellee.

James W. Barlow, Montpelier, for Amicus Curiae Vermont League of Cities and Towns.

Judges: Present: **Reiber, C.J., Skoglund, Burgess and Robinson, JJ., and Kupersmith, Supr. J., Specially Assigned**

Opinion by: REIBER

Opinion

[*P1] [190] [***209]** **Reiber, C.J.** In this predatory pricing suit, the Franklin County Sheriff's Office appeals **[***210]** the trial court's judgment in favor of the St. Albans City Police Department. The Sheriff's Office contends that the City Police Department engaged in an unfair method of competition with the intent to harm competition under the Vermont *Consumer Fraud Act*'s (VCFA) predatory pricing provision, *9 V.S.A. § 2461c*. Specifically, the Sheriff's Office argues that the City Police Department submitted an “artificially low” bid in response to the Town of St. Albans's request for proposals for law enforcement services. We affirm.

[*P2] The City Police Department is a municipal police department located in the **[****2]** City of St. Albans. It handles law enforcement duties within the City and provides dispatch services to emergency response organizations in three counties. The Sheriff's Office provides a wide variety of law enforcement services to local municipalities. For the past twenty-five years, the Sheriff's Office has provided law enforcement services to the Town of St. Albans.

[*P3] In 2007, the Town requested proposals for the provision of law enforcement services to the Town for a three-year contract. The City Police Department's bid of $766,532.25 for the first year **[**191]** included the hiring of six new police officers and one-and-a-half dispatchers to provide the Town with services twenty-four hours a day, seven days a week. The Sheriff's Office's bid was lower, however, and its bid was accepted.

[*P4] In October 2010, in anticipation of the expiration of the Sheriff's Office's contract, the Town again requested proposals for law enforcement services for a three-year contract. The Sheriff's Office's first-year bid was $642,652.97, which included services for twenty-four hours a day, seven days a week. The City Police Department's first-year bid was $486,850.99. Its proposal included staffing the combined **[****3]** service areas of the City and Town with between three and six patrol cars. The City Police Department also proposed hiring three fulltime officers and reassigning a fourth to cover the Town for 120 hours per week. The Department proposed using officers who already worked in the City to supply the additional forty-eight hours, so as to meet the contract's requirement of police coverage twenty-four hours a day, seven days a week. The Town selectboard considered both proposals and in an open meeting voted to award the contract to the City Police Department. The three-year term began July 1, 2011.

[*P5] The Sheriff's Office sued the City Police Department, alleging that the Department violated the VCFA. Specifically, the Sheriff's Office claimed that the Department engaged in predatory pricing by intentionally pricing its law enforcement services in a way that would harm competition under *9 V.S.A. § 2461c*. **[****4]** The Sheriff's Office requested an injunction and damages. The City Police Department opposed the injunction on the grounds that the claim did not meet the elements of the VCFA, the Sheriff's Office did not have standing, and the state-action immunity doctrine barred suit against the Department.

[*P6] The trial court denied the injunction in an order dated April 27, 2011, in which the court made preliminary findings of fact and conclusions of law. The Sheriff's Office filed a motion for interlocutory appeal. While that motion was pending, the parties filed a joint stipulation and motion for entry of final judgment, stating that the court could enter a final decision based on the findings of fact and conclusions of law in the court's April 27 order. The court entered judgment for the City Police Department, making its April 27 order the final decision on the merits.

[*P7] The court rejected the City Police Department's argument that the Sheriff's **[***211]** Office lacked standing. The court acknowledged **[**192]** that the statutes authorizing municipalities to enter into agreements for police services do not require a bidding process. The court concluded, however, that the Sheriff's Office acquired a legally protected **[****5]** interest in competing for the contract when the Town opened the procurement process for bidding. It reasoned that the VCFA applies to all activities in commerce, that the provision of police services falls within the definition of commerce, and that an alternative conclusion would "suggest that even egregious antitrust violations (e.g., price fixing) would be acceptable in what purported to be a competitive bidding process." The court also rejected the City Police Department's argument that the suit was barred by the state-action immunity doctrine, reasoning that the City Police Department was not eligible for immunity, having entered the market as a seller.

[*P8] On the merits, however, the court agreed with the City Police Department. The court concluded that the City Police Department's conduct did not violate the VCFA because there was no intent to harm competition. The court found three legitimate reasons for the reduction between the City Police Department's 2007 and 2010 bids: (1) by 2010, the Department was fully staffed and did not have to hire and train as many new officers as it would have in 2007; (2) the Department was able to perform a better analysis of its costs and capacities **[****6]** by 2010 due to an additional qualified accountant in the finance office; and (3) the Department based its bid on using service zones and a cover car.[1] The court found that the use of the current City Police Department employees to concurrently

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[1] The court described a service zones model as follows. Police patrols perform in overlapping assignment areas within an area that is divided into zones. Between three and six officers are on duty, depending upon the typical intensity of the shift. A shift supervisor divides the service area into two to four zones, depending on the number of officers on duty. The on-duty officers are responsible for calls in their assigned zones, but may leave the area in order to respond to an emergency or "a major incident" in

provide forty-eight hours of coverage to the Town per week would not require the City to pay them overtime. Rather, the court found that police officers are generally not fully occupied during their shifts, and that "combining services for the Town and City allows both municipalities to benefit from using these existing services more efficiently." The **[**193]** court also found that the contract does not require the City or its taxpayers to subsidize the Town because the City would pay its officers the same compensation regardless of whether some of its officers provide coverage to the Town. Ultimately, the court held that the City Police Department did not engage in unfair conduct by taking advantage of efficiencies made possible by geography. The court concluded that the Sheriff's Office had not proven that the City Police Department acted with any intent to harm competition, a prerequisite to a predatory pricing claim. *9 V.S.A. § 2461c*. The Sheriff's **[****7]** Office appeals this decision.

[*P9] The Sheriff's Office argues on appeal that the City Police Department acted unfairly by "supplementing its bid with existing, dedicated resources" and had an intent to harm competition. The Sheriff's Office also argues that the City Police Department subsidized its bid by using City police officers to deliver some Town law enforcement services, and that the **[***212]** court's finding to the contrary is clearly erroneous. The City Police Department **[****8]** contends that the elements of a VCFA claim are not present, that the Sheriff's Office does not have standing, and that its claims are barred by the state-action immunity doctrine.

[*P10] ***HN1***[] We will uphold the trial court's findings unless clearly erroneous. *V.R.C.P. 52(a)(2)*. Our review of the court's legal conclusions is de novo. *Charbonneau v. Gorczyk, 2003 VT 105, ¶ 2, 176 Vt. 140, 838 A.2d 117*.

[*P11] ***VT[1]***[] [1] Because it is a threshold requirement, we first address the question of standing. ***HN2***[] Vermont courts are limited to deciding actual cases or controversies. *In re Constitutionality of House Bill 88, 115 Vt. 524, 529, 64 A.2d 169, 172 (1949)* ("The judicial power, as conferred by the Constitution of this State upon this Court, is the same as that given to the Federal Supreme Court by the United States Constitution; that is, 'the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.' " (quoting *Muskrat v. United States, 219 U.S. 346, 361, 31 S. Ct. 250, 55 L. Ed. 246, 46 Ct. Cl. 656 (1911))*. An element of the case-or-controversy requirement is that a plaintiff must have standing — that is, "must have suffered a particular injury that is attributable to the defendant and that can be redressed **[****9]** by a court of law." *Parker v. Town of Milton, 169 Vt. 74, 77, 726 A.2d 477, **[**194]** 480 (1998)*. To bring a case, a plaintiff must show "(1) injury in fact, (2) causation, and (3) redressability." *Id*.[2]

[*P12] ***VT[2]***[] [2] ***HN3***[] Standing also embodies "a prudential component of self-imposed judicial limits." *Hinesburg Sand & Gravel Co. v. State, 166 Vt. 337, 341, 693 A.2d 1045, 1048 (1997)*. Under the principles of prudential standing, a plaintiff's complaint must " 'fall within the zone of interests protected by the law invoked,' " which requires inquiry into the substance of a plaintiff's claim. *Id*. (quoting *Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984))*.

[*P13] We begin by examining the injury-in-fact element of constitutional standing — the only element at issue. The City Police Department argues that the Sheriff's Office has not suffered an injury in fact. The Sheriff's Office claims injury because it lost the bid due to the City Police Department's artificially low bid. The Sheriff's Office contends that it was unable to compete on equal ground with the City Police Department for the present contract,

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another zone. The supervisor would maintain overlapping responsibility in the cover car. The court found that these operational efficiencies were made possible in part because the Town completely surrounds the City.

[2] The City Police Department urges that antitrust plaintiffs have a heightened burden to demonstrate standing, reasoning that litigation in an antitrust case may be used to restrain, rather than to protect, legitimate competition. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* ("Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."); see also 2 P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶ 335a (2d ed. 2000) (noting that antitrust standing "requires more than the constitutional minimum for the 'case or controversy' " requirement). Because we conclude that the Sheriff's Office does not have constitutional standing, we need not reach the issue of whether the Sheriff's Office is required to prove so-called antitrust **[****10]** standing.

and that, going forward, it will not be able to compete with the City Police Department for future contracts. The Sheriff's Office alleges that the City Police Department shifted municipal resources previously dedicated solely to the City in order to underbid the Sheriff's Office, and that the City Police Department **[****11]** has "effectively eliminate[d] its only competitor **[***213]** for the delivery of law enforcement services."

[*P14] ***VT[3,4]***[] [3, 4] ***HN4***[] An injury for standing purposes means the invasion of a legally protected interest, not a generalized harm to the public. *Parker, 169 Vt. at 78, 726 A.2d at 480*. The interest at issue here is the right to provide police services to the Town. Therefore, it is critical to determine if the Sheriff's Office has a right to **[**195]** compete for providing these services. There are several statutory provisions that impact this determination. ***HN5***[] The Legislature has created a limited number of governmental entities which are authorized to provide law enforcement services. Constables, municipal police departments, sheriffs' offices, and the Vermont State Police may provide law enforcement services within the state. See *17 V.S.A. § 2646(7)* (appointment or election of constables); *24 V.S.A. § 1936a* (constable law enforcement authority); *24 V.S.A. §§ 1931*, *1935* (municipal police departments); *24 V.S.A. § 291a* (sheriffs' departments); *20 V.S.A. §§ 1812*, *1911-1915* (state police). No private actors are involved, and the Sheriff's Office conceded at oral argument that it was unaware of any law that would allow a private **[****12]** entity to contract to provide municipal police services. Municipalities may enter into agreements for the provision of police services. See *24 V.S.A. § 1938(a)* ("Cities, towns, incorporated villages, the University of Vermont, sheriffs, and state agencies may enter into agreements to provide for intermunicipal police services.").

[*P15] ***VT[5-7]***[] [5-7] The Sheriff's Office lacks standing to assert a predatory pricing claim in part because it has no legally protected right to "fair competition" with other statutorily created government entities to provide police services to the Town. ***HN6***[] *Section 1938* states that various municipalities "may" enter into agreements for the provision of police services, and does not mandate a bidding process. In construing this statute, we presume that the Legislature intended the plain and ordinary meaning of the statute. *In re Ambassador Ins. Co., 2008 VT 105, ¶ 18, 184 Vt. 408, 965 A.2d 486*. "The plain, ordinary meaning of the word 'may' indicates that a statute is permissive, not mandatory." *Town of Calais v. Cnty. Road Comm'rs, 173 Vt. 620, 621, 795 A.2d 1267, 1268 (2002)* (mem.). Thus, municipalities have discretion to enter into agreements for the provision of law enforcement **[****13]** services and may choose the provider in their own manner.

[*P16] Consequently, the Town was under no obligation to entertain bids for police services in the first instance, or to award the contract to the lowest bidder. The Town's request for proposals echoed this discretionary power, stating that "[t]he Town reserves the right to make a contract award decision based on the totality of response to this [request for proposals], past performance, and comments from Town residents received by the Selectboard." This language alerted bidders that the Town could award the contract **[**196]** to any bidder for practically any reason, without imposing on the Town or the bidders any "fair procedure" requirement. Thus, neither statutory law nor the Town's request afforded the Sheriff's Office any legally protected interest.

[*P17] ***VT[8,9]***[] [8, 9] We disagree with the trial court's conclusion that, once the Town put the contract up for bid, the Sheriff's Office was entitled to a fair procurement process through competitive bidding because providing police services is included in the VCFA definition of commerce. ***HN7***[] The VCFA prohibits engaging in predatory pricing because it is an unfair method of competition in commerce. See *9 V.S.A. §§ 2461c(a)*, **[****14]** *2453*. Commerce is generally defined as the "interchange of goods and **[***214]** commodities, especially on a large scale." *Carter v. Gugliuzzi, 168 Vt. 48, 54, 716 A.2d 17, 22 (1998)* (quotation omitted). We conclude that no commerce existed in this case as would provide the Sheriff's Office with a legally protected interest. The subject of the bidding — i.e., the "commodity" to be provided — is a purely public function. That function, as noted, is carried out only by statutorily authorized public entities. Fundamentally, then, the provision of police services in Vermont occurs outside the realm of commerce because it involves no interchange of goods or commodities on the open market. It is a governmental function provided only by governmental entities for the benefit of the public. We therefore conclude that the Sheriff's Office has no legally protected interest because the provision of law enforcement services does not occur within commerce for the purposes of the VCFA.

[*P18] *VT[10]*[] [10] Furthermore, the claim does not meet the requirements of prudential standing, which demands that the Sheriff's Office's complaint fall within the zone of interests protected by the predatory pricing statute. See *Hinesburg Sand & Gravel Co., 166 Vt. at 341, 693 A.2d at 1048*. **[****15]** Thus, we examine whether the predatory pricing statute was intended to encompass claims by one governmental entity against another outside the realm of a traditional competitive marketplace.

[*P19] *VT[11]*[] [11] *HN8*[] The United States Supreme Court has noted that federal ***antitrust law*** "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress," and that "the policy unequivocally laid down by the [federal law] is competition." *N. Pac. Ry. v.* ***[**197]*** *United States, 356 U.S. 1, 4, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. Similarly, Vermont's predatory pricing statute is designed to protect the integrity of a competitive marketplace. See *9 V.S.A. § 2461c(a)* (proscribing acts that "tend[] to create or maintain a monopoly or otherwise harm[] competition"); see also *id*. *§ 2451* (stating that the purpose of chapter 63 is to complement enforcement of federal law concerning unfair competition).

[*P20] *VT[12]*[] [12] In the context of this case, *HN9*[] there is simply no "unrestrained interaction of competitive forces" in the Vermont law enforcement market that would require regulation by the predatory pricing statute. *N. Pac. Ry., 356 U.S. at 4*. **[****16]** It is the protection of competition, rather than the protection of competitors, that antitrust laws are designed to protect, *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*, and the statutory scheme relating to law enforcement embraces no element of competition in an open marketplace. This is because the universe of entities that can provide police services is narrowly limited to state actors, and the "market" in which the services are contracted for is wholly restricted.

[*P21] *VT[13]*[] [13] More specifically, *HN10*[] predatory pricing occurs when a firm "bites the bullet and forgoes present revenues to drive a competitor from the market," with the intent "to recoup lost revenues through higher profits when it succeeds in making the environment less competitive." *Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vt., Inc., 845 F.2d 404, 407 (2d Cir. 1988)*. Predatory pricing in its orthodox form exists where a "single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market, or perhaps to deter potential entrants from coming in." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 584 n.8, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Here, the "competitors" **[****17]** **[***215]** are all statutorily created entities, meaning that one entity cannot lower its prices so as to put another out of business, nor can potential entrants be deterred from entering the "market" because the statutory scheme allows no new entrants. Although there is competition within a limited sphere as between the statutorily empowered entities, there is no threat of monopolization by any one of them. Thus, the Sheriff's Office's injuries alleged in the complaint do not fall within the zone of interests to be protected by Vermont's predatory pricing statute. In sum, the Sheriff's Office was not denied something in which it had a legally **[**198]** protected interest, nor is its claim within the zone of interests protected by the statute, and it therefore lacks constitutional and prudential standing.

Affirmed.

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[Hinds County v. Wachovia Bank N.A.](#)

United States District Court for the Southern District of New York

August 3, 2012, Decided; August 6, 2012, Filed

08 Civ. 2516 (VM); 08 MDL No. 1950 (VM)

Reporter

885 F. Supp. 2d 617 *; 2012 U.S. Dist. LEXIS 112780 **; 2012 WL 3245500

HINDS COUNTY, MISSISSIPPI, Plaintiff, - against - WACHOVIA BANK N.A., et al., Defendants. IN RE MUNICIPAL DERIVATIVES ANTITRUST LITIGATION

Subsequent History: Motion denied by *Hinds County v. Wachovia Bank N.A. (In re Mun. Derivatives Antitrust Litig.), 2013 U.S. Dist. LEXIS 100010 (S.D.N.Y., July 9, 2013)*

Prior History: *United States v. Carollo, 2012 U.S. Dist. LEXIS 50568 (S.D.N.Y., Apr. 9, 2012)*
Hinds County v. Wachovia Bank N.A. (In re Mun. Derivatives Antitrust Litig.), 811 F. Supp. 2d 910, 2011 U.S. Dist. LEXIS 106276 (S.D.N.Y., 2011)

Core Terms

Indictment, Plaintiffs', conspiracy, inquiry notice, antitrust, municipal, co-conspirators, amend, statute of limitations, derivatives, tolling, futile, propose an amendment, media, alleged conspiracy, limitations, alleges, undue delay, investigations, antitrust violation, tolling statute, leave to amend, municipal bond, probable, brokers, limitations period, former employee, anti trust law, institutions, articles

Counsel: **[**1]** For Municipal Derivatives Antitrust Litigation, In Re: Jeffrey B. Gittleman, LEAD ATTORNEY, Barrack, Rodos & Bacine, Philadelphia, PA; Marc M. Seltzer, LEAD ATTORNEY, PRO HAC VICE, Susman Godfrey, L.L.P., Los Angeles, CA.

For Hinds County, Mississippi, on behalf of itself and all others similarly situated State and municipal entities, Plaintiff: Jeffrey B. Gittleman, LEAD ATTORNEY, Barrack, Rodos & Bacine, Philadelphia, PA; Roland Gustaf Riopelle, LEAD ATTORNEY, Sercarz & Riopelle, L.L.P., New York, NY; Arun Srinivas Subramanian, Susman Godfrey LLP (NYC), New York, NY; David R. Woodward, PRO HAC VICE, Heinrichson, Siegel, P.L.L.C., Washington, DC; Dylan J. McFarland, Vincent J. Esades, Heins Mills & Olson, P.L.C., Minneapolis, MN; Jack A. Simms, Jonathan M. Shaw, Matthew Friedrich, PRO HAC VICE, William A. Isaacson, Boies, Schiller & Flexner LLP (D.C.), Washington, DC; Magda Maria Jimenez, Boies, Schiller & Flexner, LLP(NYC), New York, NY; William A. Isaacson, Boies, Schiller & Flexner LLP (D.C.), Washington, DC.

For Berkeley County, South Carolina, Charleston County School District, South Carolina, City of Chicago, Illinois, City of Fall River, Massachusetts, Plaintiffs: Christopher **[**2]** J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC (DC), Washington, DC; Jeffrey B. Gittleman, LEAD ATTORNEY, Barrack, Rodos & Bacine, Philadelphia, PA; Jonathan Watson Cuneo, LEAD ATTORNEY, Cuneo Gilbert & LaDuca, LLP, New York, NY; Jonathan M. Shaw, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner LLP (D.C.), Washington, DC; Michael D. Hausfeld, LEAD ATTORNEY, PRO HAC VICE, Hausfeld, LLP (DC), Washington, DC; Ricahrd A. Koffman, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, PLLC, Washington, DC; Tanya S. Chutkan, LEAD ATTORNEY, Boies, Schiller & Flexner LLP (D.C.), Washington, DC; Arun Srinivas Subramanian, Susman Godfrey LLP (NYC), New York, NY; David R. Woodward, PRO HAC VICE, Heinrichson, Siegel, P.L.L.C., Washington, DC; Dylan J. McFarland, Vincent J. Esades, Heins Mills & Olson, P.L.C., Minneapolis, MN.

For Fairfax County, Virginia, Plaintiff: Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC (DC), Washington, DC; Jeffrey B. Gittleman, LEAD ATTORNEY, Barrack, Rodos & Bacine, Philadelphia, PA; Jon T. King, LEAD ATTORNEY, Michael P. Lehmann, Hausfeld LLP(SF), San Francisco, CA; Jonathan Watson Cuneo, LEAD ATTORNEY, **[**3]** Cuneo Gilbert & LaDuca, LLP, New York, NY; Jonathan M. Shaw, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner LLP (D.C.), Washington, DC; Michael D. Hausfeld, LEAD ATTORNEY, PRO HAC VICE, Hausfeld, LLP (DC), Washington, DC; Ricahrd A. Koffman, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, PLLC, Washington, DC; Tanya S. Chutkan, LEAD ATTORNEY, Boies, Schiller & Flexner LLP (D.C.), Washington, DC; Arnold Levin, Levin, Fishbein, Sedran & Berman, Philadelphia, PA; Arun Srinivas Subramanian, Susman Godfrey LLP (NYC), New York, NY; Christopher L. Lebsock, Cohen, Milstein, Haufeld,&Toll, P.L.L.C(SF), San Francisco, CA; David R. Woodward, PRO HAC VICE, Heinrichson, Siegel, P.L.L.C., Washington, DC; Dylan J. McFarland, Vincent J. Esades, Heins Mills & Olson, P.L.C., Minneapolis, MN; Henry A. Cirillo, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Laurence S. Berman, PRO HAC VICE, Levin, Fishbein, Sedran & Berman, Philadelphia, PA; Robert Gerard Eisler, Hausfeld L.L.P. (PA), Philadelphia, PA.

For State of Mississippi, Plaintiff: Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC (DC), Washington, DC; Jeffrey B. Gittleman, LEAD **[**4]** ATTORNEY, Barrack, Rodos & Bacine, Philadelphia, PA; Jonathan Watson Cuneo, LEAD ATTORNEY, Cuneo Gilbert & LaDuca, LLP, New York, NY; Jonathan M. Shaw, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner LLP (D.C.), Washington, DC; Michael D. Hausfeld, LEAD ATTORNEY, PRO HAC VICE, Hausfeld, LLP (DC), Washington, DC; Ricahrd A. Koffman, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, PLLC, Washington, DC; Tanya S. Chutkan, LEAD ATTORNEY, Boies, Schiller & Flexner LLP (D.C.), Washington, DC; Arun Srinivas Subramanian, Susman Godfrey LLP (NYC), New York, NY; Dylan J. McFarland, Vincent J. Esades, Heins Mills & Olson, P.L.C., Minneapolis, MN; Jack A. Simms, Matthew Friedrich, PRO HAC VICE, William A. Isaacson, Boies, Schiller & Flexner LLP (D.C.), Washington, DC; Magda Maria Jimenez, Boies, Schiller & Flexner, LLP(NYC), New York, NY; Robert Gerard Eisler, Hausfeld L.L.P. (PA), Philadelphia, PA.

For County of Alameda, Plaintiff: Jeffrey B. Gittleman, LEAD ATTORNEY, Barrack, Rodos & Bacine, Philadelphia, PA; Andrew Scirica Kingsdale, Lieff Cabraser Heimann & Bernstein, LLP(SF), San Francisco, CA; Arun Srinivas Subramanian, Susman Godfrey LLP (NYC), New York, NY; David R. Woodward, PRO **[**5]** HAC VICE, Heinrichson, Siegel, P.L.L.C., Washington, DC; Dylan J. McFarland, Vincent J. Esades, Heins Mills & Olson, P.L.C., Minneapolis, MN; Eric B. Fastiff, Joseph Richard Saveri, PRO HAC VICE, Richard M. Heimann, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; G. Scott Emblidge, James A. Quadra, Sylvia Sokol, Moscone, Emblidge & Quadra, LLP, San Francisco, CA.

For Central Bucks School District, City of Baltimore, Maryland, Bucks County Water And Sewer Authority, Plaintiffs: Jeffrey B. Gittleman, LEAD ATTORNEY, Barrack, Rodos & Bacine, Philadelphia, PA; Arun Srinivas Subramanian, Susman Godfrey LLP (NYC), New York, NY; David R. Woodward, PRO HAC VICE, Heinrichson, Siegel, P.L.L.C., Washington, DC; Dylan J. McFarland, Vincent J. Esades, Heins Mills & Olson, P.L.C., Minneapolis, MN; Eugene A. Spector, Jeffrey L. Spector, William G. Caldes, PRO HAC VICE, Spector, Roseman & Kodroff Willis, P.C. (PA), Philadelphia, PA; Pamela A. Markert, Gold Bennett Cera & Sidener, LLP, San Francisco, CA; Robert Gerard Eisler, Hausfeld L.L.P. (PA), Philadelphia, PA.

For Plaintiff Class, Plaintiff: Bernard Persky, Labaton Sucharow, LLP, New York, NY; David R. Woodward, PRO HAC VICE, Heinrichson, **[**6]** Siegel, P.L.L.C., Washington, DC; Eugene A. Spector, William G. Caldes, PRO HAC VICE, Spector, Roseman & Kodroff Willis, P.C. (PA), Philadelphia, PA.

For City of Fresno, California, Fresno County Financing Authority, Plaintiffs: David R. Woodward, PRO HAC VICE, Heinrichson, Siegel, P.L.L.C., Washington, DC; Eric B. Fastiff, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA.

For State of West Virginia, ex rel., Plaintiff: Joshua Israel Barrett, Sean Patrick McGinley, LEAD ATTORNEY, PRO HAC VICE, DiTrapano, Barrett, & DiPiero, P.L.L.C., Charleston, WV; Rudolph L. DiTrapano, LEAD ATTORNEY, DiTrapano Barrett & DiPiero, Charleston, WV; Christopher B. Hall, PRO HAC VICE, COOK, HALL & LAMPROS, LLP, Atlanta, GA; David R. Woodward, PRO HAC VICE, Heinrichson, Siegel, P.L.L.C., Washington, DC; William G. Caldes, PRO HAC VICE, Spector, Roseman & Kodroff Willis, P.C. (PA), Philadelphia, PA.

For City of Stockton, City of Los Angeles, County of San Diego, County of San Mateo, Contra Costa County, Plaintiffs: Imtiaz A. Siddiqui, LEAD ATTORNEY, Cotchett, Pitre & McCarthy LLP, New York, NY; David R. Woodward, PRO HAC VICE, Heinrichson, Siegel, P.L.L.C., Washington, DC.

For Redevelopment **[**7]** Agency of the City and County of San Francisco, Plaintiff: James Brian Morales, LEAD ATTORNEY, SF Redevelopment Agency, San Francisco, CA; Joseph W. Cotchett, LEAD ATTORNEY, Cotchett, Pitre & Simon, Burlingame, CA; Nanci E. Nishimura, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, Burlingame, CA; David R. Woodward, PRO HAC VICE, Heinrichson, Siegel, P.L.L.C., Washington, DC.

For City of Redwood City, Plaintiff: Joseph W. Cotchett, LEAD ATTORNEY, Cotchett, Pitre & Simon, Burlingame, CA; Nanci E. Nishimura, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, Burlingame, CA; Roy Charles Abrams, LEAD ATTORNEY, Attorney at Law, San Mateo, CA; David R. Woodward, PRO HAC VICE, Heinrichson, Siegel, P.L.L.C., Washington, DC.

For City of Richmond, Plaintiff: Everett Jenkins, LEAD ATTORNEY, City of Richmond, City Attorney, Richmond, CA; Joseph W. Cotchett, LEAD ATTORNEY, Cotchett, Pitre & Simon, Burlingame, CA; Nanci E. Nishimura, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, Burlingame, CA; David R. Woodward, PRO HAC VICE, Heinrichson, Siegel, P.L.L.C., Washington, DC.

For East Bay Municipal Utility District, Plaintiff: Craig Stephen Spencer, LEAD ATTORNEY, Office of General Counsel, East Bay Municipal Utility **[**8]** District, Oakland, CA; Derek Todd McDonald-Juresa, LEAD ATTORNEY, Attorney at Law, Oakland, CA; Joseph W. Cotchett, LEAD ATTORNEY, Cotchett, Pitre & Simon, Burlingame, CA; Jylana Collins, LEAD ATTORNEY, City of Richmond, Office of City Attorney, Richmond, CA; Nanci E. Nishimura, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, Burlingame, CA; David R. Woodward, PRO HAC VICE, Heinrichson, Siegel, P.L.L.C., Washington, DC.

For City Of San Jose, The San Jose Redevelopment Agency, Plaintiffs: J. Richard Doyle, Nora Valerie Frimann, LEAD ATTORNEY, Office of the City Attorney, City of San Jose, San Jose, Ca; Joseph W. Cotchett, LEAD ATTORNEY, Cotchett, Pitre & Simon, Burlingame, CA; Louise H Renne, LEAD ATTORNEY, PRO HAC VICE, Renne Sloan Holtzman Sakai LLP, San Francisco, CA; Nanci E. Nishimura, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, Burlingame, CA; David R. Woodward, PRO HAC VICE, Heinrichson, Siegel, P.L.L.C., Washington, DC.

For Mississippi Department of Transportation, University of Mississippi, University of Mississippi Medical Center, University of Southern Mississippi, Plaintiffs: David R. Woodward, PRO HAC VICE, Heinrichson, Siegel, P.L.L.C., Washington, DC; Jeffrey L. Spector, PRO **[**9]** HAC VICE, Spector, Roseman & Kodroff Willis, P.C. (PA), Philadelphia, PA.

For Active Retirement Community, Inc., Plaintiff: Barbara J. Hart, Lowey Dannenberg Cohen & Hart, P.C., White Plains, NY; David R. Woodward, PRO HAC VICE, Heinrichson, Siegel, P.L.L.C., Washington, DC; Deborah A. Rogozinski, Lowey, Dannenberg, Bemporad & Selinger, P.C., White Plains, NY; Imtiaz A. Siddiqui, LEAD ATTORNEY, Cotchett, Pitre & McCarthy LLP, New York, NY; Joseph W. Cotchett, LEAD ATTORNEY, Cotchett, Pitre & Simon, Burlingame, CA; Nanci E. Nishimura, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, Burlingame, CA; Peter Dexter St. Philip, Jr, Scott Vincent Papp, Lowey Dannenberg Cohen & Hart, P.C., White Plains, NY.

For Los Angeles Unified School District, Plaintiff: Joseph Winters Cotchett, Cotchett Pitre and McCarthy, Burlingame, CA; Louise H Renne, PRO HAC VICE, Renne Sloan Holtzman Sakai LLP, San Francisco, CA; Nanci E. Nishimura, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, Burlingame, CA.

For Peconic Landing at Southhold, Inc., Plaintiff: Barbara J. Hart, Lowey Dannenberg Cohen & Hart, P.C., White Plains, NY; Imtiaz A. Siddiqui, LEAD ATTORNEY, Cotchett, Pitre & McCarthy LLP, New York, NY; Peter Dexter St. **[**10]** Philip, Jr, Scott Vincent Papp, Lowey Dannenberg Cohen & Hart, P.C., White Plains, NY.

For East Bay Delta Housing & Finance Agency, Plaintiff: Eric B. Fastiff, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA.

For Utah Housing Corporation, Consolidated Plaintiff: Timothy C. Houpt, LEAD ATTORNEY, Billie J. Siddoway, Jones Waldo Holbrook & McDonough (SLC), Salt Lake City, UT.

For Bank of America N.A., Defendant: Richard T. Marooney, Jr, LEAD ATTORNEY, Kana Ellis Caplan, King & Spalding LLP (NYC), New York, NY; Kevin R. Sullivan, King & Spalding llp, washington, dc; Patricia L. Maher, Shannon M. Kasley, King & Spalding LLP (DC), Washington, DC.

For Bear, Stearns & Co., Inc., Defendant: Thomas C. Rice, LEAD ATTORNEY, Janelle Louise Filson, Joseph Franklin Wayland, Peter Coyne Thomas, Simpson Thacher & Bartlett LLP (NY), New York, NY; Annette C. Rizzi, Meiselman, Denlea, Packman, Carton & Eberz P.C.(WPl), White Plains, NY.

For First Southwest Company, Defendant: Alden Lewis Atkins, LEAD ATTORNEY, Vinson & Elkins L.L.P.(Washington D.C.), Washington, DC.

For GE Funding Capital Market Services, Inc., Trinity Funding Co., LLC, Defendants: John Arak Freedman, Arnold & Porter, **[**11]** LLP (DC), Washington, DC.

For George K. Baum & Co., Defendant: John Vincent McDermott, LEAD ATTORNEY, PRO HAC VICE, Brownstein Hyatt Farber Schreck, LLP, Denver, CO; Christopher Calderon Javillonar, Bryan Cave, LLP (MO), Kansas City, MO; Michael William Byrne, Brownstein Hyatt Farber Schreck, LLP (CO), Denver, CO; Michael D. Hoke, PRO HAC VICE, Brownstein Hyatt Farber Schreck, LLP (CO), Denver, CO; William Perry Brandt, Bryan Cave LLP, Kansas City, MO.

For Investment Management Advisory Group, Inc., Defendant: Timothy E. Hoeffner, DLA Piper US LLP (Philadelphia), Philadelphia, PA.

For JP Morgan Chase & Co., Defendant: Joseph Franklin Wayland, Janelle Louise Filson, Peter Coyne Thomas, Simpson Thacher & Bartlett LLP (NY), New York, NY; Thomas C. Rice, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP (NY), New York, NY; Annette C. Rizzi, Meiselman, Denlea, Packman, Carton & Eberz P.C.(WPl), White Plains, NY; Ryan Anthony Kane, Simpson Thacher & Bartlett LLP, New York, NY.

For Morgan Keegan & Co., Inc., Defendant: Joseph D. Edmondson, Jr., LEAD ATTORNEY, PRO HAC VICE, Foley & Lardner LLP (DC), Washington, DC; Dana Christina Rundlof, Foley & Lardner, LLP, New York, NY.

For Morgan Stanley, Defendant: **[**12]** Shepard Goldfein, Skadden, Arps, Slate, Meagher & Flom LLP (NYC), New York, NY.

For National Westminster Bank PLC, Defendant: Harry Simeon Davis, Mark David Richardson, Michael Everett Swartz, LEAD ATTORNEY, Taleah Esperanza Jennings, Schulte Roth & Zabel LLP (NY), New York, NY; Jay N. Fastow, LEAD ATTORNEY, Dickstein Shapiro LLP (NYC), New York, NY.

For Natixis Funding Corp., Defendant; Howard Jeffrey Rubin, LEAD ATTORNEY, Bruce Martin Ginsberg, James R. Levine, Paul Francis Corcoran, Peggy Senyie Chen, Davis & Gilbert LLP, New York, NY; Gustavo Manuel Gonzalez, Willkie Farr & Gallagher LLP (NY), New York, NY.

For Piper Jaffray & Co., Defendant: J David Jackson, LEAD ATTORNEY, Dorsey & Whitney, LLP (MN), Minneapolis, MN; F. Matthew Ralph, Kirsten E. Schubert, PRO HAC VICE, Dorsey & Whitney, LLP (MN), Minneapolis, MN.

For Societe Generale SA, Defendant: Matthew D. Ingber, Michael Orth Ware, Paula Garrett Lin, Steven Wolowitz, LEAD ATTORNEY, Mayer Brown LLP, New York, NY; Richard Marc Steuer, LEAD ATTORNEY, Mayer Brown LLP(DC), Washington, DC.

For Sound Capital Management, Inc., Defendant: Nicole M. Moen, Fredrikson & Byron, P.A., Minneapolis, MN.

For UBS AG, UBS Financial Services Inc., **[**13]** Defendants: Jesse T. Smallwood, Williams & Connolly LLP, Washington, DC.

For Wachovia Bank N.A., Defendant: David Bruce Tulchin, LEAD ATTORNEY, Stephanie G Wheeler, Sullivan and Cromwell, LLP(NYC), New York, NY.

For Winters & Co. Advisors, LLC, Defendant: Marc Elliott Masters, Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg, Los Angeles, CA.

For Bank of America, Defendant: Kevin R. Sullivan, LEAD ATTORNEY, King & Spalding llp, washington, dc; Kana Ellis Caplan, King & Spalding LLP (NYC), New York, NY; Patricia L. Maher, Shannon M. Kasley, King & Spalding LLP (DC), Washington, DC.

For JP Morgan Chase Bank, Bear Sterns Companies, Inc., Defendants: Annette C. Rizzi, Meiselman, Denlea, Packman, Carton & Eberz P.C.(WPl), White Plains, NY; Janelle Louise Filson, Simpson Thacher & Bartlett LLP (NY), New York, NY.

For The Goldman Sachs Group, Inc., Defendant: Evan A. Davis, LEAD ATTORNEY, Victor L. Hou, Cleary Gottlieb Steen & Hamilton, LLP(NYC), New York, NY.

For Wells Fargo & Co., Inc., Defendant: Stephanie G Wheeler, Sullivan and Cromwell, LLP(NYC), New York, NY.

For Natixis Funding Corp., f/k/a IXIS Funding Corp., Defendant: Howard Jeffrey Rubin, James R. Levine, LEAD ATTORNEY, Davis **[**14]** & Gilbert LLP, New York, NY; Gustavo Manuel Gonzalez, Willkie Farr & Gallagher LLP (NY), New York, NY.

For CDR, Defendant: Richard William Beckler, LEAD ATTORNEY, Howrey LLP (DC), Washington, DC.

For National Westminster Bank Plc, Defendant: Mark David Richardson, Michael Everett Swartz, LEAD ATTORNEY, Taleah Esperanza Jennings, Schulte Roth & Zabel LLP (NY), New York, NY.

For Syncora Guarantee Inc., Syncora Holdings Ltd., Defendants: Elliot Greenfield, LEAD ATTORNEY, Debevoise & Plimpton, LLP (NYC), New York, NY.

For Bayerische Landesbank Girozentrale, Defendant: Mark Robert Hellerer, Pillsbury Winthrop Shaw Pittman, LLP (NY), New York, NY.

For Merrill Lynch & Co., Inc., Defendant: Kevin R. Sullivan, LEAD ATTORNEY, King & Spalding llp, washington, dc.

For JPMorgan Securities, Inc., Defendant: Thomas C. Rice, LEAD ATTORNEY, Peter Coyne Thomas, Simpson Thacher & Bartlett LLP (NY), New York, NY; Ryan Anthony Kane, Simpson Thacher & Bartlett LLP, New York, NY.

For Natixis S.A., f/k/a Ixis CIB, f/k/a CDC Finance-CDC IXIS, Defendant: Gustavo Manuel Gonzalez, Willkie Farr & Gallagher LLP (NY), New York, NY.

For General Electric Capital Corporation, Trinity Plus Funding Co., LLC, Defendants: Craig **[**15]** A. Stewart, Arnold & Porter, LLP, New York, NY; Douglas Lewis Wald, John Arak Freedman, Laura Cofer Taylor, Sonia Kuester Pfaffenroth, Arnold & Porter, LLP (DC), Washington, DC.

For Westdeutsche Landesbank, Consolidated Defendant: Alejandra De Urioste, Anthony Mathias Candido, James Drew Miller, Clifford Chance US, LLP (NYC), New York, NY.

For James W. Giddens, for the SIPA Liquidation of Lehman Brothers, Trustee: Sarah Loomis Cave, LEAD ATTORNEY, Hughes Hubbard & Reed LLP (NY), New York, NY.

For City of Oakland, Intervenor: Eric B. Fastiff, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Andrew Scirica Kingsdale, Lieff Cabraser Heimann & Bernstein, LLP(SF), San Francisco, CA; G. Scott Emblidge, James A. Quadra, Sylvia Sokol, Moscone, Emblidge & Quadra, LLP, San Francisco, CA; Joseph Richard Saveri, PRO HAC VICE, Richard M. Heimann, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA.

Judges: VICTOR MARRERO, United States District Judge.

Opinion by: VICTOR MARRERO

Opinion

[*621] **DECISION AND ORDER**

VICTOR MARRERO, United States District Judge.

By letter dated March 5, 2012, Class Plaintiffs requested leave to file a Third Amended Complaint in this action. (Docket No. 1678.) **[**16]** Among other changes, the proposed Third Amended Complaint would add as named defendants Trinity Funding Co. LLC and GE Funding Capital Market Services Group (the "GE Defendants"). The Court deems the March 5, 2012 letter to be Class Plaintiffs' motion to amend the complaint as set forth therein.

By letters dated March 6, 2012 (Docket No. 1679) and March 14, 2012 (Docket No. 1683), the GE Defendants opposed Class Plaintiffs' motion. The GE Defendants argued that, in light of previous decisions in this matter that dismissed on statute of limitations grounds other plaintiffs' claims against the GE Defendants, Class Plaintiffs' proposed claims are likewise time-barred. Class Plaintiffs responded, by letter dated March 15, 2012 (Docket No. 1682), citing *15 U.S.C. § 16 (i)* ("*§ 16 (i)*") for the first time in this litigation. The basic function of *§ 16(i)* is to toll the statute of limitations as to private civil antitrust claims during the pendency of government antitrust proceedings related to the same subject matter. See *15 U.S.C. § 16(i)*.

By letter dated March 16, 2012 (Docket No. 1685), the GE Defendants argued against the application of *§ 16 (i)* to private civil defendants who have been **[**17]** prosecuted under non-antitrust criminal statutes and asserted that *§ 16 (i)* could not reopen a limitations period which began and concluded prior to the initiation of the relevant government proceeding. Class Plaintiffs submitted a further letter, dated March 19, 2012, disputing these points. (Docket No. 1684.)

Because *§ 16 (i)* had not been addressed by the parties in any prior briefing to this Court, on April 3, 2012, the Court ordered Class Plaintiffs and the GE Defendants to submit further letter-briefs on the applicability of *§ 16(i)* to the Class Plaintiffs' proposed additional claims. (Docket No. 1687.) On April 13, 2012, each party did so (see Docket Nos. 1709 & 1710), supplementing and refining the arguments presented in their earlier submissions described above.

[*622] Now, with the benefit of these submissions and for the reasons discussed below, the Court finds that *§ 16(i)* operates to toll the statute of limitations as to Class Plaintiffs' proposed claims against the GE Defendants and, accordingly, finds that Class Plaintiffs' proposed amendments would not be futile. Further, the Court finds that there has been no undue delay in bringing the amendments. For these reasons, the Court **[**18]** GRANTS Class Plaintiffs' request to amend.

I. BACKGROUND[1]

This multidistrict litigation centers upon an alleged conspiracy among various financial institutions and brokerage firms to illegally rig bids, limit competition, and fix prices in the trillion-dollar municipal derivatives market. The litigation has continued for over four years and the Court has issued numerous opinions on various issues; familiarity with those opinions and the course of this litigation is presumed.[2]

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[1] "For purposes of this motion to amend, the Court accepts all well-pleaded, nonconclusory factual allegations as true and treats them in the best light for the Plaintiff." *Bartels v. Inc. Vill. of Lloyd Harbor, No. 10 Civ. 5076, 2012 U.S. Dist. LEXIS 92351, 2012 WL 2576142, at *1 (E.D.N.Y. July 2, 2012)* (citing *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *Selevan v. N.Y. Thruway Auth., 584 F.3d 82, 88 (2d Cir. 2009))*.

[2] Specifically, the Court presumes familiarity with the following decisions: the September 7, 2011 Decision and Order, *Hinds Cnty. v. Wachovia Bank, N.A., 811 F. Supp. 2d 910 (S.D.N.Y. 2011)* ("Hinds County V"); the June 23, 2011 Decision and Order, *Hinds Cnty. v. Wachovia Bank, N.A., 790 F. Supp. 2d 121 (S.D.N.Y. 2011)* ("Hinds County **[**19]** IV") ; the April 29, 2011 Decision and Order, *Hinds Cnty. v. Wachovia Bank, N.A., 790 F. Supp. 2d 106 (S.D.N.Y. 2011)*; the April 26, 2010 Decision and Order, ***Hinds Cnty. v. Wachovia Bank, N.A., 708 F. Supp. 2d 348 (S.D.N.Y. 2010)***; and the March 25, 2010 Decision and Order, ***Hinds Cnty. v. Wachovia Bank, N.A., 700 F. Supp. 2d 378 (S.D.N.Y. 2010)*** ("Hinds County I").

To provide a measure of context for this particular dispute, the Court will broadly and briefly recapitulate some of the relevant facts. Class Plaintiffs allege a nationwide conspiracy "to fix, maintain or stabilize the price of, and to rig bids and allocate customers and markets for" government investment contracts and other derivative financial products linked to municipal bonds. (Second Consolidated Am. Class Action Compl., Docket No. 450, June 22, 2009 ("SCACAC") ¶ 1.) The operative complaint alleges that brokers of municipal derivatives, who were hired by municipal bond issuers, combined and conspired with certain providers of those investments to fix the prices charged for the transactions. The effect of these actions, according to Class Plaintiffs, was to increase the portion of the returns on those derivative instruments **[**20]** that would be retained by the financial institutions and brokers rather than paid out to the municipal issuers as interest. To manipulate auctions for municipal derivatives, as Class Plaintiffs allege, individuals employed by certain defendants acted as knowing conduits of pricing and bidding information before and during auctions. Moreover, Class Plaintiffs allege that derivative-provider defendants shared profits from manipulated derivative transactions with broker defendants through elaborate and disguised kickback payments.

The alleged conspiracy, as described by the Class Plaintiffs, is as vast as it is complicated. Class Plaintiffs allege corruption throughout many of the largest global financial institutions and present as victims unsophisticated and financially over-burdened towns, school districts and municipal service entities. In addition to the instant suit brought by Class Plaintiffs, scores of individual municipal plaintiffs, multiple state attorneys general and several **[*623]** federal agencies have also initiated civil, enforcement, and criminal actions arising out of the same alleged conspiracy targeted by Class Plaintiffs. News media, ranging from niche trade publications to **[**21]** Rolling Stone magazine, have reported on the investigations and subsequent civil and criminal litigation. The instant dispute implicates the substantive relationship between certain federal criminal prosecutions and the Class Plaintiffs' action, as well as the effect that early media reporting had or should have had on Class Plaintiffs' knowledge of the existence of antitrust claims against the GE Defendants.

Specifically, Class Plaintiffs ask the Court to find that the statute of limitations applicable to its claims against the GE Defendants has been tolled, pursuant to *§ 16(i)* during the pendency of the federal prosecution initiated by the October 29, 2009 indictment in United States v. Rubin/Chambers, Dunhill Insurance Services, Inc., et al., 09 Cr. 1058 (S.D.N.Y. filed Oct. 29, 2009) ("CDR"). The GE Defendants argue that even if *§16(i)* is found to toll the applicable limitations period based on the CDR indictment, early news reports of the CDR investigation put Class Plaintiffs on inquiry notice as to any related claims and started the four-year limitations period more than four years before the CDR indictment was filed. Thus, according to the GE Defendants, the limitations period **[**22]** expired before it could be tolled by *§ 16(i)*, and Class Plaintiffs' claims would be time-barred even if that statute does apply.

To determine whether *§ 16(i)* is applicable to the Class Plaintiffs' proposed claims against the GE Defendants, the Court must begin with a brief review of the CDR indictment and a related criminal proceeding.

A. THE CDR AND CAROLLO INDICTMENTS

On November 15, 2006, agents of the Federal Bureau of Investigations raided the offices of several municipal bond brokers, including the Southern California offices of a broker known as "CDR." Shortly thereafter, the Antitrust Division of the Department of Justice (the "DOJ") presented its case to a grand jury convened in the Southern District of New York. Ultimately, on October 29, 2009, the grand jury returned the CDR indictment, which named as defendants CDR and three of its executives and alleged a criminal antitrust conspiracy in the municipal derivatives industry. (See Indictment, United States v. Rubin/Chambers, Dunhill Ins. Servs., Inc. et al., 09 Cr. 1058, (S.D.N.Y. filed Oct. 29, 2009) (Docket No. 1) (the "CDR Indictment").)

Count One of the CDR Indictment alleges a "conspiracy in unreasonable restraint of interstate **[**23]** trade," which "consisted of an agreement ... to allocate and rig bids for investment agreements or other municipal finance contracts," in violation of *15 U.S.C. § 1*. (CDR Indictment 111 17, 18.) The CDR Indictment describes the "manner and means by which the conspiracy was carried out" by listing several types of actions taken by co-conspirators in furtherance of the alleged conspiracy. (Id. ¶ 19.) Some of those actions include designating winners in advance of auctions, communicating competitors' price information to bidders before and during auctions, submitting intentionally losing bids to create the appearance of competitive auctions, and paying kickbacks to brokers in the form of unearned or inflated fees. (See id.)

The GE Defendants were not included as defendants in the CDR Indictment, nor were they named expressly therein as co-conspirators. The DOJ did, however, prosecute **[*624]** former employees of a GE Defendant for related and overlapping conduct by a separate indictment. (See United States v. Carollo et al., 10 Cr. 654 (S.D.N.Y. filed July 27, 2010) (Docket No. 1) (the "Carollo Indictment").) The Carollo Indictment did not allege antitrust violations; the offenses it described **[**24]** charged only fraud and conspiracy. Further, the DOJ entered into a non-prosecution agreement with one of the GE Defendants that related to conduct at issue in the CDR prosecution and addressed violations of non-antitrust statutes. (See No. 08 Civ. 2516, Docket No. 1709 at 2.)

The Carollo Indictment presents a highly detailed account of the same scheme to manipulate the municipal derivatives market as set forth in the CDR Indictment and, in many instances, employs identical language. (See generally Carollo Indictment ¶¶ 13-21.) In fact, the Carollo Indictment describes at length actions taken by Carollo defendants, former employees of GE Defendants, in concert with CDR defendants. (See, e.g., id. ¶¶ 22-23; 28-31.) On May 11, 2012, the three former employees of the GE Defendants charged in the Carollo Indictment were convicted by a jury sitting in the Southern District of New York. During that trial, defendants named in the CDR Indictment, who had pled guilty to antitrust violations pursuant to cooperation agreements, testified at length regarding the participation of individuals working for a GE Defendant in certain transactions that constituted overt acts in furtherance of the antitrust **[**25]** conspiracy charged in the CDR Indictment.

B. THE CURRENT OPERATIVE COMPLAINT AND CLASS PLAINTIFFS' PROPOSED AMENDMENTS

The SCACAC describes the same conspiracy as the CDR Indictment. It alleges manipulation of the same set of financial instruments through the same bid-rigging conduct by the same set of institutional players. In its fifth paragraph, the SCACAC describes the alleged conspiracy using words and phrases that closely echo those found in the CDR Indictment. (SCACAC ¶ 5.) In its sixth paragraph, the SCACAC expressly identifies the conspiracy it alleges as the object of the DOJ investigation that culminated in the CDR Indictment. (Id. ¶ 6.) In its seventh paragraph, the SCACAC expressly identifies the time period at issue as "track[ing] the time period of the DOJ investigation." (Id. ¶ 7.) By the end of its brief introductory section, the SCACAC has squarely situated itself as a private, civil action seeking redress of the same illegal activity targeted by the CDR prosecution.

The SCACAC also expressly relies on the CDR Indictment and the investigation that led to that charging instrument - to establish a factual basis for the alleged conspiracy. In so doing, the SCACAC makes **[**26]** several specific allegations of facts that also provided a basis for the CDR Indictment and prosecution.

Most prominently, the SCACAC includes a section entitled, "Antitrust Division Investigation," which reviews the 2006 raid of CDR's offices, the CDR Indictment and the fact that the GE Defendants were subpoenaed in connection with the CDR investigation. (Id. ¶¶ 162-168.) Actions taken by CDR in furtherance of the conspiracy alleged in the SCACAC are set forth in at least ten separate paragraphs. (See id. ¶¶ 103, 114, 121-3, 130, 131, 137, 138 & 147.) Several employees of CDR are listed among those who "engaged in the illegal communications and conduct ... to restrain competition" and "engaged in the illegal agreement, understanding and conspiracy." (See id. ¶¶ 100-01.)

In short, the operative complaint, as it stands, advances private civil claims for the precise conduct complained of in the **[*625]** CDR Indictment. Now, Class Plaintiffs seek to include the GE Defendants as named defendants.[3]

C. EARLY MEDIA COVERAGE OF THE MUNICIPAL DERIVATIVES INVESTIGATIONS

The SCACAC also **[**27]** draws heavily from news media reports regarding potential malfeasance in and investigations of the municipal derivatives industry. Prior opinions of this Court have discussed in some depth the

[3] The Court notes that the SCACAC already expressly includes the GE Defendants as named co-conspirators. (SCACAC ¶¶ 43-44.)

effect of such media coverage upon the relevant dates for statute of limitations purposes. See generally *Hinds County V, 811 F. Supp. 2d 910*; *Hinds County IV, 790 F. Supp. 2d 121*.

In response to Class Plaintiffs' instant request to amend, the GE Defendants point to specific media reports which they assert should have put Class Plaintiffs on notice of any private civil claims that could be related to the CDR Indictment. According to the GE Defendants, the CDR investigation was publicly known at least as early as August 2005, when it was reported by Bloomberg news services. (Docket No. 1709 at 5.) As early as April 2005, the publication Bond Buyer reported on corruption at CDR, though the paper did not discuss the specific conduct at issue in the CDR Indictment. (Id.) A regional paper — The Kansas City Star — also reported on an IRS inquiry into the municipal bond market. (Id.) Earlier still, in a February 2005 bulletin, one law firm noted that those in municipal finance were aware of ongoing investigations. **[**28]** (Id.) However, no news source cited by the GE Defendants makes specific reference to the GE Defendants.

II. LEGAL STANDARDS

A. LEAVE TO AMEND

Rule 15 of the Federal Rules of Civil Procedure provides that courts "should freely give leave [to amend] when justice so requires." *Fed. R. Civ. P. 15(a) (2)*. Leave to amend should be granted unless there is "any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment." *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*; see also *Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 333 (2d Cir. 2000)* (noting that leave to amend is "discretionary" and should be "freely given"); *Block v. First Blood Assocs., 988 F.2d 344, 350 (2d Cir. 1993)* ("The rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith." (citations omitted)).

An amendment may be denied as futile if it could not withstand a motion to dismiss pursuant to *Rule 12(b)(6)*. *Ricciuti v. N.Y.C. Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991)* **[**29]** (citation omitted) ; *Wong v. HSBC USA, Inc., 2010 U.S. Dist. LEXIS 81058, 2010 WL 3154976, at *5 (S.D.N.Y. Aug. 9, 2010)* (quoting *Lucente v. Int'l Bus. Mach. Corp., 310 F.3d 243, 258 (2d Cir. 2002))*. Specifically, an "[a]mendment would likely be futile if . . . the claims the plaintiff sought to add would be barred by the applicable statute of limitations." *Grace v. Rosenstock, 228 F.3d 40, 53 (2d Cir. 2000)* (citation omitted).

Additionally, "a court has discretion to deny leave to amend where the **[*626]** motion is made 'after an inordinate delay, no satisfactory explanation is offered for the delay, and the amendment would prejudice other parties, or where the belated motion would unduly delay the course of proceedings by, for example, introducing new issues for discovery.'" *State Farm Ins. Cos. v. Kop-Coat, Inc., 183 F. App'x 36, 37-38 (2d Cir. 2006)* (quoting *Grace, 228 F.3d at 53-54*). Delay alone, in the absence of an additional reason such as prejudice to the opposing party, usually does not warrant denial of leave to amend. *Rachman Bag Co. v. Liberty Mut. Ins. Co., 46 F.3d 230, 234-35 (2d Cir. 1995)* (citing *State Teachers Ret. Bd. v. Fluor Corp., 654 F.2d 843, 856 (2d Cir. 1981))*.

Applying these principles, the Court **[**30]** should grant Class Plaintiffs leave to amend the SCACAC unless the GE Defendants can show that the proposed amendment would be futile because the potential claims are time-barred or that the proposed amendment comes after a prejudicial and undue delay.

B. *SECTION 16(i)*

For present purposes, the Rule 15 futility inquiry collapses into the underlying question of timeliness. In evaluating the parties' invocation of the doctrine of fraudulent concealment, the Court has already ruled that plaintiffs were on inquiry notice of the claims at issue here "at least as of November 15, 2006." See September 2011 Decision at 912. Using that date, the applicable four-year statute of limitations would have expired on November 15, 2010 unless some other statute or doctrine acted to toll the running of the clock. Class Plaintiffs argue that *§ 16 (i)*, as applied to the October 2009 CDR Indictment, does just that, rendering their claims against the GE Defendants timely and their proposed amendment not futile.

Section 16(i), in relevant part, reads:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, . . . the **[**31]** running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter ....

15 U.S.C. § 16 (i). In analyzing the text of *§ 16(i)*, the Supreme Court of the United States has held that "a private party who brings suit for a conspiracy against which the Government has already brought suit is undeniably basing its claim in whole or in part upon the matter complained of in the Government suit." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 335-36, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*. This presumption holds "even if the defendant named in the private suit was named neither as a defendant nor as a coconspirator by the Government." Id. Additionally, for *§ 16 (i)* to apply, "[t]he private plaintiff is not required to allege that the same means were used to achieve the same objectives of the same conspiracies by the same defendants." *Leh v. General Petroleum Corp., 382 U.S. 54, 59, 86 S. Ct. 203, 15 L. Ed. 2d 134 (1965)*.

Claims brought in a private antitrust suit are "based in whole or in part on" the "matter complained of" in a prior criminal antitrust **[**32]** prosecution, if "the matters complained of in the government proceeding bear a real relation to the private plaintiff's claim for relief." *Id. at 59*. In determining whether such a "real relation" exists, a court's analysis "must be limited to a comparison of the two complaints on their face." *Chipanno v. Champion Int'l Corp., 702 F.2d 827, 832-33 (9th Cir. 1983)* (quoting *Leh, 382 U.S. at 65-66*); see also *Philip* ***[*627]*** *Morris Inc. v. Heinrich, No. 95 Civ. 0328, 1996 U.S. Dist. LEXIS 9156, 1996 WL 363156, *11 (S.D.N.Y. June 25, 1996)* (applying *§ 16 (i)* by "comparing the plaintiff's complaint with the complaint in the government proceeding on which the plaintiff relies" (citing *Leh, 382 U.S. at 59*)).

Though the United States Court of Appeals for the Second Circuit has not elaborated on the "real relation" test announced by the Supreme Court in Leh, at least one court in this district has applied the Third Circuit's definition requiring that the litigations share "a 'substantial identity' in order to invoke *§ 16(i)* tolling." *Philip Morris, 1996 U.S. Dist. LEXIS 9156, 1996 WL 363156, at *11* (citing *New Jersey v. Morton Salt Co., 387 F.2d 94, 98 (3d Cir. 1967)*, cert. denied, *391 U.S. 967, 88 S. Ct. 2035, 20 L. Ed. 2d 880 (1968))*. A private action that is substantially broader than a **[**33]** prior Government action may still benefit from *§ 16(i)* tolling where the allegations in the private action incorporate the subject matter of the Government action. See *In re Antibiotic Antitrust Actions, 333 F. Supp. 317, 321 (S.D.N.Y. 1971)* (citing *Zenith Radio, 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77*); see also *In re Scrap Metal Antitrust Litig., No. 02 Civ. 0844, 2006 U.S. Dist. LEXIS 75873, 2006 WL 2850453, at *22 (N.D. Ohio 2006)* ("[S]imply because the conspiracy alleged in this case may differ slightly from the conspiracy alleged in the [Government] case, and because [a particular defendant] was not a named defendant in that case, does not automatically prevent *§ 16(i)*'s application.").

There is no dispute that the CDR prosecution represents a "criminal proceeding . . . instituted by the United States to prevent, restrain or punish violations of [an] ***antitrust law***[]." The central question presented as to *§ 16(i)*, then, is whether Class Plaintiffs' claims against the GE Defendants, as stated in the proposed amendment, are "based in whole or in part on any matter complained of in" the CDR prosecution.

C. INQUIRY NOTICE

Antitrust claims are subject to a four-year statute of limitations. See *15 U.S.C. § 15b*. When civil plaintiffs allege **[**34]** conspiracies involving bid-rigging and price-fixing in violation of *15 U.S.C. § 1*, the statute of limitations does not begin to run until the plaintiffs, in the exercise of due diligence, discover the antitrust violation. See *Hinds County I, 700 F. Supp. 2d at 399*; *In re Nine West Shoes Antitrust Litig., 80 F. Supp. 2d 181, 192 (S.D.N.Y. 2000))*.

As a general matter, the question of whether specific media reports serve to put a diligent plaintiff on inquiry notice involves an objective inquiry into whether the totality of the circumstances revealed probable — and not merely possible — illegal activity attributable to the defendants named in the complaint and of the type described therein. See *Staehr v. Hartford Fin. Servs. Group, Inc., 547 F.3d 406, 427 (2d Cir. 2008)* (describing inquiry notice in context of securities fraud action). "Inquiry notice may be found as a matter of law only when uncontroverted evidence clearly demonstrates when the plaintiff should have discovered the fraudulent conduct." Id. (citation omitted).

Here, the Court has already found that individual antitrust plaintiffs should have been on notice of the conspiracy at issue at least as of the November 15, 2006 raids **[**35]** on the offices of CDR and other co-conspirators. The GE Defendants contend that, assuming Class Plaintiffs acted diligently, they were on inquiry notice of any claims that would be related to the CDR Indictment at least as of early 2005, when the first general reports of investigations into the municipal bond market were published. If Class Plaintiffs were on inquiry notice of **[*628]** the claims at that point, the statute of limitations would have expired in early 2009, prior to the October 2009 CDR Indictment, rendering ineffectual the operation of *§ 16 (i)* based on that prosecution.

The inquiry notice question presented, therefore, is whether Class Plaintiffs were on notice of their claims against the GE Defendants sometime prior to October 2005.

III. ANALYSIS

The Court's analysis below supports the following conclusions: First, that Class Plaintiffs' claims against the GE Defendants demonstrate a "real relation" to the matters complained of in the CDR Indictment, and, accordingly, that *§ 16 (i)* functions to toll the statute of limitation during the pendency of the CDR prosecution. Second, that the GE Defendants cannot establish that Class Plaintiffs were on inquiry notice prior to October **[**36]** 2005, and, as such, that the statute of limitations did not begin to run until less than four years before to the CDR Indictment was filed. Third, because *§ 16(i)* applies and the statute of limitations had not expired prior to October 2009, the pendency of the CDR prosecution tolls the relevant statute of limitations and renders Class Plaintiffs' claims timely and the proposed amendment not futile. Fourth and finally, the Court finds that Class Plaintiffs have not unduly delayed seeking to amend their pleadings to name the GE Defendants. Because the proposed amendment is neither futile nor sought after undue delay, the Court will grant Class Plaintiffs' request to file a Third Amended Class Action Complaint.

A. SECTION 16(i) APPLIES TO CLASS PLAINTIFFS' CLAIMS

To determine whether or not Class Plaintiffs' claims against the GE Defendants are "based in whole or in part on any matter complained of in" the CDR prosecution, the Court need look only at the faces of the CDR indictment and SCACAC. As detailed above, these two documents alleged substantially the same conspiracy.

Where, as here, the private civil action alleges a conspiracy that uses substantially similar means to accomplish the **[**37]** same anticompetitive goal in the same market as the prior government suit, *§ 16(i)* is applicable. See, e.g., *Philip Morris, 1996 U.S. Dist. LEXIS 9156, [WL] at *11* (applying *§ 16 (i)* where civil plaintiff "makes the same allegations . . . elaborating upon the mechanics of the scheme"); *Chipanno, 702 F.2d at 832-33* (applying *§ 16(i)* because "[p]laintiffs' complaint alleged a conspiracy that included the objectives, means, time span, and geographic scope of the conspiracy alleged in the government suit").

The conspiracy alleged by Class Plaintiffs is inarguably based on the conspiracy alleged by the Government in the CDR Indictment. As such, there can be no reasonable doubt that a "real relation" exists between the CDR Indictment and Class Plaintiffs' claims against the GE Defendants.

Nevertheless, the GE Defendants assert that *§ 16 (i)* should not be applied to claims against them because the Government did not name their former employees as CDR's co-conspirators. Rather, the Government chose to indict certain former employees of the GE Defendants under statutes outside of the antitrust laws for conduct indisputably related to the antitrust conspiracy alleged in the CDR Indictment. Similarly, one of the GE Defendants

[38]** itself entered into a non-prosecution agreement with the DOJ that did not include antitrust violations in its scope, though, again, it related to the same underlying conduct. Based on those Government charging decisions, the GE Defendants argue that the Government has **[*629]** stated a definitive position that the GE Defendants' conduct did not violate antitrust laws. (See Docket No. 1709 at 2-4.) The Court is not persuaded. Neither law nor basic logic supports the GE Defendants' theory.

First, the argument cannot stand as a matter of law. Decades ago, the Supreme Court interpreted *§ 16(i)* to apply to claims against private, civil defendants who were not named as co-defendants or co-conspirators in the related, prior Government action. See *Zenith Radio, 401 U.S. at 335*. In Zenith Radio, the Court was unequivocal: "If . . . the government sues only certain conspirators, but also alleges and proves during trial that others were conspirators, the fact of the tolling of the statute against those so proved but not sued can hardly be denied." Id. Further, even if, in the course of its prior action, the government does not prove that a specific defendant was a co-conspirator, *§ 16 (i)* may still apply **[**39]** if the later private plaintiff can prove as much. See id. Neither the Supreme Court nor any court applying Zenith Radio has created an exception from *§ 16(i)* to exempt putative private civil defendants who have been charged by the Government for non-antitrust offenses indisputably related to the same underlying conduct. This Court declines to do so now.

Second, the GE Defendants have presented no explanation for how the particular charging strategy — adopted by the DOJ serves to alter the relationship between the CDR Indictment and the Class Plaintiffs' claims which, of course, is the only subject of inquiry mandated by *§ 16 (i)*.[4] Leh limits the Court's inquiry to the faces of the CDR Indictment and the Class Plaintiffs' pleading to determine whether or not *§ 16 (i)* applies. See *Leh, 382 U.S. at 65*. The GE Defendants' argument asks the Court to ignore the Supreme Court's rule in Leh and to speculate as to an array of conceivable conclusions implicit in prosecutorial decisions; the Court declines that invitation. Cf. *Novell, Inc. v. Microsoft Corp., 505 F.3d 302, 321 (4th Cir. 2007)* (rejecting "reading [that] would require us to look beyond the face of the DOJ complaint").

The application **[**40]** of *§ 16 (i)* to Class Plaintiffs' claims against the GE Defendants also advances the fundamental and repeatedly recognized Congressional purpose in enacting *§ 16 (i)*. "[T]he tolling provision is primarily [intended] to enable private litigants to have the benefit of the final judgment in the government's case . . . [and] also to enable the private litigants to have the benefit of whatever clarification of either the facts or the law the government's litigation may provide." *In re Lower Lake Erie Iron Ore Litig., MDL 587, 1987 U.S. Dist. LEXIS 2932, 1987 WL 4775, at *1 (E.D.Pa. Apr. 13, 1987)*; see also, *Chipanno, 702 F.2d at 832* .("[E]vidence adduced in the trial of the government suit would be of practical assistance to plaintiffs in proving their own complaint [and i]t was precisely the purpose of *[§] 16(i)* to provide such assistance to private antitrust complainants."). As the Supreme Court explained in Zenith Radio,

> holding that *[§] 16([i])* tolls the statute of limitations against all participants in a **[*630]** conspiracy which is the object of a Government suit, whether or not they are named as defendants or conspirators therein . . . materially furthers congressional policy by permitting private litigants to await **[**41]** the outcome of Government suits and use the benefits accruing therefrom.

401 U.S. at 336. Applying *§ 16 (i)* to Class Plaintiffs' claims against the GE Defendants gives effect to the statute's purpose by allowing Class Plaintiffs to benefit from the Government proceedings that have preceded their amended claims.

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[4] The Court is certainly not tasked with examining any other criminal indictments or filings in an effort to divine the Government's possible rationales for its charging decisions. See *Morton Salt, 387 F.2d at 97* ("[T]he absence of complete identity of defendants may be explained on several grounds unrelated to the question of whether the private claimant's suit is based on matters of which the Government complained. [S]ome of the conspirators whose activities injured the private claimant may have been too low in the conspiracy to be selected as named defendants or co-conspirators in the Government's necessarily broader net." (internal quotations and citation omitted)).

Beyond the specific policies animating the statute, its broader remedial purpose compels courts to liberally construe *§ 16(i)*. The Supreme Court has instructed that "effect must be given to the broad terms of the **[**42]** statute itself — based in whole or in part on any matter complained of — read in light of Congress' belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Leh, 382 U.S. at 59* (internal quotation and alterations omitted). "[T]he tolling provision was enacted for the benefit of private parties who were injured[, which] suggest[s] most strongly that the tolling provision, if of doubtful meaning, should be interpreted in a way which will permit a determination on their merits of private claims in this area." *Morton Salt, 387 F.2d at 97*.

Finally, the exception to *§ 16 (i)* advanced by the GE Defendants would also be untenable as a matter of common sense, given the Supreme Court's application of *§ 16(i)* to un-indicted co-conspirators in Zenith Radio: It would place possible co-conspirators against whom the Government alleges non-antitrust criminal charges in a better position than possible co-conspirators against whom the Government brings no charges whatsoever. There is simply nothing in either the statute or the case law to compel such a peculiar and potentially inequitable result.[5]

B. THE GE DEFENDANTS HAVE NOT ESTABLISHED THAT THE CLASS PLAINTIFFS WERE ON INQUIRY NOTICE OF THEIR CLAIMS PRIOR TO OCTOBER 2004

This Court has already held that "the quantity of information about government investigations into the alleged antitrust conspiracy" available to a plaintiff "in January 2005 was simply too meager, particularly in light of the fact that [the moving defendant] was not identified as a possible target," to trigger inquiry notice at that point. See *Hinds County IV, 790 F. Supp. 2d at 124*. Thus, as the basis for their inquiry notice argument here, the GE Defendants advance a set of media reports from between January and August 2005. These reports — which do not mention **[**44]** the GE Defendants and appear to discuss broadly an ongoing and general investigation into the municipal bonds industry — are similarly "simply too meager" to hold that Class Plaintiffs should have recognized in them claims against the GE Defendants. See *id. at 124* (citing *GO Computer, Inc. v. Microsoft Corp., 508 F.3d 170, 178-79 (4th Cir. 2007))*; cf. *Lentell v. Merrill Lynch & Co., 396 F.3d 161, 170 (2d Cir. 2005)* (finding, in securities fraud context, **[*631]** that "numerous generic articles on the subject of structural conflicts appear[ing] in the financial press" insufficient to trigger inquiry notice).

Guidance from the Second Circuit in the securities fraud context cements this conclusion. First, the Second Circuit has instructed that, to trigger inquiry notice, the publications in question must provide "indications of the probability (and not just possibility)" of the relevant claims. *Staehr, 547 F.3d at 430* (internal citations omitted). Even if the articles put forward by the GE Defendants should have suggested the possibility that class antitrust claims might be brought against them, such publications did not come close to suggesting that such claims were probable. The suggestion of **[**45]** probable claims necessary to trigger inquiry notice must also be defendant-specific, in contrast to the analysis required in the *§ 16 (i)* context described above. See id. ("The media reports cited by Appellees at most suggest the potential for conflicts of interest involving some insurers, but not the probability of fraud by The Hartford."); June 2011 Decision at 124 (finding January 2005 articles failed to trigger inquiry notice because specific defendant "was not identified as a possible target" of the investigation). The articles cited here do not suggest a probable claim against the GE Defendants.

Additionally, the GE Defendants rely upon an article prepared by a law firm, Thorpe, Reed & Armstrong, presumably distributed for the firm's promotional purposes. Given that article's status as specialty publications with unknown but undoubtedly limited readerships, the Court "cannot conclude" that a reasonable antitrust plaintiff "would have encountered th[is] article[]." *Staehr, 547 F.3d at 434*. It seems the same can safely be said for the article published in The Kansas City Star.

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[5] The cases cited by the GE Defendants provide **[**43]** no support for their position. Each case refusing to apply *§ 16 (i)* did so on the grounds that the private, civil plaintiffs alleged a conspiracy in a different market than the earlier, Government action. See, e.g., *Novell, 505 F.3d at 321* ("The DOJ complaint only expressly alleges harm to the markets for PC operating systems and for Internet browsers. Novell's allegations of harm to the office-productivity-applications market, therefore, overlap little with the subject matter of the DOJ complaint.").

Further, as Class Plaintiffs point out, to accept the GE Defendants' position here would be to effectively **[**46]** initiate the limitations period and thus bar legal action against every player in an industry based on the moment any newspaper publishes a report on potential antitrust violations by any actor in that field. Under these facts, the GE Defendants' position would not be restricted by any reasonable limiting principle.

In sum, because the articles presented to the Court do not amount to "uncontroverted evidence [that] clearly demonstrates when the plaintiff should have discovered" the antitrust violations of the GE Defendants, id. at 427, the Court cannot find that the statute of limitations began running prior to November 15, 2006.

Accordingly, the four-year statute of limitations had not expired as of the October 2009 indictment of CDR. As the CDR prosecution then tolled the statute of limitations with respect to Class Plaintiffs' claims against the GE Defendants, those claims are still timely and the proposed amendment is not futile.

C. CLASS PLAINTIFFS' AMENDMENT WAS NOT UNDULY DELAYED

The Court is not persuaded that Class Plaintiffs' request to amend should be denied on the basis of undue delay for two independent reasons.

First, even assuming that the delay was undue, the GE Defendants **[**47]** have not shown that they have suffered any prejudice from the elapsed time. In their earlier letter submission regarding undue delay, the GE Defendants failed to even imply that any prejudice would result from Class Plaintiffs' allegedly belated amendment. (See Docket No. 1683 at 3.) Without prejudice to the opposing party or some other reason, even an extended delay does **[*632]** not mandate denial of leave to amend. See *Rachman Bag Co., 46 F.3d at 234-35*.

Second, there was good reason for Class Plaintiffs to wait before seeking to amend their complaint to add the GE Defendants, so any delay was certainly not "undue." Moreover, this good reason relates directly to the discussion of *§ 16(i)* above: Class Plaintiffs were gathering information and evidence from the ongoing criminal proceedings. (See Docket No. 1678.) Class Plaintiffs have been closely tracking the CDR prosecution, and the very purpose of *§ 16 (i)* is to permit them to do just that in an effort to buttress or develop their claims against any of CDR's co-conspirators. Were the Court to find undue delay here, it would stifle the purposes of *§ 16(i)* through a discretionary denial of leave to amend, which is, of course, to be "freely **[**48]** give[n]." *Fed. R. Civ. P. 15(a)(2)*. In the absence of prejudice to the GE Defendants, such an exercise of the Court's discretion would be improper.

IV. ORDER

For the reasons discussed above, it is hereby

ORDERED that, the Class Plaintiffs' motion for leave to amend the Second Amended Class Action Complaint, deemed contained in their March 5, 2012 letter (Docket No. 1678), is GRANTED.

SO ORDERED.

Dated: New York, New York

3 August 2012

/s/ Victor Marrero

Victor Marrero

U.S.D.J.

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In re Publ'n Paper Antitrust Litig.

United States Court of Appeals for the Second Circuit

December 21, 2011, Argued; August 6, 2012, Decided

Docket No. 11-101-cv

Reporter

690 F.3d 51 *; 2012 U.S. App. LEXIS 16330 **; 2012-2 Trade Cas. (CCH) P78,000; 2012 WL 3156156

IN RE: PUBLICATION PAPER ANTITRUST LITIGATION

Subsequent History: US Supreme Court certiorari denied by *Stora Enso N. Am. v. Parliament Paper, Inc., 133 S. Ct. 940, 184 L. Ed. 2d 725, 2013 U.S. LEXIS 829 (U.S., 2013)*

Motion denied by *In re Publ'n Paper Antitrust Litig., 2013 U.S. Dist. LEXIS 89496 (D. Conn., June 20, 2013)*

Prior History: [1]** Appeal from a judgment of the U.S. District Court for the District of Connecticut (Stefan R. Underhill, Judge), awarding summary judgment to defendants Stora Enso North America Corporation ("SENA") and Stora Enso Oyj ("SEO") in an antitrust class action alleging a conspiracy to fix prices in violation of section 1 of the Sherman Act, *15 U.S.C. § 1*. We hold that the district court erred in granting summary judgment to SENA because a jury could reasonably find that SENA and former defendants UPM-Kymmene Corporation and UPM-Kymmene, Inc., reached an unlawful agreement to raise the price of publication paper, and that this agreement injured plaintiffs. We also conclude that the district court properly granted summary judgment to SEO because plaintiffs failed to offer sufficient evidence from which a jury could reasonably conclude that SEO had any direct involvement in decisions regarding the marketing, sale, or pricing of publication paper in the United States. Accordingly, we vacate the district court's judgment in part, affirm it in part, and remand the case for further proceedings consistent with this opinion.

Parliament Paper, Inc. v. Stora Enso Oyj (In re Publ'n Paper Antitrust Litig.), 2010 U.S. Dist. LEXIS 131931 (D. Conn., Dec. 14, 2010)

Core Terms

increased price, pricing, announced, district court, grade, summary judgment, antitrust, competitors, conspiracy, plaintiffs', customers, price-fixing, decisions, manufacturers, defendants', coated, match, price fixing, phone call, conversation, causation, cwt, act independently, communications, collusion, tends, sufficient evidence, alleged conspiracy, fix prices, Sherman Act

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN1[] Cartels & Horizontal Restraints, Price Fixing

An appellate court's task on appeal of a grant of summary judgment in an antitrust class action alleging a conspiracy to fix prices in violation of *§ 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, is to determine whether, on the evidence presented, a jury could reasonably conclude that defendants reached an agreement for the purpose and with the effect of raising the price of their products. This requires evidence sufficient to permit a preponderance finding that higher prices came about as a result of the agreement, rather than through independent action of the defendants.

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

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

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

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

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

HN2[] Standards of Review, De Novo Review

An appellate court reviews de novo a district court's grant of summary judgment. The court will affirm only if, after construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law, *Fed. R. Civ. P. 56(a)*.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

The United States Court of Appeals for the Second Circuit has observed that by avoiding wasteful trials and preventing lengthy litigation that may have a chilling effect on pro-competitive market forces, summary judgment serves a vital function in the area of ***antitrust law***. Nevertheless, summary judgment is not a substitute for trial. Thus, when the evidence admits of competing permissible inferences with regard to whether a plaintiff is entitled to relief, the question of what weight should be assigned to those inferences remains within the province of the fact-finder at a trial.

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

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

HN4[] Per Se Rule & Rule of Reason, Per Se Violations

Section 1 of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal. *15 U.S.C.S. § 1*. Notwithstanding its broad language, this provision prohibits only unreasonable restraints of trade. Per se liability attaches, however, to plainly anticompetitive agreements. An agreement between competitors to fix prices, known as a horizontal price-fixing agreement, categorically constitutes an unreasonable restraint, and, accordingly, is unlawful per se.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN5[] **Cartels & Horizontal Restraints, Price Fixing**

To prevail on a claim of horizontal price fixing, a plaintiff must demonstrate that the defendants entered into a conspiracy formed for the purpose and with the effect of raising prices. In other words, the evidence must show that: (1) the defendants conspired to raise prices, and (2) this conspiracy caused injury to the plaintiff in the form of artificially inflated prices.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

HN6[] **Sherman Act, Defenses**

Parallel pricing among competitors, also known as conscious parallelism, is often proffered as evidence of a price-fixing agreement. Conscious parallelism describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

HN7[] **Sherman Act, Defenses**

Conscious parallelism alone does not establish an antitrust violation. Such behavior is consistent with both unlawful conspiracy and lawful independent conduct. Accordingly, when the defendants' parallel pricing forms the basis for a price-fixing claim, a plaintiff must show additional circumstances—often referred to as "plus factors" — which, when viewed in conjunction with the parallel conduct, would permit a fact-finder to infer a conspiracy. Such plus factors may include, for example: a common motive to conspire; evidence that the parallel acts were against the apparent economic self-interest of the individual alleged conspirators; or evidence of a high level of interfirm communications.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

HN8[] **Sherman Act, Claims**

Section 1 of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, does not itself provide a private right of action. That right is established by § 4 of the Clayton Act, which authorizes private suits by any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws, *15 U.S.C.S. § 15*, and affords prevailing plaintiffs a claim to three times their actual damages.

Antitrust & Trade Law > Sherman Act > Claims

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

HN9[] **Sherman Act, Claims**

To survive a motion for summary judgment a plaintiff seeking damages for a violation of *§ 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, must present evidence that "tends to exclude the possibility" that the alleged conspirators acted independently.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > General Overview

Antitrust & Trade Law > Sherman Act > Claims

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

HN10[] **Clayton Act, Claims**

Matsushita stands for the proposition that substantive ***antitrust law*** limits the range of permissible inferences that may be drawn from ambiguous evidence. It further holds that the range of inferences that may be draw from such evidence depends on the plausibility of the plaintiff's theory. Thus, where a plaintiff's theory of recovery is implausible, it takes strong direct or circumstantial evidence to satisfy Matsushita's tends to exclude standard. By contrast, broader inferences are permitted, and the tends to exclude standard is more easily satisfied, when the conspiracy is economically sensible for the alleged conspirators to undertake and the challenged activities could not reasonably be perceived as procompetitive. Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN11[] Cartels & Horizontal Restraints, Price Fixing

Requiring a plaintiff to exclude or dispel the possibility of independent action in a horizontal price fixing claim under *15 U.S.C.S. § 1* places too heavy a burden on the plaintiff. Rather, if a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw from that evidence; it need not be the sole inference. It is important not to be misled by Matsushita's statement that the plaintiff's evidence, if it is to prevail, must tend to exclude the possibility that the alleged conspirators acted independently. The U.S. Supreme Court surely did not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct. Not only did the court use the word "tend," but the context made clear that the Court was simply requiring sufficient evidence to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN12[] Clayton Act, Claims

The standards established in Matsushita do not apply at all when a plaintiff has produced unambiguous evidence of an agreement to fix prices. As such, an admission by the defendants that they agreed to fix their prices is all the proof a plaintiff needs. Thus, at least three circuits have held that summary judgment is generally not appropriate where a plaintiff has produced direct, as opposed to circumstantial, evidence of an agreement to fix prices. Some courts have reached this conclusion by reasoning that direct evidence requires no inferences to establish the proposition or conclusion being asserted.

Evidence > Admissibility > Circumstantial & Direct Evidence

HN13[] Admissibility, Circumstantial & Direct Evidence

All evidence, including direct evidence, can sometimes require a factfinder to draw inferences to reach a particular conclusion, though perhaps on average circumstantial evidence requires a longer chain of inferences.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > Sherman Act > Claims

HN14[] Clayton Act, Claims

The U.S. Supreme Court has noted that it is enough that the illegality is shown to be a material cause of the antitrust injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling its burden of proving compensable injury. The United States Court of Appeals for the Second Circuit has also observed that an antitrust defendant's unlawful conduct need not be the sole cause of the plaintiffs' alleged injuries; to prove a causal connection between the defendant's unlawful conduct and the plaintiff's injury, the plaintiff need only demonstrate that the defendant's conduct was a substantial or materially contributing factor in producing that injury. The Second Circuit has held further that to prevail on an antitrust claim, a plaintiff must establish that the injuries alleged would not have occurred but for the defendant's antitrust violation, adding necessity to the materiality requirement of the antitrust causation analysis.

Antitrust & Trade Law > Clayton Act > Claims

HN15[] **Clayton Act, Claims**

Common law principles of causation derived from tort and contract law are applied to determine whether the plaintiff has sufficiently alleged an antitrust injury under § 4 of the Clayton Act, *15 U.S.C.S. § 15*.

Torts > ... > Elements > Causation > General Overview

Torts > ... > Causation > Proximate Cause > General Overview

HN16[] **Elements, Causation**

There is a causal link between an act or activity and an injury when the court concludes on the basis of the available evidence that the recurrence of that act or activity will increase the chances that the injury will also occur. In other words, if an act is deemed wrongful because it is believed significantly to increase the risk of a particular injury, the court is entitled—in the tort context at least—to presume that such an injury, if it occurred, was caused by the act. Under this framework, the burden then shifts to the defendant to bring in evidence tending to rebut the strong inference, arising from the injury, that the act was in fact a but-for cause of the plaintiff's injury.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > Sherman Act > Claims

HN17[] **Clayton Act, Claims**

In considering the causal link between an agreement to raise prices and a subsequent price increase, price-fixing agreements are conclusively presumed to be unreasonable and therefore illegal precisely because of their pernicious effect on competition and lack of any redeeming virtue—that is, because such agreements are so likely to result in artificially higher prices being charged to consumers without accomplishing any legitimate business purpose. Furthermore, the causal link is presumed to be particularly strong when the agreement is between executives at rival companies, each of whom has final pricing authority.

Counsel: DANIEL A. SMALL, Cohen Milstein Sellers & Toll PLLC, Washington, DC (Kathleen **[**2]** M. Konopka, Cohen Milstein Sellers & Toll PLLC, Washington, DC; David R. Schaefer, Brian P. Daniels, Brenner, Saltzman & Wallman LLP, New Haven, CT; Gary Specks, Kaplan Fox & Kilsheimer LLP, Highland Park, IL; Vincent J. Esades, Heins Mills & Olson, PLC, Minneapolis, MN; Steven J. Greenfogel, Daniel B. Allanoff, Meredith Cohen Greenfogel & Skirnick, PC, Philadelphia, PA; Mark R. Rosen, Jeffrey Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA, on the brief), for Plaintiffs-Appellants.

DAVID MARX, JR., McDermott Will & Emery LLP, Chicago, IL (Amy J. Carletti, McDermott Will & Emery LLP, Chicago, IL; James T. Shearin, Pullman & Comley, LLC, Bridgeport, CT; Nicole L. Castle, McDermott Will & Emery LLP, Washington, DC, on the brief), for Defendants-Appellees.

Judges: BEFORE: CALABRESI, RAGGI, and CARNEY, Circuit Judges.

Opinion by: SUSAN L. CARNEY

Opinion

[*55] SUSAN L. CARNEY, *Circuit Judge*:

Plaintiffs appeal from an award of summary judgment to defendants in an antitrust class action alleging a conspiracy to fix prices in violation of section 1 of the Sherman Act, *15 U.S.C. § 1*. Defendants Stora Enso North America Corporation ("SENA") and Stora Enso Oyj ("SEO") and former defendants UPM-Kymmene Corporation and UPM-Kymmene, **[**3]** Inc. (together, "UPM") are manufacturers and sellers of "publication paper," a type of paper used in preparing printed material of various types. Plaintiffs—a certified class consisting of direct purchasers of defendants' paper products—contend that, in the relevant period, they paid higher prices for publication paper than they would have in the absence of the alleged price-fixing agreement.

Plaintiffs' theory of conspiracy is relatively simple. In August and November 2002, and again in February 2003, SENA and UPM—as well as several other publication paper manufacturers—raised their list prices for certain types of publication paper. The price hikes mirrored each other in amount and occurred in close succession. Plaintiffs maintain that SENA and UPM instituted these three price increases pursuant to an agreement, rather than independently. Plaintiffs also contend that, in the same time frame, SENA and UPM coordinated the closure of paper mills in order to reduce the supply of publication paper, and that SEO played a material role in the overall price-fixing scheme. The U.S. District Court for the District of Connecticut (Stefan R. Underhill, *J.*) concluded that defendants were entitled **[**4]** to summary judgment on all counts because, in its view, and in light of the standards articulated by the Supreme Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, plaintiffs "failed to offer sufficient evidence to dispel the possibility that SENA and UPM acted independently." *In re Publication Paper Antitrust Litig., No. 3:04-md-1631, 2010 U.S. Dist. LEXIS 131931, 2010 WL 5253364, at *13 (D. Conn. Dec. 14, 2010)*.

We hold that the district court erred in granting summary judgment to SENA because a jury could reasonably find that SENA and UPM entered into an agreement to raise the price of publication paper, and that, as implemented, this agreement damaged plaintiffs. SENA was thus not entitled to judgment as a matter of law. As to SEO, however, we conclude that the district court properly awarded it summary judgment because plaintiffs failed to offer sufficient evidence from which a jury could reasonably conclude that SEO had any direct involvement in decisions regarding SENA's marketing, sale, or pricing of publication paper in the United States. Accordingly, we vacate the district court's judgment in part, affirm it in part, and remand the case for further proceedings consistent **[**5]** with this opinion.

I. BACKGROUND

Unless otherwise noted, the following facts are not disputed by the parties.

A. The Parties

SEO is a pulp and paper manufacturer headquartered in Helsinki, Finland. In August 2000, SEO acquired Consolidated Papers, Inc., an American paper manufacturer located in Wisconsin. Thereafter, Consolidated

Papers—renamed SENA—operated as a subsidiary of SEO. From August 2000 until May 2003, Kai Korhonen was President of SENA. Under Korhonen's **[*56]** leadership, SENA's sales and marketing team would recommend to him whether SENA should initiate a price increase or follow a price increase previously announced by a competitor. As President, Korhonen had the "final say" over SENA's pricing strategy and decisions. Trial Tr. at 262.[1]

UPM is also a pulp and paper manufacturer headquartered in Helsinki. In January 2002, Markku Tynkkynen became President of UPM's Magazine Paper Division. In this role, Tynkkynen **[**6]** had responsibility for, and "final authority" over, UPM's pricing of publication paper in the United States. Dep. of Markku Tynkkynen, Jan. 22, 2009, at 18.

B. The Publication Paper Industry

"Commercial paper" is a type of publication paper that is used for printing and advertising. Manufactured in several different grades, some of which are numbered 1 through 5, its quality ranges from "fine" (the most expensive type) to "supercalendered" (the least expensive). Fine paper—categorized in the industry as including grades 1, 2, and 3—is typically used for high-end publications. Magazine paper—comprised of grades 4 and 5—is generally used in ordinary magazines and store catalogues. Supercalendered paper—which is not assigned grade numbers—is often used to print the advertising inserts found in newspapers.

The present action involves "publication paper," which, for purposes of this litigation, is defined as grades 3, 4, and 5 of "coated" commercial paper.[2] The publication paper that plaintiffs purchased thus includes the coated products of some fine, and all magazine, paper. Publication paper is commonly considered a commodity product—i.e., a product that is uniform rather than differentiated **[**7]** across sellers. The publication paper market in North America is an oligopoly.

In 2002 and 2003, when the price-fixing agreement is alleged to have been made and implemented, International Paper ("IP"), SENA, and UPM ranked first, second, and third, respectively, in volume of production of publication paper in North America. Each had a market share of between 17% and 21%; their combined market shares totaled approximately 60%.[3] During the same two-year period, publication paper was selling at historically low prices, and the industry suffered from excess capacity and low demand.[4] Despite these unfavorable conditions, in August 2002, IP and MeadWestvaco ("Mead"), another publication paper manufacturer, both announced price increases; in November 2002, Mead announced a price increase; and in February 2003, IP announced a price increase. Both in the timing of the announcements and the amount of the increases, SENA and UPM's price increases in August and November 2002 and in February 2003 closely followed those **[**8]** of their competitors.

C. The Alleged Conspiracy

The conspiracy alleged in this action centers around certain private meetings **[*57]** and phone calls between Korhonen and Tynkkynen that undisputedly occurred soon before each of these three price increase announcements.

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[1] Citations to the "Trial Tr." refer to the transcript of SENA's criminal trial on alleged antitrust violations (discussed *infra*). In addition, we make a few citations to materials contained in the sealed appendix. With respect to that material only, we hereby lift the seal.

[2] Plaintiffs describe "coated" papers as "papers that contain a layer of coating material . . . in combination with an adhesive on one or both surface(s) of the paper." Compl. ¶ 6.

[3] The individual market shares at the time of other publication paper producers are unclear from the record.

[4] The parties dispute whether demand for publication paper increased in the latter half of 2002 and in 2003.

The two men originally met in Finland in the late 1970s, when both were working as production engineers for Ahlström Company. During the approximately five years that they worked together, they were also neighbors, and became close friends. Tynkkynen left Ahlström Company in 1982; Korhonen, however, remained at the firm, which was later acquired by a predecessor company to SEO. Over the twenty years following Tynkkynen's departure, despite their earlier close friendship, Korhonen and Tynkkynen saw each other only on occasion, their interactions typically limited to social settings and meetings of the Finnish Paper Engineers Association, of which they were both members.

1. The August 2002 Price Increase

In August 2002, soon **[**9]** after he became President of UPM's Magazine Paper Division and twenty years after they last worked as colleagues, Tynkkynen invited Korhonen, who by then had become President of SENA, to lunch. As he later testified at SENA's criminal trial, Tynkkynen wanted Korhonen to provide him with insight into operating in the North American market, a market with which Tynkkynen was unfamiliar. Tynkkynen also sought to determine whether SENA had sufficient market power to lead a price increase in the United States.

In response to Tynkkynen's invitation, Tynkkynen and Korhonen met for approximately 90 minutes on August 8 in a private executive lunchroom at UPM's headquarters in Helsinki. During the meeting, Korhonen expressed his opinion that, contrary to Tynkkynen's view, SENA was not a market leader for coated grade 5 or supercalendered paper. Tynkkynen and Korhonen estimated that together SENA and UPM likely would have a combined 40% market share for coated grade 5 paper. Tynkkynen advised Korhonen, "UPM has been a follower and will be a follower"—meaning that UPM would follow price increases announced by any major competitor and would also try to implement those increases consistently with **[**10]** its customers.[5] Trial Tr. at 177, 104. No one else was present during the meeting, and Korhonen did not disclose to anyone at SENA that he met with Tynkkynen or mention the substance of their discussion.

The following day, on August 9, IP and Mead announced a $2 per hundredweight ("cwt.") price increase for publication paper grades 2 through 4 effective October 1, 2002. Four days later, on August 13, SENA issued an identical announcement as to price, paper grades, and effective date. On August 21, UPM announced its $2 per cwt. price increase for publication paper grades 3 and 4, on the same schedule. (According to plaintiffs, UPM sold little or no grade 2 publication paper in the United States at that time.)

2. The November 2002 Price Increase

On November 6, again at Tynkkynen's invitation, **[**11]** Korhonen and Tynkkynen met at the Chicago O'Hare airport and had lunch together in a private dining room at the O'Hare Hilton Hotel. During their meeting, Korhonen and Tynkkynen discussed the poor economic conditions in the **[*58]** industry: prices were eroding because of an excess supply. Notwithstanding the August price increase, which had become effective approximately five weeks earlier, they agreed that the industry was in need of a price increase. Tynkkynen again advised Korhonen that UPM would follow if a competitor announced a price increase. Apart from his personal assistant, who arranged his itinerary, Korhonen did not disclose to anyone at SENA that he met with Tynkkynen.

The following week, on November 15, Mead announced a $2 per cwt. price increase for publication paper grades 1 through 4 effective January 1, 2003. On November 19, after UPM had decided to follow Mead's price increase but before any public announcement was made, Tynkkynen called Korhonen and left a voicemail stating, "Mead is out, we are following." *Id*. at 118. Korhonen did not return the call. The following day, on November 20, both SENA and

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[5] To implement a price increase once it is announced, manufacturers in the publication paper industry (as, surely, in many industries) engage in individualized negotiations with customers to try to persuade them to accept all or part of the price increase, while customers—particularly larger ones with more leverage—attempt to convince the vendor not to apply the full proposed price increase to their accounts.

IP announced a $2 per cwt. price increase for publication paper grades **[**12]** 2 through 4, also effective January 1, 2003. Two days later, on November 22, UPM issued a written announcement declaring a $2 per cwt. price increase for publication paper grades 2 through 4, also effective as of the turn of the year.

3. The February 2003 Price Increase

On February 3, 2003, executives at IP decided at an internal meeting to increase the price of their grade 5 publication paper, subject to final approval by senior IP officials. Three days later, on February 6, Korhonen called Tynkkynen. Each man asserts that he does not remember exactly what was discussed during the call, which lasted approximately five minutes.[6]

On February 10, IP publicly announced a $3 per cwt. price increase for grade 5 publication paper effective April 1, 2003. The following morning, on February 11, Korhonen called Tynkkynen and left a message requesting that Tynkkynen return his call. That afternoon, Tynkkynen called Korhonen, and the two men spoke for four minutes. During the call, Korhonen told Tynkkynen, "IP's out and [SENA] will match and follow." *Id*. at 84. Tynkkynen understood "match and follow" to mean that SENA would follow IP's price increase and also would "implement [the price increase] seriously" at the customer end—in other words, that SENA would hold a hard line in negotiating with customers. *Id*. Tynkkynen informed Korhonen that UPM had notified some of its customers of its intention to match IP's price increase. Approximately one half-hour after the men's phone call, SENA e-mailed and faxed a brief letter to its customers announcing a $3 per cwt. price increase for grade 5 paper, coated grade 4 paper, and supercalendered products. **[**14]** That same afternoon, UPM mailed a bulletin to its customers in which it, too, announced a $3 per cwt. price increase for grade 5 publication paper. Both price increases were to take effect April 1.

After Korhonen and Tynkkynen's conversation on February 11, Tynkkynen advised Kevin Lyden, President of UPM's **[*59]** North American subsidiary, that he thought SENA was "going to be tough on the price increase" it had announced. Dep. of Peter Littley, Feb. 18, 2010, at 14. Lyden understood Tynkkynen's statement to mean that SENA would stand firm on its price increase when negotiating contracts with its customers. According to Lyden, Tynkkynen's assessment of how aggressively SENA would implement the price increase was based, in part, on his February 11 phone call with Korhonen.

D. The Department of Justice Investigation and SENA's Criminal Trial

In 2004, the United States Department of Justice ("DOJ") launched a criminal antitrust investigation into the publication paper industry. In July 2004, after learning that government investigators sought to interview him in relation to the investigation, Tynkkynen called Korhonen from a public telephone booth. Tynkkynen concedes that he used a public telephone **[**15]** in order to ensure that he "ha[d] a clean line"—i.e., a phone line that was not being "followed or taped" by law enforcement authorities. Dep. of Markku Tynkkynen, Jan. 22, 2009, at 136. During their conversation, Tynkkynen proposed that he and Korhonen develop a "joint story" concerning what they had discussed during their private phone calls and meetings. Trial Tr. at 133. Korhonen concurred that developing a "joint story" was "a good idea." *Id*. They decided that if interviewed, they would tell law enforcement officials that in their conversations in 2002 and 2003 they discussed railroad fees, timber swaps, and the Finnish Paper Engineers Association. Pricing was not among those topics that they agreed to identify as having been discussed. (Later, in an

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[6] The parties dispute whether, when they spoke, either Korhonen or Tynkkynen (or both) were aware of IP's possible price increase. Asked at SENA's criminal trial what prompted him to call Tynkkynen, Korhonen testified that he did not have a "specific recollection" of the phone call, but that it "c[ould] be related to" IP's price increase. Trial Tr. at 308. In a subsequent declaration, however, Korhonen asserted that during the February 6 phone call he did not discuss with Tynkkynen "any specific price increase or a possible price increase." Decl. of Kai Korhonen **[**13]** in Supp. of Defs. SEO and SENA's Mot. for Summ. J. ¶ 39. Tynkkynen contends that Tynkkynen first learned of IP's plan to raise its prices on February 8, two days after the phone call.

August 2004 phone call, Tynkkynen told Korhonen that he intended to tell the government "everything" that he remembered about their meetings, rather than the "joint story" they had discussed in July. *Id*. at 135-36.)

In February 2006, the DOJ granted conditional full immunity to UPM in return for the company's cooperation in the price-fixing investigation. In December 2006, a grand jury issued a one-count indictment against SENA charging **[**16]** that from August 2002 through June 2003, SENA and others entered into a conspiracy to fix the price at which the companies sold publication paper to customers in the United States, in violation of *section 1* of the Sherman Act. The case against SENA was tried to a jury in the U.S. District Court for the District of Connecticut (Christopher F. Droney, *J.*) in July 2007. *United States v. Stora Enso N. Am. Corp*., No. 3:06-cr-323.

During the criminal trial, Tynkkynen testified, *inter alia*, that during their phone conversation on February 11, 2003, he and Korhonen reached an "agreement" that UPM and SENA would "match[ ]" IP's February 2003 price increase for coated grade 5 paper and that both firms would "seriously implement" that price increase with their customers. Trial Tr. at 88, 247-48. For his part, Korhonen testified that at the time of the November 6, 2002 meeting, he understood Tynkkynen to be trying to "initiate something to get the prices improved." *Id*. at 281. Korhonen further testified that after the November 6 meeting, "some phone calls" occurred between him and Tynkkynen during which "intentions were exchanged about [publication] paper price increases," and that, during their **[**17]** February 11, 2003 phone conversation in particular, Korhonen told Tynkkynen what SENA was "going to do," and, likewise, Tynkkynen told Korhonen what UPM was "going to do." *Id*. at 282, 284-85. After both parties presented their evidence, SENA unsuccessfully moved for acquittal. On July 19, 2007, in a general verdict, the jury acquitted **[*60]** SENA of criminal antitrust violations.

E. Procedural History

After the DOJ's investigation became public, individual plaintiffs brought nine separate actions against various manufacturers of publication paper in federal district courts across the country, alleging price fixing in the U.S. market for publication paper. In November 2004, the Judicial Panel on Multidistrict Litigation ("MDL") consolidated and transferred these actions to the U.S. District Court for the District of Connecticut, thereby creating MDL 1631, *In re Publication Paper Antitrust Litigation*. Additional suits were filed over the course of the following year. They, too, were consolidated with MDL 1631.

In their fifth and final amended complaint, filed in March 2008, plaintiffs brought claims under section 1 of the Sherman Act, *15 U.S.C. § 1*, and *sections 4* and *16* of the Clayton Act, *15 U.S.C. §§ 15* **[**18]** and *26*, seeking treble damages and alleging that from October 1, 2002, to May 31, 2004, SENA, SEO, and UPM conspired to fix the prices of coated paper grades 3, 4, and 5. In April 2008, the district court approved plaintiffs' settlement with UPM, leaving only SENA and SEO as defendants in the MDL proceedings. In May 2009, the district court certified the plaintiff class as "[a]ll persons . . . who directly purchased Publication Paper for delivery in the United States from [SENA or SEO] . . . at any time during the period from October 1, 2002 to and including September 30, 2003" (the "class period"). Order Granting Class Certification, D. Ct. Dkt. No. 470. After the close of discovery, defendants moved for summary judgment, and the district court granted defendants' motion. *Publication Paper, 2010 U.S. Dist. LEXIS 131931, 2010 WL 5253364, at *1*.

In its decision, the district court rejected plaintiffs' argument that Tynkkynen's testimony that he and Korhonen reached an "agreement" on pricing in February 2003 constituted sufficient "direct evidence" of price fixing to withstand defendants' motion for summary judgment. *2010 U.S. Dist. LEXIS 131931, [WL] at *8*. As to plaintiffs' other evidence, the court acknowledged that SENA and UPM's three price **[**19]** increases constituted parallel conduct; that the publication paper industry was conducive to collusion; and that the communications between Tynkkynen and Korhonen supported the existence of a conspiracy. Nevertheless, the court determined that plaintiffs' evidence did not sufficiently "exclude the possibility that SENA acted independently in raising the prices charged for publication paper" and that, in any event, "even if Tynkkynen and Korhonen agreed that UPM and SENA would follow rivals' future price increases," plaintiffs had not demonstrated that such an agreement "had some effect on future price increases announced by SENA." *2010 U.S. Dist. LEXIS 131931, [WL] at *13-14*. The district court also concluded that plaintiffs failed to show that defendants conspired to reduce the supply of publication paper by closing certain of their paper mills, and ruled that plaintiffs offered "virtually no evidence" demonstrating that SEO played a role in the alleged price-fixing scheme. *2010 U.S. Dist. LEXIS 131931, [WL] at *17*.

This appeal followed.

On appeal, plaintiffs contend that the district court made several factual and legal errors that require us to reverse the judgment entered for defendants. In particular, they maintain that the district court **[**20]** improperly discounted direct evidence of a price-fixing agreement; improperly failed to draw reasonable inferences in their favor; and erred in concluding as a matter of law that the alleged agreement between Korhonen and Tynkkynen had no **[*61]** effect on SENA's pricing decisions.[7] ***HN1***[] Our task is to determine whether, on the evidence presented, a jury could reasonably conclude that defendants reached an agreement "for the purpose and with the effect of raising . . . the price of" publication paper. *United States v. Socony Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*; *accord* *Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 336 (2d Cir. 2008)*. This requires evidence sufficient to permit a preponderance finding that "higher prices came about as a result of [the agreement], rather than through independent action of the defendants." *Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2d Cir. 1987)*.

II. DISCUSSION

A. Standard of Review

HN2[] We review *de novo* a district court's grant of summary judgment. *MBIA Inc. v. Fed. Ins. Co., 652 F.3d 152, 158 (2d Cir. 2011)*. We will affirm only if, after construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor, *id*., "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," *Fed. R. Civ. P. 56(a)*.

HN3[] Our Court has observed that "[b]y avoiding wasteful trials and preventing lengthy litigation that may have a chilling effect on pro-competitive market forces, summary judgment serves a vital function in the area of ***antitrust law***." *Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 95 (2d Cir. 1998)*. Nevertheless, summary judgment is not a substitute for trial. *Apex, 822 F.2d at 252*. Thus, when the evidence admits of competing permissible inferences with regard to whether a plaintiff is entitled to relief, "the **[**22]** question of what weight should be assigned to [those] inferences remains within the province of the fact-finder at a trial." *Id. at 253*.

B. Price-Fixing Claims

HN4[] *Section 1* of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is . . . illegal." *15 U.S.C. § 1*. Notwithstanding its broad language, this provision prohibits "only unreasonable restraints of trade." *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*. *Per se* liability attaches, however, to "plainly anticompetitive" agreements. *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. An agreement between competitors to fix prices, known as a horizontal price-fixing agreement, categorically constitutes an unreasonable restraint, and, accordingly, is unlawful *per se. Id*.

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[7] Plaintiffs also take issue with the district court's conclusion that there was insufficient evidence from which a reasonable jury could find that Korhonen and Tynkkynen conspired to reduce the supply of publication paper. We agree with the district court that the evidence demonstrates conclusively **[**21]** that SENA's plan to reduce capacity was in development long before Korhonen and Tynkkynen began communicating in August 2002. Accordingly, we will not discuss further plaintiffs' allegations concerning reductions in capacity.

HN5[] To prevail on a claim of horizontal price fixing, a plaintiff must demonstrate that the defendants entered into a conspiracy "formed for the purpose and with the effect of raising . . . price[s]." *Socony-Vacuum, 310 U.S. at 223*. In other words, the evidence must show that: (1) the defendants conspired to raise prices, and (2) this conspiracy caused injury to the **[**23]** plaintiff in the form of artificially inflated prices. *See* *Apex, 822 F.2d* **[*62]** *at 253*; *In re Flat Glass Antitrust Litig., 385 F.3d 350, 356 (3d Cir. 2004)*.

HN6[] Parallel pricing among competitors, also known as "conscious parallelism," is often proffered as evidence of a price-fixing agreement. "Conscious parallelism" describes "the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*.

HN7[] Conscious parallelism alone, however, does not establish an antitrust violation. Such behavior is consistent with both unlawful conspiracy and lawful independent conduct. *See* *Apex, 822 F.2d at 253*. Accordingly, when the defendants' parallel pricing forms the basis for a price-fixing claim, a plaintiff must show additional circumstances—often referred to as "plus factors"—which, when viewed in conjunction with the parallel conduct, would permit a fact-finder to infer a conspiracy. *Id*. Such "plus **[**24]** factors" may include, for example: a common motive to conspire; evidence that the parallel acts were against the apparent economic self-interest of the individual alleged conspirators; or evidence of "a high level of interfirm communications." *Id. at 254*.

HN8[] *Section 1* of the Sherman Act does not itself provide a private right of action. That right is established by *section 4* of the Clayton Act, which authorizes private suits by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," *15 U.S.C. § 15*, and affords prevailing plaintiffs a claim to three times their actual damages.

C. Evidence of an Agreement

1. The Scope of Matsushita

In concluding that summary judgment was appropriate in this case, the district court cited extensively to the Supreme Court's decision in *Matsushita*. Acknowledging that "the evidence as a whole arguably could support an inference of illegal collusive behavior," the district court nonetheless determined that plaintiffs "failed to offer sufficient evidence to dispel the possibility" that SENA acted independently. *Publication Paper, 2010 U.S. Dist. LEXIS 131931, 2010 WL 5253364, at *9, *13*. The parties dispute the extent to which the "tends **[**25]** to exclude" formulation articulated in *Matsushita, 475 U.S. at 588* (HN9[] "To survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of *§ 1* must present evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently."), applies under the circumstances presented here. We take this opportunity to clarify the application of the standards established in that case.

In *Matsushita*, the plaintiffs alleged that Japanese television manufacturers had engaged in a longstanding and wide-ranging conspiracy to fix prices in the United States below the level that their costs and market conditions made reasonable. According to the plaintiffs' theory, the defendants' predatory prices would eventually force competitors to leave the market, at which point the defendants would raise prices to monopoly levels. The Court observed that, as a general matter, "predatory pricing schemes are rarely tried, and even more rarely successful." *Id. at 589*. Indeed, the conspiracy alleged in *Matsushita* had spanned 20 years without achieving the putatively desired monopoly. Because it found both that the plaintiffs' theory of conspiracy **[*63]** was implausible and **[**26]** that the defendants' price-cutting conduct could as readily be explained as legitimate competitive behavior, the Court required the plaintiffs to "come forward with more persuasive evidence to support their claim than would otherwise be necessary" to withstand summary judgment. *Id. at 587*.

HN10[] *Matsushita*, then, stands for the proposition that substantive "***antitrust law*** limits the range of permissible inferences" that may be drawn from ambiguous evidence. *Id. at 588*; *accord* *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 654, 661-62 (7th Cir. 2002)* (Posner, *J.*). It further holds that the range of inferences that may be draw from such evidence depends on the plausibility of the plaintiff's theory. *See* *Matsushita, 475 U.S. at 588*; *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*; *Apex, 822 F.2d at 253*. Thus, where a plaintiff's theory of recovery is implausible, it takes "strong direct or circumstantial evidence" to satisfy *Matsushita's* "tends to exclude" standard. *Apex, 822 F.2d at 253*. By contrast, broader inferences are permitted, and the "tends to exclude" standard is more easily satisfied, when the conspiracy is economically sensible for the alleged conspirators **[**27]** to undertake and "the challenged activities could not reasonably be perceived as procompetitive." *Flat Glass, 385 F.3d at 358*; *cf.* *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 468, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* ("*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.").

At several points in its opinion, intermingled with its use of the "tends to exclude" standard, the district court stated that plaintiffs were required to "exclude" or "dispel" the possibility that defendants acted independently. *Publication Paper, 2010 U.S. Dist. LEXIS 131931, 2010 WL 5253364, at *10-11, *13-14*.***HN11***[] Requiring a plaintiff to "exclude" or "dispel" the possibility of independent action places too heavy a burden on the plaintiff. Rather, if a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw from that evidence; it need not be the *sole* inference. As Professors Areeda and Hovenkamp have advised:

> It is important not to be misled by *Matsushita's* statement . . . that the plaintiff's evidence, if it is to prevail, must "tend . . **[**28]** . to exclude the possibility that the alleged conspirators acted independently." The Court surely did not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct. Not only did the court use the word "tend," but the context made clear that the Court was simply requiring sufficient evidence to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not.

Phillip E. Areeda and Herbert Hovenkamp, *Fundamentals of* ***Antitrust Law***, § 14.03(b), at 14-25 (4th ed. 2011) (footnotes omitted).

Of course, ***HN12***[] the standards established in *Matsushita* do not apply at all when a plaintiff has produced *unambiguous* evidence of an agreement to fix prices. As such, "an admission by the defendants that they agreed to fix their prices is all the proof a plaintiff needs." *Corn Syrup, 295 F.3d at 654*. Thus, at least three of our sister circuits have held that summary judgment is generally not appropriate where a plaintiff has produced direct, as opposed to circumstantial, evidence of an **[*64]** agreement to fix prices. *See* *Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1300 (11th Cir. 2003)*; *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1233 (3d Cir. 1993)*; **[**29]** *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 441 (9th Cir. 1990)*; *see also* *R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 58 (2d Cir. 1997)* (quoting, in dicta, Ninth Circuit decision drawing distinction between direct and circumstantial antitrust evidence). Some courts have reached this conclusion by reasoning that "direct evidence . . . requires no inferences to establish the proposition or conclusion being asserted." *In re Baby Food Antitrust Litig., 166 F.3d 112, 118 (3d Cir. 1999)*.

Neither party in this case questions this evidentiary distinction. Nevertheless, we do not think it necessary to draw bright lines to decide this case. *See* *Corn Syrup, 295 F.3d at 661-62*. ***HN13***[] All evidence, including direct evidence, can sometimes require a factfinder to draw inferences to reach a particular conclusion, though "[p]erhaps on average circumstantial evidence requires a longer chain of inferences." *Sylvester v. SOS Children's Vills. Ill., Inc., 453 F.3d 900 (7th Cir. 2006)* (Posner, *J.*). Here, the totality of the evidence, viewed in the light most favorable to plaintiffs and with proper regard for the *Matsushita* standards, could support a reasonable inference **[**30]** of illegal collusive behavior.

2. Plaintiffs' Evidence of an Agreement to Fix Prices

In this case, the district court concluded that "[n]othing in the record concerning the February 2003 price increase suggests that Tynkkynen or Korhonen had an agreement to follow the IP increase." *Publication Paper, 2010 U.S. Dist. LEXIS 131931, 2010 WL 5253364, at *9*. We disagree. As previously discussed, Tynkkynen testified during SENA's criminal trial that he and Korhonen reached an "agreement" that UPM and SENA would follow IP's February 2003 price increase and that they would implement that price increase on the customer end "seriously," i.e., to the fullest extent possible. Whether or not this testimony—a co-conspirator's acknowledgment that he understood his numerous communications with Korhonen to reflect a price-fixing agreement—admits any ambiguity as to Korhonen's parallel understanding of the same communications, the testimony is surely strong evidence of a collusive scheme between UPM and SENA. That would be sufficient to satisfy *Matsushita's* "tends to exclude" standard even if plaintiffs' theory were implausible, which it is not. *See* *Apex, 822 F.2d at 253*.[8]

The district court considered Tynkkynen's testimony to be of limited value, in part, because, as the court explained and is not disputed, "English is not the native language of Tynkkynen and Korhonen." *Publication Paper, 2010 U.S. Dist. LEXIS 131931, 2010 WL 5253364, at *8*. Any notion that Tynkkynen did not understand the meaning of "agreement" in English or the import of his testimony, however, is belied by the record. Tynkkynen repeatedly explained in court that he and Korhonen had a "common understanding," and that the substance of that "understanding" was that "both companies are matching . . . [IP's] coated #5 price increase and will seriously implement the price increase. So it was a common understanding, and, thus, [an] agreement." Trial Tr. at 247-48. Moreover, defendants conceded at oral argument before this Court that translation and language were not an issue. Oral Arg. Tr. at 23. Although an "understanding" might in some **[*65]** contexts be intended to signal an "expectation" rather than "agreement," the substance of Tynkkynen's testimony and the context of the events he describes fully support the conclusion **[**32]** that when he said "understanding"—as when he said "agreement"—he meant "agreement."

Plaintiffs have provided additional evidence to support a reasonable finding that SENA and UPM engaged in price fixing. The district court found, and defendants do not contest, that the publication paper industry is conducive to collusion: publication paper is a commodity product with few substitutes; the market is controlled by a limited number of sellers (principally, IP, SENA, and UPM); and high capital investment costs limit the entry of new market players. *See* *Corn Syrup, 295 F.3d at 656-57* (describing characteristics that make a market susceptible to collusion). Furthermore, during the class period, the publication paper industry suffered from excess capacity and historically low prices, conditions that make "price competition more than usually risky and collusion more than usually attractive." *Id. at 657*. Finally, there is ample evidence of conspiratorial behavior. Most notably, it is undisputed that in private phone calls and meetings—for which no social or personal purpose has been persuasively identified—Tynkkynen shared UPM's pricing strategies with Korhonen and both men disclosed to each **[**33]** other their companies' intentions to increase prices before those decisions had been publicly announced. Tynkkynen and Korhonen also developed a "joint story" to conceal from the government the true nature of their communications—behavior from which a jury could infer that both men were aware that their communications and related actions regarding publication paper pricing violated the law.

We recognize that despite the strength of plaintiffs' evidence of an agreement, the totality of the evidence admits of alternative interpretations—namely, that SENA as a corporation acted independently of UPM in deciding to increase its prices and that the price increases each company announced were the product of certain characteristics of the industry and not any agreement between Korhonen and Tynkkynen. But it is the province of the jury to determine how much weight to accord Tynkkynen's testimony and the other relevant evidence. We believe that, on the basis of Tynkkynen's testimony alone, a jury could reasonably find that SENA and UPM made an agreement to fix the prices at which their companies sold publication paper in the latter part of 2002 and early 2003. Plaintiffs' other evidence provides **[**34]** additional support for the theory that, as early as August 2002, Korhonen and Tynkkynen reached an agreement to follow price increases announced by their competitors. In sum, unlike in *Matsushita*, the

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[8] Any questions of Tynkkynen's credibility, perception, or memory **[**31]** are, of course, for the jury. On this appeal, we must assume they will be answered in favor of plaintiffs.

record in this case presents strong, if not irrefutable, evidence of a conspiracy in a context where the conspiracy's goals were aligned with the conspirators' economic interests.

D. Causation

1. Applicable Law

Having determined that a jury could reasonably find that SENA and UPM unlawfully agreed to raise prices, we now consider whether there was enough evidence for a jury to find that such an agreement actually *caused* the price increases that occurred.[9] This Court has **[*66]** had little occasion to explore at length the issue of causation in the antitrust context,[10] although certain principles have emerged from the Supreme Court's opinions and our precedents. ***HN14***[] The Supreme Court has noted, for instance, that "[i]t is enough that the illegality is shown to be a material cause of the [antitrust] injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling [its] burden of proving compensable injury." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. **[**35]** Relying on *Zenith Radio*, our Court has also observed that an antitrust defendant's unlawful conduct need not be the *sole* cause of the plaintiffs' alleged injuries; to prove a "causal connection" between the defendant's unlawful conduct and the plaintiff's injury, the plaintiff need only "demonstrate that [the defendant's] conduct was a substantial or materially contributing factor" in producing that injury. *Litton Sys., Inc. v. AT & T Co., 700 F.2d 785, 823 n.49 (2d Cir. 1983)*; *see also* *U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1377 (2d Cir. 1988)*. We have held further that to prevail on an antitrust claim, a plaintiff must establish that "the injuries alleged would not have occurred *but for* [the defendant's] antitrust violation," *Argus Inc. v. Eastman Kodak Co., 801 F.2d 38, 41 (2d Cir. 1986)*, adding necessity to the materiality requirement of our antitrust causation analysis.

Applying these basic concepts here, we consider whether there is sufficient evidence from which a jury could find that Korhonen and Tynkkynen's agreement, if proven, was both a material and but-for cause of the price increases. Our analysis is enriched and refined by study of causation principles as developed in the tort law context. *See generally* *Associated Gen. Contractors of Cal., Inc. v. Cal. St. Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (***HN15***[] applying common law principles of causation derived from tort and contract law to determine whether the plaintiff had sufficiently alleged an antitrust injury under *section 4* of the Clayton Act).

HN16[] "There is a causal link between an act or activity and an injury **[**37]** when we conclude on the basis of the available evidence that the recurrence of that act or activity will increase the chances that the injury will also occur." Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr*., 43 U. Chi. L. Rev. 69, 71 (1975). In other words, if an act is deemed wrongful because it is believed significantly to increase the risk of a particular injury, we are entitled—in the tort context at least—to presume that such an injury, if it occurred, was caused by the act. *See, e.g.,* *Liriano v. Hobart Corp., 170 F.3d 264, 271 (2d Cir. 1999)* ("When a defendant's negligent act is deemed wrongful precisely because it has a strong propensity to cause the type of injury that ensued, that very causal tendency is evidence enough to establish a *prima facie* case of cause-in-fact."); *see also* *BCS Servs., Inc. v. Heartwood 88, LLC, 637 F.3d 750, 758 (7th Cir. 2011)* ("Once a plaintiff presents evidence that he **[*67]** suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, he has done enough to withstand summary judgment on the ground of absence of causation."). Under this

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[9] Plaintiffs' economic expert, Dr. John C. Beyer, estimated that SENA and UPM's prices were 5.98% higher during the class period than they would have been in the absence of the alleged conspiracy. Using this estimate, Dr. Beyer calculated further that plaintiffs sustained $102.5 million in **[**36]** damages during the class period as a result of the alleged conspiracy. Defendants' expert, Dr. Peter Bronsteen, contested this analysis.

[10] Neither this court nor any other of which we are aware has determined whether *Matsushita's* "tends to exclude" standard applies to the causation element as well as to the agreement element of a section 1 price-fixing claim. Assuming, without deciding, that it does, we are satisfied that the causation evidence discussed *infra* would satisfy that standard.

framework, the burden then shifts to **[**38]** the defendant "to bring in evidence tending to rebut the strong inference, arising from the [injury], that the [act] was in fact a but-for cause of the plaintiff's injury." *Liriano, 170 F.3d at 271*.

2. The Strength of the Evidence

As applied here, ***HN17***[] we consider the causal link between an agreement to raise prices and a subsequent price increase. Price-fixing agreements are "conclusively presumed to be unreasonable and therefore illegal" precisely because of their "pernicious effect on competition" and lack of any redeeming virtue, *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*—i.e., because such agreements are so likely to result in artificially higher prices being charged to consumers without accomplishing any legitimate business purpose. Therefore, the demonstrable existence of an agreement between Korhonen and Tynkkynen to follow price increases announced by competitors, if proven, constitutes strong evidence that the alleged agreement caused at least some element of the subsequent price increases (e.g., amount or effective date), or, at a minimum, the inability of plaintiffs to negotiate below the list price. Furthermore, the causal link is presumed to be particularly strong **[**39]** when, as alleged here, the agreement is between executives at rival companies, each of whom has final pricing authority. *Compare* *Flat Glass, 385 F.3d at 368-69* (evidence of "upper level executives hav[ing] secret conversations about price" has more probative weight than "price discussion[s] among low level sales people"), *with* *Baby Food, 166 F.3d at 125* ("Evidence of sporadic exchanges of shop talk among field sales representatives who lack pricing authority is insufficient to survive summary judgment.").

Defendants contend, and the district court concluded, that even if Korhonen and Tynkkynen entered into an illegal agreement, the record provides an inadequate basis on which a jury could find that the agreement caused plaintiffs' complained-of injuries. They so reason from the record's reflection that employees in SENA's sales and marketing department initiated, recommended, and implemented pricing decisions during the class period. Defendants maintain that these lower-level employees—not Korhonen—independently decided that SENA should follow price increases announced by competitors because doing so made economic sense and was consistent with SENA's pricing philosophy to be a market **[**40]** follower rather than a market leader. Defendants further assert that Korhonen never altered or vetoed these employees' pricing recommendations. Accordingly, they urge that the district court properly concluded as a matter of law that even if Korhonen and Tynkkynen reached a price-fixing agreement, it had no effect on SENA's pricing decisions.

Although defendants' argument has some force, and might well persuade a jury, we are not convinced that it so conclusively rebuts plaintiffs' strong evidence that the alleged agreement was both a material and but-for cause of the price increases as to permit an award of summary judgment for defendants. Even if other SENA employees had day-to-day responsibility for pricing strategy and implementation, it is undisputed that Korhonen, as President of SENA, had the final say on *all* pricing decisions. Defendants emphasize that Korhonen never told other SENA employees about his communications with **[*68]** Tynkkynen. But there was no reason for him to do so, and indeed there were strong reasons for him to remain silent on this score. Korhonen's decisions on pricing were final and, as Korhonen himself has admitted, he knew, at a minimum, that his communications **[**41]** with Tynkkynen violated SENA's internal antitrust policy, which prohibited "sett[ing] prices or verify[ing] the activities of [SENA's] competitors by calling competitors," Defs.' Resp. to Pls.' Local Rule 56(a)(2) Statement ¶ 499. Moreover, one component of the alleged pricing agreement was holding firm with customers as to price—an arrangement that Korhonen was in a position to enforce strictly or variably.

In addition, there is scant evidence in the record to support defendants' assertion that SENA has historically been a market follower rather than a market leader, and that any agreement was therefore of no effect. Defendants cite only Korhonen's qualified statement, made in a declaration filed in the course of this litigation, that "SENA *usually* did not initiate a price increase on its own, but rather would respond to (and *normally* match) price increases initiated by other paper manufacturers." Decl. of Kai Korhonen in Supp. of Defs. SEO and SENA's Mot. for Summ. J. ¶ 15 (emphasis added). We are aware of no specific information regarding SENA's pricing decisions outside of the class period in the record on summary judgment. Even during the class period, SENA did not uniformly follow

[42]** the pricing decisions announced by other publication paper manufacturers: for example, SENA did not match Mead's price increase on all products in November 2002 and led price increases in February 2003 for coated grade 4 paper and supercalendered paper—products that were not covered by IP's price announcement. In any event, the mere fact that following price increases announced by competitors may have been consistent with SENA's overall pricing strategy does not immunize SENA from liability if it had an illegal agreement with UPM to adhere to that strategy. Defendants conceded as much at oral argument before this Court. Oral Arg. Tr. at 21-22.

Finally, the alleged agreement between Korhonen and Tynkkynen would have been valuable to SENA because it significantly reduced SENA's risk: by coordinating with UPM in advance, SENA could follow competitors' price increases secure in the knowledge that UPM, one of its biggest competitors, would not undercut SENA. Without an advance agreement, SENA ran the risk that UPM would hold its prices steady, thereby spiriting away SENA's customers and eating into SENA's market share. For these reasons, a jury could reasonably conclude that even if other **[**43]** SENA employees, based on their own independent business judgments, recommended matching competitors' price increases, Korhonen would neither have approved those blanket price increases nor enforced them strictly, absent assurances from Tynkkynen that UPM would do likewise.[11]

Defendants also argue that any agreement reached by Korhonen and Tynkkynen during their phone conversation on February 11, 2003, had no effect on pricing **[*69]** because, by that point, SENA had already decided to follow IP's price increase. But defendants do not dispute that SENA's decision to follow IP's price increase was not actually reached until February 11, the day **[**44]** of the phone call. Moreover, when the call was made, neither UPM nor SENA had publicly announced or implemented any price increase. Indeed, SENA sent its price increase announcement to customers approximately one half-hour *after* Korhonen and Tynkkynen's conversation, and UPM had not finished compiling its list of customer contacts or mailed out its price announcement letter until the afternoon of February 11. It therefore would be reasonable to infer that Korhonen required assurance from Tynkkynen as to UPM's plans before SENA would go forward as it did with its price increase and with its efforts to implement that price increase with customers to the fullest extent possible.[12] *See* Flat Glass, 385 F.3d at 369 (concluding that exchanges of pricing information that are "tightly linked" with subsequent parallel price increases permit the inference that "the exchanges of information had an impact on pricing decisions").

Based on the foregoing, we conclude that the evidence regarding causation presents a genuine dispute of material fact: that is, whether Korhonen and Tynkkynen's agreement, if proven, was both a material and but-for cause of the price increases. The question of causation is therefore a jury question.[13]

E. SEO

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[11] During SENA's criminal trial, Korhonen testified that even if UPM had not followed IP's price increase in February 2003, SENA would still have increased its prices. Korhonen conceded, however, that notes taken by an investigator during Korhonen's earlier interview with the DOJ reflected that Korhonen told the government that he would *not* have allowed SENA to raise its prices had Tynkkynen informed him that UPM would not match IP. Although Korhonen testified that he did not have a specific recollection of making this statement, he did not deny making it.

[12] Although the record is not decisive in this respect, there is evidence that SENA and UPM each consistently attempted to implement the full amount of the February 2003 price increase when negotiating contracts with customers, reflecting the "seriously implement" aspect **[**45]** of the alleged agreement. For instance, Tynkkynen refused to allow UPM salespeople to enter into contracts with customers at prices below the full price increase amount, even when customers threatened to take their business elsewhere. There is also some evidence that SENA stood firm on the price increase despite customer resistance.

[13] This Court has on at least one occasion mentioned other factors that may inform a court's decision regarding disputed causation issues at summary judgment, *see* Williams v. Utica Coll. of Syracuse Univ., 453 F.3d 112, 121-22 (2d Cir. 2006); *see also* Williams v. KFC Nat'l Mgmt. Co., 391 F.3d 411, 422-25 (2d Cir. 2004) (Calabresi, J., concurring) (considering strength of evidence, relative knowledge of parties, and "how strongly we feel about making an error in one direction as against the other"). Such considerations have not been addressed by the parties, and **[**46]** we therefore do not address them further, although it appears that these factors favor plaintiffs here.

Finally, plaintiffs contend that the district court erred in granting summary judgment to SEO. Plaintiffs have offered evidence that on October 30, 2002, Tynkkynen met with Bernd Rettig, an SEO executive, and that during that meeting Tynkkynen and Rettig agreed that UPM would lead a price increase for publication paper *in Europe*, and that SEO would match that price increase. Plaintiffs assert that the success of SEO's price-fixing efforts in Europe depended on its ability to ensure that SENA and its rivals fixed the price of publication paper in the United States. Plaintiffs have failed, however, to offer any concrete evidence in support of their theory. For that reason, and because the record is devoid of evidence that SEO had any direct involvement in decisions regarding the marketing, sale, or pricing of publication paper in the United States, we affirm the district court's grant of summary judgment to SEO.

III. CONCLUSION

For the foregoing reasons, we conclude that plaintiffs' Sherman Act section 1 claim **[*70]** against SENA is sufficiently supported to require a trial, but their **[**47]** claim against SEO is not. Accordingly, we **VACATE** the district court's judgment in part, **AFFIRM** it in part, and **REMAND** the case for further proceedings consistent with this opinion.

Am. Airlines, Inc. v. Travelport Ltd.

United States District Court for the Northern District of Texas, Fort Worth Division

August 7, 2012, Decided; August 7, 2012, Filed

CIVIL ACTION NO. 4:11-CV-244-Y

Reporter

2012 U.S. Dist. LEXIS 126934 *; 2012-2 Trade Cas. (CCH) P78,026; 2012 WL 3737037

AMERICAN AIRLINES, INC. vs. TRAVELPORT LIMITED, et al.

Subsequent History: Stay granted by *Am. Airlines, Inc. v. Travelport Ltd., 2012 U.S. Dist. LEXIS 147636 (N.D. Tex., Sept. 6, 2012)*

Prior History: *Am. Airlines, Inc. v. Travelport Ltd., 2012 U.S. Dist. LEXIS 198417 (N.D. Tex., July 16, 2012)*

Core Terms

allegations, conspiracy, travel agency, submarkets, Connect, monopolize, airline, second amended complaint, motion to dismiss, reasonable inference, compete, alleged facts, customers, alleged conspiracy, senior executive, group boycott, flights, sales, travel agent, negotiations, horizontal, conspired, commerce, monopoly, booking, restraint of trade, rule of reason, customer-allocation, competitors, subscriber

Counsel: [*1] For American Airlines Inc, a Delaware corporation, Plaintiff: R Paul Yetter, LEAD ATTORNEY, Anna G Rotman, George H Fibbe, Yetter Coleman LLP, Houston, TX; Allen S Blaustein, Christopher R J Pace, Marc A Weinroth, PRO HAC VICE, Weil Gotshal & Manges LLP, Miami, FL; Bill F Bogle, Roland K Johnson, Harris Finley & Bogle, Fort Worth, TX; Eric Hochstadt, James W Quinn, Richard A Rothman, Robert S Berezin, PRO HAC VICE, Weil Gotshal & Manges LLP, New York, NY; Grace H Kwon, Marc G Schildkraut, PRO HAC VICE, Cooley LLP, Washington, DC; MJ Moltenbrey, Paul Hastings LLP, Washington, DC; Michelle LeGrand Hartmann, Yolanda Cornejo Garcia, Weil Gotshal & Manges, Dallas, TX; Robert E Zuver, Jr, PRO HAC VICE, Paul Hastings, LLP, Washington, DC; Timothy S Longman, PRO HAC VICE, Dewey & LeBoeuf LLP, Washington, DC.

For Travelport Limited, a foreign corporation, Travelport, LP, a Delaware limited partnership doing business as Travelport, Defendants: John T Schriver, Paul E Chronis, LEAD ATTORNEYS, Duane Morris LLP, Chicago, IL; Michael G Cowie, LEAD ATTORNEY, PRO HAC VICE, Dechert LLP, Washington, DC; Carolyn H Feeney, Justin N Pentz, PRO HAC VICE, Dechert LLP, Philadelphia, PA; Christian D Tucker, **[*2]** Walker Cheney Friedman, Friedman Suder & Cooke, Fort Worth, TX; Craig Gerald Falls, PRO HAC VICE, Dechert LLP, Washington, DC; Faith Gay, Steig D Olson, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan LLP, New York, NY; Karin Kramer, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, San Francisco, CA; Michael L Weiner, PRO HAC VICE, Dechert LLP, New York, NY; Patrick C Doolittle, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan LLP, San Francisco, CA.

For Orbitz Worldwide, LLC, a Delaware limited liability company doing business as Orbitz, Defendant: Christopher S Yates, LEAD ATTORNEY, PRO HAC VICE, Latham & Watkins LLP, San Francisco, CA; Brendan Andrew McShane, Daniel M Wall, PRO HAC VICE, Latham & Watkins LLP, San Francisco, CA; John J Little, Little Pedersen Fankhauser LLP, Dallas, TX; Megan K Dredla, Stephen G Gleboff, Gleboff Law Group PLLC, Dallas, TX.

For Sabre Inc, a Delaware corporation, Sabre Holdings Corporation, a Delaware corporation, Sabre Travel International Ltd, a foreign corporation doing business as Sabre Travel Network, Defendants: Scott A Fredricks, LEAD ATTORNEY, Philip A Vickers, Cantey Hanger LLP, Fort Worth, TX; Andrew C MacNally, Andrew Polovin, Katherine M Swift, **[*3]** PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL; Chris Lind, Bartlit Beck Herman Palenchar & Scott, Chicago, IL; Donald E Scott, Karma M Giulianelli, Sean C Grimsley, Sundeep K Addy, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott LLP, Denver, CO; George S Cary, Kenneth Reinker, Larry C Work-Dembowski, PRO HAC VICE, Steven J Kaiser, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC.

For Sabre Inc, Sabre Travel International Ltd, doing business as Sabre Travel Network, Intervenor Defendants: Scott A Fredricks, LEAD ATTORNEY, Philip A Vickers, Cantey Hanger LLP, Fort Worth, TX; Andrew C MacNally, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL; Ralph H Duggins, Cantey Hanger LLP, Fort Worth, TX.

For Hewlett Packard Company, Movant: Timothy F Gavin, LEAD ATTORNEY, Carrington Coleman Sloman & Blumenthal, Dallas, TX.

For ADR Provider, Mediator: Daniel Weinstein, LEAD ATTORNEY, JAMS, San Francisco, CA.

For ADR Provider, Mediator: Layn R Phillips, LEAD ATTORNEY, Irell & Manella LLP, Newport Beach, CA.

For Travelport, LP, a Delaware limited partnership, Travelport Limited, a foreign corporation, Counter Claimants: John T Schriver, Paul E Chronis, **[*4]** LEAD ATTORNEYS, Duane Morris LLP, Chicago, IL; Michael G Cowie, LEAD ATTORNEY, Dechert LLP, Washington, DC; Carolyn H Feeney, Dechert LLP, Philadelphia, PA; Christian D Tucker, Walker Cheney Friedman, Friedman Suder & Cooke, Fort Worth, TX; Craig Gerald Falls, Dechert LLP, Washington, DC; Faith Gay, Steig D Olson, Quinn Emanuel Urquhart & Sullivan LLP, New York, NY; Justin N Pentz, PRO HAC VICE, Dechert LLP, Philadelphia, PA; Michael L Weiner, Dechert LLP, New York, NY; Patrick C Doolittle, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan LLP, San Francisco, CA.

For American Airlines Inc, a Delaware corporation, Counter Defendant: R Paul Yetter, LEAD ATTORNEY, Anna G Rotman, Yetter Coleman LLP, Houston, TX; Allen S Blaustein, Christopher R J Pace, Marc A Weinroth, PRO HAC VICE, Weil Gotshal & Manges LLP, Miami, FL; Bill F Bogle, Roland K Johnson, Harris Finley & Bogle, Fort Worth, TX; Eric Hochstadt, PRO HAC VICE, James W Quinn, Richard A Rothman, Robert S Berezin, Weil Gotshal & Manges LLP, New York, NY; MJ Moltenbrey, Paul Hastings LLP, Washington, DC; Michelle LeGrand Hartmann, Yolanda Cornejo Garcia, Weil Gotshal & Manges, Dallas, TX; Robert E Zuver, Jr, Paul Hastings, LLP, Washington, **[*5]** DC; Timothy S Longman, Dewey & LeBoeuf LLP, Washington, DC.

Judges: TERRY R. MEANS, UNITED STATES DISTRICT JUDGE.

Opinion by: TERRY R. MEANS

Opinion

SEALED ORDER DENYING MOTIONS TO DISMISS

Before the Court is the Partial Motion to Dismiss (doc. 163) filed by defendants Sabre Inc., Sabre Holdings Corporation, and Sabre Travel International Limited (collectively, "Sabre"), along with Sabre's Supplement to Its Motion to Dismiss (doc. 283). Also before the Court are the Motion to Dismiss (doc. 169) and Supplemental Motion to Dismiss (doc. 287) filed by defendants Travelport Limited and Travelport, LP (collectively, "Travelport"), and the Motion to Dismiss (doc. 165) filed by defendant Orbitz Worldwide, LLC ("Orbitz"). After review, the Court will deny the motions.

I. Background

This is an antitrust case that plaintiff American Airlines, Inc. ("American"), filed against Travelport, Orbitz, and Sabre. American is a large domestic and international airline. Orbitz operates an online travel agency. And Travelport and Sabre each operate global distribution systems ("GDSes"). [1]

In its first amended complaint (doc. 70), American asserted claims against the defendants under *sections 1* and *2* of the Sherman Antitrust Act as well as under state law. In that complaint, American alleged in essence that Sabre and Travelport had each unlawfully wielded monopoly power in the market for the distribution of airline fare, flight, and availability information and the provision of booking services to travel agents ("the Market"), as well as in the submarkets consisting of Sabre and Travelport customers, respectively. In addition, American alleged that Sabre and Travelport, along with Orbitz and other unnamed industry participants, had engaged in an industry-wide conspiracy to preserve the GDSes' monopoly power.

All defendants responded by moving for dismissal of the first amended complaint under *Federal Rule of Civil Procedure 12(b)(6)*. After reviewing the motions, the Court determined that American had stated claims against Sabre for monopolization of the Market and the Sabre submarket **[*7]** and a claim against Travelport for monopolization of the Travelport submarket. The Court, however, dismissed all other claims—some with prejudice—and granted American leave to file a second amended complaint. Pursuant to that order, American filed its second amended complaint (doc. 159).

American also filed a motion for reconsideration challenging certain aspects of the Court's dismissal order. The Court rejected the majority of the arguments made in that motion, but granted reconsideration on American's argument that it should be permitted to assert section 1 claims based on its own contracts with Sabre and Travelport. Rather than grant American leave to file an entirely new complaint, however, the Court granted American leave to file a supplement to its second amended complaint. American thereafter filed its supplement (doc. 265), and Sabre and Travelport filed supplemental motions to dismiss.

In the second amended complaint and supplement, American re-urges its position that Sabre, Travelport, and Orbitz have engaged in an industry-wide conspiracy to preserve the GDSes' market power. According to American, the defendants have conspired to preserve the GDS model [2] and to exclude American's **[*8]** "AA Direct Connect" from the Market and submarkets. AA Direct Connect is a method of providing airline information and booking services directly to travel agents without having to go through GDSes.

Based on these allegations, American asserts the following claims in its second amended complaint: (1) monopolization by Sabre of the Market and the Sabre submarket in violation of *section 2* of the Sherman Act; (2) monopolization by Travelport of the Travelport submarket in violation of *section 2*; (3) conspiracy by Sabre, Travelport, Orbitz, and "other unnamed co-conspirators" to monopolize the Market and submarkets in violation of *section 2*; (4) agreement between Sabre and Travelport to unreasonably restrain interstate commerce in violation of *section 1* of the Sherman Act; (5) group boycott by Sabre, Travelport, and "numerous travel agencies" in violation of *section 1*; (6) agreement between Travelport and Orbitz to allocate customers in violation of *section 1*; and (7) unreasonable restraint of competition by Sabre and Travelport via their contracts with **[*9]** American in violation of *section 1*. The defendants now collectively seek dismissal under *Rule 12(b)(6)* of counts 3-7.

II. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) authorizes the dismissal of a complaint that fails "to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. This rule must be interpreted in conjunction with *Rule 8(a)*, which sets forth the requirements for pleading a claim for relief in federal court. *See Fed. R. Civ. P. 8(a)*. *Rule 8(a)*

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[1] GDSes distribute airline fare, flight, and availability information to travel agents, enabling those travel agents to make reservations and issue tickets **[*6]** to travelers. (Pl.'s Second Am. Compl. 2, ¶ 2.) Airlines provide their information to GDSes and pay each GDS a booking fee for every reservation that is made through the GDS. (*Id.* at 3, ¶¶ 6-7.)

[2] The GDS model is explained in detail in the Court's November 21, 2011 Order Regarding Motions to Dismiss and Motion for Leave (doc. 244).

calls for "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *see* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (holding that Rule 8(a)'s simplified pleading standard applies to most civil actions). The Court must accept as true all well-pleaded, non-conclusory allegations in the complaint and liberally construe the complaint in favor of the plaintiff. Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982).

The plaintiff must, however, plead specific facts, not mere conclusory allegations, to avoid dismissal. Guidry v. Bank of LaPlace, 954 F.2d 278, 281 (5th Cir. 1992). Indeed, the plaintiff **[*10]** must plead "enough facts to state a claim to relief that is plausible on its face," and his "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citations omitted). The Court need not credit bare conclusory allegations or "a formulaic recitation of the elements of a cause of action." Id. at 555. Rather, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

"Generally, a court ruling on a motion to dismiss may rely on only the complaint and its proper attachments. A court is permitted, however, to rely on documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Dorsey v. Portfolio Equities, Inc., 540 F.3d 333, 338 (5th Cir. 2008) (citations omitted) (internal quotation marks omitted). "A written document that is attached to a complaint as an exhibit is considered **[*11]** part of the complaint and may be considered in a 12(b)(6) dismissal proceeding." Ferrer v. Chevron Corp., 484 F.3d 776, (5th Cir. 2007) (footnote omitted). In addition, a "court may consider documents attached to a motion to dismiss that 'are referred to in the plaintiff's complaint and are central to the plaintiff's claim.'" Sullivan v. Leor Energy, LLC, 600 F.3d 542, 546 (5th Cir. 2010) (quoting Scanlan v. Tex. A&M Univ., 343 F.3d 533, 536 (5th Cir. 2003)).

III. Analysis

A. Count Three: Conspiracy to Monopolize in Violation of Section 2

"Section 2 of the Sherman Antitrust Act provides a cause of action against 'single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize.'" Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc., 200 F.3d 307, 315 (5th Cir. 2000) (quoting Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 454, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)). [3] To state a claim for conspiracy to monopolize, a plaintiff must plead facts showing "(1) the existence of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect upon **[*12]** a substantial amount of interstate commerce." Id. at 316 (quoting N. Miss. Commc'ns, Inc. v. Jones, 792 F.2d 1330, 1335 (5th Cir. 1986)) (internal quotation marks omitted).

After reviewing the second amended complaint and drawing all reasonable inferences in favor of American, the Court concludes that American has stated a plausible section 2 conspiracy-to-monopolize claim. [4] First, American identifies the specific intent to monopolize allegedly shared by Sabre, Travelport, and Orbitz. American alleges that

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[3] Section 2 of the Sherman Act reads, in relevant part, as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

15 U.S.C.A. § 2 (West 2012).

[4] It would take a treatise to respond to all of the arguments raised by the parties in their motion-to-dismiss briefing. Therefore, the Court will explicitly address only those arguments (a) that are germane to the disposition of the instant motions and (b) that are not indirectly addressed by the Court's analysis.

Sabre, Travelport, Orbitz, and certain unnamed industry participants conspired "to punish and retaliate against American for its direct connect initiative, with the specific intent of preserving Sabre's and Travelport's monopolies in the [Market] and submarkets." (Pl.'s Second Am. Compl. 52, ¶ 177.) American contends that AA Direct Connect **[*13]** poses a threat to the GDS model and that, consequently, the defendants and certain other industry participants share an interest in excluding AA Direct Connect from the Market and submarkets. According to American, the GDSes benefit directly from the GDS model because it allows them to enjoy monopoly power, while travel agencies such as Orbitz benefit indirectly from the model because they share in the booking fees that the GDSes charge to airlines. These allegations, taken as true, support a reasonable inference that GDSes and travel agencies alike share an interest in preserving the status quo of the GDS model and defeating efforts such as AA Direct Connect that challenge the long-term viability of the GDS model. The allegations further support an inference that Sabre, Travelport, and Orbitz have specifically intended to act in accordance with that shared interest.

Second, **[*14]** American has adequately pleaded the existence of a conspiracy. More precisely, American has alleged facts sufficient to support a reasonable inference that Sabre, Travelport, Orbitz, and other industry participants engaged in a combination or conspiracy to preserve the GDS model and exclude AA Direct Connect from the Market and submarkets. American alleges that the defendants, joined by various travel agencies, "agreed with one another not to implement American's direct connect technology, agreed to bias their displays to disfavor American's flights, agreed to boycott American flights for their own corporate sales, and agreed to encourage their corporate customers to 'book away' from American and shift sales to other airlines." (Second Am. Compl. 6, ¶ 14.) American alleges further that this conspiracy was "orchestrated by Sabre and Travelport, with assistance from large travel agencies such as Orbitz and Expedia, and trade associations such as the Business Travel Coalition and the American Society of Travel Agents." (*Id.* 7, ¶ 15.)

Third, American has alleged facts from which it may reasonably be inferred that overt acts were taken in furtherance of the alleged conspiracy. For example, **[*15]** the defendants, American alleges, "coordinated their actions through telephone and email communications, and face-to-face meetings among their senior executives, board members, and employees." (*Id.*) American also alleges that in November 2010 "a senior executive at Sabre reported to colleagues on a conversation he had with a Travelport representative" and mentioned "a roadmap for AA plan." (*Id.* at 36, ¶ 115.). In addition, American alleges that "an Orbitz employee sent an email to employees at Sabre, Expedia, BTC, and ASTA asking them to 'stand together' with Orbitz against American." (*Id.* ¶ 116.) Further, as a final example, American alleges that "[i]n mid-2010, the GDSs were meeting with travel agencies to 'discuss AA' or to 'share views and action plan' on AA Direct Connect." (*Id.* at 39, ¶ 126.) These allegations are sufficient to support an inference that the defendants took actions in furtherance of the alleged conspiracy.

Fourth, American has alleged facts showing that the alleged conspiracy has had a substantial effect on commerce. The second amended complaint alleges that Sabre controls the largest GDS in the Market, accounting for more than 60% of all airline ticket sales made **[*16]** by U.S.-based travel agencies, and that Travelport controls three GDSes—Galileo, Apollo, and Worldspan—which collectively account for over 30% of all airline ticket sales made by U.S.-based travel agencies. (*Id.* at 2, ¶ 3; 11, ¶ 26.) Furthermore, American alleges that the majority of airlines' passenger revenues are generated by ticket sales through travel agencies. (*Id.* at 12, ¶ 33.) According to American, approximately 51% of American's passenger revenue is generated by sales through brick-and-mortar travel agencies, and approximately 10-15% is generated by sales through online agencies. (*Id.*) Given these allegations, it is reasonable to infer that a substantial amount of commerce is affected by the alleged conspiracy.

In their motions to dismiss, the defendants collectively contend that American's conspiracy allegations are merely conclusory and are insufficiently pleaded. Admittedly, American's conspiracy allegations are rather sweeping. But anchoring American's broad conspiracy allegations are facts that, taken as true and construed in American's favor, support a reasonable inference of an industry-wide conspiracy between Sabre, Travelport, Orbitz, and other travel agencies and **[*17]** trade associations. Moreover, whereas American's first amended complaint lacked any allegations linking Sabre's and Travelport's activities, the second amended complaint contains several such allegations of horizontal agreement. Thus, American, rather than alleging several discrete vertical conspiracies (as it did in its first amended complaint), has alleged facts that plausibly support a reasonable inference that a broad, industry-wide conspiracy to exclude American from the Market and submarkets exists.

To illustrate, consider American's allegation that "Sabre and Travelport have a policy and practice of using contractual and technical methods to prevent non-GDS distribution providers from interoperating with their platforms" while "they permit interoperation with each other." (*Id.* at 30, ¶ 93.) This allegation corroborates American's position that Sabre and Travelport have been working together to exclude non-GDS technologies from the Market and the submarkets.

Travelport argues that it is illogical to infer that Travelport and Sabre are engaged in a common conspiracy in the Market, particularly one that preserves Sabre's market position, because they are competitors. But in the economic **[*18]** landscape painted by American's complaint, Travelport has a concrete monopoly in the Travelport submarket and a tight grip on 30% of the Market, each of which is jeopardized if the GDS model crumbles. In view of this, it is not illogical to infer that Travelport is willing to work to maintain the GDS model simply because it benefits Sabre.

Consider also American's allegation that Sabre, Orbitz, and Amadeus, the fifth GDS in the Market, engaged in "regular communication with each other about the threat that American's activities posed to the GDS model, how each of the GDSs would approach negotiations with American (and other airlines)[,] and how they would neutralize the threat that AA Direct Connect posed to the GDS model and its monopoly profits." (*Id.* at 32, ¶ 99.) Describing an example of such collaboration, American alleges that "in September 2010, a senior executive at Sabre and a member of Travelport's board of directors discussed their strategies for negotiating with American, including the Travelport director's belief that American's direct connect initiative would not get any traction." (*Id.*) These allegations help solidify American's assertion that Sabre and Travelport have **[*19]** aligned themselves in their respective negotiations with American.

Moreover, American alleges that the conspiracy to monopolize "between, Sabre, Travelport, and numerous travel agencies was conducted at the highest levels by some of the most senior executives at these firms and they recognized that their communications crossed the line of legitimate competition on the merits." (*Id.* at 34, ¶ 107.) To illustrate, American alleges that "one senior executive at a leading travel agency wrote to one of Sabre's most senior executives, 'the circle needs to be very small and very tight.'" (*Id.*) Furthermore, alleges American, "another travel agency expressed concerns about discussing American's direct connect initiative in writing, and suggested using a code name" while Sabre "ordered its employees not to use words such as 'bias' in their e-mails and to communicate verbally, rather than in writing, with senior executives when possible." (*Id.*) While none of these allegations is, on its own, enough to support an inference of a conspiracy, when considered together and in context, and construed in favor of American, they are sufficient to support a conspiracy-to-monopolize claim under *section 2*.

B. **[*20]** Count Four: Unreasonable Restraint on Interstate Commerce by Sabre and Travelport in Violation of *Section 1*

"To establish a § 1 violation, a plaintiff must prove that: (1) the defendants engaged in a conspiracy, (2) that restrained trade, (3) in the relevant market." *Golden Bridge Tech., Inc. v. Motorola, Inc., 547 F.3d 266, 271 (5th Cir. 2008)* (citing *Apani Sw., Inc. v. Coca-Cola Enters., Inc., 300 F.3d 620, 627 (5th Cir. 2002))*. [5] In addition, "antitrust plaintiffs must prove they have suffered an injury stemming from the complained-of anti-competitive behavior." *Stewart, 200 F.3d at 312* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*.

"Once a plaintiff establishes that a conspiracy occurred, whether it violates *§ 1* is determined by the application of either the per se rule or the rule of reason." *Golden Bridge, 547 F.3d at 271* (citing *Spectators' Commc'n Network, Inc. v. Colonial Country Club, 253 F.3d 215, 222-23 (5th Cir. 2001))*. **[*21]** Should "the court determine[] that the defendant's conduct 'would always or almost always tend to restrict competition and decrease output,' the restraint is per se illegal and no further inquiry occurs." *Id.* (quoting *Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007))*. But "if the conduct is not deemed per se unreasonable, the

[5] *Section 1* states, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C.A. § 1*.

plaintiff will also have to prove that the conduct unreasonably restrains trade in light of actual market forces under the rule of reason." *Id.* (citing *Leegin, 551 U.S. at 886*). Most cases will require analysis under the rule of reason. *See N. Tex. Speciality Physicians v. F.T.C., 528 F.3d 346, 360 (5th Cir. 2008)* (noting that the Supreme Court "has analyzed most restraints under the so-called rule of reason" (footnote omitted) (internal quotation marks omitted)).

American alleges that "Sabre and Travelport have conspired and agreed with one another not to compete with one another on certain terms on which they provide airline booking services to American." (Second Am. Compl. 53, ¶ 180.) In particular, alleges American, Sabre and Travelport have agreed that "they would not implement AA Direct Connect" and that they would "coordinate their negotiations **[*22]** with American." (*Id.*)

As discussed above, American has alleged facts sufficient to support a reasonable inference that Sabre and Travelport have been working together to exclude AA Direct Connect from the Market and submarkets. More to the point here, American has alleged facts from which it may be inferred that Sabre and Travelport have agreed not to compete for American's business, but instead to align themselves together in their negotiations with American. For example, American alleges that a Sabre employee stated: "We don't want to take advantage of it with Travelport agencies. We want AA to LOSE the book/passenger. We need to support Tport in their tough actions." (*Id.* at 39, ¶ 125.) The defendants may dispute that this was ever said or that the speaker intended the comment to mean what American contends it means. But at the *Rule 12(b)(6)* stage, the Court must treat American's allegations as true and draw all reasonable inferences in American's favor—even if those inferences are not the **most** reasonable. [6] *See Kaiser Aluminum, 677 F.2d at 1050*.

Because a horizontal agreement between competitors not to compete "would always or almost always tend to restrict competition and decrease output," Sabre and Travelport's alleged agreement amounts to a restraint that is *per-se* unlawful. *Leegin, 551 U.S. at 886*; **[*24]** *see also Jayco Sys., Inc. v. Savin Bus. Mach. Corp., 777 F.2d 306, 317 (5th Cir. 1985)* ("Horizontal agreements affect inter brand competition, and because interbrand competition is the primary concern of ***antitrust law***, they are generally illegal per se." (citation omitted) (internal quotation marks omitted)); *Transource Int'l, 725 F.2d at 280* ("[A]greements not to compete among potential competitors are also illegal per se." (citing *Otter Tail Power Co. v. United States, 410 U.S. 366, 377, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973))*). But even if analyzed under the rule of reason, the alleged agreement between Travelport and Sabre to align themselves in their negotiations with American would, given the economic landscape alleged in the second amended complaint, unreasonably restrain trade in, and foreclose a substantial share of, the Market and submarkets in violation of *section 1*. *Golden Bridge, 547 F.3d at 271*.

C. Count Five: Group Boycott in Violation of Section 1

American contends that "Sabre, Travelport, and numerous travel agencies have combined and conspired with one another to retaliate against American for its efforts to implement direct connect." (Second Am. Compl. ¶ 183.) American alleges that Sabre and Travelport **[*25]** carried out the boycott by "obtain[ing] agreements from these travel agencies to bias their displays to disfavor American flights" and by "soliciting travel agents and major corporate customers' agreement[s] to reduce their sales of tickets on American flights." (*Id.*)

Technically, the allegations contained in the second amended complaint under the headings "Sabre and Travelport Orchestrate a Group Boycott" and "Fifth Claim for Relief: Group Boycott in the Relevant Markets in Violation of

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[6] Throughout its briefing, Travelport highlights purported discrepancies between American's allegations and the actual documents from which **[*23]** the allegations are derived. While the Court is permitted to consider certain documents described in American's second amended complaint, and even though the Court is not bound to treat as true any allegations that contradict such documents, the Court declines to engage in significant document review at the pleading stage. In other words, the Court will not undertake to check the accuracy of the allegations in American's fifty-five-page second amended complaint and four-page supplement by comparing each of those allegations to the document from which it is derived. Such an evidence-based process is more appropriately conducted at the summary-judgment stage. At the *Rule 12(b)(6)* stage, the Court will treat American's allegations as true and will only refuse to give them effect if they are directly contradicted by a document obviously central to American's second amended complaint. *See Kaiser Aluminum, 677 F.2d at 1050*; *Sullivan, 600 F.3d at 546*.

Section 1 of the Sherman Act" do not establish the existence of a group boycott involving both Sabre and Travelport. Instead, the allegations under these headings show the existence of two boycotts—one orchestrated by Sabre and the other by Travelport. But reading the allegations in the context of the entire second amended complaint, and considering that elsewhere in the complaint allegations of collusion between Sabre and Travelport can be found, the Court is satisfied that American has alleged sufficient facts to support a reasonable inference that Sabre and Travelport orchestrated a group boycott of American.

Further, because American has alleged that Sabre and Travelport (1) possess dominant positions **[*26]** in the Market and their respective submarkets, (2) "control access to an element necessary to enable [American] to compete," and (3) have no pro-competitive justifications for their alleged boycott, the alleged horizontal boycott is *per se* unlawful. *Tunica Web Adver. v. Tunica Casino Operators, 496 F.3d 403, 414-15 (5th Cir. 2007)*; *see also* *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 290, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)* ("This Court has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as per se violations of *§ 1* of the Sherman Act."); *Hood v. Tenneco Tex. Life Ins. Co., 739 F.2d 1012, 1017 (5th Cir. 1984)* ("Horizontal agreements are ordinarily considered illegal *per se* 'because of their pernicious effect on competition and lack of any redeeming virtue.'" (quoting *Transource Int'l, Inc. v. Trinity Indus., Inc., 725 F.2d 274, 279 (5th Cir. 1984))*).

D. Count Six: Customer-Allocation Agreement in Violation of Section 1

A customer-allocation agreement is *per-se* unlawful under *section 1*. *See* *Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 708, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*. **[*27]** American alleges that "[b]eginning in November 2010, Travelport and Orbitz entered into secret customer allocation agreements with numerous other travel agencies." (Second Am. Compl. 54, ¶ 187.) According to American, "[p]ursuant to these agreements, these agencies agreed not to compete for the business of [the] corporate customers" of Orbitz for Business ("OFB"), Orbitz's corporate travel agency. (*Id.*)

What American is alleging here is not a horizontal customer-allocation agreement. A "classic" customer-allocation agreement is "one[] in which 'competitors at the same level agree to divide up the market for a given product.'" *Cal. ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1137 (9th Cir. 2011)* (quoting *Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839, 844 (9th Cir. 1996))*. Instead, what American is alleging is an agreement between Orbitz and other travel agencies, monitored and enforced by Travelport, not to compete for OFB customers. Such an agreement constitutes a *per-se* violation under *section 1*. *See* *Transource, 725 F.2d at 280* ("[A]greements not to compete among potential competitors are also illegal per se."). Thus, while the Court disagrees with American's characterization of **[*28]** this claim as one challenging a customer-allocation agreement, the Court nevertheless concludes that American has pleaded a section 1 claim based on Orbitz and other travel agents' alleged agreement not to compete for OFB customers. [7]

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[7] This alleged agreement not to compete is horizontal because it is primarily between Orbitz and other travel agencies. *See* *Bus. Elec. Corp. v. Sharp Elec., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints."). That Travelport has joined in the agreement and policed it does not render the agreement a vertical restraint, even though Travelport has a vertical relationship with Orbitz. *See* *Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1004 (5th Cir. 1981)* ("Conspiracies between a manufacturer and its distributors are . . . treated as horizontal when the source of the conspiracy is a combination of the distributors.").

Moreover, American's failure to identify the other travel-agency participants is not fatal to American's section 1 claim (as it was to many of American's claims in the first amended complaint) because American has alleged the identity **[*29]** of at least two members of the conspiracy—Travelport and Orbitz—and because American has alleged sufficient facts to apprise Travelport and Orbitz of the particular agreement that it is challenging. In any event, American explains that it knows the identities of the other travel-agency participants but that Orbitz refused to consent to American's filing of a proposed second amended complaint that included those names. If this is true, then Orbitz should not be permitted to now challenge the sufficiency of American's complaint on that basis.

E. Count Seven: Section 1 Violation Based on Sabre's and Travelport's Contracts with American

Lastly, American alleges that "Sabre and Travelport have included terms in their subscriber agreements with American that have the purpose and effect of excluding [from] competition . . . direct connect, as well as restricting competition among GDSs." (Pl.'s Supp. to Second Am. Compl. 1, ¶ 2.) More specifically, alleges American, "both Sabre and Travelport require that American provide them with full content and content parity, and restrict American's ability to provide incentives to travel agents to shift bookings among GDSs." (*Id.*) In addition, American **[*30]** alleges that Sabre "has prohibited American from publicly marketing a Direct Connect program." (*Id.*) According to American, "[t]hese provisions effectively prevent American from promoting competition and supporting new entrants in the relevant markets, including competition from its own AA Direct Connect." (*Id.*)

"To prove conspiracy or 'concerted action' [for purposes of *section 1*], the plaintiff must prove that the conspirators had a 'conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Spectators' Commc'n Network, 253 F.3d at 220* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*. That said, "[a]ntitrust law has never required identical motives among conspirators, and even reluctant participants have been held liable for conspiracy." (*Id.*) Indeed, *section 1* itself states that "**[e]very contract**, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C.A. § 1* (emphasis added). Based on this language, if a contract unreasonably restrains trade, then it offends *section 1*—even if one of the parties to the **[*31]** contract assented to its terms merely because of financial necessity. [8] *See id.*

Sabre and Travelport contend that their subscriber agreements with American cannot support a section 1 claim because the agreements are not exclusionary and do not foreclose a substantial share of the Market or submarkets. Concerning the latter, Sabre argues that American must allege facts indicating its percentage share of the airline-services market. But in the Court's view, this argument would more likely be correct if the aggrieved party were a passenger or a travel agent seeking to obtain flights. Instead, because American is the aggrieved party, the relevant market for purposes of American's section 1 claim is the Market (i.e., the distribution of airline fare, flight, and availability information and **[*34]** the provision of booking services to travel agents), along with the Sabre and Travelport submarkets (i.e., the provision of airline booking services to Sabre and Travelport subscribers,

[8] Travelport posits that "[a] plaintiff that voluntarily enters into and enjoys the benefits of a contract cannot later complain that the contract violates the antitrust laws." (Travelport Supp. Mot. to Dismiss 6.) According to Travelport, American "will need to show that [it] had anticompetitive terms imposed upon it" and that it "unwillingly complied." (*Id.* (internal quotation marks omitted).) Travelport's position is difficult to reconcile with the United States Supreme Court's comments in *Perma Life Mufflers, Inc. v. International Parts Corporation, 392 U.S. 134, 140, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)*, *overruled on other grounds by* *Copperweld Corporation v. Independence Tube Corporation, 467 U.S. 752, 777, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. There, the Supreme Court, in holding that *in pari delicto* is not a defense to an antitrust action, stated that a "plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition." *Id. at 139*. The Court noted further that "permitting the plaintiff to recover a windfall gain does not encourage **[*32]** continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct." *Id.* Thus, the Court is not persuaded that American must allege facts showing that it was completely innocent in its involvement in the scheme embodied by the subscriber agreements.

But at the same time, the Supreme Court explicitly declined to answer the question of whether "truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of in pari delicto, for barring a plaintiff's cause of action." *Id. at 140*. That is, "*Perma Life Mufflers* did not foreclose a defense to an antitrust claim based on a plaintiff's 'truly complete involvement.'" *Rogers v. McDorman, 521 F.3d 381, 388-89 (5th Cir. 2008)* (quoting *Perma Life Mufflers, 392 U.S. at 140*). In any event, American's allegations do not suggest that it had "truly complete involvement" in the drafting and selection of provisions in the subscriber agreements. To the contrary, American has alleged facts indicating that the economic realities were such that American had little choice but to accept the terms in the subscriber agreements. Thus, **[*33]** American should not be barred from asserting section 1 claims based on its subscriber agreements with Sabre and Travelport simply because American was a party to those agreements. *See* *Perma Life Mufflers, 392 U.S. at 140* ("[E]ven if petitioners actually favored and supported some of the other restrictions, they cannot be blamed for seeking to minimize the disadvantages of the agreement once they had been forced to accept its more onerous terms as a condition of doing business.").

respectively). American has alleged facts showing that its subscriber agreements with Sabre and Travelport (or Travelport's predecessors) bear on its ability to access Sabre and Travelport's combined ninety-plus percentage share of the Market and their respective 100% shares of their submarkets. These allegations are sufficient to establish substantial foreclosure.

Regarding Sabre and Travelport's contentions that the subscriber agreements are not exclusionary, the Court maintains the position it took in its November 21, 2011 Order Regarding Motions to Dismiss and Motion for Leave (doc. 244): that while the factfinder may eventually find that the full-content and related provisions are not anticompetitive, at this stage of the litigation the Court is simply not able to say that the aforementioned allegations are, as a matter of law, insufficient to support a section 1 claim.

IV. Conclusion

Based on the foregoing, the Court concludes that American's second amended complaint and supplement contain sufficient **[*35]** allegations to avoid dismissal under *Rule 12(b)(6)*. Accordingly, the defendants' motions to dismiss are DENIED.

SIGNED August 7, 2012.

/s/ Terry R. Means

TERRY R. MEANS

UNITED STATES DISTRICT JUDGE

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Carlin v. DairyAmerica, Inc.

United States Court of Appeals for the Ninth Circuit

August 31, 2011, Argued and Submitted, San Francisco, California; August 7, 2012, Filed

No. 10-16448

Reporter

688 F.3d 1117 *; 2012 U.S. App. LEXIS 16374 **; 2012-2 Trade Cas. (CCH) P78,004; 2012 WL 3181554

GERALD CARLIN, JOHN RAHM, PAUL ROZWADOWSKI, And BRYAN WOLFE, Plaintiffs-Appellants, v. DAIRYAMERICA, INC. and CALIFORNIA DAIRIES, INC., Defendants-Appellees.

Subsequent History: Amended by, Rehearing denied by, Rehearing, en banc, denied by *Carlin v. Dairy Am., Inc., 2013 U.S. App. LEXIS 790 (9th Cir. Cal., Jan. 11, 2013)*

Reprinted as amended at *Carlin v. Dairy Am., Inc., 705 F.3d 856, 2013 U.S. App. LEXIS 791 (9th Cir. Cal., 2013)*

US Supreme Court certiorari denied by *Dairyamerica, Inc. v. Carlin, 2013 U.S. LEXIS 5337 (U.S., Oct. 7, 2013)*

Prior History: [1]** Appeal from the United States District Court for the Eastern District of California. USDC No. 1:09-CV-00430-AWI-DLB. Anthony W. Ishii, United States District Judge, Presiding.

Carlin v. Dairy Am., Inc., 690 F. Supp. 2d 1128, 2010 U.S. Dist. LEXIS 10902 (E.D. Cal., 2010)

Disposition: REVERSED AND REMANDED.

Core Terms

prices, filed rate doctrine, rates, milk, USDA, dairy, producers, regulations, minimum price, raw milk, formulas, district court, tariff, misreporting, reporting, dry milk, retroactively, manufactured, plaintiffs', damages, nonfat, calculated, purposes, farmers, courts, dairy product, Agricultural, contracts, incorrect, carrier

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN1[] **Agriculture & Food, Food Product Promotions**

Congress passed the Agricultural Marketing Agreement Act of 1937 (AMAA), *7 U.S.C.S. § 601 et seq.*, in order to establish and maintain orderly marketing conditions and fair prices for agricultural commodities. Section 8c of the AMAA, *7 U.S.C.S. § 608c*, authorizes the Secretary of Agriculture to issue orders applicable to handlers who receive, process, package, or redistribute milk or milk products. Marketing orders promulgated pursuant to the AMAA are a species of economic regulation that has displaced competition in a number of discrete markets. The essential purpose of this milk market order scheme is to raise producer prices, and thereby to ensure that the benefits and burdens of the milk market are fairly and proportionally shared by all dairy farmers.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN2[] **Agriculture & Food, Food Product Promotions**

In the context of milk and milk products, "handler" is defined in *7 C.F.R. § 1000.9 (2012)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN3[] **Agriculture & Food, Food Product Promotions**

Milk, milk products, and prices paid by handlers to producers of raw milk (i.e., dairy farmers) are regulated by what are commonly referred to as Federal Milk Marketing Orders (FMMOs) issued by the U.S. Department of Agriculture pursuant to § 8c(5) (*7 U.S.C.S. § 608c(5)*) of the Agricultural Marketing Agreement Act of 1937 (AMAA), *7 U.S.C.S. § 601 et seq.*

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN4[] **Agriculture & Food, Food Product Promotions**

Under the scheme established by Congress, the Secretary of Agriculture must conduct an appropriate rulemaking proceeding before issuing a milk market order. The public must be notified of these proceedings and provided an opportunity for public hearing and comment. 7 U.S.C.S.S. *§ 608c(3)*. An order may be issued only if the evidence adduced at the hearing shows that it will tend to effectuate the declared policy of this chapter with respect to such commodity. *7 U.S.C.S. § 608c(4)*. Moreover, before any market order may become effective, it must be approved by the handlers of at least 50% of the volume of milk covered by the proposed order and at least two-thirds of the affected dairy producers in the region. *7 U.S.C.S. §§ 608c(8)*, *608c(5)(B)(i)*. If the handlers withhold their consent, the Secretary may nevertheless impose the order. But the Secretary's power to do so is conditioned upon at least two-thirds of the producers consenting to its promulgation and upon his making an administrative determination that the order is the only practical means of advancing the interests of the producers. *7 U.S.C.S. § 608c(9)(B)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN5[] **Agriculture & Food, Food Product Promotions**

Section 8c(5) of the Agricultural Marketing Agreement Act of 1937 (AMAA), *7 U.S.C.S. § 601 et seq.*, requires that the Federal Milk Marketing Orders (FMMOs) contain provisions which, inter alia: (1) classify milk in accordance with the purpose for which it is used, (2) set minimum prices for each such use that handlers must pay, (3) require that said prices be uniform except that adjustments can be made for production differentials, grade or quality of the milk, and locations of delivery, and (4) provide for the use of blended prices such that all producers of milk subject to a particular FMMO receive a uniform price for the milk delivered to handlers regardless of the ultimate use of the milk. *7 U.S.C.S. § 608c(5)*. The AMAA (and hence each FMMO) only requires a minimum price.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN6[] **Agriculture & Food, Food Product Promotions**

Although the Agricultural Marketing Agreement Act of 1937 (AMAA), *7 U.S.C.S. § 601 et seq.*, mandates a minimum price, it does not mandate a maximum price. Handlers cannot pay less than the blend price, but they are allowed to pay as much as they want. In times of relative scarcity, handlers can and do negotiate premiums, known as over-order prices, for the sale of the milk. These premiums are most typically paid for milk that is intended for Class I use, but they can apply to any of the three classes. Thus, market forces are allowed to intrude on this regime on occasion, though only in one direction.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN7[] **Agriculture & Food, Food Product Promotions**

There is no Federal Milk Marketing Order covering the state of California.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN8[] **Agriculture & Food, Food Product Promotions**

The Secretary of Agriculture has delegated his authority under the Agricultural Marketing Agreement Act of 1937 (AMAA), *7 U.S.C.S. § 601 et seq.*, to the Under Secretary for Marketing and Regulatory Programs, *7 C.F.R. § 2.22(a)(1)(viii)(G) (2011)*, and, in turn, the Under Secretary has delegated it to the Administrator for the Agricultural Marketing Service (AMS). *7 C.F.R. § 2.79(a)(8)(viii) (2011)*. As to each operative Federal Milk Marketing Order (FMMO), there is a market administrator selected by the Secretary who is empowered, inter alia, to: (1) administer the order in accordance with its terms and provisions; (2) make rules and regulations to effectuate the terms and provisions of the order; (3) receive, investigate, and report complaints of violations to the Secretary; and (4) announce FMMO prices on designated days of each month. *7 C.F.R. §§ 1000.25(b)*, *1000.53 (2012)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN9[] **Agriculture & Food, Food Product Promotions**

The Agricultural Marketing Agreement Act of 1937 (AMAA), *7 U.S.C.S. § 601 et seq.*, and its implementing regulations use two regulatory mechanisms: price fixing and payment pooling. The minimum prices that handlers must pay vary according to the end use of the milk, as categorized in four classes. *7 U.S.C.S. § 608c(5)(A)*; *7 C.F.R. § 1000.40*. Class I milk is sold in fluid form, Class II milk is used to make ice cream, soft cheeses, and related products, Class III milk is used to produce harder cheeses, and Class IV milk is used to make butter and related products including nonfat dry milk products. Instead of setting specific prices to be paid for each Class, the Secretary has established a formula by which the price for each Class is determined monthly based on the average nationwide wholesale prices from the previous month. *7 C.F.R. § 1000.50*; *Milk in the Northeast and Other Marketing Areas; Notice of Proposed Rulemaking and Tentative Partial Final Decision, 73 Fed. Reg. 35,306, 35,308 (June 20, 2008)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN10[] **Agriculture & Food, Food Product Promotions**

Under the Agricultural Marketing Agreement Act of 1937 (AMAA), *7 U.S.C.S. § 601 et seq.*, the formulas for Class III and IV milk are based on the nationwide average prices for butter, nonfat dry milk, cheese, and dry whey, minus a set dollar amount for each of those products, multiplied by a yield factor. *7 C.F.R. § 1000.50(l)-(o)*. Class I and II prices are derived from the Class III and IV prices but Class I prices are adjusted for the location of the handler so that handlers pay different prices in different geographic areas. *7 C.F.R. §§ 1000.50*, *1000.52*. The amounts subtracted from the average sale prices of Class III and IV products, known in the milk industry as make allowances or manufacturing allowances, are intended to represent the costs to the handlers of making the end dairy products from raw milk. *Tentative Decision. Milk in the Northeast and Other Marketing Areas; Notice of Proposed Rulemaking and Tentative Partial Final Decision, 73 Fed. Reg. 35,306, 35,308 (June 20, 2008)*. In essence, handlers retain from the average wholesale price the amount set by the make allowance and transfer the balance to producers.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN11[] **Agriculture & Food, Food Product Promotions**

The second major component of dairy market regulation is payment pooling. Under this system, handlers pay prices according to the end use of milk, but all the producers in a geographic area receive the same monthly average or blended price per unit of milk sold, regardless of the use to which their milk is put. *7 U.S.C.S. § 608c(5)(B)*; *7 C.F.R. §§ 1000.70*, *1000.76*. This payment equalization is accomplished through the producer settlement fund into which handlers pay, or from which handlers withdraw, according to whether their blendprice payments to producers are less or greater than the end-use-value of the milk they have purchased. *7 C.F.R. §§ 1000.70*, *1000.76*. The effect of this regime is that handlers make payments which vary according to the market value of the milk they use (as reflected in minimum prices), while all producers in an area receive the same average, or blended, price per unit of milk.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN12[] **Agriculture & Food, Food Product Promotions**

Under the Agricultural Marketing Agreement Act of 1937 (AMAA), *7 U.S.C.S. § 601 et seq.*, different geographic areas of the United States are regulated under slightly different conditions, although the formulas used to set prices of Class III and IV milk are the same in all areas. *7 C.F.R. § 1000.50*. Each of eleven areas, generally known as a marketing area or milk marketing area, is governed by a different Order of the Secretary.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN13[] **Agriculture & Food, Food Product Promotions**

Under the Federal Milk Marketing Orders, a dairy plant pays, and a dairy producer receives, minimum prices in the form of federally established component prices for butterfat, protein, solids not fat, and other solids, or skimfat prices that are derived from those component prices. *7 C.F.R. § 1000.50*. There are three factors that are used in the pricing formulas: (1) prices of certain dairy products surveyed by the National Agricultural Statistics Service (NASS); (2) a make allowance; and (3) a yield. *§ 1000.50*. The levels of each of these factors affect the price that plants pay for raw milk and, ultimately, how much producers received for their milk. Adjustments in any of these factors will impact pricing.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN14[] **Agriculture & Food, Food Product Promotions**

Under the Agricultural Marketing Agreement Act of 1937, *7 U.S.C.S. § 601 et seq.*, the make allowance and the yield are fixed by rule; the product prices are determined weekly by National Agricultural Statistics Service (NASS). Every Friday morning, NASS reports the prices of certain cheeses, butter, non-fat dry milk, and dry whey. The U.S. Department of Agriculture (USDA) then announces the advanced prices based on the weighted average of two weeks of NASS prices. The make allowances represent the allowance for manufacturing raw milk into a finished product. Changes to the make allowance have an inverse relationship to the resulting changes in the minimum prices. Producers benefit from lower make allowances, and manufacturers benefit from higher make allowances. The yield factor represents the amount of a manufactured dairy product that can be produced per hundredweight (100 pounds) of milk. USDA accounts for the portion of the price of milk attributable to the costs of the manufacturing process through the make allowance. When the price of manufactured goods is raised, however, USDA recaptures the cost by reporting a higher price for the wholesale product prices to National Agricultural Statistics Service (NASS). As a result, any increase in the selling price of manufactured goods used to produce milk will increase the price manufacturers must pay producers for raw milk.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN15[] **Agriculture & Food, Food Product Promotions**

Milk pricing formulas are changed through formal rule-making hearings. *7 C.F.R. §§ 900.3-900.18*. After the close of the evidentiary portion of the hearing, exceptions and comments are filed by interested parties and an administrative law judge certifies the transcript to U.S. Department of Agricultrue (USDA). *7 C.F.R. §§ 900.9-900.10*. Dairy Programs, a division of USDA, then prepares and submits a recommendation to USDA. The recommendation details the findings of fact, rationale, and the legal authority for its decision. *7 C.F.R. § 900.12*. After Dairy Programs has issued its recommendation, another round of comments follow, and a referendum on the order, as amended, is held. Producers facing a referendum must choose between voting out the entire marketing order or approving the amended order. There is no vote on the amendment itself. If the referendum passes, the order is adopted and becomes a final rule. See id. §§ 900.300-311.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN16[] **Agriculture & Food, Food Product Promotions**

To actually set the minimum prices, Federal Milk Marketing Orders (FMMOs) require the collection and input of certain economic information regarding commercial transactions involving milk and milk products. Prior to 2000, the USDA's National Agricultural Statistics Service (NASS) relied on the prices of dairy commodities on established and specified public exchanges, including the Chicago and New York Mercantile Exchanges, in the calculation of Federal Milk Marketing Order (FMMO) minimum milk prices. The Dairy Market Enhancement Act of 2000 (DMEA), *7 U.S.C.S. § 1637 et seq.*, was enacted in part to give the USDA the authority to make the reporting of dairy product information mandatory. *72 Fed. Reg. 36,341 (July 3, 2007)*. However, the regulations implementing the Dairy Market Enhancement Act of 2000 (DMEA), *7 U.S.C.S. § 1637 et seq.*, (now codified at 7 C.F.R. Part 1170 (2012)) were not promulgated until 2008.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN17[] **Agriculture & Food, Food Product Promotions**

Pursuant to the Dairy Market Enhancement Act of 2000 (DMEA), 7 U.S.C.S. § 1637 et seq. weekly surveys are conducted by the National Agricultural Statistics Service (NASS) to collect wholesale prices for representative products within each category. The survey information is gathered from product manufacturers (sometimes referred to in pleadings as milk handlers) who produce a million pounds or more of manufactured product per year. The Federal Milk Marketing Order (FMMO) minimum prices for milk for class III (hard cheese) and IV (dry milk and butter) products are determined by applying the wholesale prices reported in the weekly surveys to formulae specified by the FMMO. The FMMO minimum prices for products in Classes I and II are derived by mathematic formulae from the prices determined in Classes III and IV.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN18[] Agriculture & Food, Food Product Promotions

One of the major wholesale pricing inputs collected by National Agricultural Statistics Service (NASS) for computation of the Federal Milk Marketing Order (FMMO) minimum price for milk for Class IV products is the wholesale price for nonfat dry milk (NFDM). The Dairy Market Enhancement Act of 2000 (DMEA), 7 U.S.C.S. § 1637 et seq., requires handlers to submit National Agricultural Statistics Service (NASS) survey information according to instructions that, among other things, direct the handler to exclude from the survey wholesale prices for NFDM for forward sales contracts. Forward sales contracts are defined as contracts in which the selling price is set more than 30 days before the completion of the transaction. It appears undisputed that forward sales contracts generally reflected lower prices for NFDM than were reflected in contracts that were completed at or near the time of the transaction during the time period in question.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN19[] Agriculture & Food, Food Product Promotions

For enforcement purposes, the Dairy Market Enhancement Act of 2000 (DMEA), 7 U.S.C.S. § 1637 et seq., provides that each reporting firm shall maintain, and make available to the Secretary of Agriculture, on request, original contracts, agreements, receipts, and other records associated with the sale or storage of any dairy products during the 2-year period beginning on the date of the creation of the records. 7 U.S.C.S. § 1637b(c)(6). The 2000 version of the Dairy Market Enhancement Act of 2000 (DMEA), 7 U.S.C.S. § 1637 et seq., also provided that the Secretary shall take such actions as the Secretary considers necessary to verify the accuracy of the information submitted or reported under this subtitle. Pub. L. No. 106-532, § 273(c)(3), 114 Stat. 2541. In 2008, the DMEA was amended and bolstered.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN20[] Agriculture & Food, Food Product Promotions

See 7 U.S.C.S. § 1637b(c)(3)(B).

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN21[] Agriculture & Food, Food Product Promotions

Once National Agricultural Statistics Service (NASS) collects price and volume data, the Agricultural Marketing Service (AMS) uses them to calculate the Federal Milk Marketing Order (FMMO) minimum raw milk prices. Non-fat dry milk (NFDM) prices are one factor used by Agricultural Marketing Service (AMS) to determine FMMO minimum prices. The Dairy Market Enhancement Act of 2000 (DMEA), *7 U.S.C.S. § 1637 et seq.*, contains no enforcement mechanism or mechanism for compensating producers who receive prices for their milk that are lower than they should be due to inaccurate reporting.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN22[] **Agriculture & Food, Food Product Promotions**

The Agricultural Marketing Agreement Act of 1937 (AMAA), *7 U.S.C.S. § 601 et seq.*, contains no provision under which milk producers can challenge a marketing order through administrative review. The U.S. Supreme Court has held that producers could obtain judicial review of the Secretary of Agriculture's practice of deducting certain administrative expenses from the settlement fund before calculating the blended price which resulted in a reduced price for the producers. The Court has found a basis for judicial review because the AMAA had given producers definite personal rights and the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. The United States Court of Appeals for the Ninth Circuit has concluded that judicial review of the producers' complaint was necessary to ensure achievement of the Act's most fundamental objectives — to wit, the protection of the producers of milk and milk products.

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

HN23[] **Motions to Dismiss, Failure to State Claim**

An appellate court reviews de novo challenges to a dismissal for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*. That standard is applied to a district court's dismissal based on the filed rate doctrine. Such review is generally limited to the face of the complaint, materials incorporated into the complaint by reference, and matters of judicial notice. In undertaking review, an appellate court will accept the plaintiffs' allegations as true and construe them in the light most favorable to plaintiffs, and will hold a dismissal inappropriate unless the complaint fails to state a claim to relief that is plausible on its face.

Administrative Law > Judicial Review > Reviewability > Preservation for Review

Civil Procedure > Appeals > Appellate Briefs

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

HN24[] **Reviewability, Preservation for Review**

A federal appellate court does not consider an issue not passed upon below. It limits review to issues argued in a party's opening brief.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

HN25[] **Exemptions & Immunities, Filed Rate Doctrine**

The filed rate doctrine is a judicial creation that arises from decisions interpreting federal statutes that give federal agencies exclusive jurisdiction to set rates for specified utilities, originally through rate-setting procedures involving the filing of rates with the agencies. At its most basic, the filed rate doctrine provides that state law, and some federal law (e.g. ***antitrust law***), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question. It has generally been recognized that there are three purposes or governmental interests which justify or support the filed rate doctrine.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN26[] **Exemptions & Immunities, Filed Rate Doctrine**

The initial raison d'être for the filed rate doctrine concerned stabilizing rates and preventing pricing discrimination amongst ratepayers. The duty to file rates with the Commission and the obligation to charge only those rates have always been considered essential to preventing price discrimination and stabilizing rates.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN27[] **Exemptions & Immunities, Filed Rate Doctrine**

In original design, the filed rate doctrine was intended to serve as a sword to protect consumers from monopolistic price discrimination, such as a railroad charging different rates to customers of different states, or charging the shipping companies with whom it competes exorbitant prices, without justifications based on the cost of providing service to the customer. Once it was determined that federal law required the primacy of filed rates and tariffs, there developed two additional and related justifications for the doctrine, i.e., federal preemption (or the supremacy of federal law) and deference to federal agency expertise (or primary jurisdiction).

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN28[] **Exemptions & Immunities, Filed Rate Doctrine**

The filed rate doctrine as applied to the actions of the Interstate Commerce Commission assists in the enforcement of the supremacy of federal law: The common rationale is easily stated: There can be no divided authority over interstate commerce, and the acts of Congress on that subject are supreme and exclusive. Consequently, state efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN29[] **Exemptions & Immunities, Filed Rate Doctrine**

One justification for the filed rate doctrine concerns the unnecessary interjection of the courts into the rate-making process where they have no expertise or valid reason to interfere.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN30[] **Exemptions & Immunities, Filed Rate Doctrine**

The filed rate doctrine has been given an expansive reading and application in the United States Court of Appeals for the Ninth Circuit, even in the face of debate in other forums about its wisdom. After reviewing the doctrine and associated principles of federal preemption, the Ninth Circuit has concluded that: to the extent Congress has given a federal agency authority to set rates under a federal statute and the agency has exercised that authority, such rates are just and reasonable as a matter of law and cannot be collaterally challenged under federal ***antitrust law*** or state law.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN31[] **Exemptions & Immunities, Filed Rate Doctrine**

California has declined to create a state filed rate doctrine even where the tariffs are filed with the state regulatory agency having authority over the subject area and even if the rates have been approved as reasonable by that agency.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN32[] **Exemptions & Immunities, Filed Rate Doctrine**

Originally, the filed rate doctrine arose in the context of the following paradigm. A rate or tariff within an industry regulated by federal statute is filed by a carrier or other service/ product provider with a federal agency, which in turn accepts and publishes it. Thereafter, the carrier (and its customer) is not allowed to charge (or pay) a different rate for that service/product other than the filed one. The U.S. Supreme Court has held these provisions to create strict filed rate requirements and to forbid equitable defenses to collection of the filed tariff. In turn, the rate is held not to be subject to challenge on antitrust, state law or most other grounds. Simply stated, the doctrine holds that any "filed rate" — that is, one approved by the governing regulatory agency — is per se reasonable and unassailable in judicial proceedings brought by ratepayers.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN33[] **Exemptions & Immunities, Filed Rate Doctrine**

Application of the filed rate doctrine in any particular case is not determined by the culpability of the defendant's conduct or the possibility of inequitable results. Nor does the doctrine's application depend on the nature of the cause of action the plaintiff seeks to bring. Rather, the courts have held that the doctrine is to be applied strictly to prevent a plaintiff from bringing a cause of action whenever the purpose s underlying the filed rate doctrine are implicated.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN34[] **Agriculture & Food, Food Product Promotions**

Milk pricing is the subject of extensive federal statutory and regulatory control. See, e.g., *7 U.S.C.S. § 608c(5)*. Additionally, under the Agricultural Marketing Agreement Act of 1937 (AMAA), *7 U.S.C.S. § 601 et seq.*, the U.S. Department of Agriculture (USDA) (via the Agricultural Marketing Service (AMS) and through the Federal Milk Marketing Orders (FMMOs)) sets minimum prices for raw milk purchased from producers by handlers where there can be no downward deviation in the rate. Therefore, the filed rate doctrine is applicable because Congress has given the USDA authority to set rates under *7 U.S.C.S. § 608c(5)* and the USDA has exercised that authority to create the Federal Milk Marketing Orders (FMMOs) which, in turn, are utilized to establish minimum prices for raw milk purchases; and thus such rates are just and reasonable as a matter of law.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN35[] **Exemptions & Immunities, Filed Rate Doctrine**

The three underlying justifications for the filed rate doctrine apply to Federal Milk Marketing Order (FMMO) prices set under the Agricultural Marketing Agreement Act of 1937 (AMAA), *7 U.S.C.S. § 601 et seq.* The setting of minimum rates prevents discriminatory pricing (albeit to a more limited extent than other situations where the doctrine has been applied) and stabilizes prices by assuring dairy producers of reasonable payments for raw milk as fixed by the Agricultural Marketing Service (AMS). Additionally, the setting of minimum rates by means of formulas established in the FMMOs is a matter which clearly falls within an area of USDA expertise, which most courts would not possess. Finally, the AMAA and its concomitant regulations establish a federal scheme as to uniform minimum pricing which should not generally be the subject of attack by ratepayers or others.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN36[] **Agriculture & Food, Food Product Promotions**

See *7 U.S.C.S. § 602*.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN37[] **Exemptions & Immunities, Filed Rate Doctrine**

The United States Court of Appeals for the Ninth Circuit does not read Brown as making meaningful agency review a sine qua non for the applicability of the filed rate doctrine.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN38[] **Agriculture & Food, Food Product Promotions**

The U.S. Department of Agriculture has promulgated regulations which create an intricate system for the setting of the prices. The USDA not only examines the dairy products market, but also takes into account volume, location, grade/quality of the milk, production differentials, and other factors in creating the formulas in the Federal Milk Marketing Orders (FMMOs). Also, the formulas do not consider only one or two data points but a large number of them to arrive at the ultimate price determination. Additionally, the formulas which generate the rates also include the consideration of make allowances and yields which are fixed by the agency's rules. Further, the FMMOs are not effective until the Secretary of Agriculture obtains the approval of handlers of at least 50 percent of the milk processed and two-thirds of the affected dairy producers within the geographic territory subject to the order. *7 U.S.C.S. § 608c(8)*. Thus, the Secretary exercises extensive authority vis-a-vis milk pricing in establishing the formulas in the FMMOs which in turn set the parameters for the issued minimum prices.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN39[] **Exemptions & Immunities, Filed Rate Doctrine**

The filed rate doctrine precludes remedies which rely on a court's recalculation of rates which would have been charged, even if the plaintiff is not directly challenging the filed rate.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN40[] **Exemptions & Immunities, Filed Rate Doctrine**

The U.S. Supreme Court has said that the filed rate doctrine does not apply to bar a private litigant's rate-related claims if the rate has been suspended or set aside by the relevant agency. Whether an agency has sufficiently rejected a rate for purposes of the filed rate doctrine analysis, whether that rejection should eliminate the doctrine's preemptive bar, and, even if the bar is so removed, whether thereafter a plaintiff should be allowed to recover damages arising from the incorrect prior rates are admittedly difficult issues. They can only be correctly answered after consideration of the underlying statutory scheme in which the doctrine is being applied and the justifications for the doctrine.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN41[] **Exemptions & Immunities, Filed Rate Doctrine**

Where the controlling statute prohibits a federal agency from altering a filed rate retroactively or limits any application of reconsidered rates to prospective situations, then the agency cannot effectively suspend or set aside the published rates for purposes of a lawsuit seeking recovery based on injuries arising from the imposition of those rates.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN42[] **Agriculture & Food, Food Product Promotions**

There is nothing in the Agricultural Marketing Agreement Act of 1937 (AMAA), *7 U.S.C.S. § 601 et seq.*, or the Dairy Market Enhancement Act of 2000 (DMEA), *7 U.S.C.S. § 1637 et seq.*, which specifically bars the U.S. Department of Agricultrue from revising rates where handlers have supplied incorrect data to the agency.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN43[] **Exemptions & Immunities, Filed Rate Doctrine**

In a filed rate doctrine analysis, turning to the issue of the extent to which the federal agency must indicate that it is suspending, setting aside or otherwise rejecting the filed rate, it is noted that a large segment of the cases dealing with the filed rate doctrine arise in the context of statutes where an anti-discriminatory policy as to filed rates or tariffs lies at the very heart of the statutory scheme. In such situations, a federal agency's ability to set aside a published rate retroactively would be extremely limited and, hence, any attempt to do so would have to be explicitly executed and thoroughly explained.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN44[] **Exemptions & Immunities, Filed Rate Doctrine**

The filed rate doctrine contains an important caveat: The filed rate is not enforceable if the agency finds the rate to be unreasonable.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN45[] **Exemptions & Immunities, Filed Rate Doctrine**

Maislin stands, in part, for the limited proposition that, where the statute allows the agency to decide that a published tariff is unreasonable under controlling law, the filed rate doctrine will not bar a plaintiff from seeking reparation from the imposition of the unreasonable rate.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN46[] **Agriculture & Food, Food Product Promotions**

The primary purposes of the Agricultural Marketing Agreement Act of 1937 (AMAA), *7 U.S.C.S. § 601 et seq.*, and Dairy Market Enhancement Act of 2000 (DMEA), *7 U.S.C.S. § 1637 et seq.*, are: (1) to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices, *7 U.S.C.S. § 602(1)*, and *(2)* the protection of the producers of milk and milk products. Additionally, the prices that are set for raw milk under the applicable statutes are minimum rates which can be (and are) subject to further negotiation between handlers and dairy farmers. Those rates are not initially filed and reviewed by the agency but rather are the product of formulas established by the U.S. Department of Agriculture, which are, in part, dependent upon the receipt of pricing data from certain handlers.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN47[] **Exemptions & Immunities, Filed Rate Doctrine**

The question of what specific steps an agency need take before it can be deemed to have rejected a rate cannot be considered in a vacuum; the steps required before an agency's rate rejection should be recognized will necessarily vary based on both the statutory framework within which the agency acts and upon the purposes of the statute in furtherance of which the agency acts.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN48[] **Exemptions & Immunities, Filed Rate Doctrine**

It is in precisely the scenario where at the time of a misreporting the agency lacks the authority to sanction the misreporting entity that the filed rate doctrine should not bar a private litigant from pursuing claims involving those rates.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN49[] **Agriculture & Food, Food Product Promotions**

The Dairy Market Enhancement Act of 2000 (DMEA), *7 U.S.C.S. § 1637 et seq.*, mandate is that the U.S. Department of Agriculture shall establish a program of mandatory dairy product information reporting that will provide timely, accurate, and reliable market information. *7 U.S.C.S. § 1637b(a)*.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN50[] **Exemptions & Immunities, Filed Rate Doctrine**

Courts typically describe the filed rate doctrine as having three purposes: deference to agencies' greater expertise in rate-setting, preventing discrimination by ensuring all ratepayers face the same price, and avoiding disruption of a Congressional scheme for uniform price regulation.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Civil Procedure > Remedies > Damages > General Overview

HN51[] **Exemptions & Immunities, Filed Rate Doctrine**

Some uncertainty can arise in any calculations of damages, but that does not preclude recovery where it is clear that some damage has occurred. Where it is only the specific prices that would have been set which remain somewhat unclear, calculating damages would not involve the kind of hypothetical speculation about agency decisions that Keogh forbids.

Torts > Intentional Torts > Prima Facie Tort > Elements

HN52[] **Prima Facie Tort, Elements**

In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit. However, there is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor's conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN53[] **Exemptions & Immunities, Filed Rate Doctrine**

The United States Court of Appeals for the Ninth Circuit has endorsed an opinion of the United States Court of Appeals for the Second Circuit which interpreted Square D to hold that the principle of nondiscrimination still suggests the filed rate doctrine should be applied in class actions. Marcus, however, qualified this holding: The concerns for discrimination are substantially alleviated in a putative class action. However, the Supreme Court has rejected the suggestion that the nondiscrimination principle is inapplicable to a putative class action suit. NOS Communications should, therefore, be read as rejecting any blanket rule that discrimination is not a concern in class actions, but still not going so far as holding that putative class action status is irrelevant to an inquiry into the discriminatory impact of not applying the filed rate doctrine.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN54[] **Agriculture & Food, Food Product Promotions**

The prohibition against discriminatory pricing under the Agricultural Marketing Agreement Act of 1937 (AMAA), *7 U.S.C.S. § 601 et seq.*, is concerned with discrimination suffered by the dairy producers, not the handlers.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN55[] **Exemptions & Immunities, Filed Rate Doctrine**

Misreported rates and rates reported for fictitious transactions are not agency-approved rates, and barring claims that such fictitious transactions damaged purchasers in the natural gas market would not further the purpose of the filed rate doctrine.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN56[] **Agriculture & Food, Food Product Promotions**

While Congress undoubtedly intended the Federal Milk Marketing Orders (FMMOs) minimum prices to apply in a uniform way within the monthly periods and the geographic areas, there is no indication of an overarching congressional or agency intent for uniformity on a nationwide scale, for a long period of time, or even in terms of the actual price paid, given that the FMMO merely sets a floor price.

Counsel: Benjamin D. Brown (argued), Daniel A. Small, Victoria S. Nugent, George F. Farah and Brent W. Johnson, Cohen Milstein Sellers & Toll PLLC, Washington, D.C.; Joseph J. Tabacco, Jr., Christopher T. Heffelfinger and Anthony D. Phillips, Berman DeValerio, San Francisco, California; Ron Kilgard, Keller Rohrback P.L.C., Phoenix, Arizona; Jon A. Tostrud, Case Lombardi and Pettit, Honolulu, Hawaii; Lynn L. Sarko, Mark A. Griffin, Juli E. Farris, Keller Rohrback P.L.C., Seattle, Washington; J. Barton Goplerud, Hudson, Mallaney, Shindler and Anderson, PC, West Des Moines, Iowa, for the plaintiffs-appellants.

Allison A. Davis, Davis Wright Tremaine LLP, San Francisco, California; Charles M. English (argued), Wendy M. Yoviene and E. John Steren, Ober, Kaler, Grimes & Shriver, Washington, D.C., for defendant-appellee DairyAmerica, Inc.

John J. Vlahos (argued), Lawrence M. Cirelli and S. Anne Johnson, Hanson Bridgett LLP, San Francisco, California, for defendant-appellee California Dairies, Inc.

Judges: Before: Raymond **[**2]** C. Fisher and Johnnie B. Rawlinson, Circuit Judges, and George H. Wu, District Judge.* Opinion by Judge Wu.

Opinion by: George H. Wu

Opinion

[*1118] WU, District Judge:

This appeal raises two issues: (1) whether the judicially created "filed rate doctrine,"[1] which typically has been utilized in common carrier and public utility litigation, is applicable in a class action lawsuit seeking monetary and injunctive relief under state law arising from the misreporting of pricing data to the United States Department of Agriculture ("USDA"), where the data in turn were used to set a minimum price structure for raw milk **[*1119]** sales; and (2) if the doctrine is applicable in that situation, whether the district court erred when it dismissed the plaintiffs' state causes of action on the ground that the filed rate doctrine barred such claims, even though the court found that "[i]t is not disputed that [the] USDA determined that the rates calculated . . . were erroneous and that other rates should have applied based on corrected pricing inputs."[2]

BACKGROUND

I. Statutory and Regulatory Framework as to Milk Pricing

As observed in *Zuber v. Allen, 396 U.S. 168, 172-73, 90 S. Ct. 314, 24 L. Ed. 2d 345 (1969)*:

> The two distinctive and essential phenomena of the milk industry are a basic two-price structure that permits a higher return for the same product, depending on its ultimate use, and the cyclical characteristic of production.
>
> Milk has essentially two end uses: as a fluid staple of daily consumer diet, and as an ingredient in manufactured dairy products such as butter and cheese. Milk used in the consumer **[**4]** market has traditionally commanded a premium price, even though it is of no higher quality than milk used for manufacture. While cost differences account for part of the discrepancy in price, they do not explain the entire gap. At the same time the milk industry is characterized by periods of seasonal overproduction. The winter months are low in yield and conversely the summer months are fertile. In order to meet fluid demand which is relatively constant, sufficiently large herds must be maintained to supply winter needs. The result is oversupply in the more fruitful months. The historical tendency prior to regulation was for milk distributors, "handlers," to take advantage of this surplus to obtain bargains during glut periods. Milk can be obtained from distant sources and handlers can afford to absorb transportation costs and still pay more to outlying farmers whose traditional outlet is the manufacturing market. [Footnote omitted.] To maintain income[,] farmers increase production and the disequilibrium snowballs.

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* The Honorable George H. Wu, United States District Judge for the Central District of California, sitting by designation.

[1] The precept is most often cited as the "filed rate doctrine," although **[**3]** it is sometimes referenced as the "filed tariff doctrine" (*see, e.g.,* ***Davel Commc'ns, Inc. v. Qwest Corp., 460 F.3d 1075, 1084 (9th Cir. 2006))***, and, on rarer occasions, as the "Keogh doctrine" (*see, e.g., Cost Mgmt. Servs., Inc. v. Wash. Natural Gas Co., 99 F.3d 937, 943 & n.7 (9th Cir. 1996))*, after the case where it was purportedly first established (*i.e., Keogh v. Chi. & Nw. Ry. Co., 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922))*. As used herein (except where a different term is utilized within a quoted source), the reference will be to the "filed rate doctrine."

[2] The district court's dismissal decision is reported at *Carlin v. DairyAmerica, Inc., 690 F. Supp. 2d 1128 (E.D. Cal. 2010)*.

HN1[] Congress passed the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 601 et seq.) ("AMAA") "in order to establish and maintain orderly marketing conditions and **[**5]** fair prices for agricultural commodities." Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 461, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997). Section 8c of the AMAA (7 U.S.C. § 608c) authorizes the Secretary of Agriculture to issue "orders" applicable to "handlers" who receive, process, package, or redistribute milk or milk products.[3] "Marketing orders promulgated pursuant to the AMAA are a species of economic regulation that has displaced competition in a number of discrete markets . . . ." Glickman, 521 U.S. at 461. As stated in Block v. Cmty. Nutrition Inst., 467 U.S. 340, 104 S. Ct. 2450, 81 L. Ed. 2d 270 (1984), "[t]he 'essential purpose [of this milk market order scheme is] to raise producer prices,' S. Rep. No. 1011, 74th Cong., 1st Sess., 3 (1935), and thereby to ensure that the benefits and burdens of the milk market are fairly and proportionally shared by all dairy farmers." Id. at 342 (second alteration in original); *see also* Ark. Dairy Coop. Ass'n, v. U.S. Dep't of Agric., 573 F.3d 815, 818, 387 U.S. App. D.C. 346 (D.C. Cir. 2009).

[*1120] HN3[] Milk, milk products, and prices paid by handlers to producers of raw milk (*i.e.*, dairy farmers) are regulated by what are commonly referred **[**6]** to as Federal Milk Marketing Orders ("FMMOs") issued by the USDA pursuant to section 8c(5) of the AMAA. 7 U.S.C. § 608c(5). The promulgation process is described in *Block* as follows:

> HN4[] Under the scheme established by Congress, the Secretary must conduct an appropriate rulemaking proceeding before issuing a milk market order. The public must be notified of these proceedings and provided an opportunity for public hearing and comment. See 7 U. S. C. § 608c(3). An order may be issued only if the evidence adduced at the hearing shows "that [it] will tend to effectuate the declared policy of this chapter with respect to such commodity." 7 U. S. C. § 608c(4). Moreover, before any market order may become effective, it must be approved by the handlers of at least 50% of the volume of milk covered by the proposed order and at least two-thirds of the affected dairy producers in the region. 7 U. S. C. §§ 608c(8), 608c(5)(B)(i). If the handlers withhold their consent, the Secretary may nevertheless impose the order. But the Secretary's power to do so is conditioned upon at least two-thirds of the producers consenting to its promulgation and upon his making an administrative determination that the **[**7]** order is "the only practical means of advancing the interests of the producers." 7 U. S. C. § 608c(9)(B).

467 U.S. at 342 (alteration in original).

HN5[] Section 8c(5) of the AMAA requires that the FMMOs contain provisions which, *inter alia*: (1) classify milk in accordance with the purpose for which it is used, (2) set minimum prices for each such use that handlers must pay, (3) require that said prices be uniform except that adjustments can be made for production differentials, grade or quality of the milk, and locations of delivery, and (4) provide for the use of "blended" prices such that all producers of milk subject to a particular FMMO receive a uniform price for the milk delivered to handlers regardless of the ultimate use of the milk. 7 U.S.C. § 608c(5). The AMAA (and hence each FMMO) only requires a *minimum* price. As observed in Farmer Union Milk Mktg. Coop. v. Yeutter, 930 F.2d 466, 468-69 (6th Cir. 1991):

> HN6[] Although the AMAA mandates a minimum price, it does not mandate a maximum price. Handlers cannot pay less than the blend price, but they are allowed to pay as much as they want. In times of relative scarcity, handlers can and do negotiate premiums, known as "over-order" prices, **[**8]** for the sale of the milk. These premiums are most typically paid for milk that is intended for Class I use, but they can apply to any of the three classes. Thus, market forces are allowed to intrude on this regime on occasion, though only in one direction.

FMMOs have been issued which cover some, but not all, regions of the United States.[4] *See* 7 C.F.R. pts. 1001, 1005-07, 1030, 1032-33, 1124, 1126, 1131, 1135 (2012) (setting price regulations for each designated region).

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[3] HN2[] In the context of milk and milk products, "handler" is defined in 7 C.F.R. § 1000.9 (2012).

[4] For example, HN7[] there is no FMMO covering the state of California. *See* Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 61, 123 S. Ct. 2142, 156 L. Ed. 2d 54 (2003).

HN8[] The Secretary of Agriculture has delegated his authority under the AMAA to the Under Secretary for Marketing and Regulatory Programs, *see 7 C.F.R. § 2.22(a)(1)(viii)(G) (2011)*, and, in turn, the Under Secretary has delegated it to the Administrator for the Agricultural Marketing Service ("AMS"). *7 C.F.R. § 2.79(a)(8)(viii) (2011)*; *see also White Eagle* **[*1121]** *Coop. Ass'n v. Connor, 553 F.3d 467, 482 (7th Cir. 2009)*. As to each operative FMMO, there is a "market administrator" selected by the Secretary who is empowered, *inter alia*, to: (1) "[a]dminister the order in accordance with its terms and provisions"; **[**9]** (2) "[m]ake rules and regulations to effectuate the terms and provisions of the order"; (3) "[r]eceive, investigate, and report complaints of violations to the Secretary"; and (4) announce FMMO prices on designated days of each month. *7 C.F.R. §§ 1000.25(b)*, *1000.53 (2012)*.

The district court correctly observed that "[t]he method by which [the USDA has] accomplished [the framework for a minimum price structure for milk and milk products] is admittedly complex." *690 F. Supp. 2d at 1130*. A description of part of that methodology is provided in *Ark. Dairy Coop. Ass'n, 573 F.3d at 818-19*, as follows:

> HN9[] The AMAA and its implementing regulations use two regulatory mechanisms: price fixing and payment pooling. The minimum prices that handlers must pay vary according to the end use of the milk, as categorized in four classes. *See 7 U.S.C. § 608c(5)(A)*; *7 C.F.R. § 1000.40* (Class I milk is sold in fluid form, Class II milk is used to make ice cream, soft cheeses, and related products, Class III milk is used to produce harder cheeses, and Class IV milk is used to make butter and related products [including nonfat dry milk products].). Instead of setting specific prices to be paid for each Class, **[**10]** the Secretary has established a formula by which the price for each Class is determined monthly based on the average nationwide wholesale prices from the previous month. *See 7 C.F.R. § 1000.50*; *Milk in the Northeast and Other Marketing Areas; Notice of Proposed Rulemaking and Tentative Partial Final Decision, 73 Fed. Reg. 35,306, 35,308 (June 20, 2008)* ("Tentative Decision"). HN10[] The formulas for Class III and IV milk are based on the nationwide average prices for butter, nonfat dry milk, cheese, and dry whey, minus a set dollar amount for each of those products, multiplied by a "yield factor." *7 C.F.R. § 1000.50(l)-(o)*. Class I and II prices are derived from the Class III and IV prices but Class I prices are adjusted for the location of the handler so that handlers pay different prices in different geographic areas. *See 7 C.F.R. §§ 1000.50*, *1000.52*. The amounts subtracted from the average sale prices of Class III and IV products, known in the milk industry as "make allowances" or "manufacturing allowances," are intended to represent the costs to the handlers of making the end dairy products from raw milk. *Tentative Decision, 73 Fed. Reg. at 35,308*. In essence, handlers retain from the **[**11]** average wholesale price the amount set by the make allowance and transfer the balance to producers.
>
> HN11[] The second major component of dairy market regulation is payment pooling. Under this system, handlers pay prices according to the end use of milk, but all the producers in a geographic area receive the same monthly average or "blended" price per unit of milk sold, regardless of the use to which their milk is put. *See 7 U.S.C. § 608c(5)(B)*; *7 C.F.R. §§ 1000.70*, *1000.76*. This payment equalization is accomplished through the "producer settlement fund" into which handlers pay, or from which handlers withdraw, according to whether their blendprice payments to producers are less or greater than the end-use-value of the milk they have purchased. *7 C.F.R. §§ 1000.70*, *1000.76*. Again, the effect of this regime is that handlers make payments which vary according to the market value of the milk they use (as reflected in minimum prices), while all producers in an area receive the **[*1122]** same average, or blended, price per unit of milk.
>
> HN12[] Different geographic areas of the United States are regulated under slightly different conditions, although the formulas used to set prices of Class III and IV milk are the **[**12]** same in all areas. *See 7 C.F.R. § 1000.50*. Each of eleven areas, generally known as a "marketing area" or "milk marketing area," is governed by a different "Order" of the Secretary. *See, e.g.*, *7 U.S.C. § 608c(5)(A)*; *7 C.F.R. § 1001.2*.

The process utilized by the AMS during the relevant period here to establish the formulas through which minimum prices were set pursuant to an FMMO is also complicated, but is adequately summarized in *Ark. Dairy Coop., Inc. v. U.S. Dep't of Agric., 576 F. Supp. 2d 147, 152 (D.D.C. 2008)*, aff'd, *573 F.3d 815, 387 U.S. App. D.C. 346 (D.C. Cir. 2009)*, as follows:

HN13[] Under the FMMOs, a dairy plant pays, and a dairy producer receives, minimum prices in the form of federally established "component prices" for butterfat, protein, solids not fat, and other solids, or skimfat prices that are derived from those component prices. *See* 7 C.F.R. § 1000.50. There are three factors that are used in the pricing formulas: (1) prices of certain dairy products surveyed by the National Agricultural Statistics Service ("NASS"); (2) a make allowance; and (3) a yield. *See id*. The levels of each of these factors affect the price that plants pay for raw milk and, ultimately, how much producers received for **[**13]** their milk. Adjustments in any of these factors will impact pricing.

HN14[] The make allowance and the yield are fixed by rule; the product prices are determined weekly by NASS. *See id*. Every Friday morning, NASS reports the prices of certain cheeses, butter, non-fat dry milk, and dry whey. USDA then announces the advanced prices based on the weighted average of two weeks of NASS prices. *Id*. The make allowances represent the allowance for manufacturing raw milk into a finished product. Changes to the make allowance have an inverse relationship to the resulting changes in the minimum prices. Producers benefit from lower make allowances, and manufacturers benefit from higher make allowances. The yield factor represents the amount of a manufactured dairy product that can be produced per hundredweight (100 pounds) of milk. USDA accounts for the portion of the price of milk that is attributable to the costs of the manufacturing process through the make allowance. When the price of manufactured goods is raised, however, USDA recaptures the cost by reporting a higher price for the wholesale product prices to NASS. As a result, any increase in the selling price of manufactured goods used to produce **[**14]** milk will increase the price manufacturers must pay producers for raw milk. *Id*.

HN15[] The pricing formulas are changed through formal rule-making hearings. *See* 7 C.F.R. §§ 900.3-900.18. After the close of the evidentiary portion of the hearing, exceptions and comments are filed by interested parties and an administrative law judge certifies the transcript to USDA. *See id*. §§ 900.9-900.10. Dairy Programs, a division of USDA, then prepares and submits a recommendation to USDA. The recommendation details the findings of fact, rationale, and the legal authority for its decision. *See id*. § 900.12. After Dairy Programs has issued its recommendation, another round of comments follow, and a referendum on the order, as amended, is held. Producers facing a referendum must choose between voting out the entire marketing order or approving the amended order. There is no vote on the **[*1123]** amendment itself. If the referendum passes, the order is adopted and becomes a final rule. *See id*. §§ 900.300-311.

HN16[] To actually set the minimum prices, FMMOs require the collection and input of certain economic information regarding commercial transactions involving milk and milk products. *See, e.g.*, 7 C.F.R. § 1000.50 (2012). **[**15]** Prior to 2000, the USDA's National Agricultural Statistics Service ("NASS") relied on the prices of dairy commodities on established and specified public exchanges, including the Chicago and New York Mercantile Exchanges, in the calculation of FMMO minimum milk prices. *See, e.g.*, *63 Fed. Reg. 35,564 (June 30, 1998)*.[5] The Dairy Market Enhancement Act of 2000, 7 U.S.C. § 1637 et seq. ("DMEA"), was enacted in part to give the USDA the authority to make the reporting of dairy product information mandatory. *See* 72 Fed. Reg. 36,341 (July 3, 2007). However, the regulations implementing the DMEA (now codified at 7 C.F.R. Part 1170 (2012)) were not promulgated until 2008.

The district court summarized NASS's methods for collecting pricing information during the period of time relevant to this action (and the parties have **[**16]** not disputed that summary) as follows:

HN17[] Pursuant to the DMEA, weekly surveys are conducted by the National Agricultural Statistics Service ("NASS") to collect wholesale prices for representative products within each category. The survey information is gathered from product manufacturers (sometimes referred to in pleadings as milk "handlers") who produce a million pounds or more of manufactured product per year. The FMMO minimum prices for milk for class III

[5] *See also* Kenneth Bailey & Peter Tozer, *An Evaluation of Federal Order Reform*, 84 J. Dairy Sci. 974, 977 (2001) (indicating that NASS had been using such exchanges for pricing information but that they were considered to be "thin markets" because only a small percent of the commodities were actually traded on them and, hence, they were subject to potential price manipulation).

> (hard cheese) and IV (dry milk and butter) products are determined by applying the wholesale prices reported in the weekly surveys to formulae specified by the FMMO. The FMMO minimum prices for products in Classes I and II are derived by mathematic formulae from the prices determined in Classes III and IV.
>
> Of significance to this action, ***HN18***[] one of the major wholesale pricing inputs collected by NASS for computation of the FMMO minimum price for milk for Class IV products is the wholesale price for NFDM [nonfat dry milk]. The DMEA requires handlers to submit NASS survey information according to instructions that, among other things, direct the handler to exclude from the survey wholesale prices for NFDM for forward sales contracts. Forward **[**17]** sales contracts are defined as contracts in which the selling price is set more than 30 days before the completion of the transaction. It appears undisputed that forward sales contracts generally reflected lower prices for NFDM than were reflected in contracts that were completed at or near the time of the transaction during the time period in question.

690 F. Supp. 2d at 1130-31. NASS required the handlers/reporting firms to fill out "Annual Validation Worksheets" which included the question "[w]hen reporting nonfat dry milk sales data to NASS, did you or can you: exclude forward pricing sales (sales in which the selling price is established, and not adjusted, 30 or more days before the transaction is completed)?"

[*1124] ***HN19***[] For enforcement purposes, the DMEA provides that "[e]ach [reporting firm] . . . shall maintain, and make available to the Secretary, on request, original contracts, agreements, receipts, and other records associated with the sale or storage of any dairy products during the 2-year period beginning on the date of the creation of the records." *7 U.S.C. § 1637b(c)(6)*. The 2000 version of the DMEA also provided that "[t]he Secretary shall take such actions as the Secretary considers **[**18]** necessary to verify the accuracy of the information submitted or reported under this subtitle." Pub. L. No. 106-532, § 273(c)(3), 114 Stat. 2541. In 2008, the DMEA was amended and bolstered with the following provision:

> ***HN20***[] QUARTERLY AUDITS. — The Secretary shall quarterly conduct an audit of information submitted or reported under this subtitle and compare such information with other related dairy market statistics.

Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 1510(b), 122 Stat. 9237 (codified at *7 U.S.C. § 1637b(c)(3)(B)*).

HN21[] Once NASS collects price and volume data, the AMS uses them to calculate the FMMO minimum raw milk prices. Non-fat dry milk ("NFDM") prices are one factor used by AMS to determine FMMO minimum prices. The DMEA contains no enforcement mechanism or mechanism for compensating producers who receive prices for their milk that are lower than they should be due to inaccurate reporting.[6]

II. Factual and Procedural Background

Plaintiffs are "dairy farmers located in states other than California who sold raw milk that was priced according to [FMMOs] during the time between January 1, 2002 and April 30, 2007." *690 F. Supp. 2d at 1129-30*.

[6] ***HN22***[] The AMAA contains no provision under which milk producers can challenge a marketing order through administrative review. *See* ***United Dairymen of Ariz. v. Veneman, 279 F.3d 1160, 1164 (9th Cir. 2002)***. The Supreme Court in *Stark v. Wickard, 321 U.S. 288, 64 S. Ct. 559, 88 L. Ed. 733 (1944)*, held that producers **[**19]** could obtain judicial review of the Secretary of Agriculture's practice of deducting certain administrative expenses from the settlement fund before calculating the blended price which resulted in a reduced price for the producers. The Court found a basis for judicial review because the AMAA had given producers "definite personal rights" and "the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." *Id. at 309*. In our consideration of the holdings in *Stark*, we concluded that "judicial review of the producers' complaint was necessary to 'ensure achievement of the Act's most fundamental objectives — to wit, the protection of the producers of milk and milk products.'" ***United Dairymen, 279 F.3d at 1165*** (quoting *Block, 467 U.S. at 352*).

[20]** Defendants are: (1) DairyAmerica, Inc. ("DairyAmerica"), a non-profit entity "established by a group of nine dairy cooperatives for the purpose of marketing dairy products manufactured by the cooperatives" and (2) California Dairies, Inc., one of the nine cooperatives. *Id. at 1130*. It is alleged that DairyAmerica sells approximately 75 percent of the NFDM produced in the United States.

As stated by the district court:

> It is not disputed that, during the time in question, Dairy America submitted pricing information to the NASS survey that improperly included wholesale prices for forward contracts for NFDM. Plaintiffs allege, and Defendants do not appear to dispute, that approximately ninety percent of the contracts executed by Dairy America and reported in the weekly NASS surveys were forward contracts that should not **[*1125]** have been reported in the NASS surveys according to DMEA procedures. Plaintiffs contends [sic] that, because forward contract prices were significantly below spot prices during the time period in question, the minimum prices set by the FMMO's for raw milk were significantly lower than would have been the case if the information provided by Dairy America to NASS had been **[**21]** provided according to instructions.

Id. at 1131. On account of DairyAmerica's market dominance, its erroneous reports had the effect of pushing FMMO minimum prices paid to milk producers noticeably lower than they would have been otherwise. Thus, because of its own transgressions, DairyAmerica obtained significant financial benefits from the lowered prices, to the detriment of plaintiff dairy farmers.

In March 2007, DairyAmerica's misreporting was revealed by *The Milkweed*, a dairy industry publication. In April 2007, DairyAmerica's CEO confirmed that misreporting to the NASS.

On or about April 20, 2007, NASS requested that all 39 firms that had reported NFDM data review their weekly price and sales volume submissions for the period of April 29, 2006 through April 14, 2007, and submit revisions. On June 28, 2007, NASS published "revised prices and sales volume" for NFDM, and the "AMS calculated that the errors in the reporting of nonfat dry milk prices for the period April 29, 2006 through April 14, 2007 had increased the average 2-week price of NFDM by $0.0218 per pound and the average 4-5 week price of NFDM by $0.0193 per pound during a period of 14 months."

In February 2008, the USDA **[**22]** Office of the Inspector General ("OIG") issued a report regarding "the April 2007 discovery of the error in the reporting of nonfat dry milk prices." Office of Inspector Gen., U.S. Dep't of Agric., No. 26901-01-IR, Inspection Report: Survey and Estimation Internal Controls for Nonfat Dry Milk and the *Dairy Products Prices* Report i (2008), *available at* http:// www.usda.gov/oig/ webdocs/26901-01-IR.pdf (last visited June 19, 2012). Among its findings were:

> A large dairy firm inappropriately included long-term forward contracted nonfat dry milk volume and price information in their weekly submissions to NASS. We found that this dairy firm has been including data for sales of this type since 2002.
>
> NASS then aggregated the misreported data from this large dairy firm with the weekly data submitted by other dairy firms for the same reporting period. This caused inaccurate nonfat dry milk aggregated volume and price statistics to be published weekly. The internal controls for the survey and estimation process used by NASS for the *Dairy Products Prices* report were inadequate, as this error went undetected from 2002 until April 2007.
>
> NASS' published nonfat dry milk price statistics are utilized **[**23]** by AMS as a component of its formula for establishing federal milk marketing order (FMMO) prices. Given that incorrect nonfat dry milk prices were factored into the FMMO formula, the published FMMO prices were also incorrect. AMS issued a report on June 28, 2007 stating: "The total classified value of milk regulated under the FMMO program for the period covered by the NASS revision was understated by $50 million . . . " covering the period between April 29, 2006, and April 14, 2007.
>
> . . . .

> AMS did not have the authority to audit a reporting firm's books when the misreporting occurred. The authority was included in the Dairy Marketing Act of 2000, but the rulemaking necessary to implement a program of audits was not **[*1126]** completed until July 2007. AMS began performing audits on August 6, 2007. Between August 6, 2007, and September 30, 2007, AMS visited seven plants reporting nonfat dry milk volume and price statistics. Based on these visits, AMS notified NASS of reporting discrepancies at six of the plants. NASS contacted these plants and explained the proper reporting criteria.

Id. at i-ii.

Following the release of the Inspection Report, NASS sent letters to "dairy firms" (*i.e*., handlers) **[**24]** that reported NFDM information asking whether they had correctly related the NFDM data between January 4, 2002 and April 22, 2006, and, if they had not, to provide corrected data. None of the dairy firms provided corrected information, and, hence, the NASS (and consequently the USDA) was unable to publish revised NFDM data or FMMO prices for that period.[7] In August 2007, AMS instituted a new auditing process which included in-person inspections of large dairy firms and their sales records.

Beginning in March 2009, each plaintiff filed a class action on behalf of **[**25]** a nationwide class of raw milk producers in federal court based on diversity jurisdiction. *See* *690 F. Supp. 2d at 1131*. The cases were eventually consolidated. *Id*. The Amended Class Action Complaint contains four causes of action: the first and second claims for relief charged negligent misrepresentation and negligent interference with prospective economic advantage, respectively, both under California common law; the third claim asserted violation of California's Unfair Business Practices Law, *California Business and Professions Code § 17200 et seq*.; and the fourth claim alleged unjust enrichment under California common law.

Defendants filed separate motions seeking dismissal of the entire lawsuit on five grounds: (1) the filed rate doctrine barred plaintiffs' claims, (2) the DMEA confers no right of private enforcement, (3) the USDA is an indispensable party but immune from suit herein, (4) the price reporting program creates no legal obligation on defendants' part, and (5) plaintiffs' state law claims are preempted by the DMEA. The district court dismissed the monetary portions of all four claims *solely* on the grounds that they were not justiciable pursuant to the filed rate doctrine. **[**26]** *690 F. Supp. 2d at 1140-41*. The district court also held that, while the filed rate doctrine purportedly does not bar injunctive relief, the third cause of action — wherein such relief was requested — was inadequately pled. *Id. at 1140*. In so ruling, the district court noted that:

> Because the filed rate doctrine applies narrowly to bar only claims that are based on minimum prices paid for raw milk, the court is not willing at this point to make the determination that there are no other facts that Plaintiffs could possibly plead that would cure the deficiency. Further, as noted, the court cannot determine at this point that there is no non-money equitable remedy available to Plaintiffs. For that reason the **[*1127]** [amended complaint] will be dismissed with leave to amend.
> The court is also mindful that the filed rate doctrine consists of a body of law that has been the subject of conflicting interpretations. The court will therefore give favorable consideration to the motion of either party for interlocutory appeal on the issue of whether the filed rate doctrine bars Plaintiffs' claims in this case.

Id. at 1141.

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[7] As noted by the NASS:

> In cases where there had been reporting problems, NASS provided the firms with their previously reported data and asked them to review and submit appropriate corrections.
>
> NASS agreed to summarize results of this process in a special report to be released on June 19, 2008. However, no firms provided corrected data, and therefore NASS will not issue a special report.

News Release, Nat'l Agric. Statistics Serv., U.S. Dep't of Agric., NASS Will Not Issue Special Report on Nonfat Dry Milk Prices (June 19, 2008), *available at* http://www.nass.usda.gov/Newsroom/Notices/06_19_2008.asp (last visited June 19, 2012).

Plaintiffs filed an initial appeal, but their appeal was dismissed because the district **[**27]** court's ruling was not a final order. *See* WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). Plaintiffs then moved in the district court to dismiss their complaint with prejudice so that this court could exercise jurisdiction. The district court granted that motion. Plaintiffs then filed a timely notice of appeal.

DISCUSSION

I. Standard of Review and Applicable Procedural Law

HN23[] We review *de novo* challenges to a dismissal for failure to state a claim under Federal Civil Rule 12(b)(6). N.M. State Inv. Council v. Ernst & Young LLP, 641 F.3d 1089, 1094 (9th Cir. 2011). That standard is applied to a district court's dismissal based on the filed rate doctrine. California ex rel. Lockyer v. Dynegy, Inc., 375 F.3d 831, 849 n.16 (9th Cir. 2004), *amended*, 387 F.3d 966 (9th Cir. 2004); Brown v. MCI Worldcom Network Servs., Inc., 277 F.3d 1166, 1169 (9th Cir. 2002). "Such review is generally limited to the face of the complaint, materials incorporated into the complaint by reference, and matters of judicial notice." N.M. State Inv. Council, 641 F.3d at 1094; *see also Metzler Inv. GMBH v. Corinthian Colls., Inc., 540 F.3d 1049, 1061 (9th Cir. 2008)* (citing Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)). **[**28]** In undertaking this review, we will "accept the plaintiffs' allegations as true and construe them in the light most favorable to plaintiffs," Gompper v. VISX, Inc., 298 F.3d 893, 895 (9th Cir. 2002), and will hold a dismissal inappropriate unless the complaint fails to "state a claim to relief that is plausible on its face," Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

Because the only issues on appeal raised by plaintiffs concern the application of the filed rate doctrine and its preclusive effect in the present case and because the district court did not rule on defendants' other defenses (such as the purported lack of a private right of enforcement under the DMEA, the status of the USDA as an indispensable party, etc.), our decision is limited to the filed rate doctrine issues. *See* Singleton v. Wulff, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) (**HN24**[] "[A] federal appellate court does not consider an issue not passed upon below."); U.S. ex rel. Lee v. SmithKline Beecham, Inc., 245 F.3d 1048, 1050 n.1 (9th Cir. 2001) ("[W]e limit our review to issues argued in a party's opening brief.").

II. The District Court Did Not Err in Concluding that the Agency-set Minimum Prices for Raw Milk Are Generally [**29] Subject to the Filed Rate Doctrine.

A. *The Filed Rate Doctrine*

As we observed in E. & J. Gallo Winery v. Encana Corp., 503 F.3d 1027, 1033 (9th Cir. 2007): **HN25**[] "The [filed rate] doctrine is a judicial creation that arises from decisions interpreting federal statutes that give federal agencies exclusive jurisdiction to set rates for specified utilities, originally through rate-setting procedures involving the filing of rates with the agencies." "At its most basic, the filed rate doctrine provides that state law, and some federal law **[*1128]** (e.g. ***antitrust law***), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question." Wah Chang v. Duke Energy Trading & Mktg., LLC, 507 F.3d 1222, 1225 (9th Cir. 2007) (quoting *Transmission Agency v. Sierra Pac. Power Co., 295 F.3d 918, 929-30 (9th Cir. 2002))*. It has generally been recognized that there are three "purposes" or "governmental interests" which justify or support the filed rate doctrine.

The origin and justifications for the doctrine can be traced to the Supreme Court's early cases involving the Interstate Commerce Act ("ICA"). Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981); **[**30]** *see* Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 Vand. L. Rev. 1591, 1598-99 (2003) (henceforth *Lowering the Filed Tariff Shield). In* New York, New Haven & Hartford R.R. Co. v. ICC, 200 U.S. 361, 391, 26 S. Ct. 272, 50 L. Ed. 515 (1906), the Court, in interpreting the ICA, stated:

> [T]he great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination.

Thus, ***HN26***[] the initial *raison d'être* for the doctrine concerned stabilizing rates and preventing pricing discrimination amongst ratepayers.[8] *See* *Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 126, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990)* ("The duty to file rates with the Commission and the obligation to charge only those rates have always been considered essential to preventing price discrimination and stabilizing rates." (citations omitted)).

Once it was determined that federal law required the primacy of filed rates and tariffs, there developed two additional and related justifications for the doctrine, *i.e.*, federal preemption (or the supremacy of federal law) and deference to federal agency expertise (or primary jurisdiction). As observed in *Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 964, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986)*:

> ***HN28***[] In *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 101 S. Ct. 1124, 67 L. Ed. 2d 258 (1981)*, the Court similarly noted that the filed rate doctrine as applied to the actions of the Interstate Commerce Commission assisted in the enforcement of the supremacy of federal law:
>
> > "The common rationale of these cases is easily stated: '[There] can be no divided authority over interstate commerce, and . . . the acts of Congress on that subject are supreme and exclusive.' *Missouri Pacific R. Co. v. Stroud, 267 U.S. 404, 408, 45 S. Ct. 243, 69 L. Ed. 683 (1925)*. **[**32]** Consequently, state efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity." *Id. at 318-319*.

(Alterations in original and parallel citations omitted). Allowing filed rates to be **[*1129]** subject to litigation in state courts (or in federal courts applying state law) could result in service rates and conditions varying across jurisdictions, which would conflict with the federal interest in uniformity. *See* *Ark. La. Gas Co., 453 U.S. at 578-79* (permitting individual ratepayers or others to attack a filed rate "would undermine the congressional scheme of uniform rate regulation"). That conflict would be prevented by treating the filed rates as having what amounts to a preclusive effect on state law rate-based claims.

HN29[] The third justification concerns the unnecessary interjection of the courts into the rate-making process where they have no expertise or valid reason to interfere. *See, e.g.,* *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 251-52, 71 S. Ct. 692, 95 L. Ed. 912 (1951)* ("We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts **[**33]** can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.").

HN30[] The filed rate doctrine has been given an expansive reading and application in this Circuit, even in the face of "debate in other forums about [its] wisdom."[9] *MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 234, 114*

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[8] As noted in *Lowering the Filed Tariff Shield*, *56 Vand. L. Rev. at 1599*:

> ***HN27***[] In original design, **[**31]** the [filed rate] doctrine was intended to serve as a sword to protect consumers from monopolistic price discrimination, such as a railroad charging different rates to customers of different states, or charging the shipping companies with whom it competes exorbitant prices, without justifications based on the cost of providing service to the customer.

[9] For example, ***HN31***[] California has declined to create a state filed rate doctrine even where the tariffs are filed with the state regulatory agency having authority over the subject area and even if the rates have been approved as reasonable by that agency. *See* *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 992-93 (9th Cir. 2000)*.

S. Ct. 2223, 129 L. Ed. 2d 182 (1994) (quoting Sec. Servs., Inc. v. Kmart Corp., 511 U.S. 431, 440, 114 S. Ct. 1702, 128 L. Ed. 2d 433 (1994)) (internal quotation marks omitted); *see also* Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 417-24, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986); *but see* Verizon Del., Inc. v. Covad Commc'ns Co., 377 F.3d 1081, 1089 (9th Cir. 2004) ("[T]he filed rate doctrine now functions in the telecommunications field as an anomaly. It is a relic, open to repudiation by the FCC."). In E. & J. Gallo Winery, 503 F.3d at 1035, after reviewing the doctrine and "associated principles" of federal preemption, we concluded that: "to the extent Congress has given [a federal agency] authority to set rates under [a federal statute] and [the agency] has exercised that authority, such rates are just and reasonable as a matter of law and cannot be collaterally challenged under federal ***antitrust law*** or state law." *See also* Wah Chang, 507 F.3d at 1225-26 **[**34]** ("The filed rate doctrine's fortification against direct attack is impenetrable. It turns away both federal and state antitrust actions; it turns away Racketeer Influenced and Corrupt Organization Act actions; it turns away state tort actions; and it even turns away state attempts to assert sovereign power to commandeer power contracts." (footnotes omitted)).

B. *The Filed Rate Doctrine Applies to the Minimum Rates for Raw Milk Set under FMMOs pursuant to the AMAA*.

No Supreme Court or federal appellate court case has considered whether the filed rate doctrine applies to marketing orders setting the prices for raw milk under the AMAA. However, a number of trial courts (in addition to the district court here) have held it does. *See, e.g.,* In re Se. Milk Antitrust Litig., 801 F. Supp. 2d 705, 732-34 (E.D. Tenn. 2011); In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig., 767 F. Supp. 2d 880, 894-95 (N.D. Ill. 2011); **[**35]** Servais v. Kraft Foods, Inc., 2001 WI App 165, 246 Wis. 2d 920, 631 N.W.2d 629, 633-35 (Wis. Ct. App. 2001); *but see* Ice Cream Liquidation, Inc. v. Land O'Lakes, Inc., 253 F. Supp. 2d 262, 276 **[*1130]** (D. Conn. 2003) (holding that, while filed rate doctrine does apply to challenges to milk pricing set under an FMMO, it does not apply to a challenge to a defendant's artificially inflated wholesale milk prices, which are permitted to be in excess of the minimum rates set under the FMMOs).

HN32[] Originally, the filed rate doctrine arose in the context of the following paradigm. A rate or tariff within an industry regulated by federal statute is filed by a carrier or other service/ product provider with a federal agency, which in turn accepts and publishes it. *See, e.g.,* Sec. Servs., Inc., 511 U.S. at 435. Thereafter, the carrier (and its customer) is not allowed to charge (or pay) a different rate for that service/ product other than the filed one. *Id*. ("We have held these provisions 'to create strict filed rate requirements and to forbid equitable defenses to collection of the filed tariff.'" (quoting Maislin Indus., 497 U.S. at 127)). In turn, the rate is held not to be subject to challenge on antitrust, state law or most other grounds. **[**36]** *See, e.g.,* Keogh v. Chi. & Nw. Ry. Co., 260 U.S. 156, 161-65, 43 S. Ct. 47, 67 L. Ed. 183 (1922); Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 18 (2d Cir. 1994) ("Simply stated, the doctrine holds that any 'filed rate' — that is, one approved by the governing regulatory agency — is per se reasonable and unassailable in judicial proceedings brought by ratepayers."). As noted in Ice Cream Liquidation, 253 F. Supp. 2d at 275:

> ***HN33***[] Application of the filed rate doctrine in any particular case is not determined by the culpability of the defendant's conduct or the possibility of inequitable results. Nor does the doctrine's application depend on the nature of the cause of action the plaintiff seeks to bring. Rather, the courts have held that the doctrine is to be applied strictly to prevent a plaintiff from bringing a cause of action whenever [the] purpose[s] underlying the filed rate doctrine [are] implicated.

(Citations omitted).

Here, admittedly, the statutory scheme created by AMAA does not present the typical filed rate scenario. For example, the handlers do not submit rates or prices to the AMS in order to create an unwavering price. Rather, various pricing data are provided to the NASS (some of which are supplied by handlers **[**37]** such as the defendants) and that data are utilized along with "make allowances" and "yields" (which are fixed by the agency's rules) in pricing formulas which, in turn, delineate the raw milk rates. *See* 7 C.F.R. § 1000.50 (2012). Also, the rates consist of only *minimum* prices from which the handlers and producers can deviate, albeit only in an upward direction (which favors the dairy producers). Further, the set rates are not uniform across the nation. They can vary amongst the eleven established milk marketing areas, and there are also locations without any applicable FMMOs (and hence no controlling filed rates). *See* 7 C.F.R. subtit. B, ch. X (2012); Hillside Dairy Inc., 539 U.S. at 61.

Additionally, the individual handlers make payments which vary according to the market value of the milk they use as reflected in the minimum payments, but all the milk producers in the area covered by the FMMO receive the same average, or blended, price per unit of milk. Finally, the FMMOs (which contain the pricing formulas), while promulgated by the USDA and subject to appropriate rulemaking proceedings including public hearing and comment, must be approved by the handlers of at least 50 percent **[**38]** of the volume of milk within the geographic area covered by the proposed order and at least two-thirds of the affected dairy producers in the region. *See 7 U.S.C. § 608c(8)*. Nevertheless, despite those elements, there are sufficient attributes which justify **[*1131]** the application of the doctrine to the AMAA milk pricing situation generally.

First, ***HN34***[] milk pricing is the subject of extensive federal statutory and regulatory control. *See, e.g.*, *7 U.S.C. § 608c(5)*. Additionally, under the AMAA, the USDA (via the AMS and through the FMMOs) sets minimum prices for raw milk purchased from producers by handlers where there can be no downward deviation in the rate. Therefore, to paraphrase *Gallo*, the filed rate doctrine is applicable because Congress has given the USDA authority to set rates under *7 U.S.C. § 608c(5)* and the USDA has exercised that authority to create the FMMOs which, in turn, are utilized to establish minimum prices for raw milk purchases; and thus "such rates are just and reasonable as a matter of law." *503 F.3d at 1035*.

Further, ***HN35***[] the three underlying justifications for the filed rate doctrine apply to FMMO prices set under the AMAA. The setting of minimum rates prevents discriminatory **[**39]** pricing (albeit to a more limited extent than other situations where the doctrine has been applied) and stabilizes prices by assuring dairy producers of reasonable payments for raw milk as fixed by the AMS. Additionally, the setting of minimum rates by means of formulas established in the FMMOs is a matter which clearly falls within an area of USDA expertise, which most courts would not possess. Finally, the AMAA and its concomitant regulations establish a federal scheme as to uniform minimum pricing which should not generally be the subject of attack by ratepayers or others. As stated in *7 U.S.C. § 602*:

> ***HN36***[] It is declared to be the policy of Congress —
>
> (1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by *section 1301(a)(1)* of this title [*7 U.S.C. § 1301(a)*].
>
> (2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section . . . and (b) authorizing **[**40]** no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

C. Meaningful Review by the Federal Agency Is Not a Prerequisite to the Application of the Filed Rate Doctrine.

Plaintiffs challenge application of the filed rate doctrine here based on the contention that the USDA lacks "any actual legal authority to meaningfully review the substance of the pricing." They rely on *Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992)*, where we held that the filed rate doctrine did not apply to title insurance rates filed with state insurance agencies because, although the rates were filed with the state agencies, they "were not subjected to meaningful review by the state." *Id. at 394* (citing *Wileman Bros. & Elliott, Inc. v. Giannini, 909 F.2d 332, 337-38 (9th Cir. 1990)*).[10]

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[10] Plaintiffs also relied on our decision in *Wileman Bros*., which is readily distinguishable from the present case. In *Wileman Bros*., the defendants were nectarine and plum growers who served as members of committees appointed by the Secretary of Agriculture and who (without **[**41]** the Secretary's authorization) issued and enforced a "well-matured" standard governing when those varieties of fruits could be picked. *Wileman Bros*. did not involve a tariff or rate submitted to or issued by a federal agency. Thus, the filed rate doctrine was not applicable to that situation. Further, the holding of that case was that the

[*1132] We are not persuaded that *Brown* requires meaningful review for the filed rate doctrine to apply in all cases, however. In *Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 417 n.19, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986)*, the Supreme Court held that the filed rate doctrine applied to rates merely filed with the Interstate Commerce Commission ("ICC"), even when those rates had not been "investigated and approved by the ICC." Similarly, in *Gallo*, we held that the filed rate doctrine applied to market rates for natural gas authorized by the Federal Energy Regulatory Commission ("FERC"). **[**42]** The plaintiff argued that the filed rate doctrine applied only to "only rates that have been literally filed with and approved by FERC." *503 F.3d at 1039*. We disagreed, emphasizing that the essential question was whether the market rates were *authorized* by the FERC. *See id*. We explained that the FERC was not required to use "any particular form of regulation in its quest to ensure reasonable rates." *Id*. It mattered only that the rates were authorized by the FERC in the exercise of its statutory authority. *See id. at 1040-43*.[11] Thus, like the district courts that have addressed the issue, ***HN37***[] we do not read *Brown* as making meaningful agency review a *sine qua non* for the applicability of the filed rate doctrine. *See In re Hawaiian & Guamanian Cabotage Antitrust Litig., 754 F. Supp. 2d 1239, 1245-46 (W.D. Wash. 2010)* (collecting cases that characterize *Brown* as an "outlier" decision on the issue).

The proper inquiry, therefore, is whether the FMMO minimum prices were authorized by the USDA pursuant to its statutory authority, or, to paraphrase *Gallo*, whether the USDA was doing enough regulation to justify federal preemption **[**44]** of state laws. *See Gallo, 503 F.3d at 1041*. We conclude that it did.

The applicable statute required the Secretary to issue orders which provided for a particular, but partial, methodology for establishing minimum uniform prices for raw milk. *7 U.S.C. § 608c(5)*. It is not disputed that the Secretary exercised his discretion and promulgated regulations governing that rate setting process and issued orders in the form of the FMMOs to effectuate those requirements of the statutory scheme. Part of the methodology includes formulas which are dependent upon the **[*1133]** input of sales prices and volumes supplied by designated handlers.

Plaintiffs argue that the prices DairyAmerica reported to NASS are comparable to market-based rates like those in *Brown* because AMS only had the power to take NASS data, plug them into a predetermined formula, and then publish the resulting FMMO prices. Once the prices were reported to NASS, in other words, the rest of the pricing was mechanical and amounted to silence by AMS. Moreover, as plaintiffs argue, AMS did not have (at that time) the power to review the accuracy of data collected by the NASS. However, plaintiffs do not contend that the Secretary did not have **[**45]** the statutory authority to review the accuracy of NASS data.[12] Instead they argue that the USDA's implementing regulations did not, during the applicable time frame, contain any explicit provision for such a review. In opposition, defendants point out that the USDA has, in at least 18 instances, used its discretion to change the price data it used to calculate milk prices.[13] Plaintiffs counter that, under the relevant

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defendants could not establish immunity from antitrust claims on the simple basis that the Secretary had "tacitly" approved the higher maturity standards they issued by his failing to explicitly disapprove them, as he could have done under applicable regulations. *See 909 F.2d at 337-38*.

[11] *Gallo* relied on an earlier case involving market rates for electricity, where it was held that the filed rate doctrine applied because the FERC was "doing enough regulation to justify federal preemption of state laws." *Gallo, 503 F.3d at 1041* (quoting *Pub. Util. Dist. No. 1 of Snohomish Cnty. v. Dynegy Power Mktg., Inc., 384 F.3d 756, 760 (9th Cir. 2004)*). **[**43]** In *Gallo* too, we concluded that the FERC was doing enough regulation for the filed rate doctrine to apply. First, the FERC determined that the best way to ensure just and reasonable rates in the evolving natural gas market was to allow natural gas sales to proceed at market prices. *See id. at 1041-42*. Second, the FERC reviewed the natural gas market and determined it was competitive. *See id. at 1042*. Third, although the FERC did not impose individualized reporting requirements on sellers of natural gas, it maintained ongoing oversight of the market and took corrective responses to evidence of market manipulation. *See id*. We thus concluded that, "[b]ecause FERC has not abdicated its responsibilities but has acted, albeit with a light hand, to authorize just and reasonable rates in the natural gas arena, the Filed Rate Doctrine continues to preempt any rate-setting activities by the courts and bar federal antitrust claims under the Filed Rate Doctrine." *Id*.

[12] The USDA clearly had statutory authority. Plaintiffs' Complaint alleges that the Secretary issued a rule that allowed for such review in 2007. Thus, even if the Secretary did not choose to review the accuracy of data reported to NASS, he had the power to do so.

implementing regulations, AMS only has the power to do so "[i]f for any reason a price or pricing constituent required for computing the prices described in *§ 1000.50* is not available." *7 C.F.R. § 1000.54 (2012)*. *Section 1000.50* calculates rates based on NASS pricing data.

Plaintiffs clearly underestimate the extent of the agency's authority (and its execution of those powers) in setting the minimum prices **[**46]** under the FMMOs. Indeed, the USDA here did far more than the FERC in the *Gallo* case in this regard. First, ***HN38***[] the agency promulgated regulations which created an intricate system for the setting of the prices. Unlike the FERC in *Gallo* which merely "reviewed the natural gas market and determined it was competitive," *503 F.3d at 1042*, the USDA not only examined the dairy products market, but also took into account volume, location, grade/quality of the milk, production differentials, and other factors in creating the formulas in the FMMOs. Also, the formulas do not consider only one or two data points but a large number of them to arrive at the ultimate price determination. Additionally, the formulas which generate the rates also include the consideration of "make allowances" and "yields" which are fixed by the agency's rules. Further, the FMMOs are not effective until the Secretary obtains the approval of handlers of at least 50 percent of the milk processed and two-thirds of the affected dairy producers within the geographic territory subject to the order. *7 U.S.C. § 608c(8)*. Thus, the Secretary exercises extensive authority vis-a-vis milk pricing in establishing the formulas in the FMMOs **[**47]** which in turn set the parameters for the issued minimum prices.

Additionally, as in *Gallo*, the USDA here maintained ongoing oversight of the market and initiated remedial actions in response to evidence of market manipulation. Indeed, upon being informed of the misreporting by DairyAmerica, the agency took steps to determine the effect of the misinformation, calculated corrective prices for the periods when the original data were available, and enacted regulations and amendments to the FMMOs for improved oversight of the reporting process. Furthermore, plaintiffs' contention (that AMS **[*1134]** did not and could not do anything but accept the NASS data even if it knew they were unreliable) is incorrect. Plaintiffs' argument is essentially that, had DairyAmerica provided false pricing information to NASS and then sent a letter to AMS saying "we made this data up," AMS would have been obligated to use that data to set prices. That is, to say the least, a curious interpretation of the pertinent regulations, *i.e.*, *7 C.F.R. §§ 1000.50* and *1000.54*. Indeed, during the relevant period, the market administrators (who were empowered to administer the FMMOs) had the authority to (1) make rules and regulations **[**48]** to effectuate the terms and provisions of the FMMOs, (2) receive, investigate, and report violations to the Secretary, and (3) recommend amendments to the Secretary. See *7 C.F.R. § 1000.25(b) (2004)*.

In sum, the USDA did possess the authority and did exercise it to address problems as to the agency-set minimum prices for raw milk under the FMMOs, such that the filed rate doctrine is applicable in the present AMAA situation.[14]

III. Precedent Does Not Require and Policy Considerations Do Not Support Applying the Filed Rate Doctrine as a Bar under the Facts of This Case.

Plaintiffs argue that even if the filed rate doctrine applies to agency-set milk prices in general, it should not serve as a bar in this case, since the USDA has indicated that it would have set different prices had DairyAmerica reported its data correctly. We know that prices would have been different but for the misreporting, because (1) the NASS

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[13] Defendants' citations are to the federal register and, hence, judicially noticeable. *See 44 U.S.C. § 1507*.

[14] Plaintiffs also cite three cases from the same district court which declined to apply the filed rate doctrine to Medicaid reimbursement rates for prescription drugs. Each case, however, rejected the application of the doctrine at least in part because there were no filed rates. *Massachusetts v. Mylan Labs., 357 F. Supp. 2d 314, 329 (D. Mass. 2005)* (holding that the filed rate doctrine was inapplicable because "[t]he reported data do not control the rates which Defendants can charge customers, as a tariff would"); *In re Lupron Mktg. and Sales Prac. Litig., 295 F. Supp. 2d 148, 163 n.16 (D. Mass. 2003)*; *In re Pharm. Indus. Average Wholesale Price Litig., 263 F. Supp. 2d 172, 192 (D. Mass. 2003)* (holding that filed rate doctrine did not apply because pharmaceutical **[**49]** companies do not file rates with any agency). Furthermore, none of these cases address the doctrine at significant length and they would not therefore be particularly persuasive even if they were on point.

issued retroactive revised prices for part of the relevant period after DairyAmerica acknowledged its erroneous reporting, and (2) AMS calculated the increase in the prices of NFDM for the period between April 29, 2006 and April 14, 2007. We agree that the filed rate doctrine does not preempt or otherwise pose a preclusive bar to plaintiffs' lawsuit, because: (1) the federal agency itself determined that the FMMO prices were incorrect and (2) the policy considerations behind the doctrine do not **[**50]** justify applying the doctrine as a bar in this case.

Plaintiffs initially attempt to avoid the strictures of the filed rate doctrine by arguing that they are not actually seeking to challenge a fixed rate at all. However, we have made it clear that***HN39***[] the doctrine precludes remedies which rely on a court's recalculation of rates which would have been charged, even if the plaintiff is not directly challenging the filed rate:

> Wah Chang cannot avoid the fact that it seeks what amounts to having the courts determine what rates the Energy Companies should have charged instead of the rates they did charge. Wah Chang would inevitably drag the courts into a determination of what rate would be fair and proper. That is precisely what Wah Chang cannot do.

[*1135] *Wah Chang, 507 F.3d at 1226*. Establishing damage amounts for plaintiffs' claims, similarly, would require calculating what rates would have been set but for the defendants' misreporting. For this reason, it would be unavailing for plaintiffs to rely on *Gallo's* dictum that "[w]e are aware of no basis for holding that the Filed Rate Doctrine bars claims based on a reference point for pricing transactions (be it a trade index, the Consumer Price Index, **[**51]** or the New York Stock Exchange) that is not itself a FERC-approved rate." *Gallo, 503 F.3d at 1048 n.15*. Still, as discussed below, it is a different situation where the agency itself in the context of the AMAA/DMEA recognizes that its issued rates are in error due to the misconduct of the enriched party.

A. *The Filed Rate Doctrine Does Not Bar Plaintiffs' Claims Given the USDA's Recognition That Its Published FMMO Rates Were Incorrect Due to Defendants' Misreporting*.

HN40[] The Supreme Court has said that the filed rate doctrine does not apply to bar a private litigant's rate-related claims if the rate has been "suspended" or "set aside" by the relevant agency. *Keogh, 260 U.S. at 163*.[15] **[**52]** Whether an agency has sufficiently rejected a rate for purposes of the filed rate doctrine analysis, whether that rejection should eliminate the doctrine's preemptive bar, and, even if the bar is so removed, whether thereafter a plaintiff should be allowed to recover damages arising from the incorrect prior rates are admittedly difficult issues. They can only be correctly answered after consideration of the underlying statutory scheme in which the doctrine is being applied and the justifications for the doctrine.

Initially, the defendants contend that the issues disputed **[**53]** herein were settled by *Ark. La. Gas Co*., where the Supreme Court held that the filed rate doctrine prohibited a federally regulated seller of natural gas from charging higher rates than those filed with the FERC despite the contention that, had the seller applied for a higher rate, the FERC would have approved it. *453 U.S. at 573-76, 584-85*. In that case, the Court did not find compelling the argument that the defendant's misconduct (a breach of contract) had prevented the plaintiff seller from filing for a higher rate.[16] *Id. at 583*. However, the Court specifically focused on the controlling statute (*i.e*., the Natural Gas Act, *15 U.S.C. § 717 et seq.*). It observed that:

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[15] *Accord* *City of Groton v. Conn. Light & Power Co., 662 F.2d 921, 929 (2d Cir. 1981)*:

> Under the Keogh or "filed rate" doctrine, . . . a public utility subject to regulation is not subject to antitrust liability to its customers for rates or services provided under tariffs approved by the appropriate regulatory agency. The rationale is that the regulatory agency determines the legal rate and the utility must collect it while it is in effect. The doctrine applies to rates that have been published but not acted upon by the regulatory agency, because they are the legal rates until suspended or set aside.

(Citation omitted).

[16] The Court in *Ark. La. Gas Co*. also noted that "[w]e save for another day the question whether the filed rate doctrine applies in the face of fraudulent conduct." *Id. at 583 n.13*.

> Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively. When the Commission finds a rate unreasonable, it "shall determine the just and reasonable rate . . . to be *thereafter* observed and in force." § 5 (a), 52 Stat. 823, 15 U. S. C. § 717d (a) (emphasis added).

Id. at 578. Based upon the plain text of the statute specifically precluding the FERC from altering a published **[*1136]** rate retroactively as well as **[**54]** ordering any reparations based on the unlawfulness of past rates, the Court concluded that a state court could not be allowed "to award what amounts to a retroactive right to collect a rate in excess of the filed rate [because it would] 'only accentuate[ ] the danger of conflict.' . . . [and constitute a] usurpation of federal authority." Id. at 584.[17]

Obviously, ***HN41***[] where the controlling statute prohibits the federal agency from altering a filed rate retroactively or limits any application **[**55]** of reconsidered rates to prospective situations, then the agency cannot effectively suspend or set aside the published rates for purposes of a lawsuit seeking recovery based on injuries arising from the imposition of those rates. However, unlike the Natural Gas Act, ***HN42***[] there is nothing in the AMAA or the DMEA which specifically bars the USDA from revising rates where handlers have supplied incorrect data to the agency.

HN43[] Turning to the issue of the extent to which the federal agency must indicate that it is suspending, setting aside or otherwise rejecting the filed rate, it is noted that a large segment of the cases dealing with the filed rate doctrine arise in the context of statutes such as the ICA, the Communications Act, and legislation involving the FERC, where an anti-discriminatory policy as to filed rates or tariffs lies at the very heart of the statutory scheme. *See, e.g.*, New York, New Haven & Hartford R.R. Co., 200 U.S. at 391; AT&T Co. v. Central Office Tel., Inc., 524 U.S. 214, 223, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998). In such situations, a federal agency's ability to set aside a published rate retroactively would be extremely limited and, hence, any attempt to do so would have to be explicitly executed **[**56]** and thoroughly explained. For example, in *Keogh*, it was held that a rate that is filed with the ICC (and, after hearings, is approved by the Commission) is deemed reasonable and non-discriminatory as a matter of law, "[u]nless and until suspended or set aside." 260 U.S. at 160-63. However, the Court observed that in the context of the ICA, setting aside or suspending the published tariff for purposes of a legal action for damages would be extremely difficult because (1) any such case which led to a damages award to the plaintiff shipper would operate as "a preference over his trade competitors" and vitiate the paramount purpose of the ICA (*i.e.*, preventing pricing discrimination), and (2) in any such proceeding, "the Commission [would have to] determine whether a rate is discriminatory . . . . But by no conceivable proceeding could the question whether a hypothetical lower rate would under conceivable conditions have been discriminatory, be submitted to the Commission for determination." Id. at 163-64.

Plaintiffs cite to the Supreme Court's decision in *Maislin* for the proposition that the doctrine does not bar claims challenging prices that were rejected by the relevant agency. That **[**57]** reading of the case is overbroad. In *Maislin*, the Court noted the ICA prohibited both carriers and shippers from deviating from published tariffs filed with the ICC, but also required that the carrier's rates be nondiscriminatory **[*1137]** and reasonable, and charged the ICC, upon determining that a rate or practice violates the statute, with prescribing the subsequent rate or practice to be followed. 497 U.S. at 119-20. In 1986, in response to a growing trend wherein carriers and shippers privately negotiated rates lower than those filed with the agency, the ICC concluded that changes in the motor carrier industry "clearly warrant[ed] a tempering of the former harsh rule of adhering to the tariff rate in virtually all cases," and so it established a new policy whereby in referenced cases it would "decid[e] if the collection of undercharges would be an unreasonable practice." Id. at 121. A carrier that had entered into such a private contract went bankrupt, and its bankruptcy estate brought an action against the shipper to collect the difference between the

[17] Defendants also cite *Montana-Dakota Utilities Co*. where the Court declined to order the lower court to direct an agency to make a retroactive determination where Congress had not granted such authority to the agency. 341 U.S. at 254. It was noted that the agency's decision was required because the reasonableness of the rate charged, which could only be assessed by the agency, was determinative as to whether the plaintiff had a viable cause of action and a basis for the federal courts to exercise jurisdiction. Id. at 253-54.

contract rate and the higher filed tariff. The Court initially held that ***HN44***[] "The filed rate doctrine . . . contains an important caveat: The **[**58]** filed rate is not enforceable if the ICC finds the rate to be unreasonable." *Id. at 128*. The Court went on to quote from *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370, 384, 52 S. Ct. 183, 76 L. Ed. 348 (1932)*, that "Under [the Act] the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation." *Id. at 129* (alteration in original).[18] Thus, ***HN45***[] *Maislin* stands, in part, for the limited proposition that, where the statute allows the agency to decide that a published tariff is unreasonable under controlling law, the filed rate doctrine will not bar a plaintiff from seeking reparation from the imposition of the unreasonable rate.

The Supreme Court in *ICC v. American Trucking Associations, 467 U.S. 354, 104 S. Ct. 2458, 81 L. Ed. 2d 282 (1984)*, considered the related issue regarding the extent to which an agency can retroactively reject a previously filed rate. In the Motor Carrier Act of 1980, *49 U.S.C. § 10706(b)(3)*, Congress set forth specific guidelines to which motor carrier rate bureaus had to comply in order to receive antitrust immunity. **[*1138]** In response, the ICC issued an interpretive ruling wherein it proposed to adopt a new remedy wherein it would retroactively reject "effective" tariffs that had been submitted in substantial violation of the law. It based its authority to adopt that remedy on former *49 U.S.C. § 10762(e)*, which provided that the "Commission may reject a tariff submitted to it by a common carrier . . . if that tariff violates this section or regulation of the Commission carrying out this section." *Id. at 359-60*. The Court held that *section 10762(e)* did not authorize the Commission to reject effective tariffs, but nevertheless found that the ICC's authority "is not **[**61]** bounded by the powers expressly enumerated in the Act . . . . [but that] the Commission also has discretion to take actions that are 'legitimate, reasonable, and direct[ly] adjunct to the Commission's express statutory power.'" *Id. at 364-65* (third alteration in original) (quoting *In re Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 655, 98 S. Ct. 2053, 56 L. Ed. 2d 591 (1978))*. The Court found the ICC's new remedy to be a "justifiable adjunct to its express statutory mandate." *467 U.S. at 370*.

The district court here considered the issue of whether the FMMO prices were rejected by the agency such that the filed rate doctrine would be inapplicable. It found that the USDA had disapproved of the rates but then stated that "the issue before the court is whether the disapproval of rates by the regulating agency can be held by the courts to operate retroactively." *690 F. Supp. 2d at 1139*. The court relied on both *American Trucking* and *City of Groton* to hold that "rejection" in the context of filed rate doctrine analysis necessarily involves (1) the agency's (presumably formal) suspension or setting aside of the published rates, and (2) a finding that a "statutory mandate" would be

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[18] However, the Court found that the ICC had not found the *rates* were unreasonable but rather that the carrier had engaged in an unreasonable *practice*. It then held that:

> The Commission argues that under the filed rate doctrine, a finding that the carrier engaged in an unreasonable practice should, like a finding that the filed rate is unreasonable, disentitle the carrier to collection of the filed rate. We have never held that a carrier's unreasonable practice justifies departure from the filed tariff schedule. But **[**59]** we need not resolve this issue today because we conclude that the justification for departure from the filed tariff schedule that the ICC set forth in its *Negotiated Rates* policy rests on an interpretation of the Act that is contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular.
>
> Under the *Negotiated Rates* policy, the ICC has determined that a carrier engages in an unreasonable practice when it attempts to collect the filed rate after the parties have negotiated a lower rate. The ICC argues that its conclusion is entitled to deference because *§ 10701* does not specifically address the types of practices that are to be considered unreasonable and because its construction is rational and consistent with the statute. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*.
>
> We disagree. For a century, this Court has held that the Act, as it incorporates the filed rate doctrine, forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate. See *supra, at 126-128*. By refusing to order collection of the filed rate solely because the parties **[**60]** had agreed to a lower rate, the ICC has permitted the very price discrimination that the Act by its terms seeks to prevent.

497 U.S. at 129-30 (footnote omitted).

furthered by the retroactive rejection [**62] of the minimum pricing structures set forth in FMMOs in question.[19] Id. at 1139-40. We disagree with the first point and conclude that the second was satisfied.

As discussed above, HN46[] the primary purposes of the AMAA and DMEA are: (1) "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices," 7 U.S.C. § 602(1), and (2) "the protection of the producers of milk and [*1139] milk products," Block, 467 U.S. at 352. Additionally, the prices that are set for raw milk under the applicable statutes are minimum rates which can be (and are) subject to further negotiation between handlers and dairy farmers. Those rates are not initially [**64] filed and reviewed by the agency but rather are the product of formulas established by the USDA which are, in part, dependent upon the receipt of pricing data from certain handlers. In such a situation, there is nothing in the controlling statutes or concomitant regulations that would appear to require any formal process or particular expression for the agency's retroactively setting aside or rejecting milk prices that have been incorrectly set as a result of misreporting by certain handlers. Further, the statutory goals as to an orderly mandate of marketing conditions and the protection of milk producers would both be served by imposing consequences on handlers for misreporting data[20] that resulted in incorrect FMMO pricing and multimillion dollar losses for dairy farmers.

Neither *Keogh, Maislin*, nor *American Trucking* addresses the issue HN47[] of what specific steps an agency need take before it can be deemed to have "rejected" a rate. Such a question cannot [**65] be considered in a vacuum; the steps required before an agency's rate "rejection" should be recognized will necessarily vary based on both the statutory framework within which the agency acts and upon the purposes of the statute in furtherance of which the agency acts. In *American Trucking*, the Court noted that the agency itself had limited its rejection powers such that "effective tariffs will be nullified only upon findings of substantial violations of rate-bureau agreements." 467 U.S. at 370. Neither *Keogh* nor *Maislin* had the opportunity to address this issue of *when* an agency has taken sufficient steps to officially disapprove a rate. We conclude that the USDA's actions here constitute a sufficient rejection such that the filed rate doctrine is not a bar. Further, the statutory mandate of the AMAA and the DMEA, as well as the policies of the filed rate doctrine more generally, are furthered by our conclusion that the filed rate doctrine does not apply to bar plaintiffs' claims here.

The USDA adequately expressed its disapproval of the FMMO prices.[21] While the USDA's recalculation of minimum dairy prices was not explicitly called a rejection, the agency recognized that earlier filed [**66] rates were

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[19] The district court also held that the filed rate doctrine should preclude plaintiffs' claim for damages because they had not alleged that DairyAmerica's actions were willful or knowing. 690 F. Supp. 2d at 1139-40. Plaintiffs argue that NASS's instructions were clear and that the fact that DairyAmerica's reporting errors were self-serving suggests that its misstatements were knowing. The Supreme Court made a similar inference in *American Trucking*, holding that "[t]he guidelines for antitrust immunity . . . are of such a nature that carriers who submit tariffs in substantial violation of agreements will be aware of their transgressions." 467 U.S. at 370-71. The regulations in this case were similarly clear ("don't report long-term prices" is not a very hard instruction to understand), yet we need not address the issue of whether DairyAmerica's misreporting was intentional because neither the district court nor the parties have identified a precedent which holds that knowledge is determinative of plaintiffs' right to proceed. [**63] The district court quotes *Cooperative Power Association v. FERC*, which held that *American Trucking* "approved retroactive tariff rejection as a sanction for knowing violations of agreements" but omits its qualification that the Supreme Court's decision was premised on the assumption that "any carrier in substantial violation of a rate-bureau agreement would be aware of the violation." 739 F.2d 390, 391 n.3 (8th Cir. 1984) (per curiam). *Cooperative Power* contains no language *requiring* knowledge. And since *American Trucking* assumed knowledge, it did not reach the question of whether damages could be recovered without it.

[20] The district court found that about 90 percent of the contracts reported to the NASS by DairyAmerica were forward contracts, which under DMEA procedures were not to be included in the data provided to the NASS. 690 F. Supp. 2d at 1131.

[21] While the defendants argue that the AMS (which defendants characterize as "the division that the Secretary charged with FMMO minimum price oversight and enforcement") did not reject or change previously announced FMMO prices as a result of the discovery of their misreporting, the USDA OIG has stated: "Given that incorrect nonfat dry milk prices were factored into the FMMO formula, AMS has stated that its published FMMO prices were incorrect. According to the AMS, this caused the total

incorrect at the time they were filed and imposed significant and improper costs on producers. These "revisions" were, as AMS made clear, not necessarily complete since "reallocation effects [were] not considered." The USDA also sought to recalculate prices for the whole class period, but could not do so because dairy handlers did not supply it with accurate data on their sales of NFDM for the entire class period. While plaintiffs **[*1140]** seek to characterize these revisions as a wholesale repudiation, and defendants as a mere speculative exercise, the reality is that AMS did recognize and attempt to estimate the impact of DairyAmerica's misstatements. The Secretary then took actions to revise regulations to prevent such misreporting from recurring. The USDA took no further action, noting that "[a]ll of the funds in the FMMO pools for the 14-month period covered by NASS' revision had previously been disbursed to the milk producers, and corrective disbursements to producers were no longer possible." But the USDA also recognized that the rates that were filed were incorrect at the time they were filed. Indeed, when members of Congress, outraged by the uncompensated losses suffered **[**67]** by the milk producers, asked what plans the agency had to remedy the situation, the USDA responded by ensuring that, moving forward, the agency would promulgate regulations providing for more oversight responsibilities and more effective enforcement mechanisms. *See* 7 C.F.R. pt. 1170 (2012).

Given that at the time of the misreporting the agency lacked the authority to sanction DairyAmerica,[22] the record supports **[**68]** the conclusion that the USDA rejected the FMMO rates at issue. ***HN48***[] It is in precisely this scenario that *Maislin* and *Keogh* recognized that the filed rate doctrine should not bar a private litigant from pursuing claims involving those rates.

Our holding will not permit a flood of litigation such that the filed rate doctrine will be circumvented every time a milk producer has a quibble with FMMO prices. To the contrary, this case presents a narrow exception to the general rule that the filed rate doctrine not only applies but functions so as to bar FMMO price-related claims. Here, we are faced with the unusual situation where (1) the misreporting is both significant in scope and undisputed between the parties, (2) the USDA has recognized that the FMMO rates based on DairyAmerica's erroneous reports were incorrect, and (3) permitting the rate-related claims to move forward is the only way to remedy the **[**69]** injuries suffered by the milk producers, the very class of persons the statutory scheme was enacted to protect.

B. *The Purposes of the AMAA and DMEA Would Not Be Served by Giving the Filed Rate Doctrine Preemptive Effect Here*.

The district court reasoned that "while the DMEA sets forth procedures for the submission and collection of milk pricing survey data, there is nothing to indicate a 'statutory mandate' that would be furthered by the retroactive 'rejection' of the minimum pricing structures set forth in the FMMO's in question." *690 F. Supp. 2d at 1139*. Yet, as cited by plaintiffs, ***HN49***[] the DMEA's mandate is that the USDA "shall establish a program of mandatory dairy product information reporting that will . . . provide timely, accurate, and reliable market information." *7 U.S.C. § 1637b(a)*. Their complaint includes numerous statements from legislators which suggest that the DMEA, by compelling dairy firms to provide information to NASS, was intended to help AMS produce more accurate prices. Retroactive adjustment of FMMO rates provides a straightforward incentive for reporting firms to obey the DMEA which would increase the accuracy and reliability of market information and ensure that **[**70]** AMS sets correct and accurate prices.

[*1141] Further, the AMAA (which is the underlying legislation) was created to stop the "destabilizing competition" among dairy farmers and the essential purpose of the FMMO scheme is to raise *producer* prices. *Block, 467 U.S. at 341-42*. It would be contrary to those statutory purposes to hold that a handler who misreports required data (which results in potentially millions of dollars in losses to dairy producers and unjustified monetary benefits to itself) should be able to avoid liability because of the absence of a specific provision as to retroactive remedies, even after the

value of milk to be understated by $50 million between April 29, 2006 and April 14, 2007." Further, on June 28, 2007, AMS issued a report on "Impacts of NASS Nonfat Dry Milk Price and Sales Volume Revisions on Federal Order Prices" which was based on revisions due to the discovery of the misreporting.

[22] Because the USDA itself had no mechanism for retroactive sanctions, plaintiffs reason, it could only have attempted to calculate revised rates to facilitate private litigation (they deny, however, that such an interpretation of the agency's actions is necessary for their claims to succeed).

agency has found misconduct by that party.[23] However, the plaintiffs here are proceeding under state law, not federal. Hence, at this point, it is only the filed rate doctrine that has been utilized as a barrier to their case.

C. *The Purposes of the Filed Rate Doctrine Do Not Support Applying It as a Bar under the Facts of This Case*.

Since the cases cited by both plaintiffs **[**71]** and defendants provide, at best, vague guidance on the applicability of the filed rate doctrine to the facts of this case, this court would look again to the purposes of the doctrine in the context of the present statutory scheme. *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1266-67 (9th Cir. 1982)* (applying Keogh's policy considerations to determine that the filed rate doctrine was not a bar). ***HN50***[] Courts typically describe the filed rate doctrine as having three purposes: deference to agencies' greater expertise in rate-setting, preventing discrimination by ensuring all ratepayers face the same price, and avoiding disruption of a Congressional scheme for uniform price regulation. *Wegoland Ltd., 27 F.3d at 21*. All of these goals would be implicated by a reversal of the district court's decision.

1. Assessing damages would not require excessive speculation or hypothetical considerations of agency decision making.

Defendants argue that the filed rate doctrine should be applied because, even with the NASS recalculation, the district court would have a great deal of trouble calculating damages. Plaintiffs counter that the formula used to convert NFDM data to FMMO **[**72]** prices was at all relevant times fixed by statute and regulation. Defendants concede this, but argue that a shift in the filed rate would have had substitution effects[24] and hence a simple recalculation of the FMMO rates would not produce an accurate measure of damages. In other words, if DairyAmerica had accurately reported NFDM prices, some FMMO prices would have been different. That price difference would have given market participants a different set of relative prices for different classes of milk which in turn would have produced losses or gains that cannot be captured by AMS's mere revision of FMMO prices. This is certainly true to some extent, but it is impossible to say how large this effect would have been without more facts. Given that the differences in prices were two cents per pound of NFDM, it seems likely that any substitution effects would have been relatively small.[25] On the other **[*1142]** hand, the aggregate effect of just 14 months of misstated prices was $50 million, so substitution effects might still have been significant.

HN51[] Some uncertainty can arise in any calculations of damages, but that does not preclude recovery where it is clear that some damage has occurred.[26] Unlike the damages contemplated in *Keogh*, those in the present case

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[23] If the acts of misreporting by the handler were considered to be violations of the FMMO orders themselves, the AMAA provides for civil penalties of up to $1,000 for each such violation. *7 U.S.C. § 608c(14)(B)*.

[24] MS referred to these as "reallocation" effects. Defendants call them a "dynamic model." But all parties are referring to the same phenomenon.

[25] Defendants **[**73]** also note that other firms' misstatements were included in the revised figures issues by NASS and then argue that plaintiffs might not be able to get data from firms besides DairyAmerica in discovery and hence would not be able to calculate accurate revised prices using the FMMO formulas. But if plaintiffs seek to recover damages from DairyAmerica only, damages would be measured by the effect DairyAmerica's misstatements alone had on the FMMO prices. Also, as noted above, DairyAmerica sells about 75 percent of the NFDM produced in the United States, and approximately 90 percent of its contracts reported in the weekly NASS surveys were forward contracts which should not have been included.

[26] As stated in *Clemente v. State, 40 Cal. 3d 202, 219 Cal. Rptr. 445, 707 P.2d 818, 828 (Cal. 1985)*:

> ***HN52***[] In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish "by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit." (*Rest.2d Torts, § 912*, p. 478.) However, "[t]here is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor's conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty **[**75]** that the harm resulted from the wrongful conduct of the person charged. It is

are not "purely speculative" or "supplied by conjecture," and "proof of such facts" is not "impossible." *260 U.S. at 164-65*. To prevail in *Keogh*, the plaintiffs would have had to show not only that the rate would have been different had the defendants' misconduct not occurred, but that the **[**74]** ICC would have disapproved of that different rate. *Id. at 164*. In the present case, by contrast, the actions the USDA would have taken had it had correct data from DairyAmerica are clear: the USDA would have announced different FMMO prices, ones more favorable to the producers. It is only the specific prices that would have been set which remain somewhat unclear. Calculating damages would not, therefore, involve the kind of "hypothetical" speculation about agency decisions that *Keogh* forbids.

2. Plaintiffs' claims do not pose a significant risk of price discrimination or destabilization.

Discrimination in the present context relates to the concern that "[i]f [one party] could recover . . . damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors." *Id. at 163*. Plaintiffs contend that discrimination is not an issue because their suit's class-action allegations ensure that all affected milk producers will be treated alike. Defendants counter that the Supreme Court has ruled that class action status alone is not enough to defeat the filed rate doctrine. *Square D, 476 U.S. at 423*. ***HN53***[] We have **[**76]** endorsed an opinion of the Second Circuit which interpreted *Square D* to hold that the principle of nondiscrimination still suggests the filed rate doctrine should be applied in class actions. *In re NOS Commc'ns, 495 F.3d 1052, 1059 (9th Cir. 2007)* (citing *Marcus v. AT&T Corp., 138 F.3d 46, 61 (2d Cir. 1998))*. *Marcus*, however, qualified this holding: "We agree that 'the concerns for discrimination are *substantially alleviated* in [a] putative **[*1143]** class action' . . . . However, the Supreme Court has rejected the suggestion that . . . the nondiscrimination principle [is] inapplicable to a putative class action suit." *Marcus, 138 F.3d at 61* (first alteration in original) (emphasis added) (citations and internal quotation marks omitted). *NOS Communications* should, therefore, be read as rejecting any blanket rule that discrimination is not a concern in class actions, but still not going so far as holding that putative class action status is irrelevant to our inquiry into the discriminatory impact of not applying the filed rate doctrine.

While putative class action status does not resolve the question, defendants' arguments that judgment in favor of plaintiffs would have a discriminatory effect **[**77]** are weak. Defendants contend that awarding damages against DairyAmerica would discriminate against them in comparison with other milk handlers. However, as observed above, ***HN54***[] the prohibition against discriminatory pricing under the AMAA is concerned with discrimination suffered by the dairy producers, not the handlers. In any case, were damages assessed against it, DairyAmerica would not be paying a higher (discriminatory) rate at all; it would be paying damages corresponding to the higher rate its own mistakes (or bad acts) had previously caused producers to pay it. It would therefore not, as defendants contend, "face higher/non-uniform prices for the relevant period." Instead, it would face the same prices as everyone else and also a separate damage award. That award might, certainly, put it at a disadvantage relative to its competitors (though it is unclear how large that disadvantage would be given that it controls 75 percent of the NFDM market), but it has already profited from the lower prices its misreporting has allowed it to enjoy; damages would at least partially cancel out this undeserved benefit.

3. Allowing Plaintiffs' claims to go forward would not unduly disrupt the Congressional ***[**78]*** *pricing scheme embodied by the AMAA*.

Plaintiffs did not initiate this lawsuit to challenge the agency's authority to set minimum milk prices or to directly contest rates which the USDA in its expertise has continued to treat as being correct and/or valid. Rather, it was only *after* the USDA concluded that DairyAmerica's misreporting had contaminated the minimum price setting

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> desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered." (*Rest.2d Torts, § 912, com. a*, at p. 479.)

(Alteration in original).

process that this action was filed. Consequently, this case does not involve a scenario where a litigant is seeking to have a court substitute its evaluation of a proper rate for the agency's determination. This lawsuit does not constitute a disruption of the Congressional pricing scheme embodied in the AMAA. As we observed in *Gallo*, "***HN55***[] [m]isreported rates and rates reported for fictitious transactions are not [agency]-approved rates, and barring claims that such fictitious transactions damaged purchasers in the natural gas market would not further the purpose of the filed rate doctrine." *503 F.3d at 1045*. Moreover, the rate scheme here differs from typical filed rates. ***HN56***[] While Congress undoubtedly intended the FMMOs' minimum prices to apply in a uniform way within the monthly periods and the geographic areas, there **[**79]** is no indication of an overarching congressional or agency intent for uniformity on a nationwide scale, for a long period of time, or even in terms of the actual price paid, given that the FMMO merely sets a floor price.

The facts of this case, therefore, do not justify applying the filed rate doctrine preemptively. The district court would not need to second-guess agency decision-making or speculate about what the agency would have done in order to assess liability or calculate damages. To hold otherwise would be an exercise of mechanical **[*1144]** formalism in contravention of the purposes of both the AMAA/DMEA and the filed rate doctrine itself.

CONCLUSION

The district court properly determined that the filed rate doctrine applies to the AMAA minimum milk pricing program, but erred by concluding that the doctrine applies to bar the plaintiffs' state-law claims in this case. The judgment of the district court dismissing the case is therefore reversed.

REVERSED AND REMANDED.

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Gumwood HP Shopping Partners, L.P. v. Simon Prop. Group

United States District Court for the Northern District of Indiana, South Bend Division

August 8, 2012, Decided; August 8, 2012, Filed

CAUSE NO. 3:11-cv-268 JD

Reporter
2012 U.S. Dist. LEXIS 188553 *

GUMWOOD HP SHOPPING PARTNERS, L.P., Plaintiff, v. SIMON PROPERTY GROUP, INC., Defendant.

Subsequent History: Adopted by, Objection overruled by, Motion denied by *Gumwood HP Shopping v. Simon Prop. Group, Inc., 2013 U.S. Dist. LEXIS 92133 (N.D. Ind., Mar. 13, 2013)*

Motion granted by *Gumwood Hp Shopping v. Simon Prop. Group, 2014 U.S. Dist. LEXIS 204447 (N.D. Ind., June 25, 2014)*

Motion granted by *Gumwood HP Shopping Partners, L.P. v. Simon Prop. Grp., Inc., 2014 U.S. Dist. LEXIS 204449 (N.D. Ind., Nov. 20, 2014)*

Related proceeding at *Gumwood HP Shopping Partners, L.P. v. Simon Prop. Group, 36 N.E.3d 2, 2015 Ind. App. Unpub. LEXIS 696 (Ind. Ct. App., June 25, 2015)*

Motion granted by *Gumwood Hp Shopping v. Simon Prop. Group, 2015 U.S. Dist. LEXIS 197711 (N.D. Ind., July 7, 2015)*

Summary judgment denied by, Motion denied by, Motion denied by, As moot *Gumwood HP Shopping Partners, L.P. v. Simon Prop. Grp., Inc., 2016 U.S. Dist. LEXIS 35759 (N.D. Ind., Mar. 18, 2016)*

Motion denied by *Gumwood HP Shopping Partners, L.P. v. Simon Prop. Grp., Inc., 2016 U.S. Dist. LEXIS 194196 (N.D. Ind., Aug. 5, 2016)*

Motion granted by, in part, Motion denied by, in part *Gumwood HP Shopping Partners, L.P. v. Simon Prop. Grp., Inc., 2016 U.S. Dist. LEXIS 144712, 2016 WL 6091244 (N.D. Ind., Oct. 19, 2016)*

Motion granted by, Motion denied by *Gumwood Hp Shopping v. Simon Prop. Group, 2016 U.S. Dist. LEXIS 200590 (N.D. Ind., Oct. 28, 2016)*

Motion granted by, Motion granted by, in part, Motion denied by, in part *Gumwood HP Shopping Partners L.P. v. Simon Prop. Grp., Inc., 221 F. Supp. 3d 1033, 2016 U.S. Dist. LEXIS 161745, 2016 WL 6871938 (N.D. Ind., Nov. 22, 2016)*

Motion granted by, in part, Motion denied by, in part *Gumwood HP Shopping Partners, L.P. v. Simon Prop. Grp., 2017 U.S. Dist. LEXIS 110070, 2017 WL 3016385 (N.D. Ind., July 17, 2017)*

Core Terms

lease, Square, tenants, alleges, Mall, foreclosure, negotiating, retail, relevant market, opening, anticompetitive conduct, monopolization, lifestyle, tactics, anticompetitive, argues, motion to dismiss, RECOMMENDS, competitor, Antitrust, renew, restraint of trade, shopping center, rents

Counsel: **[*1]** For Gumwood HP Shopping Partners LP, Plaintiff: Brad A Catlin, Carol A Nemeth, Ronald J Waicukauski, Price Waicukauski & Riley LLC, Indianapolis, IN; Henry J Price, Price Jackson Waicukauski & Mellowitz PC, Indianapolis, IN; James A Masters, Nemeth Feeney & Masters PC, South Bend, IN.

For Simon Property Group Inc, Defendant: Patrick David Murphy, LEAD ATTORNEY, Boveri Murphy Rice LLP, South Bend, IN; David C Giardina PHV, Jennifer E Novoselsky PHV, John W Treece PHV, Zachary A Madonia PHV, PRO HAC VICE, Sidley Austin LLP - Chi/IL, Chicago, IL.

Judges: Christopher A. Nuechterlein, United States Magistrate Judge.

Opinion by: Christopher A. Nuechterlein

Opinion

REPORT AND RECOMMENDATION

On October 31, 2011, Defendant, Simon Property Group, Inc. ("Simon"), filed a motion to dismiss the complaint. On November 17, 2011, Plaintiff, Gumwood HP Shopping Partners, L.P. ("Gumwood"), filed its response. On December 12, 2011, Simon filed a reply. On June 7, 2012, the presiding judge referred the motion to dismiss to the undersigned to prepare a report and recommendation. For the following reasons, the undersigned **RECOMMENDS** that the Court **DENY** the motion to dismiss.

I. RELEVANT BACKGROUND

On June 29, 2011, Gumwood filed a complaint **[*2]** against Simon for monopolization in violation of *Section 2* of the Sherman Antitrust Act and for restraint of trade in violation of *Section 1* of the Sherman Antitrust Act. According to the complaint, Gumwood is the owner and landlord of a retail property known as Heritage Square. Heritage Square is a "lifestyle shopping center" located in Mishawaka, Indiana. Simon is the owner of University Park Mall, a super-regional mall also located in Mishawaka, Indiana. Gumwood alleges that Simon interfered with its negotiations with retail tenants, in particular Ann Taylor LOFT and Coldwater Creek, causing them to cease their dealings with Gumwood.

Gumwood alleges that Simon is the largest public U.S. real estate company, owning 382 properties comprising 245 million square feet of leasable area in North America, Europe, and Asia. Doc. No. 1 at 2. Simon is the largest landlord for many national retailers, including several of the retailers with whom Gumwood negotiated to secure as tenants for Heritage Square. Gumwood alleges that Simon has managed to raise its rents at its malls even in the recent recession, while its largest competitor was driven into bankruptcy. *Id*. at 2-3. Gumwood alleges that **[*3]** Simon routinely abuses its power by refusing to renew existing leases or making renewals conditioned upon the tenant not opening stores in a competing development in another market, requiring a tenant to relocate a store without giving it an opportunity to renew an existing lease as a means of preventing the tenant from opening a store in a competing center, and increasing rates or otherwise making the terms of renewal less favorable in retaliation for opening a store in a competing center. *Id*. at 3.

According to the complaint, in 1979, Simon built University Park Mall, which enjoyed its status as the dominant retail platform in the South Bend/Mishawaka area from its opening. *Id*. In 2008, Simon expanded and opened a 100,000 square foot open-air lifestyle component, the Village at University Park. *Id*.

In 2007, Gumwood opened Heritage Square, which was designed to be an open-air lifestyle center designed to attract upscale, national-chain specialty stores with dining and entertainment in an outdoor setting. *Id*. at 3-4. Gumwood entered into lease negotiations with a portion of what it alleges are "key tenants," including Ann Taylor LOFT, Lane Bryant/Cacique, White House Black Market, Brooks Brothers, Eddie Bauer, Chico's, Coldwater Creek, and Aveda. *Id*. at 4. **[*4]** Gumwood also began negotiating with J. Jill, Franchesca's and Acorn. *Id*. Gumwood considered LOFT and Coldwater Creek as its most important potential clients because they would draw other stores to Heritage Square. Doc. No. 1 at 4-5. Co-tenancy provisions are common in retail leasing agreements to guarantee a select mix of stores that will attract more customers. *Id*. at 5. If a co-tenancy provision is not satisfied, the lease may not be binding or the landlord may have to offer a lower rent. *Id*. On August 16, 2006, after leases with some tenants had been executed, including LOFT and Coldwater Creek, Heritage Square was appraised at $46,300,000. *Id*.

Gumwood alleges that in 2005 it began negotiating with LOFT for a lease in Heritage Square, which was signed on June 14, 2006. *Id*. The LOFT lease attracted other tenants, such as Lane Bryant/Cacique and Coldwater Creek, and LOFT became a required co-tenant for some of the potential clients Gumwood was negotiating with. *Id*. at 6.

During that time, Ann Taylor operated a store at University Park Mall. *Id*. On June 25, 2006, the local newspaper published an article announcing that Ann Taylor was opening a LOFT store in Heritage Square. *Id*. On June **[*5]** 27, 2006, Gumwood executed the lease. *Id*. Gumwood alleges that Simon executives then promptly contacted Ann Taylor and pressured Ann Taylor to rescind its lease and not open a LOFT store at Heritage Square. Doc. No. 1 at 6. As a result, Ann Taylor asked to rescind its lease on June 28, 2006. *Id*. Gumwood refused and agreed to renegotiate the terms of the lease and amended the lease on August 16, 2006. *Id*. Ann Taylor took possession of the premises on that date and began construction of its LOFT store. *Id*. at 7.

Sometime after the lease was amended, Simon again contacted Ann Taylor to pressure it not to open its store at Heritage Square. *Id*. Ann Taylor then instructed its contractor to cease operations at Heritage Square after one week of building. *Id*. Gumwood again renegotiated the terms of the lease and both parties agreed on April 20, 2007, but before Ann Taylor signed the lease, Simon again pressured it not to do so. *Id*. Although Ann Taylor refused to sign the second amended lease, it continued to negotiate with Gumwood. *Id*. In August 2007, Ann Taylor terminated its lease with Gumwood. *Id*. at 8.

In February 2008, Ann Taylor informed Gumwood that it had been negotiating with Simon to **[*6]** put a LOFT store at the University Park Mall, but that it had not finalized its negotiations because it still wanted to open at Heritage Square. *Id*. On June 22, 2008, the local newspaper reported that LOFT would open at University Park Mall and not Heritage Square. *Id*. In July 2008, Ann Taylor executed a lease with Simon to open a LOFT store at University Park's outdoor lifestyle center. *Id*.

Gumwood alleges that although some Ann Taylor executives believed that opening at Heritage Square was the right thing to do, they bowed to pressure and anti-competitive tactics employed by Simon. *Id*. at 9. In particular, Simon used other leases it was negotiating with Ann Taylor as leverage to force Ann Taylor to back out of its deal with Gumwood. *Id*. Gumwood alleges that Simon attempted to destroy it as a potential competitor by contacting other potential and signed tenants of Heritage Square and using Simon's market power to use anti-competitive tactics to pressure prospective tactics away from any deals with Heritage Square. *Id*. at 9-10. According to the complaint, Simon told other Heritage Square tenants and potential tenants that Ann Taylor would not open its LOFT store in Heritage Square despite **[*7]** the fact that it had Ann Taylor had signed a lease. *Id*. at 10.

Gumwood also alleges that Simon also interfered with its lease with Lane Bryant/Cacique, which are owned by Charming Shoppes, Inc. *Id*. at 11-13. Gumwood alleges that Simon used similar pressuring tactics with Charming Shoppes as it had with Ann Taylor, and as a result, Charming Shoppes backed out of its deal with Gumwood. *Id*. at 13.

According to the complaint, Simon employed similar tactics with other stores, including Coldwater Creek, Eddie Bauer, and Acorn, often making false representations about the status of Ann Taylor's lease with Gumwood. *Id*. at 10-14.

Gumwood seeks damages in the form of lost rents and the diminution in value of Heritage Square as a result of the loss of tenants, as well as treble damages and attorney fees.

II. ANALYSIS

Under *Fed. R. Civ. P. 12(b)(6)*, dismissal of a complaint is appropriate when the complaint fails to allege a cause of action for which relief can be granted. Federal law only requires a plaintiff to provide a short and plain statement of the claim that the pleader is entitled to relief. *Fed. R. Civ. P. 8*; *see* *Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073, 1078 (7th Cir. 1992)* (A **[*8]** complaint should be "short and simple giving the opposing party notice while leaving the rest to further documents"). It is not necessary for a complaint to identify legal theories in order to state a claim or indicate each technical element of a legal theory that is identified. *Powell v. Fujimoto, 119 Fed. Appx. 803, 804 (7th Cir. 2004)*. A complaint that states a plausible claim for relief survives a motion to dismiss. *See* *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct 1937, 1949-50, 173 L. Ed. 2d 868 (2009)*; *see also* *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007)* (The pleading stage does not impose a probability requirement, it simply requires alleged facts to be plausible so as to entitle a person to relief even if recovery is remote and unlikely).

A. Count I: Monopolization and Attempted Monopolization

Under the Sherman Antitrust Act, *Section 2*, "Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . ." *15 U.S.C. § 2*. Gumwood must allege two elements to allege monopolization: "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that **[*9]** power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *U.S. v. Microsoft Corp., 253 F.3d 34, 50, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*. To allege attempted monopolization, Gumwood must allege that (1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*.

1. Relevant Market

Simon argues that Count I should be dismissed for several reasons. First, Simon argues that Count I should be dismissed because Gumwood has failed to allege a relevant market. To show a relevant market, a plaintiff must allege both a territory encompassed and a product involved. *Mullis v. Arco Petroleum Corp., 502 F.2d 290, 295 (7th Cir. 1974)*. Gumwood has satisfied both of these requirements. First, Simon does not challenge the geographic market, and Gumwood's complaint repeatedly discusses the South Bend/Mishawaka region as the territory in question. That satisfies the geographical market.

Second, Simon argues that Gumwood has failed to allege a relevant product. However, none of the cases it cited **[*10]** in support considered a motion to dismiss. *See* *Am. Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1578 (11th Cir. 1985)* (summary judgment); *Net Realty Holding Trust v. Franconia Props., Inc., 1983 U.S. Dist. LEXIS 19904, 1983 WL 1786 (E.D.Va., Jan. 20, 1983)* (decided at trial); *Deauville Corp. v. Federated Dept. Stores, Inc., 1983 U.S. Dist. LEXIS 15534, 1983 WL 1865 (S.D. Tex., Jul. 12, 1983)* (decided by directed verdicts after trial); *Optivision, Inc. v. Syracuse Shopping Center Assoc., 472 F.Supp. 665 (D.N.Y. 1979)* (preliminary injunction). The complaint alleges that University Park Mall is a "super-regional mall" that contains higher-end stores, and that Heritage Square is a lifestyle shopping center that is similarly designed to attract higher-end specialty stores. Furthermore, the retail industry recognizes certain submarkets defined by various types of shopping centers, such as "super-regional malls," "lifestyle centers," and "big-box" stores. Gumwood has alleged that "super-regional malls" and "lifestyle centers" compete because they are both part of the same market. As a result, Gumwood has sufficiently alleged a relevant product, namely lifestyle shopping centers.

2. Substantial Market Foreclosure

Next, Simon argues that Gumwood fails **[*11]** to allege that Simon caused substantial market foreclosure. "In the context of exclusive dealing arrangements, this means that the plaintiff can prevail only by showing that the agreement in question results in a substantial foreclosure of competition in an area of effective competition, that is, in a relevant market." *Dos Santos v. Columbus-Cuneo-Cabrini Med. Ctr., 684 F.2d 1346, 1352 (7th Cir. 1982)*. "Because an exclusive deal affecting a small fraction of a market clearly cannot have the requisite harmful effect upon competition, the requirement of a significant degree of foreclosure serves a useful screening function." *U.S. v. Microsoft Corp., 253 F.3d 34, 69, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*.

Gumwood's complaint alleges that Simon engaged in anticompetitive tactics designed to induce exclusive deals. As a result, Gumwood must allege a substantial foreclosure of competition. "Courts routinely observe that 'foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent.'" *B&H Medical, LLC v. ABP Admin., Inc., 526 F.3d 257, 266 (6th Cir. 2008)* (citing *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F3d 57, 68 (1st Cir. 2004))*. Gumwood has not alleged **[*12]** a specific percentage of market foreclosure, but Simon admits that a precise percentage need not be alleged. Doc. No. 25 at 21. Gumwood has alleged that its primary tenant, LOFT, was foreclosed as well as another significant tenant, Charming Shoppes, and that Simon has charged its tenants above-market rent because of exclusive dealing. Furthermore, Gumwood alleges that Simon has decreased competition in the market for high-end upscale retail space. As a result, Gumwood's complaint does not fail for lack of a "substantial foreclosure."

The Court reiterates that this is not a final decision on the merits of Gumwood's case. This is merely a judgment as to the sufficiency of the pleadings. Under the relevant standard, Gumwood must only state a plausible claim for relief to survive a motion to dismiss. See *Iqbal, 129 S.Ct at 1949-50 (2009)*.

3. Competitive Harm

Third, Simon argues that Gumwood has failed to allege competitive harm. "The exclusion of competitors is cause for antitrust concern only if it impairs the health of the competitive process itself." *Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 394 (7th Cir. 1984)*. ***Antitrust law*** is concerned with activity that inhibits competition, **[*13]** not necessarily adverse actions against competitors. *See Id*. Gumwood must allege that "it is likely to keep at least one significant competitor of the defendant from doing business in the relevant market." *Id*. Gumwood must also allege "the probable (not certain) effect of the exclusion will be to raise prices above (and therefore reduce output below) the competitive level, or otherwise injure competition; he must show in other words that the anticompetitive effects (if any) of the exclusion outweigh any benefits to competition from it." *Id*.

Gumwood has met this test. Gumwood has alleged that its Heritage Square shopping center has lost value and key tenants, namely LOFT and Charming Shoppes as a direct result of Simon's actions. Gumwood has alleged that Simon's actions have resulted in Heritage Square's partial exclusion in the market of retail shopping centers. Furthermore, Gumwood has alleged that Simon has raised its rents above the competitive level as a result of the exclusion. This is sufficient to satisfy the competitive harm allegation requirement.

4. Anticompetitive Conduct

Finally, Simon argues that Gumwood has failed to allege any predatory, exclusionary, or anticompetitive **[*14]** conduct by Simon. Neither the possession nor the pursuit of "monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct." Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (emphasis in original). In the Seventh Circuit, exclusionary, predatory, or anticompetitive conduct is "conduct that is in itself an independent violation of the antitrust laws or that has no legitimate business justification other than to destroy or damage competition." *The Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 541 (7th Cir. 1986)*.

Gumwood has alleged, at minimum, that Simon misrepresented the status of Ann Taylor's lease with Gumwood. Gumwood alleged that Simon told Gumwood's potential tenants that Ann Taylor would not open at Heritage Square when in fact it had already signed a lease and was beginning construction. Gumwood also alleged that Simon falsely stated that a LOFT store would be opening at University Park Mall, when no such lease had been signed. There is no legitimate business justification for such a misrepresentation other than to harm Gumwood's Heritage Square. *See Id*. Furthermore, Gumwood has **[*15]** alleged a variety of other tactics that Simon used, which may not be anticompetitive, but Gumwood has alleged that they are. *See* Doc. No. 1 at 3 (describing three separate tactics including refusing to renew existing leases or making renewals conditioned upon the tenant not opening stores in a competing development in another market). This is legally sufficient pleading.

Again, the Court is not concluding that Simon engaged in anticompetitive conduct, only that Gumwood has adequately alleged anticompetitive behavior sufficient to survive a *Rule 12(b)(6)* attack. It is left to a later time to determine if Gumwood can prove its allegations.

Because Gumwood has alleged a relevant market, as well as substantial foreclosure, competitive harm, and anticompetitive conduct, Count I should not be dismissed.

B. Count II: Restraint of Trade

"Every contract, combination in the form of trust or otherwise . . . in restraint of trade or commerce . . . is declared to be illegal." *15 U.S.C. § 1*. To state a claim under this section, Gumwood must allege that Simon's actions restrained trade or commerce in the relevant market. *Gateway Contracting Servs., LLC v. Sagamore Health Network, Inc., 2002 U.S. Dist. LEXIS 7328, 2002 WL 7316686, at *13-14 (S.D. Ind. 2002)*. **[*16]** Simon argues that Count II fails because Gumwood has failed to allege a relevant market, a substantial foreclosure, competitive harm, or anticompetitive harm. These are the very reasons Simon offered to dismiss Count I, which the Court has already discussed and rejected.

Furthermore, Gumwood has alleged that Simon's actions have restrained trade in retail shopping centers in the South Bend/Mishawaka region by inducing retail tenants to cease negotiations with Simon's competitors. Gumwood has alleged that Simon achieved its aim by misrepresenting the status of Ann Taylor's lease with Gumwood. As a result, Gumwood has sufficiently pled Count II.

III. Conclusion

Because Gumwood has sufficiently pled Count I by pleading a relevant market, substantial market foreclosure, competitive harm and anticompetitive conduct, and Count II in similar fashion, the undersigned **RECOMMENDS** that Simon's motion to dismiss be **DENIED**. [Doc. No. 24].

> **NOTICE IS HEREBY GIVEN that within fourteen (14) days after being served with a copy of this recommended disposition a party may serve and file specific, written objections to the proposed findings and/or recommendations. *Fed. R. Civ. P. 72(b)*. FAILURE TO FILE OBJECTIONS [*17] WITHIN THE SPECIFIED TIME WAIVES THE RIGHT TO APPEAL THE DISTRICT COURT'S ORDER**.

SO ORDERED.

Dated this 8th day of August, 2012.

/s/ Christopher A. Nuechterlein

Christopher A. Nuechterlein

United States Magistrate Judge

In re TFT-LCD (Flat Panel) Antitrust Litig.

United States District Court for the Northern District of California

August 9, 2012, Decided; August 9, 2012, Filed

No. M 07-1827 SI; MDL. No. 1827; Case No. C 09-5840 SI

Reporter

2012 U.S. Dist. LEXIS 112499 *; 2012-2 Trade Cas. (CCH) P78,031; 2012 WL 3276932

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION. This Order Relates to: Motorola Mobility, Inc. v. AU Optronics Corporation, et al., C 09-5840 SI

Subsequent History: Motion granted by, in part, Claim dismissed by *CompuCom Sys. v. AU Optronics Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.), 2012 U.S. Dist. LEXIS 132770 (N.D. Cal., Aug. 21, 2012)*

Reconsideration granted by, Claim dismissed by *Motorola Mobility, Inc. v. AU Optronics Corp., 2014 U.S. Dist. LEXIS 8492 (N.D. Ill., Jan. 23, 2014)*

Prior History: *Schultze Agency Services, LLC v. AU Optronics Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.), 2012 U.S. Dist. LEXIS 110000 (N.D. Cal., Aug. 2, 2012)*

Core Terms

defendants', domestic, panels, commerce, prices, deposition testimony, Sherman Act, negotiations, mobile, injury claim, conspiracy

Counsel: **[*1]** Martin Quinn, Special Master (3:07-md-01827-SI), Pro se, San Francisco, CA.

For Martin Quinn, Mr. Daniel Weinstein, Special Masters (3:07-md-01827-SI): Martin Quinn, San Francisco, CA.

For Mr. Daniel Weinstein, Special Master (3:07-md-01827-SI), Pro se, San Francisco, CA.

For Giles Patricia, 07-3078, Plaintiff (3:07-md-01827-SI): Samuel W. Lanham, Jr., LEAD ATTORNEY, Lanham & Blackwell, Bangor, ME; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For ATS Claim, LLC, 09-1115, Plaintiff (3:07-md-01827-SI): David Paul Germaine, LEAD ATTORNEY, Chicago, IL; Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA.

For Direct Purchaser Plaintiffs, Plaintiff (3:07-md-01827-SI): Daniel L. Warshaw, LEAD ATTORNEY, Clifford H. Pearson, Pearson, Simon, Warshaw & Penny LLP, Sherman Oaks, CA; Eric B. Fastiff, LEAD ATTORNEY, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Brendan Patrick Glackin, Lieff, Cabraser, Heimann & Bernstein LLP, San Francisco, CA; Bruce Lee Simon, Pearson, Simon, Warshaw & Penny, LLP, San Francisco, CA; Richard Martin Heimann, Lieff Cabraser Heimann & Bernstein, San Francisco, CA.

For Hewlett-Packard Company, Interested Party (5/19/09), 10-5577, Plaintiff (3:07-md-01827-SI): **[*2]** Beatrice B. Nguyen, Gregory D. Call, LEAD ATTORNEYS, Suzanne E. Rode, Crowell & Moring LLP, San Francisco, CA; Bryan Leach, Bartlit Beck Herman Palenchar & Scott LLP, Denver, CO; Fred H. Bartlit, Jr., Lester Houtz, Bartlit Beck Herman Palenchar & Scott, Denver, CO; Karma Micaela Giulianelli, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott, Denver, CO; Mark S. Ouweleen, Attorney at Law, Chicago, IL.

For BellSouth Telecommunications, Inc., 09-4997, Pacific Bell Telephone Company, 09-4997, Southwestern Bell Telephone Company, 09-4997, AT & T Corp., 09-4997, AT & T Datacomm, Inc., 09-4997, AT & T Mobility LLC, 09-

4997, AT & T Operations, Inc., 09-4997, AT & T Services, Inc., 09-4997, Plaintiffs (3:07-md-01827-SI): Janet Irene Levine, LEAD ATTORNEY, Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Christopher T. Leonardo, Kenneth L. Adams, R. Bruce Holcomb, Adams Holcomb LLP, Washington, DC; Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Jerome A. Murphy, Crowell & Moring LLP, Washington, DC; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA; Nathanial John Wood, Crowell & Moring LLP, San Francisco, CA.

For Nokia Corporation, 09-5609, Nokia Inc., **[*3]** 09-5609, Plaintiffs (3:07-md-01827-SI): Brian Parker Miller, Donald MacKaye Houser, Joann Elizabeth Johnston, Donald MacKaye Houser, Alston & Bird LLP, Atlanta, GA; Edward Paul Bonapfel, Kacy Christine McCaffrey, Alston and Bird LLP, Atlanta, GA; Kevin Michael Pitre, Alston and Bird, Atlanta, GA; Lisa Kathleen Bojko, Alston & Bird, Atlanta, GA; Matthew Scott Orrell, 1590 Loring Drive NW, Atlanta, GA; Matthew D. Richardson, Peter Konito, Alston Bird LLP, Atlanta, GA; Randall Lee Allen, Alston and Bird, Menlo Park, CA; Richard W. Stimson, Alston & Bird LLP, Dallas, TX; Valarie Cecile Williams, PRO HAC VICE, Alston & Bird LLP, Atlanta, GA.

For Motorola, Inc., 09-5840, Plaintiff (3:07-md-01827-SI): Janet Irene Levine, LEAD ATTORNEY, Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Jerome A. Murphy, Crowell & Moring LLP, Washington, DC; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA; Nathanial John Wood, Crowell & Moring LLP, San Francisco, CA; R. Bruce Holcomb, Adams Holcomb LLP, Washington, DC.

For Electrograph Systems, Inc., 10-117, Electrograph Technologies, Corp., 10-117, Plaintiffs (3:07-md-01827-SI): **[*4]** Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Philip J. Iovieno, Boies, Schiller & Flexner LLP, Albany, NY.

For Dell Inc., 10-1064, Dell Products, L.P., 10-1064, Plaintiffs (3:07-md-01827-SI): Andrew Jacob Tuck, Alston and Bird LLP, Atlanta, GA; Debra Dawn Bernstein, Elizabeth Helmer Jordan, Michael P. Kenny, Rodney J Ganske, Alston & Bird LLP, Atlanta, GA; Douglas R. Young, Farella Braun & Martel LLP, San Francisco, CA; Kimball Richard Anderson, Winston and Strawn LLP, Chicago, IL; Matthew David Kent, Alston + Bird LLP, Atlanta, GA; Melissa Mahurin Whitehead, Alston and Bird, Atlanta, GA; Steven Daniel Hemminger, Alston & Bird LLP, Menlo Park, CA.

For Indirect Purchaser Plaintiffs, Plaintiff (3:07-md-01827-SI): Joseph M. Alioto, Sr., LEAD ATTORNEY, Alioto Law Firm, San Francisco, CA; Craig C. Corbitt, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Daniel R. Shulman, Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, MN; Derek G. Howard, Jack Wing Lee, Minami Tamaki LLP, San Francisco, CA; John Dmitry Bogdanov, Tracy R. Kirkham, Cooper & Kirkham, P.C., San Francisco, CA; Judith A. Zahid, Zelle Hofmann Voelbel Mason & Gette, LLP, San Francisco, CA; Robert William **[*5]** Finnerty, Girardi Keese, Los Angeles, CA; Steven J Foley, Hellmuth and Johnson PLLC, Edina, MN.

For State of Oregon, 10-4346, ex rel. John Kroger, Attorney General, Plaintiff (3:07-md-01827-SI): Blake Lee Harrop, Office of the Attorney General, Chicago, IL; Brady R. Johnson, Attorney General of Washington, Seattle, WA; Michael E. Haglund, Haglund Kelley Horngren Jones & Wilder, LLP, Portland, OR; Michael Kevin Kelley, haglund kelley, Portland, OR; Michael G. Neff, Haglund Kelley Jones & Wilder LLP, Portland, OR; Shay S. Scott, PRO HAC VICE, Haglund Kelley Horngren Jones & Wilder LLP, Portland, OR; Tim David Nord, Oregon Department of Justice, Salem, OR.

For Direct Purchaser Plaintiffs, Plaintiff (3:07-md-01827-SI): Joseph R. Saveri, LEAD ATTORNEY, Saveri Law Firm, San Francisco, CA; Aaron M. Sheanin, Girard Gibbs LLP, San Francisco, CA; Brendan Patrick Glackin, Lieff, Cabraser, Heimann & Bernstein LLP, San Francisco, CA; Bruce Lee Simon, Pearson, Simon, Warshaw & Penny, LLP, San Francisco, CA; Eric B. Fastiff, Lieff, Cabraser, Heimann & Bernstein,LLP, San Francisco, CA; Marc Pilotin, Lieff, Cabraser, Heimann and Bernstein, LLP, San Francisco, CA; Richard Martin Heimann, Lieff Cabraser **[*6]** Heimann & Bernstein, San Francisco, CA; Thomas Kay Boardman, Pearson Simon, Warshaw and Penny, LLP, San Francisco, CA.

For Tracfone Wireless, Inc., 10-3205, Plaintiff (3:07-md-01827-SI): David Bedford Esau, 525 Okeechobee Blvd., West Palm Beach, FL; James Blaker Baldinger, Carlton Fields PA, West Palm Beach, FL; Robert L. Ciotti, Carlton Fields, P.A., Tampa, FL.

For State of Missouri, 10-3619, ex rel. Chris Koster, Attorney General, Plaintiff (3:07-md-01827-SI): Anne E. Schneider, LEAD ATTORNEY, Attorney General of Missouri, Jefferson City, MO.

For State of Arkansas, 10-3619, ex rel. Dustin McDaniel, Attorney General, Plaintiff (3:07-md-01827-SI): David A. Curran, Assistant Attorney General, Little Rock, AR; Kevin Wells, Arkansas Attorney General's Office, Little Rock, AR.

For State of Michigan, 10-3619, ex rel. Michael A. Cox, Attorney General, Plaintiff (3:07-md-01827-SI): Mary Elizabeth Lippitt, Michigan Attorney General, Lansing, MI.

For State of Missouri, 10-3619, ex rel. Chris Koster, Attorney General, Plaintiff (3:07-md-01827-SI): Andrew McNally Hartnett, Office of the Missouri Attorney General, Jefferson City, MO; Anne E. Schneider, Attorney General of Missouri, Jefferson City, **[*7]** MO.

For State of West Virginia, 10-3619, ex rel Darrell McGraw, Attorney General, Plaintiff (3:07-md-01827-SI): Douglas Lee Davis, Attorney General, Charleston, WV; Jill L. Miles, Assistant Attorney General, Charleston, WV.

For State of Wisconsin, 10-3619, ex rel J.B. Van Hollen, Attorney General, Plaintiff (3:07-md-01827-SI): Gwendolyn J. Cooley, Wisconsin Attorney General, Madison, WI.

For State of Florida, Office of the Attorney General, Department of Legal Affairs, Oct-17, Plaintiff (3:07-md-01827-SI): Gregory S Slemp, FL OAG, Tallahassee, FL; Liz Ann Brady, Nicholas J. Weilhammer, Robert Scott Palmer, Office of the Attorney General, Tallahassee, FL.

For Best Buy Co., Inc., 10-4572, Best Buy Enterprise Services, Inc., 10-4572, Best Buy Purchasing LLC, 10-4572, Best Buy Stores, L.P., 10-4572, Magnolia Hi-Fi, Inc., 10-4572, Plaintiffs (3:07-md-01827-SI): David Martinez, Elizabeth Diemphuc Le, LEAD ATTORNEYS, Roman M. Silberfeld, Robins Kaplan Miller & Ciresi L.L.P., Los Angeles, CA; Matthew David Taggart, LEAD ATTORNEY, Attorney at Law, Los Angeles, CA; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi, Minneapolis, MN; K. Craig Wildfang, Attorney at Law, Minneapolis, MN; Laura Elizabeth **[*8]** Nelson, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Lauren Elizabeth Wood, Robins, Kaplan, Miller and Ciresi L.L.P., Los Angeles, CA.

For Target Corp., 10-4945, Kmart Corp, 10-4945, Sears, Roebuck and Co., 10-4945, Good Guys, Inc., 10-4945, Newegg Inc., 10-4945, Old Comp Inc., 10-4945, Radioshack Corp., 10-4945, Plaintiffs (3:07-md-01827-SI): Janet Irene Levine, LEAD ATTORNEY, Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Christopher T. Leonardo, Kenneth L. Adams, R. Bruce Holcomb, Adams Holcomb LLP, Washington, DC; Jeffrey H. Howard, Jerome A. Murphy, Crowell & Moring LLP, Washington, DC; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA; Nathanial John Wood, Crowell & Moring LLP, San Francisco, CA.

For Eastman Kodak Company, 10-5452, Plaintiff (3:07-md-01827-SI): Blaire Zina Russell, Nixon Peabody, SF, CA; John R. Foote, Karl David Belgum, Nixon Peabody LLP, San Francisco, CA.

For SB Liquidation Trust, 10-5458, Plaintiff (3:07-md-01827-SI): Allan Diamond, Jason Paul Fulton, Jim McCarthy, Diamond McCarthy LLP, Dallas, TX; Erica W. Harris, Susan Godfrey LLP, Houston, TX; Marc M. Seltzer, Steven Gerald Sklaver, Susman Godfrey LLP, Los Angeles, CA; 1201 Elm St., **[*9]** 34th Floor, Dallas, TX.

For Costco Wholesale Corp., 11-0058, Plaintiff (3:07-md-01827-SI): Cori Gordon Moore, LEAD ATTORNEY, David Burman, Eric J. Weiss, Nicholas H. Hesterberg, Steven D. Merriman, Perkins Coie LLP, Seattle, WA; Cori G. Moore, Perkins Coil LLP, Seattle, WA; Euphemia Nikki Thomopulos, Perkins Coie, San Francisco, CA; Joren Surya Bass, Troy Philip Sauro, Perkins Coie LLP, San Francisco, CA; Noah Guzzo Purcell, Seattle, Seattle, WA.

For Sony Computer Entertainment America, LLC, 10-5616, (10-5620 - voluntery dismissal), 12-1596, 12-1599, 12-2214, Sony Electronics, Inc., 10-5616, (10-5620 - voluntary dismissal), 12-1596, 12-1599, 12-2214, Plaintiffs (3:07-md-01827-SI): David Mark Goldstein, Esq., Orrick, Herrington & Sutcliffe LLP, San Francisco, CA; Margaret Branick-Abilla, Richard James Mooney, Bryan Cave LLP, San Francisco, CA; Robert L. Stolebarger, Holmes Roberts & Owen LLP, San Francisco, CA; Ross Christopher Paolino, Orrick Herrington Sutcliffe LLP, Washington, DC; Shannon Christine Leong, Orrick Herrington and Sutcliffe, SF, CA; Stephen V. Bomse, Orrick Herrington & Sutcliffe, San Francisco, CA.

For Alfred H. Siegel, 10-5625, as Trustee of the Circuit City Stores, **[*10]** Inc. Liquidating Trust, Plaintiff (3:07-md-01827-SI): David Humberto Orozco, Marc M. Seltzer, Susman Godfrey LLP, Los Angeles, CA; H. Lee Godfrey, Johnny William Carter, Jonathan Jeffrey Ross, N/A, Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Jordan Connors, Parker C. Folse, III, Rachel S. Black, Susman Godfrey L.L.P., Seattle, WA.

For State of New York, 11-0711, Plaintiff (3:07-md-01827-SI): Amy Elizabeth McFarlane, LEAD ATTORNEY, New York State Office of the Attorney General, New York, NY; Geralyn Jeanette Trujillo, Office of the Attorney General, State of New York, New York, NY; Jeremy R. Kasha, New York State Office of the Attorney General (NYC), New York, NY; Richard L. Schwartz, Office of the Attorney General, New York, NY.

For MetroPCS Wireless Inc., 11-0829, Plaintiff (3:07-md-01827-SI): Anne M. Nardacci, Albany, NY; Lewis Titus LeClair, Scott R Jacobs, McKool Smith, Dallas, TX; Mike McKool, Jr., McKool Smith, P.C., Dallas, TX; Philip J. Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Melissa B Felder, Washington, DC.

For Office Depot, Inc., 11-2225, Plaintiff (3:07-md-01827-SI): Stuart H. Singer, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP, Fort Lauderdale, FL; Stuart **[*11]** Harold Singer, Boies Schiller & Flexner, Fort Lauderdale, FL; Melissa B Felder, Washington, DC.

For Jaco Electronics, Inc., 11-2495, Plaintiff (3:07-md-01827-SI): Janet Irene Levine, LEAD ATTORNEY, Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Jerome A. Murphy, Crowell & Moring LLP, Washington, DC; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA; Nathanial John Wood, Crowell & Moring LLP, San Francisco, CA.

For T-Mobile USA Inc, 11-2591, Plaintiff (3:07-md-01827-SI): Brooke Ashley-May Taylor, Susman Godfrey L.L.P., Seattle, WA; Daniel B Rapport, PRO HAC VICE, FRIEDMAN KAPLAN SEILER ADELMAN LLP, NEW YORK, NY; David H. Orozco, PRO HAC VICE, SUSMAN GODFREY (LA,CA), LOS ANGELES, CA; Edward A. Friedman, Friedman Kaplan Seiler & Adelman LLP, New York, NY; Hallie B. Levin, PRO HAC VICE, FRIEDMAN KAPLAN SEILER & ADELMAN LLP, NEW YORK, NY; Jason C Rubinstein, Alexander David Levi, Friedman Kaplan Seiler and Adelman LLP, New York, NY; Parker C Folse, III, SUSMAN GODFREY LLP, SEATTLE, WA.

For BestBuy.com, L.L.C., Plaintiff (3:07-md-01827-SI): David Martinez, Elizabeth Diemphuc Le, Roman M. Silberfeld, LEAD **[*12]** ATTORNEYS, Robins Kaplan Miller & Ciresi L.L.P., Los Angeles, CA; Laura Elizabeth Nelson, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Lauren Elizabeth Wood, Robins, Kaplan, Miller and Ciresi L.L.P., Los Angeles, CA.

For Benjamin Larry Luber, Class representative of the Missouri state, Plaintiff (3:07-md-01827-SI): Craig C. Corbitt, Francis Onofrei Scarpulla, Qianwei Fu, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Heather T Rankie, Zelle Hofmann et al, SF, CA; Joseph M. Alioto, Sr., Theresa Driscoll Moore, Alioto Law Firm, San Francisco, CA; Judith A. Zahid, Zelle Hofmann Voelbel Mason & Gette, LLP, San Francisco, CA; Patrick Bradford Clayton, Zelle Hofmann Voelbel Mason & Gette, San Francisco, CA.

For Interbond Corporation of America, 11-3763, Plaintiff (3:07-md-01827-SI): Philip J. Iovieno, Boies Schiller & Flexner LLP, Albany, NY; Stuart Harold Singer, Boies Schiller & Flexner, Fort Lauderdale, FL; Melissa B Felder, Washington, DC.

For Schultze Agency Services, LLC, (11-3856) on behalf of Tweeter OPCO, LLC and Tweeter Newco, LLC, Marta Cooperative of America, Inc., 11-4119, P.C. Richard & Son Long Island Corporation, 11-4119, Plaintiffs (3:07-md-01827-SI): Anne M. Nardacci, **[*13]** Christopher V. Fenlon, Albany, NY; Philip J. Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Melissa B Felder, Washington, DC.

For ABC Appliance, Inc., 11-4119, Plaintiff (3:07-md-01827-SI): Anne M. Nardacci, Christopher V. Fenlon, Albany, NY.

For Indirect Purchaser Plaintiffs, Plaintiff (3:07-md-01827-SI): Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Craig C. Corbitt, Francis Onofrei Scarpulla, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Jack Wing Lee, Minami Tamaki LLP, San Francisco, CA; Robert S. Green, Green & Noblin, P.C., Larkspur, CA.

For Barry R. Himmelstein, Plaintiff (3:07-md-01827-SI): Barry R. Himmelstein, LEAD ATTORNEY, HIMMELSTEIN LAW NETWORK, Emeryville, CA.

For Tech Data Corporation, 11-5765, Tech Data Product Management, Inc., 11-5765, Plaintiffs (3:07-md-01827-SI): Melissa Willett, William A. Issacson, Boies Schiller & Flexner, Washington, DC; Mitchell E. Widom, Robert William Turken, Bilzin Sumberg Baena Price & Axelrod, LLP, Miami, FL; Scott N. Wagner, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL; Stuart Harold Singer, Boies Schiller & Flexner, Fort Lauderdale, FL.

For The AASI Creditor Liquidating **[*14]** Trust, 11-5781 (by and through Kenneth A. Welt, Liquidating Trustee), Plaintiff (3:07-md-01827-SI): Melissa Willett, Boies, Schiller & Flexner, Washington, DC; Philip J. Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Robert William Turken, Bilzin Sumberg Baena Price & Axelrod, LLP, Miami, FL; Scott N. Wagner, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL; Stuart Harold Singer, Boies Schiller & Flexner, Fort Lauderdale, FL.

For Compucom Systems Inc, 11-6241, Plaintiff (3:07-md-01827-SI): Christopher V. Fenlon, Philip J. Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Lewis Titus LeClair, Scott R Jacobs, McKool Smith, Dallas, TX; Mike McKool, Jr., PRO HAC VICE, McKool Smith, P.C., Dallas, TX; Melissa B Felder, Washington, DC.

For Viewsonic Corporation, 12-0335, Plaintiff (3:07-md-01827-SI): Janet Irene Levine, Jason C. Murray, LEAD ATTORNEYS, Crowell & Moring LLP, Los Angeles, CA; Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Jerome A. Murphy, Crowell & Moring LLP, Washington, DC; Nathanial John Wood, Crowell & Moring LLP, San Francisco, CA.

For State of Oklahoma, 11-6686, Plaintiff (3:07-md-01827-SI): James Michael Terrell, LEAD ATTORNEY, **[*15]** Nicholas W. Armstrong, Phillip W. McCallum, Robert Gordon Methvin, Jr, McCallum, Methvin & Terrell, P.C., Birmingham, AL; Julie A. Bays, Tom Bates, Office of the Oklahoma Attorney General, Oklahoma City, OK; P. Clayton Eubanks, Office of the Oklahoma Attorney General, Oklahoma, OK.

For Neco Alliance LLC, 12-1426, Plaintiff (3:07-md-01827-SI): Philip J. Iovieno, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, Albany, NY.

For Electronic Express, Inc., Plaintiff (3:07-md-01827-SI): Phillip F. Cramer, LEAD ATTORNEY, SHERRARD & ROE, PLC, Nashville, TN; Ryan Thomas Holt, Sherrard and Roe, PLC, Nashville, TN.

For Barbara Cochran, Kevin Luke, Plaintiffs (3:07-md-01827-SI): John Jacob Pentz, Class Action Fairness Group, Sudbury, MA.

For Rockwell Automation Inc., 12-2495, Plaintiff (3:07-md-01827-SI): David P Ross, Jerome A. Murphy, LEAD ATTORNEYS, Crowell & Moring LLP, Washington, DC; Janet Irene Levine, Jason C. Murray, LEAD ATTORNEYS, Crowell & Moring LLP, Los Angeles, CA; Nathanial John Wood, Crowell & Moring LLP, San Francisco, CA.

For Martin Quinn, Plaintiff (3:07-md-01827-SI): Martin Quinn, JAMS, San Francisco, CA.

For Proview Group Limited, 12-3802, Proview Technology Co., Ltd., 12-3802, Proview **[*16]** Technology, Inc., 12-3802, Plaintiffs (3:07-md-01827-SI): Mark D. Baute, Sean Adrian Andrade, LEAD ATTORNEYS, Baute & Tidus LLP, Los Angeles, CA; Chase C. Alvord, Christopher I. Brain, Tousley Brian Stephens PLLC, Seattle, WA; Kim D. Stephens, Tousley, Brain Stephens PLLC, Seattle, WA.

For Schultze Agency Services, LLC, Plaintiff (3:07-md-01827-SI): Stuart H. Singer, Boies, Schiller & Flexner, LLP, Fort Lauderdale, FL.

For LG Display Co., Ltd., (D, I, 09-1115), formerly known as, LG Philips LCD Co., LTD., Defendant (3:07-md-01827-SI): Chet Alan Kronenberg, LEAD ATTORNEY, Sarah E Luppen, Simpson Thacher & Bartlett LLP, Los Angeles, CA; Hojoon Hwang, Jerome Cary Roth, LEAD ATTORNEYS, Munger Tolles & Olson LLP, San Francisco, CA; Arman Oruc, Jane Jung Ah Lee, Simpson Thacher and Bartlett LLP, Washington, DC; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Gregory J. Weingart, Munger, Tolles and Olson LLP, Los Angeles, CA; Hailyn Jennifer Chen, Attorney at Law, Los Angeles, CA; Holly A. House, Lee F Berger, Sean David Unger, Paul, Hastings, LLP, San Francisco, CA; Jonathan E. Altman, Munger Tolles & Olson LLP, Los Angeles, CA; Jonathan Ellis Altman, Munger Tolles and Olson, Los **[*17]** Angeles, CA; Jonathan Charles Sanders, Simpson Thacher Bartlett LLP, Palo Alto, CA; Kevin J. Arquit, Simpson Thacher & Bartlett LLP, New York, NY; Kevin C.

McCann, Paul Hastings Janofsky & Walker LLP, San Francisco, CA; Xavier Blake Sparrow, Simpson Thacher Bartlett, Washington, DC.

For Samsung Electronics Co. Ltd., (D, I, 09-1115), Samsung Electronics America, Inc., (D, I, 09-1115), Defendants (3:07-md-01827-SI): Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Daniel M Suleiman, Robert D. Wick, Covington & Burling LLP, Washington, DC; David Paul Germaine, 111 S. Wacker Dr., Chicago, IL; Derek Ludwin, Washington, DC; Elizabeth Catherine Arens, Covington and Burling, L.L.P. (DC), Washington, DC; Jeffrey Michael Davidson, Covington & Burling LLP, San Francisco, CA; John Stewart Playforth, Covington and Burling LLP, Washington, DC; Neil K. Roman, Covington & Burling, Washington, DC; Steven D Sassaman, Covington and Burling, San Francisco, CA; Timothy C. Hester, Covington & Burling, San Francisco, CA.

For Sharp Corporation, (D, I, 09-1115), Defendant (3:07-md-01827-SI): Jacob R. Sorensen, LEAD ATTORNEY, Andrew Dale Lanphere, Ryan Takemoto, Pillsbury Winthrop Shaw Pittman LLP, San **[*18]** Francisco, CA; Anne Kaldor Sauro, Colin C. West, Erin Alysa Smart, Kristen A. Palumbo, Bingham McCutchen LLP, San Francisco, CA; Bruce H. Searby, Craig A. Benson, Kenneth A. Gallo, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Craig A Benson, Joseph J Simons, Paul Weiss LLP, Washington, DC; David Paul Germaine, 111 S. Wacker Dr., Chicago, IL; John M. Grenfell, Pillsbury Winthrop Shaw PittmanLLP, San Francisco, CA; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA; Kenneth I. Schacter, Bingham McCutchen LLP, New York, NY; Lindsay A. Lutz, Pillsbury Winthrop Shaw Pittman, San Francisco, CA; Richard S. Taffet, Bingham McCutchen, New York, NY.

For Sharp Electronics Corporation, (D, I, 09-1115), Defendant (3:07-md-01827-SI): Jacob R. Sorensen, LEAD ATTORNEY, Andrew Dale Lanphere, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Anne Kaldor Sauro, Colin C. West, Erin Alysa Smart, Kristen A. Palumbo, Bingham McCutchen LLP, San Francisco, CA; Bruce H. Searby, Craig A. Benson, Kenneth A. Gallo, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Christopher Alan Nedeau, Nossaman LLP, San Francisco, **[*19]** CA; Craig A Benson, Joseph J Simons, Paul Weiss LLP, Washington, DC; David Paul Germaine, 111 S. Wacker Dr., Chicago, IL; Fusae Nara, Pillsbury Winthrop LLP, San Francisco, CA; John M. Grenfell, Pillsbury Winthrop Shaw PittmanLLP, San Francisco, CA; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA; Kenneth I. Schacter, Bingham McCutchen LLP, New York, NY; Lindsay A. Lutz, Pillsbury Winthrop Shaw Pittman, San Francisco, CA; Richard S. Taffet, Bingham McCutchen, New York, NY.

For Toshiba Corporation, (D, I, 09-1115), Defendant (3:07-md-01827-SI): Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; John H. Chung, LEAD ATTORNEY, White & Case LLP, New York, NY; John Mark Gidley, LEAD ATTORNEY, White & Case LLP, Washington, DC; Kristen Jentsch McAhren, LEAD ATTORNEY, White and Case LLP, Washington, DC; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Heather Marie Burke, White and Case LLP, Palo Alto, CA; Patrick J. Eyers, White and Case LLP, New York, NY.

For Toshiba Matsushita Display Technology Co., Ltd., (D, I, 09-1115), Defendant (3:07-md-01827-SI): John H. Chung, LEAD ATTORNEY, White & Case LLP, New York, NY.

For Hitachi Ltd., (D, I, 09-1115), Hitachi **[*20]** Displays, Ltd., (D, I, 09-1115), Defendants (3:07-md-01827-SI): Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Kent Michael Roger, Michelle Kim-Szrom, Morgan, Lewis & Bockius LLP, San Francisco, CA; Kristie Anne Bluett, Morgan Lewis et al, SF, CA; John Clayton Everett, Jr., PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC.

For Hitachi America Ltd., (I), Defendant (3:07-md-01827-SI): Kent Michael Roger, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Hitachi Electronic Devices (USA), Inc., (D, I, 09-1115), Defendant (3:07-md-01827-SI): Kent Michael Roger, LEAD ATTORNEY, Michelle Kim-Szrom, Morgan, Lewis & Bockius LLP, San Francisco, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Kristie Anne Bluett, Morgan Lewis et al, SF, CA; John Clayton Everett, Jr., PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC.

For NEC Corporation, NEC LCD Technologies, Ltd., (D, I), NEC Corporation of America, Defendants (3:07-md-01827-SI): Joseph Patrick Audal, Stephen Holbrook Sutro, Duane Morris LLP, San Francisco, CA.

For NEC Electronics America, Inc., (D, I), Defendant (3:07-md-01827-SI): Stephen Holbrook Sutro, LEAD ATTORNEY, Joseph Patrick Audal, **[*21]** Duane Morris LLP, San Francisco, CA; Edward G. Biester, III, Duane Morris LLP, Philadelphia, PA.

For AU Optronics Corporation, (D, I, 09-1115), Defendant (3:07-md-01827-SI): Christopher Alan Nedeau, LEAD ATTORNEY, Allison Marie Dibley, Esq., Carl Lawrence Blumenstein, Patrick J. Richard, Nossaman LLP, San Francisco, CA; Bryan B. Barnhart, Nossman LLP, San Francisco, CA; Kirk Christopher Jenkins, Sedgwick Detert Moran Arnold, Chicago, IL; Martha A. Boersch, Martha Boersch, Attorney at Law, San Francisco, CA; Michael F. Healy, Esq., Sedwick Detert Moran & Arnold LLP, San Francisco, CA.

For AU Optronics Corporation America, (D, I, 09-1115), Defendant (3:07-md-01827-SI): John C. McGuire, LEAD ATTORNEY, Sedgwick, Detert, Moran & Arnold, Newark, NJ; Matthew Clark Lovell, LEAD ATTORNEY, Sedgwick LLP, San Francisco, CA; Allison Marie Dibley, Esq., Carl Lawrence Blumenstein, Christopher Alan Nedeau, Patrick J. Richard, Nossaman LLP, San Francisco, CA; Bryan B. Barnhart, Nossman LLP, San Francisco, CA; Jason Haruo Wilson, Willenken Wilson Loh & Lieb LLP, Los Angeles, CA; Kirk Christopher Jenkins, Sedgwick Detert Moran Arnold, Chicago, IL; Martha A. Boersch, Martha Boersch, Attorney at Law, San **[*22]** Francisco, CA; Michael F. Healy, Esq., Sedwick Detert Moran & Arnold LLP, San Francisco, CA.

For Chi Mei Optoelectronics USA, Inc., (D, I, 09-1115), Defendant (3:07-md-01827-SI): James Glenn Kreissman, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP, Palo Alto, CA; John Lyle Williams, Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Arka Dev Chatterjee, Simpson Thacher Bartlett LLP, Palo Alto, CA; Brandon Cody Martin, Simpson Thacher and Bartlett, 2550 Hanover St., Palo Alto, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Harrison J. Frahn, IV, Simpson Thacher & Bartlett, Palo Alto, CA; Jason Matthew Bussey, Simpson Thacher and Barlett LLP, Palo Alto, CA; Melissa Margaret Derr, Simpson Thacher and Bartlett LLP, Palo Alto, CA; Michael Jacob Ewart, Michael Ramsey Scott, HILLIS CLARK MARTIN PETERSON, SEATTLE, WA; Wilmer Cutler, Hale and Dorr LLP, Washington, DC.

For Chunghwa Picture Tubes Ltd., (D, I, 09-1115), Defendant (3:07-md-01827-SI): Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; David Paul Germaine, 111 S. Wacker Dr., Chicago, IL; Joel Steven Sanders, Rachel S. Brass, Gibson Dunn & Crutcher LLP, San Francisco, CA; Joel Calcar Willard, **[*23]** Gibson, Dunn Crutcher LLP, San Francisco, CA; William S Farmer, FarmerBrownstein LLP, San Francisco, CA.

For Hannstar Display Corporation, (D, I, 09-1115), Defendant (3:07-md-01827-SI): Robert E. Freitas, LEAD ATTORNEY, Freitas Tseng Baik & Kaufman LLP, Redwood Shores, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Donald H. Mullins, Badgley Mullins Law Group PLLC, Seattle, WA; Ismail Jomo Ramsey, Mary Kelly Persyn, Ramsey & Ehrlich LLP, Berkeley, CA; Mark K. Davis, PRO HAC VICE, Badgley Mullins Law Group PLLC, Seattle, WA; Jerry Chen, Orrick, Herrington & Sutcliffe LLP, Menlo Park, CA.

For Samsung Semiconductor, Inc., (D, I, 09-1115), Defendant (3:07-md-01827-SI): Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Daniel M Suleiman, Robert D. Wick, Covington & Burling LLP, Washington, DC; David Paul Germaine, 111 S. Wacker Dr., Chicago, IL; Derek Ludwin, Washington, DC; Elizabeth Catherine Arens, Covington and Burling, L.L.P. (DC), Washington, DC; Jeffrey Michael Davidson, Covington & Burling LLP, San Francisco, CA; John Stewart Playforth, Covington and Burling LLP, Washington, DC; Neil K. Roman, Covington & Burling, Washington, DC; Steven D Sassaman, Covington **[*24]** and Burling, San Francisco, CA; Timothy C. Hester, Covington & Burling, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton, San Francisco, CA.

For Epson Imaging Devices Corporation, (D), terminated on 1/15/08, Defendant (3:07-md-01827-SI): Stephen P. Freccero, LEAD ATTORNEY, Derek Francis Foran, Morrison & Foerster LLP, San Francisco, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Kimberly Linnell Taylor, Carr, McClellan, Ingersoll, Thompson & Horn, Burlingame, CA; Stephen E. Taylor, Taylor & Company Law Offices, LLP, San Francisco, CA.

For NEC Electronics Corporation, Renesas Electronics America, (11-2495), Defendants (3:07-md-01827-SI): Stephen Holbrook Sutro, Duane Morris LLP, San Francisco, CA.

For CMO Japan Co., Ltd., (D, I, 09-1115), Nexgen Mediatech, Inc. ("Nexgen"), (D, 09-1115), Defendants (3:07-md-01827-SI): James Glenn Kreissman, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP, Palo Alto, CA; John Lyle

Williams, Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Arka Dev Chatterjee, Simpson Thacher Bartlett LLP, Palo Alto, CA; Brandon Cody Martin, Simpson Thacher and Bartlett, 2550 Hanover St., Palo Alto, CA; Christopher **[*25]** Alan Nedeau, Nossaman LLP, San Francisco, CA; Harrison J. Frahn, IV, Simpson Thacher & Bartlett, Palo Alto, CA; Jason Matthew Bussey, Simpson Thacher and Barlett LLP, Palo Alto, CA; Michael Jacob Ewart, Michael Ramsey Scott, HILLIS CLARK MARTIN PETERSON, SEATTLE, WA.

For NEC Electronic America, Inc., Defendant, Intervenor (3:07-md-01827-SI): Stephen Holbrook Sutro, LEAD ATTORNEY, Duane Morris LLP, San Francisco, CA.

For Chi Mei Corporation, (D, I, 09-1115), Defendant (3:07-md-01827-SI): James Glenn Kreissman, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP, Palo Alto, CA; John Lyle Williams, Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Arka Dev Chatterjee, Simpson Thacher Bartlett LLP, Palo Alto, CA; Brandon Cody Martin, Simpson Thacher and Bartlett, 2550 Hanover St., Palo Alto, CA; Harrison J. Frahn, IV, Simpson Thacher & Bartlett, Palo Alto, CA; Jason Matthew Bussey, Simpson Thacher and Barlett LLP, Palo Alto, CA.

For Nexgen Mediatech USA Inc, (D, 09-1115), Defendant (3:07-md-01827-SI): James Glenn Kreissman, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP, Palo Alto, CA; John Lyle Williams, Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Arka **[*26]** Dev Chatterjee, Simpson Thacher Bartlett LLP, Palo Alto, CA; Brandon Cody Martin, Simpson Thacher and Bartlett, 2550 Hanover St., Palo Alto, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Harrison J. Frahn, IV, Simpson Thacher & Bartlett, Palo Alto, CA; Jason Matthew Bussey, Simpson Thacher and Barlett LLP, Palo Alto, CA; Michael Jacob Ewart, Michael Ramsey Scott, HILLIS CLARK MARTIN PETERSON, SEATTLE, WA; Wilmer Cutler, Hale and Dorr LLP, Washington, DC.

For NEC Display Solutions of America, Inc., Defendant (3:07-md-01827-SI): Stephen Holbrook Sutro, LEAD ATTORNEY, George Dominic Niespolo, Joseph Patrick Audal, Duane Morris LLP, San Francisco, CA.

For Chi Mei Optoelectronics Corporation, (D, I, 09-1115), Defendant (3:07-md-01827-SI): James Glenn Kreissman, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP, Palo Alto, CA; John Lyle Williams, Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Arka Dev Chatterjee, Simpson Thacher Bartlett LLP, Palo Alto, CA; Brandon Cody Martin, Simpson Thacher and Bartlett, 2550 Hanover St., Palo Alto, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Harrison J. Frahn, IV, Simpson Thacher & Bartlett, Palo Alto, **[*27]** CA; Jason Matthew Bussey, Simpson Thacher and Barlett LLP, Palo Alto, CA; Melissa Margaret Derr, Simpson Thacher and Bartlett LLP, Palo Alto, CA; Michael Jacob Ewart, Michael Ramsey Scott, HILLIS CLARK MARTIN PETERSON, SEATTLE, WA.

For IPS Alpha Technology, LTD., (D), dismissed from IP amended complaint on 2/21/08, Defendants (3:07-md-01827-SI): Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Epson Electronics America, Inc., (D), Dismissed as a indirect purchaser defendant on 4/1/08, Defendant (3:07-md-01827-SI): Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Derek Francis Foran, Stephen P. Freccero, Morrison & Foerster LLP, San Francisco, CA; Kimberly Linnell Taylor, Carr, McClellan, Ingersoll, Thompson & Horn, Burlingame, CA; Melvin R. Goldman, Morrison & Foerster, San Francisco, CA; Sean David Unger, Paul, Hastings, Janofsky & Walker LLP, San Francisco, CA; Stephen E. Taylor, Taylor & Company Law Offices, LLP, San Francisco, CA; David Lawrence Meyer, Morrison & Foerster, Washington, DC.

For Tatung Company of America, Inc. ("Tatung America"), (09-1115) (dismissed on 7/21/11 by Direct Purchaser Plaintiff Class), Defendant (3:07-md-01827-SI): Joel Steven **[*28]** Sanders, LEAD ATTORNEY, Rachel S. Brass, Gibson Dunn & Crutcher LLP, San Francisco, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; David Paul Germaine, 111 S. Wacker Dr., Chicago, IL; Joel Calcar Willard, Gibson, Dunn Crutcher LLP, San Francisco, CA; William S Farmer, FarmerBrownstein LLP, San Francisco, CA.

For Koninklijke Philips Electronics N.V. ("Philips"), (D), Defendant (3:07-md-01827-SI): Bradley P. Smith, Garrard R. Beeney, Theodore Edelman, LEAD ATTORNEYS, Sullivan & Cromwell LLP, New York, NY; Brendan P. Cullen, Sullivan & Cromwell, Palo Alto, CA.

For Toshiba America Electronics Components, Inc., (D, I, 09-1115), Toshiba America Information Systems, Inc., (D, I, 09-1115), Toshiba Mobile Display Co., Ltd., n/k/a Japan Display Central Inc., Defendants (3:07-md-01827-SI):

Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; John H. Chung, LEAD ATTORNEY, White & Case LLP, New York, NY; John Mark Gidley, LEAD ATTORNEY, White & Case LLP, Washington, DC; Kristen Jentsch McAhren, LEAD ATTORNEY, White and Case LLP, Washington, DC; Aya Kobori, Patrick J. Eyers, White and Case LLP, New York, NY; Bijal Vijay Vakil, White & Case LLP, Palo Alto, CA; Christopher **[*29]** Alan Nedeau, Nossaman LLP, San Francisco, CA; Heather Marie Burke, White and Case LLP, Palo Alto, CA.

For LG Display America, Inc., (D, I, 09-1115), formerly known as LG Philips LCD America, Inc., Defendant (3:07-md-01827-SI): Chet Alan Kronenberg, LEAD ATTORNEY, Sarah E Luppen, Simpson Thacher & Bartlett LLP, Los Angeles, CA; Hojoon Hwang, Jerome Cary Roth, LEAD ATTORNEYS, Munger Tolles & Olson LLP, San Francisco, CA; Arman Oruc, Jane Jung Ah Lee, Simpson Thacher and Bartlett LLP, Washington, DC; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Gregory J. Weingart, Munger, Tolles and Olson LLP, Los Angeles, CA; Hailyn Jennifer Chen, Attorney at Law, Los Angeles, CA; Holly A. House, Lee F Berger, Sean David Unger, Paul, Hastings, LLP, San Francisco, CA; Jonathan E. Altman, Munger Tolles & Olson LLP, Los Angeles, CA; Jonathan Ellis Altman, Munger Tolles and Olson, Los Angeles, CA; Jonathan Charles Sanders, Simpson Thacher Bartlett LLP, Palo Alto, CA; Katerina S Colitti, PRO HAC VICE, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC; Kevin J. Arquit, Simpson Thacher & Bartlett LLP, New York, NY; Kevin C. McCann, Paul Hastings Janofsky & Walker LLP, San Francisco, CA; Xavier **[*30]** Blake Sparrow, Simpson Thacher Bartlett, Washington, DC.

For Toshiba Mobile Display Technology Co., Ltd., 09-4997, Defendant (3:07-md-01827-SI): Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA.

For Mitsui & Co. (Taiwan), Limited, (D), Defendant (3:07-md-01827-SI): Erin Murdock-Park, Cleveland, oH; Lisa Cox Ghannoum, Baker Hostetler, Cleveland, OH; Michael Edward Mumford, Ernest E. Vargo, Jr., Baker Hostetler LLP, Cleveland, OH; Paul P Eyre, Baker Hostetler LLP, New York, NY; Peter Wethrell James, Baker Hostetler, Los Angeles, CA; Tracy Lynn Cole, Baker & Hostetler LLP, New York, NY.

For Sanyo Consumer Electronics Co., Ltd., (D), Defendant (3:07-md-01827-SI): Allison Ann Davis, LEAD ATTORNEY, Sam N. Dawood, Sanjay Mohan Nangia, Davis Wright Tremaine LLP, San Francisco, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Nick Steven Verwolf, Davis Wright Tremaine LLP, Bellevue, WA.

For Samsung SDI America, Inc., Defendant (3:07-md-01827-SI): Dylan Ian Ballard, Four Embarcadero Center, 17th Floor, San Francisco, CA; Eric Scott O'Connor, Sheppard Mullin LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, **[*31]** Sheppard Mullin Richter & Hampton, San Francisco, CA.

For Samsung SDI Co., Ltd., Defendant (3:07-md-01827-SI): Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Dylan Ian Ballard, Four Embarcadero Center, 17th Floor, San Francisco, CA; Eric Scott O'Connor, Sheppard Mullin LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton, San Francisco, CA.

For Chimei Innolux Corp., Defendant (3:07-md-01827-SI): James Glenn Kreissman, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP, Palo Alto, CA; Arka Dev Chatterjee, Simpson Thacher Bartlett LLP, Palo Alto, CA; Brandon Cody Martin, Simpson Thacher and Bartlett, 2550 Hanover St., Palo Alto, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Harrison J. Frahn, IV, Simpson Thacher & Bartlett, Palo Alto, CA; Jason Matthew Bussey, Simpson Thacher and Barlett LLP, Palo Alto, CA; Michael Jacob Ewart, Michael Ramsey Scott, HILLIS CLARK MARTIN PETERSON, SEATTLE, WA.

For Philips Electronics North America Corporation, Koninklijke Philips Electronics N.V., (11-2495), Defendants (3:07-md-01827-SI): Brendan P. Cullen, Sullivan & Cromwell, Palo **[*32]** Alto, CA; Matthew S. Fitzwater, Sullivan & Cromwell LLP, New York, NY.

For Tatung Company, Defendant (3:07-md-01827-SI): Joel Steven Sanders, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; William S Farmer, FarmerBrownstein LLP, San Francisco, CA.

For Chi Mei Optoelectronics Japan Co Ltd, Defendant (3:07-md-01827-SI): Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Melissa Margaret Derr, Simpson Thacher and Bartlett LLP, Palo Alto, CA.

For Mitsui & Co. (U.S.A.), Inc., Ricoh Electronics, Inc., Defendant (3:07-md-01827-SI): Erin Murdock-Park, Cleveland, OH; Ernest E. Vargo, Jr., Michael Edward Mumford, Baker Hostetler LLP, Cleveland, OH; Paul P Eyre, PNC Center, Cleveland, OH; Tracy Lynn Cole, Baker & Hostetler LLP, New York, NY; Paul S. Chan, Bird Marella Boxer Wolpert Nessim Drooks & Lincenberg, P.C., Los Angeles, CA.

For Apple Inc., Interested Party (3:07-md-01827-SI): Caroline Nason Mitchell, Robert Allan Mittelstaedt, LEAD ATTORNEYS, Jones Day, San Francisco, CA.

Douglas C. Giordan, Interested Party (3:07-md-01827-SI):, Pro se, Port Washington, NY.

For State of California, Amicus (3:07-md-01827-SI): Adam **[*33]** Miller, LEAD ATTORNEY, CA Dept of Justice, San Francisco, CA; Emilio Eugene Varanini, IV, State Attorney General's Office, San Francisco, CA.

For State of South Carolina, Amicus (3:07-md-01827-SI): Susan Foxworth Campbell, McGowan Hood and Felder, Columbia, SC.

For United States Antitrust Division, Department of Justice, Intervenor (3:07-md-01827-SI): Peter K. Huston, LEAD ATTORNEY, Department of Justice, San Francisco, CA; Alexandra Jill Shepard, E. Kate Patchen, Micah Lanielle Wyatt, U.S. Department of Justice, San Francisco, CA; David J. Ward, U.S. Department of Justice, Antritrust Divsion, San Francisco, CA; Heather S. Tewksbury, United States Department of Justice, San Francisco, CA; Michael L. Scott, Antitrust Division, San Francisco, CA.

For State of Illinois, Intervenor (3:07-md-01827-SI): Blake Lee Harrop, LEAD ATTORNEY, Blake Lee Harrop, Office of the Attorney General, Chicago, IL; Brady R. Johnson, LEAD ATTORNEY, Jonathan A Mark, Attorney General of Washington, Seattle, WA; Chadwick Oliver Brooker, Office of the Illinois Attorney General, Chicago, IL; Michael E. Haglund, Haglund Kelley Horngren Jones & Wilder, LLP, Portland, OR; Michael Kevin Kelley, haglund kelley, Portland, **[*34]** OR.

For State of Washington, 10-5711 (plaintiff), Intervenor (3:07-md-01827-SI): Brady R. Johnson, LEAD ATTORNEY, Jonathan A Mark, Attorney General of Washington, Seattle, WA; Blake Lee Harrop, Office of the Attorney General, Chicago, IL; Jonathan A Mark, Attorney General of Washington, Seattle, WA; Michael E. Haglund, Haglund Kelley Horngren Jones & Wilder, LLP, Portland, OR; Michael Kevin Kelley, haglund kelley, Portland, OR; Tina E. Kondo, Senior Assistant Attorney General, Seattle, WA.

For Samsung SDI America, Inc., Samsung SDI Co., Ltd., Intervenors (3:07-md-01827-SI): Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton, San Francisco, CA.

For Philips Electronics North America Corp., Intervenor (3:07-md-01827-SI): Brendan P. Cullen, Sullivan & Cromwell, Palo Alto, CA.

For Sanyo Consumer Electronics Co., Ltd., Intervenor (3:07-md-01827-SI): Allison Ann Davis, Davis Wright Tremaine LLP, San Francisco, CA.

For Leah Nylen, Intervenor (3:07-md-01827-SI), Pro se, Washington, DC.

For State of Mississippi, Intervenor (3:07-md-01827-SI): Carolyn Glass Anderson, Zimmerman Reed, PLLP, **[*35]** Minneapolis, MN; Geoffrey Morgan, Jim Hood, Meredith M. Aldridge, Office of the Mississippi Attorney General, Jackson, MS.

For LG Display Co., Ltd., (D, I, 09-1115), Counter-claimant (3:07-md-01827-SI): Hojoon Hwang, Jerome Cary Roth, LEAD ATTORNEYS, Munger Tolles & Olson LLP, San Francisco, CA; Arman Oruc, Jane Jung Ah Lee, Simpson Thacher and Bartlett LLP, Washington, DC; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Gregory J. Weingart, Munger, Tolles and Olson LLP, Los Angeles, CA; Hailyn Jennifer Chen, Attorney at Law, Los Angeles, CA; Holly A. House, Lee F Berger, Sean David Unger, Paul, Hastings, LLP, San Francisco, CA; Jonathan E. Altman, Munger Tolles & Olson LLP, Los Angeles, CA; Jonathan Ellis Altman, Munger Tolles and Olson, Los Angeles, CA; Jonathan Charles Sanders, Simpson Thacher Bartlett LLP, Palo Alto, CA; Kevin C. McCann, Paul Hastings Janofsky & Walker LLP, San Francisco, CA.

For Office Depot, Inc., 11-2225, Office Depot, Inc., Nov-25, Counter-defendants (3:07-md-01827-SI): Stuart H. Singer, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP, Fort Lauderdale, FL; Stuart Harold Singer, Boies Schiller & Flexner, Fort Lauderdale, FL; Melissa B Felder, Washington, **[*36]** DC.

For LG Display America, Inc., (D, I, 09-1115), Counter-claimant (3:07-md-01827-SI): Hojoon Hwang, Jerome Cary Roth, LEAD ATTORNEYS, Munger Tolles & Olson LLP, San Francisco, CA; Arman Oruc, Jane Jung Ah Lee, Simpson Thacher and Bartlett LLP, Washington, DC; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Gregory J. Weingart, Munger, Tolles and Olson LLP, Los Angeles, CA; Hailyn Jennifer Chen, Attorney at Law, Los Angeles, CA; Holly A. House, Lee F Berger, Sean David Unger, Paul, Hastings, LLP, San Francisco, CA; Jonathan E. Altman, Munger Tolles & Olson LLP, Los Angeles, CA; Jonathan Ellis Altman, Munger Tolles and Olson, Los Angeles, CA; Jonathan Charles Sanders, Simpson Thacher Bartlett LLP, Palo Alto, CA; Katerina S Colitti, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC; Kevin C. McCann, Paul Hastings Janofsky & Walker LLP, San Francisco, CA.

For LG Display America, Inc., (D, I, 09-1115), LG Display Co., Ltd., (D, I, 09-1115), Counter-claimants (3:07-md-01827-SI): Gregory J. Weingart, Munger, Tolles and Olson LLP, Los Angeles, CA; Hailyn Jennifer Chen, Attorney at Law, Los Angeles, CA.

For Interbond Corporation of America, 11-3763, Interbond Corporation of America, **[*37]** 11-3763, Counter-defendants (3:07-md-01827-SI): Philip J. Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Stuart Harold Singer, Boies Schiller & Flexner, Fort Lauderdale, FL; Melissa B Felder, Washington, DC.

For LG Display Co., Ltd., (D, I, 09-1115), LG Display Co., Ltd., (D, I, 09-1115), LG Display Co., Ltd., (D, I, 09-1115), Counter-claimants (3:07-md-01827-SI): Hojoon Hwang, Jerome Cary Roth, LEAD ATTORNEYS, Munger Tolles & Olson LLP, San Francisco, CA; Arman Oruc, Jane Jung Ah Lee, Simpson Thacher and Bartlett LLP, Washington, DC; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Hailyn Jennifer Chen, Attorney at Law, Los Angeles, CA; Holly A. House, Lee F Berger, Sean David Unger, Paul, Hastings, LLP, San Francisco, CA; Jonathan E. Altman, Munger Tolles & Olson LLP, Los Angeles, CA; Jonathan Ellis Altman, Munger Tolles and Olson, Los Angeles, CA; Jonathan Charles Sanders, Simpson Thacher Bartlett LLP, Palo Alto, CA; Kevin C. McCann, Paul Hastings Janofsky & Walker LLP, San Francisco, CA.

For T-Mobile USA Inc, 11-2591, T-Mobile USA Inc, 11-2591, Counter-defendants (3:07-md-01827-SI): Brooke Ashley-May Taylor, Susman Godfrey L.L.P., Seattle, WA; Daniel B Rapport, FRIEDMAN **[*38]** KAPLAN SEILER ADELMAN LLP, NEW YORK, NY; David H. Orozco, SUSMAN GODFREY (LA,CA), LOS ANGELES, CA; Edward A. Friedman, Friedman Kaplan Seiler & Adelman LLP, New York, NY; Hallie B. Levin, FRIEDMAN KAPLAN SEILER & ADELMAN LLP, NEW YORK, NY; Parker C Folse, III, SUSMAN GODFREY LLP, SEATTLE, WA; Alexander David Levi, Friedman Kaplan Seiler and Adelman LLP, New York, NY.

For LG Display America, Inc., (D, I, 09-1115), LG Display America, Inc., (D, I, 09-1115), LG Display America, Inc., (D, I, 09-1115), Counter-claimants (3:07-md-01827-SI): Hojoon Hwang, Jerome Cary Roth, LEAD ATTORNEYS, Munger Tolles & Olson LLP, San Francisco, CA; Arman Oruc, Jane Jung Ah Lee, Simpson Thacher and Bartlett LLP, Washington, DC; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Hailyn Jennifer Chen, Attorney at Law, Los Angeles, CA; Holly A. House, Lee F Berger, Sean David Unger, Paul, Hastings, LLP, San Francisco, CA; Jonathan E. Altman, Munger Tolles & Olson LLP, Los Angeles, CA; Jonathan Ellis Altman, Munger Tolles and Olson, Los Angeles, CA; Jonathan Charles Sanders, Simpson Thacher Bartlett LLP, Palo Alto, CA; Katerina S Colitti, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC; Kevin C. McCann, **[*39]** Paul Hastings Janofsky & Walker LLP, San Francisco, CA.

For LG Display Co., Ltd., (D, I, 09-1115), LG Display America, Inc., (D, I, 09-1115), Counter-claimants (3:07-md-01827-SI): Gregory J. Weingart, Munger, Tolles and Olson LLP, Los Angeles, CA.

For ABC Appliance, Inc., 11-4119, ABC Appliance, Inc., Nov-19, Counter-defendants (3:07-md-01827-SI): Anne M. Nardacci, Christopher V. Fenlon, Albany, NY.

For Marta Cooperative of America, Inc., Nov-19, Marta Cooperative of America, Inc., 11-4119, Counter-defendants (3:07-md-01827-SI): Anne M. Nardacci, Christopher V. Fenlon, Albany, NY; Philip J. Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Melissa B Felder, Washington, DC.

For P.C. Richard & Son Long Island Corporation, 11-4119, P.C. Richard & Son Long Island Corporation, Nov-19, Counter-defendants (3:07-md-01827-SI): Melissa B Felder, Washington, DC.

For State of New York, 11-0711, State of New York, 11-0711, Counter-defendants (3:07-md-01827-SI): Amy Elizabeth McFarlane, LEAD ATTORNEY, New York State Office of the Attorney General, New York, NY; Geralyn Jeanette Trujillo, Office of the Attorney General, State of New York, New York, NY; Jeremy R. Kasha, New York State Office of the Attorney **[*40]** General (NYC), New York, NY; Richard L. Schwartz, Office of the Attorney General, New York, NY.

For Jaco Electronics, Inc., 11-2495, Jaco Electronics, Inc., 11-2495, Counter-defendants (3:07-md-01827-SI): Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Jeffrey H. Howard, Jerome A. Murphy, Crowell & Moring LLP, Washington, DC; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA; Nathanial John Wood, Crowell & Moring LLP, San Francisco, CA.

FLG Display America, Inc., (D, I, 09-1115), Counter-claimant (3:07-md-01827-SI), Pro se.

LG Display Co., Ltd., (D, I, 09-1115), Counter-claimant (3:07-md-01827-SI), Pro se.

For Sony Computer Entertainment America, LLC, 10-5616, (10-5620 - voluntery dismissal), 12-1596, 12-1599, 12-2214, Counter-defendant (3:07-md-01827-SI): David Mark Goldstein, Esq., Orrick, Herrington & Sutcliffe LLP, San Francisco, CA; Margaret Branick-Abilla, Richard James Mooney, Bryan Cave LLP, San Francisco, CA; Robert L. Stolebarger, Holmes Roberts & Owen LLP, San Francisco, CA; Ross Christopher Paolino, Orrick Herrington Sutcliffe LLP, Washington, DC; Shannon Christine Leong, Orrick Herrington and Sutcliffe, SF, CA; Stephen V. Bomse, Orrick Herrington & Sutcliffe, **[*41]** San Francisco, CA.

Martin Quinn, Special Master (3:09-cv-05840-SI), Pro se, San Francisco, CA.

For Martin Quinn, Special Master (3:09-cv-05840-SI): Martin Quinn, Martin Quinn, JAMS, San Francisco, CA.

For Motorola, Inc., Plaintiff (3:09-cv-05840-SI): Janet Irene Levine, Crowell & Moring LLP, Los Angeles, CA; Jason C. Murray, PRO HAC VICE, Crowell & Moring LLP, Los Angeles, CA; Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Jerome A. Murphy, Crowell & Moring LLP, Washington, DC; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA; Nathanial John Wood, Crowell & Moring LLP, San Francisco, CA; R. Bruce Holcomb, PRO HAC VICE, Adams Holcomb LLP, Washington, DC; Sanya Sarich Kerksiek, Crowell & Moring, Washington, DC.

For AU Optronics Corporation, AU Optronics Corporation America, Inc., Defendants (3:09-cv-05840-SI): K.C. Maxwell, Esq., LEAD ATTORNEY, Law Office of K.C. Maxwell, San Francisco, CA; Carl Lawrence Blumenstein, Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; John D. Cline, Law Office of John D. Cline, San Francisco, CA; Martha A. Boersch, Martha Boersch, Attorney at Law, San Francisco, CA.

For Chi Mei Corporation, Chi Mei Optoelectronics USA, **[*42]** Inc., CMO Japan Co. Ltd., Nexgen Mediatech, Inc., Nexgen Mediatech USA, Inc., CHIMEI INNOLUX CORPORATION, Defendants (3:09-cv-05840-SI): Harrison J. Frahn, IV, Simpson Thacher & Bartlett, Palo Alto, CA.

For Chunghwa Picture Tubes Ltd., Defendant (3:09-cv-05840-SI): Andrew Howard Pontious, Jacob P. Alpren, William S Farmer, FarmerBrownstein LLP, San Francisco, CA.

For Hannstar Display Corporation, Defendant (3:09-cv-05840-SI): Robert E. Freitas, LEAD ATTORNEY, Jason Sheffield Angell, Freitas Tseng Baik & Kaufman LLP, Redwood Shores, CA; Jerry Chen, Orrick, Herrington & Sutcliffe LLP, Menlo Park, CA.

For LG Display Co. Ltd., LG Display America, Inc., Defendants (3:09-cv-05840-SI): Michael Robert Lazerwitz, Cleary Gottlieb Steen & Hamilton, Washington, DC.

For Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc., Samsung Electronics America, Inc., Defendants (3:09-cv-05840-SI): Derek Ludwin, Washington, DC; Jeffrey Michael Davidson, Simon J. Frankel, Covington & Burling LLP, San Francisco, CA; Robert D. Wick, Covington & Burling LLP, Washington, DC; Timothy C. Hester, Covington & Burling, San Francisco, CA.

For Sharp Corporation, Sharp Electronics Corporation, Defendants (3:09-cv-05840-SI): **[*43]** Bruce H. Searby, Craig A. Benson, LEAD ATTORNEYS, Kenneth A. Gallo, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Joseph J Simons, LEAD ATTORNEY, Craig A Benson, Paul Weiss LLP, Washington, DC; Anne Kaldor Sauro, Erin Alysa Smart, Kristen A. Palumbo, Bingham McCutchen LLP, San Francisco, CA.

For Toshiba Corporation, Toshiba America Electronics Components, Inc., Toshiba Mobile Display Co., Ltd., Toshiba America Information Systems, Inc., Defendants (3:09-cv-05840-SI): John H. Chung, LEAD ATTORNEY, White & Case LLP, New York, NY.

For Epson Imaging Devices Corporation, Epson Electronics America, Inc., Defendants (3:09-cv-05840-SI): Derek Francis Foran, Stephen P. Freccero, Morrison & Foerster LLP, San Francisco, CA.

For Sanyo Consumer Electronics Co., Ltd., Defendant, Intervenor (3:09-cv-05840-SI): Allison Ann Davis, LEAD ATTORNEY, Davis Wright Tremaine LLP, San Francisco, CA.

For Samsung SDI Co., Ltd., Samsung SDI America, Inc., Intervenors (3:09-cv-05840-SI): Eric Scott O'Connor, Eric Scott O'Connor, Sheppard Mullin LLP, New York, NY; James Landon McGinnis, Michael W. Scarborough, James Landon McGinnis, Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, **[*44]** CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton, San Francisco, CA.

For Philips Electronics North America Corp., Intervenor (3:09-cv-05840-SI): Brendan P. Cullen, Sullivan & Cromwell, Palo Alto, CA.

Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

ORDER DENYING DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ON MOTOROLA'S FOREIGN INJURY CLAIMS

On August 3, 2012, the Court heard argument on defendants' joint motion for summary judgment on Motorola Mobility, Inc.'s Sherman Act claim for injuries in foreign markets. Defendants' motion asserts that Motorola's claims based on TFT-LCD purchases in foreign markets are barred by the Foreign Trade Antitrust Improvements Act, *15 U.S.C. § 6a* ("FTAIA").

Defendants argue that Motorola has failed to prove that its foreign injury claims were caused by any domestic effect of defendants' anticompetitive conduct. Defendants contend that although Motorola alleged that "[d]efendants and their co-conspirators . . . entered into supply agreements with Motorola in Illinois to sell Motorola LCD panels at unlawfully inflated prices," Third Amended Complaint ("TAC") ¶ 4, in fact "[d]iscovery has shown that [Motorola's] allegations concerning **[*45]** supposed global price agreements negotiated and entered into in Illinois are untrue." Motion at 3. Pointing to a lack of evidence demonstrating the requisite "domestic effect" proximately causing Motorola's foreign injury claims, defendants argue that two of the three categories of claims against it[1] should not be allowed to go to trial.

The FTAIA establishes a general rule that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." *15 U.S.C. § 6a*. The FTAIA then "provides an

[1] Motorola's TAC alleges antitrust claims based on three categories of purchases: "(1) LCD Panels delivered by the Defendants to Motorola in the United States; (2) LCD Panels delivered to Motorola manufacturing facilities abroad for inclusion in Motorola devices imported into the U.S. by Motorola and later sold by Motorola to customers in the United States; and (3) LCD Panels delivered to Motorola manufacturing facilities abroad for inclusion in Motorola devices sold to Motorola customers abroad." TAC ¶ 184. Defendants seek summary adjudication on the second and third categories of claims (the "foreign injury claims").

exception **[*46]** to this general rule, making the Sherman Act applicable if foreign conduct '(1) has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce, and (2) 'such effect gives rise to a [Sherman Act] claim.''" *In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 985 (9th Cir. 2008)* (quoting *Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*(*Empagran I*) and *15 U.S.C. § 6a*). This is known as the "domestic injury exception" of the FTAIA. *Id*. The Supreme Court has stated:

> This technical language initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e*., it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import or (certain) export commerce, *and* (2) has an effect of a kind that ***antitrust law*** considers harmful, *i.e*., the "effect" must "giv[e] rise to a [Sherman Act] claim."

Empagran I, 542 U.S. at 162 (quoting *15 U.S.C. § 6a*) (emphasis original). The FTAIA "sets forth an element of an antitrust claim, **[*47]** not a jurisdictional limit on the power of the federal courts." *Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845, 852 (7th Cir. 2012)*; *Animal Sci. Prods., Inc v. China Minmetals Corp., 654 F.3d 462, 469 (3d Cir. 2011)*; *see also* October 5, 2011 Order Denying Defendants' Joint Dispositive Motion Regarding Indirect Purchaser Claims Based on Foreign Sales ("IPP Order") at 7, Master Docket No. 3833 (adopting *Animal Science* view that "the FTAIA does not implicate the subject matter jurisdiction of the federal courts").

The Court concludes that whether the price fixing activities alleged by Motorola in this case gave rise to direct, substantial, and reasonably foreseeable effects on domestic commerce, and whether such effects gave rise to a Sherman Act claim present issues of fact which must be resolved by the jury in this case.

Motorola contends, and this Court agrees, that its domestic roots and the locale of the transactions at issue distinguish this case from *Empagran I*. As this Court has previously observed, "Motorola is not a foreign company alleging injury based on wholly foreign transactions and conduct, unlike plaintiffs in *Empagran I*." March 28, 2011 Order Denying Defendants' Joint Motion **[*48]** to Dismiss the Second Amended Motorola Complaint (*Motorola II* Order) at 8, Master Docket No. 2602.

Motorola points to substantial evidence that defendants targeted Motorola in the United States for defendants' sales and marketing of LCD panels. *See* *Animal Science, 654 F.3d at 470* (the relevant inquiry is whether the defendants' anticompetitive behavior "target[ed] import goods or services") (citing *Turicentro, S.A. v. American Airlines Inc., 303 F.3d 293, 303 (3d Cir. 2002))*. Defendants knew that Motorola sold mobile devices in the United States and that the United States was one of the largest markets for mobile devices in the world. *See, e.g*., Declaration of Joshua Stokes ("Stokes Decl."), Ex. 379 (Samsung presentation noting that Motorola had the number one market share in the U.S.); Ex. 150 (Sharp presentation noting same); Ex. 155 (indicating Toshiba's sales plan was based on strong demand from U.S. and Europe); Exs. 156, 157-160 (defendants' presentations and analyses regarding Motorola's U.S. market share). Defendants established U.S. subsidiaries to facilitate sales of LCD panels to Motorola in the United States. *See, e.g*., Opposition at 15, n. 15 (listing defendants' relevant **[*49]** U.S. subsidiaries and affiliates); Stokes Decl., Ex. 80 (AUO email stating that its "regional strategy" for the U.S. was "direct access to Moto/Chicago and its global network"); Ex. 352 (deposition testimony of Samsung SDI employee that "[Samsung] had an office in Chicago because Motorola was in Chicago"); Ex. 345 (deposition testimony that Sharp had an office in a Chicago suburb in order to be "close to our customer . . . [f]irst of all, Motorola").

Defendants also met with Motorola on several occasions in the United States to discuss, and, at times, negotiate prices for LCD panels. *See, e.g*., Exs. 251, 254, 255, 266, 314 (defendants' PowerPoint presentations to Motorola in the United States); Ex. 375 (document indicating that Samsung had several conversations in Chicago with Motorola regarding LCD panel pricing); Ex. 96 (Toshiba America Electronic Corporation ("TAEC") report indicating in-person price negotiations with Motorola in Schaumburg, IL); Ex. 99 (email setting "Final Negotiations Meeting" in Chicago with Motorola and representatives of AUO and AUOA); Ex. 140 (Sharp email describing Motorola meeting held in U.S., where price negotiations took place). Defendants also used their **[*50]** employees --- both U.S.-based and those stationed abroad --- in furtherance of the price-fixing conspiracy. *See, e.g*., Ex. 349 (deposition testimony identifying Samsung employee who was "dispatched" to the U.S. from 1999 to 2004 and given instructions "about how to gather competitive information about [Samsung's] competitors"); Ex. 167 (email requesting that Epson's U.S.-based employees "research competitor's situation" regarding a particular Motorola phone model); Ex. 168 (Toshiba informing its U.S.-based employees that competitive information had been gathered from Sanyo about projected share awards for Razr mobile phones and instructing them to "get information as much as possible").

Motorola also points to the admissions in the guilty pleas of many companies and executives involved in the LCD price-fixing conspiracy as further evidence that the conspiracy was targeted at the United States. Opposition at 26, n. 42 (listing plea agreements of LG, Sharp, Chunghwa, Hitachi, Epson, Chi Mei, and HannStar); *see also* Special Verdict Form, *United States v. AU Optronics Corp*., Case No. 09-cr-0110 SI (N.D. Cal. Mar. 2012) (AUO convicted of participating in a conspiracy to fix prices of LCD **[*51]** panels sold in the United States from September 2001 to December 2006), Docket No. 85. Some defendants admitted to specifically targeting Motorola in the United States. *See* Plea Agreement, *United States v. Sharp Corp*., Case No. 08-cr-802 SI (N.D. Cal. Dec. 8, 2008) (Sharp pled guilty to fixing the price of LCD panels sold to Motorola for use in Razr mobile phones); *United States v. Epson Imagining Devices Corp*., Case No. 09-cr-854 SI (N.D. Cal. Oct. 23, 2009) (Epson pled guilty to fixing the price of LCD panels sold to Motorola for use in Razr mobile phones).

The parties dispute whether defendants' conduct gave rise to its Sherman Act claims. *See DRAM, 546 F.3d at 989-90* ("[W]here a global price-fixing conspiracy is alleged to have affected prices both in the United States and abroad, courts have held that 'the give rise to language of [the FTAIA] requires a plaintiff to establish a direct or proximate causal relationship' between the alleged anticompetitive effects in the United States and the plaintiff's alleged foreign injury."). Defendants argue that, because Motorola's foreign affiliates purchased LCD panels pursuant to globally-negotiated foreign contracts (*i.e*., purchase orders), **[*52]** the "domestic injury exception" is inapplicable to Motorola's foreign injury claims. *See* Motion at 23-24. Defendants claim that the prices used in purchase orders Motorola used with its LCD panel suppliers were based on negotiations abroad, not in the United States. *Id*. On this basis, defendants conclude that "the effect on U.S. domestic commerce that 'gave rise to' the foreign injury claims . . . is non-existent." *Id*. at 25. The Court is not persuaded by defendants' argument. Motorola has presented admissible evidence from which a jury could infer that final decisions regarding pricing of LCD panels took place in the United States. *See, e.g*., Stokes Decl., Ex. 363 (deposition testimony of Motorola's Vice President of Procurement, Janet Robinson, that it was Motorola's "practice" that senior procurement officers in the United States gave "approval to enter into an agreement on price with a display module supplier during the relevant time period . . . ."). Motorola also points to the deposition testimony of its employees to support its claim that foreign affiliates issued purchase orders at the price and quantity determined by Motorola in the United States. *See, e.g*., Ex. 359 (deposition **[*53]** testimony of Motorola's Chief Procurement Officer, Theresa Metty, that the "decision making" regarding contract negotiations, "which would include prices," happened in Illinois); Ex. 372 (deposition testimony of Motorola's Vice President of Global Operations, E.L. Tay, that the purchasing team "basically execute[d] what was done and planned [in the United States]").

Whether, as defendants argue, Motorola's "rubber stamp approval process falls far short of what the FTAIA requires," Motion at 6, will be left up to a jury to decide, not the Court. *See* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* ("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on motions for summary judgment."). The Court finds that a reasonable jury could find a "concrete link between defendants' price setting-conduct . . . its domestic effect, and the foreign injury suffered by Motorola and its affiliates." *See Motorola II* Order at 8.

Accordingly, the Court DENIES dependants' joint motion for summary judgment. Master Docket No. 5415; Docket No. 312 in 09-5840.

IT IS SO ORDERED.

Dated: August **[*54]** 9, 2012

/s/ SUSAN ILLSTON

SUSAN ILLSTON

United States District Judge

LexisNexis

Apple, Inc. v. Motorola Mobility, Inc.

United States District Court for the Western District of Wisconsin

August 10, 2012, Decided; August 10, 2012, Filed

11-cv-178-bbc

Reporter

886 F. Supp. 2d 1061 *; 2012 U.S. Dist. LEXIS 116484 **; 2012-2 Trade Cas. (CCH) P78,025

APPLE, INC., Plaintiff, v. MOTOROLA MOBILITY, INC., Defendant.

Subsequent History: Motion to strike granted by, Motion granted by, in part, Motion denied by, in part, Motion granted by, Motion denied by *Apple, Inc. v. Motorola Mobility, Inc., 2012 U.S. Dist. LEXIS 181854 (W.D. Wis., Oct. 29, 2012)*

Prior History: *Apple, Inc. v. Motorola Mobility, Inc., 2011 U.S. Dist. LEXIS 72745 (W.D. Wis., June 7, 2011)*

Core Terms

patents, license, terms, intellectual property rights, nondiscriminatory, contends, technology, damages, disclose, immunity, organizations, antitrust, policies, declaration, antitrust claim, rights, patent infringement, patent application, standards-setting, infringement, chipsets, unfair competition, cases, breach of contract claim, district court, contractual, defenses, tortious interference, claim preclusion, third-party

Counsel: **[**1]** For Apple Inc., Plaintiff: Robert T. Haslam, LEAD ATTORNEY, Charlin Lu, Covington & Burling LLP, Redwood Shores, CA; Azra M. Hadzimehmedovic, Tensegrity Law Group, LLP, Redwood Shores, CA; Carrie Anderson, PRO HAC VICE, Weil Gotshal & Manges, New York, NY; Catherine Cetrangolo, Cetra Law Firm, LLC, Madison, WI; Christine Saunders Haskett, Danielle Luce Goldstein, Krzysztof Bebenek, Nathan Evans Shafroth, Robert D. Fram, Samuel F. Ernst, Winslow B. Taub, Covington & Burling LLP, San Francisco, CA; Cortlin Hall Lannin, PRO HAC VICE, Covington & Burling LLP, San Francisco, CA; Deborah Ann Garza, PRO HAC VICE, Jason Raofield, Covington & Burling, LLP, Washington, DC; Mark G. Davis, Weil, Gotshal & Manges LLP, Washington, DC; Matthew D. Powers, Steven S. Cherensky, Tensegrity Law Group LLC, Redwood Shores, CA; Richard Anthony Lopez, Covington & Burling LLP, Washington, DC.

For Motorola Mobility, Inc., Defendant: Alexander Rudis, Edward John DeFranco, LEAD ATTORNEYS, Quinn Emanuel Urquhart & Sullivan, New York, NY; Brian C. Cannon, Meghan Bordonaro, Melissa N Chan, Robert William Stone, Thomas R. Watson, LEAD ATTORNEYS, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, LLP, Redwood Shores, **[**2]** CA; Carlos A Rodriguez, Richard W Erwine, LEAD ATTORNEYS, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, New York, NY; David A Nelson, Jennifer A Bauer, LEAD ATTORNEYS, Amanda Scott Williamson, Quinn Emanuel Urquhart & Sullivan LLP, Chicago, IL; David L. Shaul, Linda J Brewer, LEAD ATTORNEYS, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan LLP, San Francisco, CA; Kathleen Marie Sullivan, LEAD ATTORNEY, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, LLP, New York, NY; Kevin Johnson, LEAD ATTORNEY, Quinn Emanuel Urquhart & Sullivan, LLP, Redwood Shores, CA; Lisa Nester Kass, LEAD ATTORNEY, Reinhart Boerner Van Deuren, s.c., Milwaukee, WI; Lynn Marie Stathas, LEAD ATTORNEY, Reinhart Boerner Van Deuren S.C., Madison, WI; Rebecca Frihart-Kennedy, Scott W. Hansen, LEAD ATTORNEYS, Reinhart Boerner Van Deuren s.c., Milwaukee, WI; David M. Elihu, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, LLP, New York, NY; Peter John Chassman, Winston & Strawn LLP, Houston, TX; Shawna Marie Reeder, PRO HAC VICE, QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP, Redwood Shores, CA; Stephen Andrew Swedlow, Thomas William Cushing, Quinn, Emanuel, Urquhart & Sullivan, LLP, Chicago, IL.

For Motorola Mobility, **[**3]** Inc., Counter Claimant: Alexander Rudis, Edward John DeFranco, LEAD ATTORNEYS, Quinn Emanuel Urquhart & Sullivan, New York, NY; Brian C. Cannon, LEAD ATTORNEY, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, LLP, Redwood Shores, CA; Carlos A Rodriguez, Richard W Erwine, LEAD ATTORNEYS, Quinn Emanuel Urquhart & Sullivan, New York, NY; David A Nelson, Jennifer A Bauer, LEAD ATTORNEYS, Amanda Scott Williamson, Quinn Emanuel Urquhart & Sullivan LLP, Chicago, IL; David L. Shaul, Linda J Brewer, LEAD ATTORNEYS, Quinn Emanuel Urquhart & Sullivan LLP, San Francisco, CA; Kathleen Marie Sullivan, LEAD ATTORNEY, Quinn Emanuel Urquhart & Sullivan, LLP, New York, NY; Kevin Johnson, Meghan Bordonaro, Melissa N Chan, Robert William Stone, Thomas R. Watson, LEAD ATTORNEYS, Quinn Emanuel Urquhart & Sullivan, LLP, Redwood Shores, CA; Lisa Nester Kass, LEAD ATTORNEY, Reinhart Boerner Van Deuren, s.c., Milwaukee, WI; Lynn Marie Stathas, LEAD ATTORNEY, Reinhart Boerner Van Deuren S.C., Madison, WI; Rebecca Frihart-Kennedy, Scott W. Hansen, LEAD ATTORNEYS, Reinhart Boerner Van Deuren s.c., Milwaukee, WI; David M. Elihu, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, LLP, New York, NY; Shawna Marie Reeder, **[**4]** PRO HAC VICE, QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP, Redwood Shores, CA; Stephen Andrew Swedlow, Thomas William Cushing, Quinn, Emanuel, Urquhart & Sullivan, LLP, Chicago, IL.

For Apple Inc., Counter Defendant: Robert T. Haslam, LEAD ATTORNEY, Covington & Burling LLP, Redwood Shores, CA; Azra M. Hadzimehmedovic, Tensegrity Law Group, LLP, Redwood Shores, CA; Carrie Anderson, Weil Gotshal & Manges, New York, NY; Catherine Cetrangolo, Cetra Law Firm, LLC, Madison, WI; Christine Saunders Haskett, Robert D. Fram, Samuel F. Ernst, Winslow B. Taub, Covington & Burling LLP, San Francisco, CA; Cortlin Hall Lannin, PRO HAC VICE, Covington & Burling LLP, San Francisco, CA; Deborah Ann Garza, PRO HAC VICE, Covington & Burling, LLP, Washington, DC; Mark G. Davis, Weil, Gotshal & Manges LLP, Washington, DC; Matthew D. Powers, Steven S. Cherensky, Tensegrity Law Group LLC, Redwood Shores, CA.

Judges: BARBARA B. CRABB, District Judge.

Opinion by: BARBARA B. CRABB

Opinion

[*1066] OPINION and ORDER

This case originated in the International Trade Commission, where defendant Motorola Mobility, Inc. filed an infringement action against plaintiff Apple, Inc., seeking an exclusion order that would have prevented Apple from selling its allegedly **[**5]** infringing products in the United States. After the case had been pending for a few months in the Commission, Apple filed several counterclaims against Motorola and removed the counterclaims to this court under *19 U.S.C. § 1337(c)*. In its counterclaims, Apple alleges that Motorola has engaged in a pattern of unfair, deceptive and anticompetitive conduct by failing to timely disclose ownership of patents that it now declares are essential to technological standards adopted by the industry and by failing to offer Apple licenses to those patents on fair, reasonable and nondiscriminatory terms.

Now before the court are the parties' cross motions for summary judgment. Motorola has moved for summary judgment on all of Apple's claims on a variety of grounds. Dkt. #150. Motorola contends that Apple's claims are barred by the doctrine of claim preclusion because Apple could have pursued them as defenses in the International Trade Commission. Motorola also contends that Apple's antitrust claims are barred by the applicable statute of limitations and by the Noerr-Pennington doctrine, which provides immunity from antitrust claims that are filed in response to nonfrivolous lawsuits. Finally, Motorola **[**6]** contends that Apple cannot prove the necessary elements of its tortious interference claim or its claims of unfair competition under California law and cannot prove that it suffered any damages compensable as contractual damages.

Apple has moved for partial summary judgment on specific issues relevant to its claims. Dkt. #143. In particular, Apple seeks determinations from the court that (1) Motorola's commitments to standards-setting organizations are contractually binding; (2) Apple has the right to enforce those contracts as a third-party beneficiary; (3) Motorola was required under the policies of the European Telecommunications Standards Institute (ETSI) to disclose its patents and patent applications before ETSI adopted technical standards incorporating technology covered by the patents or applications; and (4) Motorola did not disclose certain patents or applications until after ETSI adopted the standards incorporating technology from those patents.

After reviewing the parties' arguments and the facts in the record, I conclude that Motorola's motion must be granted in part and denied in part, and Apple's motion must be granted in full. With respect to Motorola's motion, I conclude **[**7]** that Apple's claims are not barred by the doctrine of claim preclusion, but that the Noerr-Pennington doctrine provides Motorola immunity from Apple's antitrust and unfair competition claims premised on Motorola's patent infringement litigation and from Apple's claims for declaratory judgment, to the extent that those claims are premised on a theory of antitrust or unfair competition. Because I conclude that **[*1067]** Noerr-Pennington immunity applies, I need not consider Motorola's statute of limitations argument.

Additionally, I conclude that Motorola is entitled to summary judgment on Apple's claim that Motorola tortiously interfered with its contract with Qualcomm, as well as Apple's claim under *Cal. Bus. & Prof. Code § 17200* based on the same theory, because Apple has failed to adduce any evidence showing that it suffered damages from Motorola's actions.

However, I conclude that Motorola has failed to show that Apple's breach of contract or estoppel claims should be dismissed for Apple's failure to prove that it suffered any compensable damages. Therefore, I will deny Motorola's motion as to that issue.

With respect to Apple's motion, I conclude that Motorola has failed to show that there **[**8]** is any genuine dispute of material fact regarding the existence of contracts between Motorola and standards-setting organizations; Apple's status as a third-party beneficiary of those contracts; Motorola's obligations to disclose its intellectual property rights in a timely manner; and Motorola's failure to disclose its patents and applications before the adoption of standards incorporating its patents. Therefore, I am granting Apple's motion for summary judgment in full.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. Wireless Communication Industry

Plaintiff Apple, Inc. and defendant Motorola Mobility, Inc. are competitors in the wireless communication industry. Motorola has been a player in the industry for longer than Apple and, since at least 1990, has been a member of numerous international standards-setting organizations devoted to the development of telecommunications and wireless standards. Through the standards-setting organizations, companies agree on common technological standards so that all compliant products will work together. Standards lower costs by increasing product manufacturing **[**9]** volume and increase price competition by eliminating the costs for consumers to switch between products manufactured by different firms.

Some technological standards incorporate patented technology. If a patent claims technology selected by a standards-setting organization, the patent is called an "essential patent." Many standards-setting organizations have adopted rules related to the disclosure and licensing of essential patents. The policies often require or encourage members of the organization to identify patents that are essential to a proposed standard and to agree to license their essential patents on fair, reasonable and nondiscriminatory terms to anyone who requests a license. (These terms are often referred to by the acronyms FRAND or RAND.) Such rules help to insure that standards do not allow the owners of essential patents to abuse their market power to extort competitors or prevent them from entering the marketplace.

Two standards-setting organizations are relevant to the motions before the court: The European Telecommunications Standards Institute, known as ETSI; and the Institute of Electrical and Electronics Engineers, known as IEEE. At all relevant times, Motorola **[**10]** has been a member of these standards-setting organizations and has participated in developing technological standards for the wireless communication industry. Both organizations have intellectual property rights policies that address disclosure and licensing of patents that are essential to standards being **[*1068]** considered or being adopted by the organizations. Additionally, Motorola has participated in the 3rd Generation Partnership Project, known as the 3G Project, which requires its members to abide by the intellectual property rights policies of ETSI and other standards-setting organizations.

1. European Telecommunications Standards Institute (ETSI)

ETSI is a standards-setting organization located in France that creates technological standards for the telecommunications industry. It has an intellectual property rights policy set forth in Annex 6 of its Rules of Procedure to govern the disclosure of intellectual property rights that are essential to standards being considered by ETSI. Dkt. #148-22. The policy defines "intellectual property right" as "any intellectual property right conferred by statute law including applications therefor. . . [but not] rights relating to . . . confidential **[**11]** information, trade secrets or the like." Id. § 15- 7. Since 1997, ETSI's policy has required members to disclose intellectual property that may be essential to standards. With minor variations, it has stated:

> [E]ach MEMBER shall use its reasonable endeavours, in particular during the development of a STANDARD or TECHNICAL SPECIFICATION where it participates, to inform ETSI of ESSENTIAL [intellectual property rights] in a timely fashion. In particular, a MEMBER submitting a technical proposal for a STANDARD or TECHNICAL SPECIFICATION shall, on a bona fide basis, draw the attention of ETSI to any of that MEMBER's [intellectual property rights] which might be ESSENTIAL if that proposal is adopted.

Id. § 4.1. The policy does not define "reasonable endeavours" or "bona fide basis." However, it is generally understood that members of ETSI should disclose intellectual property rights that they know are relevant to potential standards while the standard is being discussed and before the standard is adopted. Generally, the engineers working on the standards in working groups or technical meetings do not formally disclose intellectual property rights at those meetings. Whinnett Dep., dkt. #142, **[**12]** at 101; Brown Dep., dkt. #136 at 291; Smolinske Dep., dkt. #140, at 72-73. Rather, the owner of the intellectual property right files a formal disclosure with ETSI.

ETSI's intellectual property rights policy also addresses the availability of licenses to essential intellectual property rights. The policy requires the Director-General of ETSI to ask owners of essential patents to agree to "grant irrevocable licences on fair, reasonable and non-discriminatory terms and conditions." Id. § 6.1. Under ETSI's "Guide on Intellectual Property Rights," the owner of the intellectual property right should notify ETSI of its willingness to license by submitting an information and licensing declaration that identifies specific patents or pending applications that may be essential. Guide, dkt. #149-23, § 2.1.2. An owner may also use a general licensing declaration to notify ETSI that it is willing to grant licenses for any of its intellectual property rights that become essential to a standard. However, use of the general licensing declaration "does not take away the obligation for members to declare essential patents to ETSI." Id. Owners are not required to disclose any specific licensing terms **[**13]** and ETSI's policies provide that "[s]pecific licensing terms and negotiations are commercial issues between the companies and shall not be addressed within ETSI." Id. § 4.1.

If a patent owner tells ETSI that it is not prepared to license one of its patents **[*1069]** that is relevant to a standard, ETSI's General Assembly reviews the requirements for that standard to determine whether "a viable alternative technology is available for the standard or technical specification" that is "not blocked by that [patent]." Dkt. #148-22, § 8.1.1. If the General Assembly concludes that no such viable alternative technology exists, ETSI "shall cease" work on the standard. Id. § 8.1.2. If the owner who is refusing to grant a licensee is a member of ETSI, the Director-General of ETSI asks the member to reconsider its position or provide a written explanation of its reasons for refusing to license its patents. Id. The Director-General forwards the written explanation to "ETSI Counselors for their consideration." Id.

The objective of ETSI's intellectual property rights policy is to

> reduce the risk to ETSI, MEMBERS, and others applying ETSI STANDARDS and TECHNICAL SPECIFICATIONS, that investment in the preparation, **[**14]** adoption and application of STANDARDS could

> be wasted as a result of an ESSENTIAL [intellectual property right] for a STANDARD or TECHNICAL SPECIFICATION being unavailable. In achieving this objective, the ETSI [intellectual property rights policy] seeks a balance between the needs of standardization for public use in the field of telecommunications and the rights of the owners of [intellectual property rights].

Id. § 3.1. The policy goes on to state that ETSI "shall take reasonable measures to ensure, as far as possible," that standards and technical specifications will "be available to potential users." Id. § 3.3.

ETSI's bylaws provide that any violation of the policy by an ETSI member "shall be deemed to be a breach, by that MEMBER, of its obligations to ETSI. The ETSI General Assembly shall have the authority to decide the action to be taken, if any, against the MEMBER in breach, in accordance with ETSI Statutes." Id. § 14.

2. The Institute of Electrical and Electronics Engineers (IEEE)

IEEE is a standards-setting organization responsible for the standardization of wireless information exchange among systems and networks. IEEE's bylaws in place from December 1993 through December 1995 **[**15]** provided that "IEEE standards may include patented technology if there is no equivalent noninfringing way of achieving the objectives of the standard, if it is justified for technical reasons, and if the patent holder agrees to nondiscriminatory licensing at reasonable rates." Dkt. #148-23, § 5.

Between 1996 and 2005, IEEE requested owners of intellectual property rights that are essential to declared standards to submit a letter of assurance that was either a general disclaimer of their right to enforce patent claims against anyone practicing the standards or an agreement to license patent rights "without compensation or under reasonable rates, with reasonable terms and conditions that are demonstrably free of any unfair discrimination." Dkt. #148-26, § 6.

The policies that were approved in February 2011 state that "[n]o license is implied by the submission of a Letter of Assurance," dkt. #7-12, § 6.2, and that IEEE is "not responsible for identifying Essential Patent Claims for which a license may be required, for conducting inquiries into the legal validity or scope of those Patent Claims, or for determining whether any licensing terms or conditions provided in connection with submission **[**16]** of a Letter of Assurance, if any, or in any licensing agreements are reasonable or non-discriminatory." Id.

[*1070] B. Motorola's Disclosure of Essential Patents and Commitments to License

Motorola has declared that its United States Patent Nos. 5,636,223 (the '223 patent), 5,311,516 (the '516 patent), 5,572,193 (the '193 patent), and the 5,319,712 (the '712 patent) are essential to the practice of the 802.11 wireless communication standard adopted by IEEE. In 1994, Motorola submitted a declaration to IEEE, stating that Motorola agreed to license any patents essential to the 802.11 standard "on a non-discriminatory basis offering fair and commercially reasonable terms." Dkt. #148-28.

In 2002, Motorola submitted declarations to ETSI and the 3G Project that its 6,175,559 (the '559 patent), 6,246,697 (the '697 patent) and 898 patents (the '898 patent) are essential or potentially essential to standards adopted by ETSI and the 3G Project. As to the '559 and '697 patents, Motorola declared in a December 20, 2002 letter to ETSI that it "is prepared to grant irrevocable licenses on fair, reasonable and nondiscriminatory terms and conditions under such [patents], to the extent that the [patents] **[**17]** remain essential." Dkt. #148-6. As to the '898 patent, Motorola declared to ETSI in 2003 that it was "prepared to grant irrevocable licenses under the [patents] on terms and conditions which are in accordance with Clause 6.1 of the ETSI [intellectual property rights] Policy, in respect of the STANDARD, to the extent that the [patents] remain ESSENTIAL." Dkt. #148-3.

C. Timeliness of Motorola's Disclosures

1. '697 patent

Motorola filed the application that led to the '697 patent on January 24, 1998. In March 1998, Motorola submitted a proposal using the '697 patent's technology to SMG2, the working group developing a portion of the 3GPP standard for the 3G Project. One of the inventors of the '697 patent, Motorola employee Nicolas Whinnett, participated in SMG2 meetings at that time. Motorola did not disclose the '697 patent or application to ETSI, a partner in the 3G Project, or to the SMG2 working group.

In July 1999, the '697 patent inventors wrote an article discussing the technology of the '697 patent. They filed applications for foreign counterparts of the '697 patent that were published on July 29, 1999 and November 22, 2000.

The 3GPP standard, including technology covered by the '697 patent, **[**18]** was adopted by the 3G Project in December 1999. The '697 patent issued on June 12, 2001. Motorola disclosed the '697 patent to ETSI on September 20, 2002.

2. '559 patent

Motorola filed the application that led to the '559 patent on July 7, 1999. On July 13-16, 1999 at an ETSI meeting in Finland, Tyler Brown, a representative of Motorola and the sole inventor of the '559 patent, proposed including technology covered by the '559 patent in a portion of ETSI's Universal Mobile Telecommunications System standard (known as the UMTS standard). Motorola did not disclose the '559 application. In March 2000, the relevant section of the standard was finalized and adopted. The '559 patent issued on January 16, 2001. Motorola disclosed the '559 patent as essential to the standard in September 2002.

3. '898 patent

Motorola filed a provisional, unpublished application that led to the '898 patent on September 2, 1997. At a meeting in Sophia Antipolis, France, in November 1997, Motorola submitted "Contribution A330" to the ETSI working group developing a portion of the GPRS Technical Specification. **[*1071]** Motorola's Contribution A330 was created, in part, by two inventors of the '898 patent and it disclosed in **[**19]** nearly verbatim form the same technology that was described in a portion of the specification of the September 1997 patent application. On March 11, 1999, Motorola's application that resulted in the '898 patent was published when Motorola applied for foreign counterparts to the application. In April 2001, ETSI published the portion of the GPRS standard that incorporated the ideas from Motorola's Contribution A330.

The '898 patent issued on March 19, 2002. Motorola disclosed the '898 patent to ETSI on April 8, 2003.

D. Negotiations for Licensing between Apple and Motorola

In 2005, Apple began developing the iPhone. No later than mid-2006, Apple became aware that Motorola had declared patents essential to cellular standards. Apple released its iPhone in 2007 without seeking a patent license from Motorola.

In August 2007, Motorola offered Apple a license to its essential patents. At the initial meeting between the companies, Motorola presented information to Apple concerning its licensing program and stated that its standard royalty rate was 2.25% for a worldwide license to its portfolio of standards-essential patents. Apple rejected the 2.25% rate. Motorola continued to engage in license **[**20]** negotiations with Apple for approximately three years, but Apple refused to accept a license on any terms offered by Motorola.

E. Motorola's Termination of the Qualcomm License

Apple entered into a "Strategic Terms Agreement" with Qualcomm on December 16, 2009. Dkt. #153-40. The agreement set terms on which "certain Apple authorized purchasers may purchase certain components from time to time from" a Qualcomm affiliate "for use and incorporation in Apple products." Id. at 1. Among these components are chipsets that allow mobile devices to communicate via cellular networks, including the baseband processor incorporated into the iPhone 4S. The chipsets incorporated technology that Qualcomm had licensed from Motorola since 1990. The Strategic Terms Agreement did not require Apple or any of its affiliates to actually purchase chipsets and also did not guarantee that the chipsets or any other components supplied by Qualcomm would be licensed under Motorola's or any other patent holder's patents.

On January 11, 2011, the day Apple announced the Verizon iPhone 4, Motorola sent a letter to Qualcomm, with a copy to Apple, stating that Motorola was terminating any and all license and covenant rights **[**21]** with respect to Qualcomm's business with Apple, effective February 10, 2011.

PROCEDURAL HISTORY

A. Related Cases

This particular dispute is related to three other proceedings. First, there is the investigation pending in the International Trade Commission that defendant Motorola initiated on October 6, 2010. In the Matter of Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof, ITC Investigation No. 337-TA-745. In that case, Motorola sought an exclusion order and a permanent cease and desist order as a result of plaintiff Apple's alleged infringement of several of Motorola's United States patents, including the '697 and '223 patents.

As part of its original defenses in the International Trade Commission action, Apple argued that Motorola should be barred from enforcing its patents because it had unclean hands and had failed to offer licenses on fair, reasonable and nondiscriminatory terms. In July 20, 2011, **[*1072]** Apple notified the commission that it would "not be pursuing as part of the 745 investigation any affirmative defenses based on Motorola's failure to make a [fair reasonable and nondiscriminatory] Offer," but that it was **[**22]** "specifically reserv[ing] the right . . . to pursue any of these defenses . . . and claims related to them in other actions, including for example, the 661, 662, and 178 actions pending in Wisconsin." Dkt. #153-35.

On April 24, 2012, the administrative law judge issued a preliminary ruling in the International Trade Commission action, finding Motorola's '697 patent valid and infringed by Apple. Dkt. #153-34. (Before this determination, Motorola abandoned its infringement claims as to some of its patents.) The administrative law judge rejected Apple's unclean hands defense, noting that Apple had no "proof that any act of Motorola actually caused any harm (to anyone)." Id. at 151.

Second (and third), the parties are litigating their disputes in two other patent infringement cases filed in this court. Plaintiff Apple filed case number 10-cv-661-bbc on October 29, 2010, asserting patent infringement claims against Motorola. On November 9, 2010, Motorola filed counterclaims in the '661 action alleging infringement of the same patents at issue in the International Trade Commission's 337-TA-745 investigation. On December 2, 2010, this court granted the parties' joint motion to stay the '661 **[**23]** case in favor of the proceedings in the commission. The case remains stayed.

Also on October 29, 2010, plaintiff Apple filed case number 10-cv-662-bbc in this court, asserting patent infringement claims against Motorola. On November 9, 2010, Motorola filed counterclaims against Apple for infringement of several of its United States patents, including the '516, '712, '230, '193, '559 and '898 patents, all of which Motorola has declared essential to certain standards adopted in the wireless communications industry. The 10-cv-662 case was transferred to the Northern District of Illinois in December 2011., where the case was dismissed with prejudice on June 22, 2012. The court found that Motorola's patents were either invalid, not infringed by Apple or that Motorola could not prove the amount of damages to which it was entitled. *Apple, Inc. v. Motorola, Inc., 869 F. Supp. 2d 901, 2012 U.S. Dist. LEXIS 89960, 2012 WL 2376664 (N.D. Ill. June 22, 2012)*.

B. The Case at Issue (11-cv-178-bbc)

Shortly after Apple removed this case to federal court, it moved for preliminary injunctive relief, seeking an order that would have enjoined Motorola from (1) proceeding as a party in the 337-TA-745 investigation in the International Trade Commission with **[**24]** respect to the '223 and '697 patents; (2) proceeding with its counterclaims filed in case number 10-cv-662-bbc in this court with respect to the '712, '230, '193, '559 and '898 patents; and (3) selectively terminating its patent license agreement with Qualcomm as to Apple. A hearing was held on the motion on April 26, 2011. At the conclusion of the hearing, I denied Apple's motion for a preliminary injunction.

Motorola filed a motion to dismiss Apple's claims, which I granted only with respect to Apple's claim of waiver. Apple has the following 10 claims remaining in the case:

• Equitable estoppel (Count 1)

• Breach of contract with ETSI/3GPP (Count 2)

• Breach of contract with ETSI/3GPP to which Apple is a third party beneficiary (Count 3)

• Breach of contract with IEEE to which Apple is a third party beneficiary (Count 4)

[*1073] • False commitments to license on fair, reasonable and nondiscriminatory terms and deceptive acts in violation of *§ 2* of the Sherman Act (Count 5)

• Unfair competition and unlawful business practices in violation of *Cal. Bus. & Prof. Code § 17200* (Count 6)

• Declaratory judgment that Motorola's offers have not been on fair, reasonable and nondiscriminatory terms (Count **[**25]** 7)

• Declaratory judgment on no entitlement to injunctive relief (Count 11)

• Declaratory judgment of patent misuse (Count 12)

• Interference with contract (Count 13)

Apple's Am. Cpt., dkt. #110.

OPINION

A. Motorola's Motion for Summary Judgment

1. Claim preclusion

Motorola contends that all of Apple's claims are barred by the doctrine of "res judicata" because Apple could have raised them in the International Trade Commission as defenses to Motorola's infringement claims, or did raise them there and they were rejected. Specifically, in the International Trade Commission action, Apple abandoned its argument that Motorola's patents were unenforceable because Motorola refused to license its patents on reasonable and nondiscriminatory terms. Apple did argue that Motorola's '697 patent was unenforceable under the doctrine of "unclean hands," but the administrative law judge rejected the argument and found that the '697 patent was valid and had been infringed by Apple.

Res judicata is the traditional term for the doctrine of claim preclusion, but is sometimes used generally to refer to both claim and issue preclusion. *Hayes v. City of Chicago, 670 F.3d 810, 814 n.1 (7th Cir. 2012)*. Motorola does **[**26]** not identify whether it is intending to invoke claim or issue preclusion, but the majority of cases it cites concern claim preclusion. Thus, I am assuming that Motorola is arguing for the application of claim preclusion.

Claim preclusion "prohibits litigants from relitigating claims that were or could have been litigated during an earlier proceeding." *Id. at 813*. The case on which Motorola relies primarily is *Martino v. McDonald's System, Inc., 598 F.2d 1079 (7th Cir. 1979)*, in which the court of appeals held that the plaintiff was barred from bringing an antitrust claim that would have undermined a previous consent judgment issued by a federal district court against the plaintiff. *Id. at 1083*. The court explained that "res judicata . . . treats a judgment on the merits as an absolute bar to relitigation between the parties . . . of every matter offered and received to sustain or defeat the claim or demand and to every matter which might have been received for that purpose." Id.

This case is distinguishable from *Martino* and the other cases cited by Motorola. In Martino, the plaintiff was attempting to attack a judgment issued by a federal court; in this case, Apple is asserting counterclaims **[**27]** that have the potential to undermine the International Trade Commission's decision regarding Apple's infringement of

Motorola's patents. It is well established law that decisions of the International Trade Commission on issues of patent validity and enforceability are not entitled to preclusive effect. E.g., *Powertech Technology Inc. v. Tessera, Inc., 660 F.3d 1301, 1308 (Fed. Cir. 2011)* ("resolution of the ITC action will not have preclusive effect" on district court action); *Bio-Technology General Corp. v. Genentech, Inc., 80 F.3d 1553, 1564 (Fed. Cir. 1996)*; *Texas Instruments Inc. v. Cypress Semiconductor Corp., 90 F.3d 1558, 1569 (Fed. Cir. 1996)*; *Texas Instruments Inc. v.* **[*1074]** *International Trade Commission, 851 F.2d 342, 344 (Fed. Cir. 1988)*.

Motorola argues that the general rule against granting preclusive effect to International Trade Commission determinations does not apply here because there is no rule barring a district court from giving preclusive effect to the commission's decisions on "non-patent" issues, such as Apple's antitrust, estoppel and contract claims. Motorola cites three cases that it believes support its position. In the first two cases, *Aunyx Corp. v. Canon U.S.A., Inc., 978 F.2d 3, 7 (1st Cir. 1992)* **[**28]** and *Baltimore Luggage Co. v. Samsonite Corp., 1992 U.S. App. LEXIS 27493, 1992 WL 296368, *4 (4th Cir. 1992)*, the courts held that it was appropriate to give preclusive effect to commission decisions concerning antitrust and unfair competition. However, neither of those cases is particularly useful because neither involved decisions from the commission arising out of patent disputes.

The third case cited by Motorola, *Telectronics Proprietary, Ltd. v. Medtronic, Inc., 687 F. Supp. 832 (S.D.N.Y. 1988)*, is more helpful to its position. In Telectronics, the district court concluded that it was appropriate to apply issue preclusion to the commission's determination regarding a license defense to a patent dispute. The court distinguished between different types of defenses to patent infringement, stating that "[u]nlike invalidity and unenforeability, noninfringement is not a defense based on the validity of a patent. Rather, it is a defense based on a contractual right to use the patent, or on defendant's lack of use of the patent." *Id. at 846, n.40*. The court concluded that "the ITC's determination as regards the existence of a license under a patent . . . was not one of the validity of a patent but of the existence **[**29]** of a contract" and should be "accorded preclusive effect." *Id. at 845-46*.

However, unlike the district court in *Telectronics*, the Court of Appeals for the Federal Circuit has not distinguished between types of defenses to patent infringement when discussing the preclusive effect of International Trade Commission decisions. As the court of appeals explained in *Texas Instruments, 90 F.3d at 1569*, "once we accept . . . that ITC decisions are not binding on district courts in subsequent cases brought before them, it necessarily follows that accused infringers can raise *whatever defenses they believe are justified*, regardless whether they previously raised them and lost in the ITC." (Emphasis added). See also *Epistar Corp. v. Philips Lumileds Lighting Co., 2008 U.S. Dist. LEXIS 79448, 2008 WL 3930030, *2-4 (N.D. Cal. Aug. 26, 2008)* (patent defendant not precluded from raising defenses of license and covenant not to sue in district court patent infringement action even though it had waived those defenses in International Trade Commission).

In Texas Instruments, the court of appeals recognized that any defense an alleged infringer raises is properly treated as a "patent issue" for purposes of determining whether preclusion **[**30]** principles should apply. In this case, it is clear from Motorola's arguments that it is seeking to give preclusive effect to the International Trade Commission's decision on "patent issues." By seeking to bar Apple from presenting any claim that would undermine the commission's determination of validity and infringement, in effect, Motorola is asking the court to give preclusive affect to the commission's conclusions regarding the enforceability of Motorola's patents. Motorola admits as much in its brief, stating that the defenses that Apple abandoned in the commission challenged whether "the patents are unenforceable." Motorola's Br., dkt. #151, at 5.

Motorola attempts to avoid the rule of Texas Instruments by arguing that the rule against giving preclusive affect to **[*1075]** commission decisions applies only when an alleged patent infringer is facing parallel infringement claims before the commission and district court. Motorola contends that this case is different because Apple has not challenged Motorola's patent disclosures and licensing offers as defenses to an infringement claim, but as affirmative claims that constitute a direct attack on the commission's decisions. However, Motorola **[**31]** cites no cases suggesting that a commission decision should be given preclusive effect in some types of district court cases and not others.

Moreover, Motorola's claim preclusion argument fails for another reason. The claims Apple is pursuing in this case originated as "counterclaims" in the International Trade Commission that were subject to mandatory removal. *19 U.S.C. § 1337(c)*; *19 C.F.R. § 210.14(e)*. Thus, the commission never had jurisdiction to hear Apple's counterclaims or to grant the type of relief that Apple is seeking in this case. The doctrine of claim preclusion does not bar a party from asserting claims that could not have been raised in a previous proceeding. *Carver v. Nall, 172 F.3d 513, 516 (7th Cir. 1999)* ("Claim preclusion does not operate so harshly as to bar whichever set of claims the chosen forum could not hear."). See also *Bio-Technology, 80 F.3d at 1563* ("[T]he bar against later claims based on the same transactional facts is 'subject to certain limitations, one of which is that it will not be applied if the initial forum did not have the power to award the full measure of relief sought in the later litigation.'") (citation omitted). Accordingly, Motorola is **[**32]** not entitled to summary judgment on the basis of claim preclusion.

2. Noerr-Pennington doctrine

Next, Motorola contends that all of Apple's claims are barred by the *First Amendment* under the Noerr-Pennington doctrine. The *First Amendment* protects "the right of the people . . . to petition the Government for a redress of grievances." *U.S. Const. amend. I*. Under the Noerr-Pennington doctrine, a party that exercises its *First Amendment* right to petition the government for redress generally is immune from antitrust liability premised on the petition. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers of America v. Pennington, 381 U.S. 657, 670, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965))*. This includes a party who brings a legitimate dispute to the courts for judicial resolution. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 56, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*; *California Motor Transportation Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*. However, petitioning conduct is not immune if it is a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor." *Noerr, 365 U.S. at 144*. **[**33]** Motorola contends that Apple's claims in this case are based solely on Motorola's patent litigation in the International Trade Commission and district court, and that because its patent litigation is protected petitioning activity, Motorola is immune from liability on Apple's claims.

Apple does not deny that initiating and prosecuting a patent infringement action is the type of petitioning activity protected by the Noerr-Pennington doctrine, and several courts have reached the same conclusion. See, e.g., *ERBE Elektromedizin GmbH v. Canady Technology LLC, 629 F.3d 1278, 1292 (Fed. Cir. 2010)*; *Monolithic Power Systems, Inc. v. O2 Micro International Ltd., 2007 U.S. Dist. LEXIS 22556, 2007 WL 801886, *6 (N.D. Cal. Mar. 14, 2007)*; *Hynix Semiconductor Inc. v. Rambus, Inc., 2006 U.S. Dist. LEXIS 48884, 2006 WL **[*1076]** 1883353, *1-2 (N.D. Cal. July 7, 2006)*; *In re Relafen Antitrust Litigation, 360 F. Supp. 2d 166, 177-78 (D. Mass. 2005)*. However, Apple contends that the immunity does not apply to any of its claims because they are not based on Motorola's petitioning activity.

a. Apple's antitrust claim

Apple contends that its claim under *§ 2* of the Sherman Act arises out of Motorola's "abuse of the standard-setting process" and "Motorola's deceptive conduct **[**34]** and failure to offer a [fair, reasonable and nondiscriminatory] license." Apple's Br., dkt. #167, at 6. In support of its argument, Apple cites *ERBE Elektromedizin, 629 F.3d at 1292*, in which the Court of Appeals for the Federal Circuit explained that a party's assertion of non-sham claims for "patent infringement, trademark, and trade dress" was protected by Noerr-Pennington from antitrust liability, but that other conduct, including "interfering with and inhibiting the development and marketing of [disputed products], and interfering with . . . contracts and business expectations," could be a basis for antitrust liability. *Id. at 1292-93*. See also *Hynix Semiconductor, 2006 U.S. Dist. LEXIS 48884, 2006 WL 1883353, at *2* (holding that Noerr-Pennington immunity applies only to protected litigation-related activities, but would not immunize defendant from antitrust claims premised on broader unlawful course of anticompetitive conduct).

The problem for Apple is that its allegations and arguments make clear that its antitrust claim is necessarily based on Motorola's patent litigation. In its brief, Apple contends that its antitrust claim arose sometime in 2007, when Motorola offered it a license with exorbitant royalty **[**35]** rates. Apple's Br., dkt. #167, at 13 (Apple's injury "could not have arisen until, at the very earliest, Motorola made its first royalty demand in September 2007"). However, Apple has presented no evidence that it suffered any antitrust injury as a result of Motorola's license demand. It is well established law that a party can sustain an antitrust claim only if it has suffered an antitrust injury. *In re Copper Antitrust Litigation, 436 F.3d 782, 789 (7th Cir. 2006)* ("[A]n antitrust cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.") (citation omitted); *Warren General Hospital v. Amgen Inc., 643 F.3d 77, 92 (3d Cir. 2011)* ("It is a basic tenet of ***antitrust law*** that a cause of action will not lie if the plaintiff has not been harmed.").

In this case, it is undisputed that Apple refused to pay the 2.25% royalty rate that Motorola demanded and continued to manufacture and market its products despite Motorola's demands. Apple has produced no evidence or argument suggesting that Motorola's licensing demand caused Apple to change its product, delay the release of the iPhone, suffer from increased costs or lose any customers **[**36]** or market share. Instead, the only injury Apple suffered as a result of Motorola's alleged antitrust violation was the attorney fees and costs that it has incurred responding to the patent litigation initiated by Motorola. Apple's damages expert identifies no other damages except litigation fees and expenses. Thus, Apple's antitrust claim is premised on Motorola's attempt to enforce its patents. Because Motorola's enforcement of its patents is privileged conduct protected by the *First Amendment*, the Noerr-Pennington doctrine applies. *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc., 944 F.2d 1525, 1529 (9th Cir. 1991)* (holding that defendant was immune from antitrust liability under Noerr-Pennington because all of plaintiff's claimed antitrust injuries were caused by defendant's enforcement of copyrights, not by defendant's refusal to license its copyrighted work).

[*1077] Apple devotes one paragraph in its brief to the argument that Motorola may not be entitled to Noerr-Pennington immunity because its patent infringement claims may fall under the "sham" exception to the doctrine. Apple's Br., dkt. #167, at 9. As the party asserting the sham exception, Apple has **[**37]** the burden of showing that it should apply. *IGEN International, Inc. v. Roche Diagnostics GmbH, 335 F.3d 303, 312 (4th Cir. 2003)*; *USS—POSCO Industries v. Contra Costa County Building & Construction Trades Council, AFL—CIO, 31 F.3d 800, 811 (9th Cir. 1994)*. A petition or lawsuit may be considered a "sham" if it is (1) "objectively baseless"; and (2) subjectively motivated by a desire to impose anticompetitive harm from the judicial process rather than obtain judicial relief. *Professional Real Estate Investors, 508 U.S. at 61, 65*. Apple makes no real attempt to satisfy either prong, stating only that Motorola has dropped two of its patent infringement claims and three others were found to be invalid or not infringed. However, the fact that some or even all of Motorola's patent infringement claims were unsuccessful is not sufficient on its own to show that Motorola's claims are "objectively baseless," particularly in light of the preliminary finding of the International Trade Commission that Apple infringed one of Motorola's patents. Simply stating, without factual support, that Motorola's patent litigation may be a sham is not sufficient to raise a genuine issue of material fact regarding **[**38]** the sham exception. Accordingly, I find that Motorola is immune from Apple's antitrust claim.

b. Apple's claims under *Cal. Bus. & Prof. Code § 17200*

Apple has two theories to support its claim of unfair competition and unlawful business practices in violation of *Cal. Bus. & Prof. Code § 17200* (count 6). First, Apple contends that Motorola engaged in unlawful business practices when it interfered with Motorola's contract with Qualcomm. The Noerr-Pennington doctrine is not applicable to that theory because Motorola's actions toward Qualcomm are separate and distinct from Motorola's protected activity of patent litigation. However, Apple's second theory of liability in count 6 is premised on the same allegations as its antitrust claim under *§ 2* of the Sherman Act. In particular, Apple contends that Motorola engaged in unfair competition when it promised standards-setting organizations that it would disclose essential patents and license those patents on reasonable and nondiscriminatory terms, and later failed to disclose the patents in a timely manner, refused to offer Apple a reasonable and nondiscriminatory license and sued Apple for patent infringement.

As with Apple's antitrust claim, **[**39]** a violation of *Cal. Bus. & Prof. Code § 17200*, requires showing that the unfair practice caused the plaintiff an economic injury. *Kwikset Corp. v. Superior Ct., 51 Cal. 4th 310, 120 Cal. Rptr. 3d 741, 246 P.3d 877, 884-85* (holding that party asserting unfair competition or unlawful business practices claim must "establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury . . . and show that that economic injury was the result of, i.e., caused by, the unfair business practice . . . that is the gravamen of the claim"). The only economic injury Apple suffered is the cost of defending itself from Motorola's infringement claims. Thus, Motorola is immune from Apple's unfair competition claim that is premised on the same theory as Apple's antitrust claim. *Monolithic Power Systems, 2007 U.S. Dist. LEXIS 22556, 2007 WL 801886, at *6* (holding that Noerr-Pennington can provide immunity against California unfair competition claims).

[*1078] c. Apple's other claims

Motorola contends that the Noerr-Pennington doctrine provides immunity not just to Apple's statutory antitrust and unfair competition claims, but to Apple's contract and tort claims also. As Motorola points out, courts have applied the Noerr-Pennington doctrine **[**40]** outside the antitrust context. *Theme Promotions, Inc. v. News America Marketing FSI, 546 F.3d 991, 1006-1007 (9th Cir. 2008)* (applying doctrine to claim for tortious interference with prospective economic advantage under California law); *International Brotherhood of Teamsters v. Philip Morris Inc., 196 F.3d 818, 826 (7th Cir. 1999)* (applying Noerr-Pennington immunity to protect petitioning activity from liability for RICO suits); *Tarpley v. Keistler, 188 F.3d 788, 794 (7th Cir. 1999)* (applying doctrine to § 1983 claims); *Video International Production, Inc. v. Warner—Amex Cable Communications, Inc., 858 F.2d 1075, 1084 (5th Cir. 1988)* (applying doctrine to state law claim for tortious interference with contract). Courts have reasoned that because the Noerr-Pennington doctrine derives from the *First Amendment*, it should be applied broadly to protect the right to petition the government. *New West, L.P. v. City of Joliet, 491 F.3d 717, 722 (7th Cir. 2007)* ("Noerr-Pennington has been extended beyond the antitrust laws, where it originated, and is today understood as an application of the *first amendment's* speech and petitioning clauses."); *White v. Lee, 227 F.3d 1214, 1231 (9th Cir. 2000)* **[**41]** (explaining that because "Noerr-Pennington is a label for a form of *First Amendment* protection . . . to say that one does not have Noerr-Pennington immunity is to conclude that one's petitioning activity is unprotected by the *First Amendment*"); *Kottle v. Northwest Kidney Centers, 146 F.3d 1056, 1059 (9th Cir. 1998)* ("the doctrine is a direct application of the Petition Clause").

However, Motorola has cited no authority for the proposition that the Noerr-Pennington doctrine should apply to Apple's breach of contract claims (counts 2, 3, and 4), and I conclude that applying immunity to Motorola from Apple's breach of contract claims is not appropriate. Although the *First Amendment* protects Motorola's right to petition the courts to enforce its patents, Apple's breach of contract claims are based on the theory that Motorola agreed by contract that it would not enforce its patent rights until it offered a license to Apple on fair, reasonable and nondiscriminatory terms. In other words, Apple contends that Motorola waived some of its petitioning rights through contract. It would be improper to use the Noerr-Pennington doctrine to bar Apple from enforcing that contract. *Powertech Technology, Inc. v. Tessera, Inc., 872 F. Supp. 2d 924, 2012 U.S. Dist. LEXIS 70630, 2012 WL 1835699, *5 (N.D. Cal. May 21, 2012)* **[**42]** (concluding that Noerr-Pennington does not provide immunity against breach of contract claims).

Similarly, Motorola has failed to cite any authority or develop any argument for applying Noerr-Pennington to Apple's equitable estoppel claim (count 1), which appears to be an alternative claim to its breach of contract claims. Because Motorola failed to develop any argument about why it should be immune from the equitable estoppel claim or why the estoppel claim should be treated differently from the contract claim, I will not apply Noerr-Pennington to the equitable estoppel claim. Cf. *Garg v. Potter, 521 F.3d 731, 736 (7th Cir. 2008)* (explaining that undeveloped arguments are waived).

As to Apple's tortious interference with contract claim (count 13), it is clear that this claim is not premised on Motorola's patent litigation. Rather, it is premised on Motorola's actions in relation to **[*1079]** Qualcomm. Therefore, the *Noerr-Pennington* doctrine does not apply to that claim.

Finally, I note that Apple asserts three claims for declaratory judgment in its amended complaint. Apple seeks declarations that the terms of the license offered by Motorola to Apple were not fair, reasonable and nondiscriminatory **[**43]** (count 7); Motorola is not entitled to injunctive relief on its patent infringement claims (count 11); and Motorola misused its patents by promising to offer fair licenses and then failing to do so (count 12). It is not clear from Apple's complaint whether its claims for declaratory judgment are based on a contract theory or an antitrust theory. To the extent that they are based on an antitrust theory, Motorola is immune under the Noerr-Pennington doctrine. To the extent that they are based on Apple's breach of contract theory or estoppel theory, they may proceed.

In sum, I am granting Motorola's motion for summary judgment on Apple's antitrust claim (count 5), its claim for unfair competition in violation of Cal. Bus. & Prof. Code § 17200 (count 6) as related to Motorola's licensing and disclosure obligations, and its claims for declaratory relief (counts 7, 11 and 12) to the extent they are based on antitrust or unfair competition theories of liability. Motorola is immune from liability for these claims under the Noerr-Pennington doctrine. I am denying Motorola's motion under the Noerr-Pennington doctrine with respect to Apple's remaining claims.

Because I am dismissing Apple's antitrust **[**44]** claim, I need not consider Motorola's argument that the antitrust claim is barred by the statute of limitations.

3. Apple's tortious interference with contract claim

Motorola has moved for summary judgment on Apple's claim that Motorola tortiously and unlawfully interfered with the Strategic Terms Agreement that Apple had entered into with Qualcomm in December 2009. Apple's Am. Cpt., dkt. #110, ¶¶ 190-195 (count 13). Under that agreement, Apple and Qualcomm agreed to terms under which Apple could purchase chipsets that would be used in Apple's products. The chipsets incorporated Motorola's patented technology, and Motorola and Qualcomm had entered into a separate licensing agreement regarding the chipsets. Apple contends that Motorola committed the tort of interference with contract by terminating license and covenant rights with respect to Apple.

Apple and Qualcomm are both headquartered in California and both Apple and Motorola assume California law applies to Apple's tortious interference claim. Thus, I will apply California law. *Auto-Owners Insurance Co. v. Websolv Computing, Inc., 580 F.3d 543, 547 (7th Cir. 2009)* ("Courts do not worry about conflict of laws unless the parties disagree **[**45]** on which state's law applies.") (citation omitted). To establish the tort of intentional interference with contract under California law, a plaintiff must show:

> (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.

Pacific Gas & Electric Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587 (Cal. 1990).

Motorola contends it is entitled to summary judgment on Apple's tortious interference claim because Apple cannot establish the last two elements of its claim. Specifically, Motorola contends that Apple has not shown that either it or Qualcomm **[*1080]** breached the Strategic Terms Agreement or that the agreement was otherwise disrupted and that Apple cannot show that it has suffered any injury as a result of Motorola's terminating its license and covenant rights with respect to Apple.

I agree with Motorola. Apple concedes that Motorola's decision to terminate license rights with respect to Apple did not cause Apple or Qualcomm to breach the **[**46]** Strategic Terms Agreement. Motorola's actions did not affect the terms of the agreement itself, because the agreement never purported to guarantee that Qualcomm's chipsets were covered by licenses to third-party patents. Additionally, Apple admits that it has continued to purchase chipsets from Qualcomm under the agreement. Apple's Br., dkt. #167, at 30. Apple does not contend that Motorola's actions have made the chipsets more expensive, that it has been forced to seek chipsets from a different manufacturer or that it has incurred additional licensing fees in response to Motorola's decision to terminate any license and covenant rights Apple may have enjoyed under Motorola's agreement with Qualcomm. In fact, Apple does not even submit evidence about what benefits it would have enjoyed under the licensing agreement and whether it would have paid Qualcomm or Motorola any licensing fees on top of what it paid Qualcomm for chipsets, if Motorola had not terminated license and covenant rights with respect to Apple. Apple implies that the chipsets would have been covered under the Qualcomm's licensing agreement with Motorola, but submits no evidence on the issue.

Apple contends that even though **[**47]** Motorola's actions have not interrupted performance of the contract between Apple and Qualcomm, Motorola's actions constituted tortious interference because they have made performance of the contract "more expensive and burdensome." *Pacific Gas & Electric, 50 Cal. 3d at 1127* ("interference which makes enjoyment of a contract more expensive or burdensome may be actionable"). However, Apple has adduced no factual support to show that Motorola has caused its contractual relationship with Qualcomm to be more expensive or burdensome. In its brief, Apple relies solely on the allegation that Motorola's actions caused Apple to file a lawsuit in a district court in California to clarify its rights to use chipsets manufactured by Qualcomm without threat of patent infringement litigation from Motorola.Apple v. Motorola Mobility, Inc., Case No. 12-cv-355 (S.D. Cal.). Apple argues that the cost of the California litigation qualifies as "damages" arising out of Motorola's tortious interference.

Apple's theory of damages arising out of the California litigation was not pleaded in its complaint. This makes sense because Apple filed the amended complaint in this case in October 2011 and did not commence **[**48]** the California lawsuit until February 2012. Even if it were appropriate to consider this new theory of damages, Apple has included no facts about the California lawsuit or its costs in its proposed findings of fact or responses to Motorola's proposed facts. Apple cannot create a genuine factual dispute sufficient to defeat summary judgment simply by making a factual assertion in its brief. Moreover, even if I considered Apple's assertions about the California lawsuit, Apple fails to connect its litigation costs to the contract between itself and Qualcomm. Apple argues that it was forced to litigate to protect its contractual rights. Apple's Br., dkt. #167, at 31. However, according to Apple's own description of its litigation, it is not suing to protect its rights under its agreement with Qualcomm. Rather, it is suing Motorola in an attempt to enforce the terms of *Motorola's* contract with **[*1081]** Qualcomm. Apple's own agreement with Qualcomm did not promise any of the benefits of which Apple now seeks to take advantage.

In sum, Apple has adduced no evidence that Motorola's decision to terminate license and covenant rights with respect to Apple interfered with Apple's rights or benefits under **[**49]** its agreement with Qualcomm or made Apple's contract with Qualcomm more expensive or burdensome. Therefore, Motorola is entitled to summary judgment on Apple's claim of tortious interference with contract.

4. Apple's claim under *Cal. Bus. & Prof. Code § 17200*

As discussed above, Apple's claim under *Cal. Bus. & Prof. Code § 17200* can be divided into two separate theories: (1) Motorola violated the law by initiating patent litigation against Apple after failing to offer Apple a license on fair, reasonable and nondiscriminatory terms; and (2) Motorola violated the law by suspending its contract with Qualcomm as it related to Apple.

Motorola has moved for summary judgment on Apple's claim under the first theory, contending that it is barred by *California Civil Code § 47(b)*, which provides that the filing of a lawsuit is privileged activity immune from tort liability. Because I concluded above that the *Noerr-Pennington* immunity doctrine applies to this claim, I need not address whether the claim would be barred by the California litigation privilege.

With respect to Apple's second theory of liability, Motorola contends that Apple has not proven that it suffered an economic injury, as required **[**50]** under *Cal. Bus. & Prof. Code § 17200*. *Kwikset, 246 P.3d at 884-85*. I agree. To defeat Motorola's motion for summary judgment, Apple was required to adduce specific evidence showing that it lost money or property as a result of Motorola's termination of any license and covenant rights that flowed to Apple through Qualcomm. As explained in the discussion of Apple's tortious interference claim, Apple has failed to adduce any specific facts on this issue. Therefore, Motorola is entitled to summary judgment on this claim.

5. Apple's breach of contract claims

Motorola has moved for partial summary judgment on Apple's breach of contract claims, seeking a determination from the court that Apple has not suffered any damages from the alleged breaches. (Motorola did not move for summary judgment on Apple's request for specific performance of Motorola's contractual obligations.) The only damages Apple seeks to recover through its contract claims are litigation costs. According to Apple's expert's report, Apple believes it is entitled to a minimum of $31,948,128.31 in damages based on "litigation costs, including attorneys' fees, Apple has incurred to date in (1) having to defend the ITC 745 Investigation; **[**51]** (2) having to defend the District Court Case; and (3) prosecuting the [present case] to establish Motorola's violation of its obligations to ETSI and IEEE." Napper Rep., dkt. #153-36 at 6. Motorola contends that litigation costs cannot be recovered as damages from a breach of contract claim.

The first question is what forum's law applies to Apple's contract claims. Apple (a California company) is suing Motorola (an Illinois company) for violation of commitments to ETSI (based in France) and IEEE (based in New York). Both parties agree that ETSI's bylaws are governed by the laws of France, so I will apply French law to Apple's claims involving ETSI. (Under *Fed. R. Civ. P. 44.1*, courts determining foreign law "may consider any relevant material or source, including testimony, whether or not submitted **[*1082]** by a party or admissible under the Federal Rules of Evidence." Apple submitted an expert report from Philippe Delebecque regarding French contract law. Dkt. #159. Motorola submitted an excerpt regarding French law on damages from an English language treatise. Barry Nicholas, The French Law of Contract (2d ed. 1992), dkt. #176-1.)

Neither party undertakes an adequate choice of law analysis **[**52]** with respect to claims concerning IEEE, and both sides cite variously to Wisconsin, New York and Illinois law in support of their respective positions. However, it does not appear that there is a conflict among Wisconsin, New York or Illinois law relevant to the issues in this case. Thus, I will apply Wisconsin law to Apple's claims concerning IEEE. *Danielson v. Gasper, 2001 WI App 12, ¶ 5, 240 Wis. 2d 633, 623 N.W.2d 182* (under Wisconsin's choice of law principles, if there is no genuine conflict between Wisconsin law and law of other possible state, court applies Wisconsin law); *Tanner v. Jupiter Realty Corp., 433 F.3d 913, 915 (7th Cir. 2006)* (federal court applies choice of law principles of forum state to determine which state's substantive law governs contract claim).

Motorola contends that under the laws of Wisconsin, France or any other jurisdiction, Apple cannot recover attorney fees as damages for a breach of contract action. However, Motorola does not cite any cases establishing such a bright-line rule. Motorola cites *In re Guardianship & Protective Placement of Evelyn O., 571 N.W.2d 700, 214 Wis. 2d 434 (1997)*, and *Computer Docking Station Corp. v. Dell, Inc., 547 F. Supp. 2d 948, 951 (W.D. Wis. 2007)*, **[**53]** for the general "American rule" that a prevailing party may not recover attorneys fees unless authorized by statute or contract. However, Apple is not seeking an award of attorney fees to a prevailing party. It is seeking attorney fees as damages incurred because of Motorola's alleged breach of contract.

As Motorola concedes in its reply brief, Wisconsin law allows recovery of attorneys fees as contractual damages in some situations. Motorola's Br., dkt. #173, at 7 (citing *Repinksi v. Clintonville Federal Savings & Loan Association, 49 Wis. 2d 53, 58, 181 N.W.2d 351, 354 (1970)* ("An award of damages for breach of contract should compensate the injured party for losses necessarily flowing from the breach. . . .When litigation is a natural and proximate result of the breach, recovery may be had as damages for attorney's fees necessarily incurred in that litigation.") (dictum). Additionally, Motorola concedes that French law allows recovery for damages that are the "immediate and direct and foreseeable result of breach." Id. However, Motorola contends that the litigation costs that Apple incurred are not compensable because many specific costs that Apple's expert included in his damages **[**54]** calculations, such as the costs of attorneys' meals and laundry, have too tenuous a relationship to Motorola's alleged breach.

Motorola has not shown that it is entitled to summary judgment on this issue. Its legal analysis is incomplete; it cited no cases discussing whether a party can recover as contract damages the costs it incurred in previous litigation with the same defendant, let alone any cases actually holding that a party may not recover such costs. Further, Motorola raised several new arguments in its reply brief regarding whether Apple's litigation costs were the direct and foreseeable result of Motorola's alleged breach. Therefore, I am denying Motorola's motion for summary judgment on this issue. If Motorola wishes to make further arguments regarding whether certain costs identified by Apple's **[*1083]** expert should be excluded, it may file a motion in limine on the subject.

B. Apple's Motion for Partial Summary Judgment

Apple has moved for partial summary judgment, seeking to establish certain elements of its claims. Because I have concluded that Motorola is entitled to summary judgment on all of Apple's claims with the exception of Apple's contract and estoppel claims, I will consider **[**55]** Apple's arguments only as they relate to those claims. In particular, Apple requests a determination that:

- Motorola entered into binding contractual obligations with ETSI and IEEE to license its declared-essential patents on fair, reasonable and nondiscriminatory terms.
- Apple is a third-party beneficiary of Motorola's contractual obligations to ETSI and IEEE.
- In submitting technical proposals to ETSI for inclusion of Motorola technology in ETSI standards, Motorola was obligated by ETSI policy to make a bona fide effort to identify essential intellectual property rights that might be required by the technical proposal before the adoption of the technical proposal into the standard.
- Motorola was obligated to make a bona fide effort to disclose the applications leading to the issuance of the '898, '559 and '697 patents to ETSI before the adoption of Motorola's technical proposals, even when those patent applications were unpublished.
- Motorola disclosed the patent applications issuing as the '898, '559 and '697 patents after the adoption of the standards to which Motorola contends those patents are essential.

Notably, Apple does not seek a determination that Motorola's failure to disclose **[**56]** its intellectual property rights was intentional, that Motorola failed to comply with the disclosure requirements of ETSI and IEEE policies or that Motorola breached its contractual obligations by demanding unreasonable licensing fees for its patents from Apple.

1. Motorola's contracts with ETSI and IEEE

As discussed above, I am applying Wisconsin law to Apple's breach of contract claims related to IEEE and French law to the claims related to ETSI.

To form a valid contract under Wisconsin law, there must be evidence of an offer, acceptance and consideration, *Kamikawa v. Keskinen, 44 Wis. 2d 705, 710, 172 N.W.2d 24, 26 (1969)*, and an understanding between the parties regarding the essential terms of the contract. *Metropolitan Ventures, LLC v. GEA Associates, 2006 WI 71, ¶ 24, 291 Wis. 2d 393, 717 N.W.2d 58*. Apple's expert states that French law requires the same general elements, which Motorola has not disputed. Delebecque Rep., dkt. #146, ¶ 31 ("French law considers that the contractual agreement is reached . . . as of the moment the parties have reached an agreement on the essential elements of the contract.").

In this case, the combination of the policies and bylaws of the standards-setting **[**57]** organizations, Motorola's membership in those organizations and Motorola's assurances that it would license its essential patents on fair, reasonable and nondiscriminatory terms constitute contractual agreements. The intellectual property rights policies of ETSI and IEEE constituted offers to Motorola for membership in the organization in exchange for Motorola's ability to participate in developing technical standards. The "offers" set out the essential terms of the contract, namely, **[*1084]** that members must abide by intellectual property rights policies. Under IEEE's policy, members must submit letters of assurance including a commitment to license essential patents under reasonable and nondiscriminatory terms. Similarly, ETSI's policy states that its members shall use "reasonable endeavors" to inform the organization of essential patents "in a timely fashion." All members are asked to grant licenses to essential patents on fair, reasonable and nondiscriminatory terms; if they refuse, they must explain their reasons in writing.

Motorola accepted the offers and agreed to be bound by these policies when it joined ETSI and IEEE. Later, Motorola confirmed that it was bound by the organizations' **[**58]** policies when it submitted declarations and letters of assurance stating that it would license its patents on fair, reasonable and nondiscriminatory terms. In particular, Motorola sent declarations to ETSI regarding the '697, '898, '230 and '559 patents, and sent letters of assurance to IEEE regarding the '516, '193, '223 and '712 patents.

Both Motorola and the organizations benefited from this arrangement and thus, the element of consideration is satisfied. Motorola received the benefit of participating in the standards development process and influencing the choice of technology for the standards. The organizations benefited from Motorola's commitments by knowing that their technical standards would be available for use by third parties.

Several courts have reached similar conclusions. *Microsoft Corp. v. Motorola, Inc., 864 F. Supp. 2d 1023, 2012 U.S. Dist. LEXIS 78670, 2012 WL 2030098, *5-6 (W.D. Wash. June 6, 2012)* (holding that contract was formed through Motorola's commitments to IEEE to license patents essential to 802.11 standard on reasonable and nondiscriminatory terms); *Research In Motion Ltd. v. Motorola, Inc., 644 F. Supp. 2d 788, 797 (N.D. Tex. 2008)* (holding at motion to dismiss stage that plaintiff had stated breach of **[**59]** contract claim based on defendant's failure to offer FRAND terms as it had agreed to ETSI and IEEE); *ESS Technology, Inc. v. PC-Tel., Inc., 1999 U.S. Dist. LEXIS 23227, 1999 WL 33520483, *4 (N.D. Cal. Nov. 4, 1999)* (holding that, as third-party beneficiary of contract between standards-setting organization and defendant-essential-patent holder, software manufacturer had properly stated claim for specific performance of agreement requiring defendant to license patents on nondiscriminatory and reasonable terms).

In its opposition brief, Motorola states that it "does not dispute that it made commitments to the industry groups," and "does not dispute that obligations flow from those commitments." Motorola's Br., dkt. #164, at 1. However, Motorola argues that its commitments are not binding contracts and that neither the industry groups nor Apple can enforce those commitments. In other words, Motorola argues that although it made promises, the promises are largely meaningless because they cannot be enforced by either the organizations or third parties.

Motorola relies largely on language from ETSI's and IEEE's policies to argue that the organizations do not intend to enforce their intellectual property rights policies. **[**60]** IEEE's policy states that "[n]o license is implied by the submission of a Letter of Assurance," and that "IEEE is not responsible for determining whether any licensing terms or conditions provided in connection with submission of a Letter of Assurance . . . are reasonable and non-discriminatory." ETSI's policy states that "[s]pecific licensing terms and negotiations are commercial issues between the companies and shall not be addressed within ETSI."

These provisions do not say that the organizations will not enforce their policies. Rather, the provisions make clear **[*1085]** that organizations will not be responsible for deciding what terms constitute a fair, reasonable and nondiscriminatory license. They will not resolve licensing disputes. However, ETSI and IEEE still require members to offer reasonable and nondiscriminatory licenses to their essential patents in order to comply with the conditions of membership and their declarations. ETSI's policies state explicitly that "[a]ny violation of the POLICY by a MEMBER shall be deemed to be a breach, by that MEMBER, of its obligations to ETSI." Similarly, in its commitment to IEEE, Motorola agreed that it would "license those patents on a non-discriminatory **[**61]** basis offering fair and commercially reasonable terms."

Motorola has several arguments about whether it complied with the terms of ETSI's and IEEE's policies by making reasonable efforts to disclose its patents and by offering to negotiate a licensing agreement with Apple. However, these arguments relate to whether Motorola breached the contracts, not whether contractual obligations exist. Neither Apple nor Motorola moved for summary judgment on the element of breach.

In sum, I am granting Apple's motion for summary judgment with respect to the existence of contracts between Motorola and the standards-setting organizations.

2. Apple's status as a third-party beneficiary

The next question is whether Apple has a right to enforce the contracts as a third party beneficiary. *Becker v. Crispell-Snyder, Inc., 2009 WI App 24, ¶ 9, 316 Wis. 2d 359, 763 N.W.2d 192* (party wishing to enforce contract must either be party to contract or third-party beneficiary). Under Wisconsin law, a third-party beneficiary is one whom the contracting parties intended to "directly and primarily" benefit. *Id. at ¶ 11* (citing *Winnebago Homes, Inc. v. Sheldon, 29 Wis. 2d 692, 699, 139 N.W.2d 606 (1966))*. The benefit **[**62]** proven must be direct; an indirect benefit incidental to the primary contractual purpose is insufficient. Id. French law is consistent with Wisconsin law on this issue. Delebecque Rep., dkt. #159, ¶ 25.

Motorola advances several arguments in support of its contentions that its commitments to ETSI and IEEE were not intended primarily to benefit potential users of the standards. However, none of its arguments are persuasive. The primary purpose of the ETSI and IEEE intellectual property rights policies and Motorola's licensing commitments is to protect companies that need to obtain licences in order to practice the standards adopted by the organizations. This is clear from the language of the policies. For example, ETSI's policy states that an "objective" of the policy is to "reduce the risk" of an essential patent's becoming "unavailable." The entities that care the most about the availability of a license are those entities such as Apple, who will incorporate the standards into their own products.

As a potential user of the standards at issue and a prospective licensee of essential patents, Apple is a third party beneficiary of the agreements between Motorola and IEEE and Motorola and **[**63]** ETSI. See also *Microsoft, 2012 U.S. Dist. LEXIS 78670, 2012 WL 2030098, at *5-6* (holding that Microsoft was third-party beneficiary of Motorola's agreements with standard setting organization because the "commitments are clearly designed to benefit potential licensees of Motorola's standard essential patent by ensuring that such patents are readily accessible to everybody at reasonable rates").

3. Scope of contractual obligations to ETSI

Apple also seeks summary judgment on issues related to the scope of **[*1086]** Motorola's contractual obligations to ETSI. In particular, Apple seeks a determination that (1) the ETSI intellectual property rights policy required Motorola to make a "bona fide" effort to identify its intellectual property rights that might be essential to a technical standard *before* the technical proposal was adopted into the standard; and (2) that Motorola was required to include its unpublished patent applications as part of those disclosures.

With respect to the first issue, the ETSI intellectual property rights policy is clear. It states that members

> submitting a technical proposal for a STANDARD shall, on a bona fide basis, draw the attention of ETSI to any of that MEMBER's [intellectual property rights] **[**64]** which *might* be ESSENTIAL *if that proposal is adopted*.

By using the terms "might" and "if," the policy clearly requires members to make efforts to disclose intellectual property rights *before* a standard is adopted.

Motorola has two arguments in opposition, neither of which is persuasive. First, it says it was not required to disclose patents or patent applications at the time a technical proposal is made or during work meetings relating to the technical development of standards. This argument is not responsive to Apple's motion. Apple has not argued that Motorola was required to disclose its intellectual property rights during work meetings or when it submitted technical proposals. Apple has argued only that Motorola was required to disclose its patents and patent applications at some point before a technical proposal is adopted into a standard.

Second, Motorola argues that it was relieved of its obligation to disclose specific patents by submitting a general declaration to ETSI, in which it agreed to license any of its essential patents on fair, reasonable, and nondiscriminatory terms. However, the ETSI policies make clear that the submission of a general declaration does not relieve **[**65]** a member of its duty to make a timely declaration of specific patents and applications that it believes may be essential to an ETSI standard. The ETSI Guide on Intellectual Property Rights states that use of a general licensing declaration "does not take away the obligation for members to declare essential patents to ETSI. . . ."

As to the issue of Motorola's obligation to disclose unpublished patent applications, ETSI's policy makes clear that members are required to disclose patents and "applications therefor." The policy exempts "confidential information." Apple asserts several reasons in its brief about why Motorola's patent applications issuing as the '898, '559 and '697 patents do not qualify as "confidential." Apple's Br., dkt. #144, at 22-23. For example, Apple contends that Motorola waived any confidentiality privilege that might have applied by publicly disclosing the relevant language in those applications through its technical proposals to the relevant working groups and through foreign patent applications.

Motorola's only response is to assert that ETSI members are not required to disclose confidential information and that patent applications may qualify as confidential. **[**66]** This is nonresponsive to Apple's arguments. By failing to respond to Apple's contention that the specific patent applications at issue in this case were not confidential, Motorola has waived any arguments in opposition and has failed to meet its burden at summary judgment of showing the existence of material facts in dispute regarding this issue of the scope of its contractual obligations to ETSI. *Wojtas v. Capital Guardian Trust Co., 477 F.3d 924, 926 (7th Cir. 2007)* ("A failure to oppose an argument permits an inference of acquiescence and 'acquiescence operates as a waiver.'") (quoting *Cincinnati Insurance **[*1087]** Co. v. East Atlantic Insurance Co., 260 F.3d 742, 747 (7th Cir. 2001))*.

4. Timing of Motorola's disclosure

Finally, Apple seeks a determination that Motorola disclosed the patent applications issuing as the '898, '559 and '697 patents after Motorola made technical proposals using technology from those patents and after ETSI adopted standards to which Motorola contends those patents are essential. I am granting Apple's motion on this issue because it is uncontested.

C. Issues Remaining for Trial

I am dismissing all of Apple's claims with the exception of its breach of contract and equitable **[**67]** estoppel claims and its declaratory judgment claims premised on a breach of contract or estoppel theory.

With respect to the breach of contract claims, Apple has shown that Motorola's membership in ETSI and IEEE and the intellectual property declarations it made established a contractual relationship that required Motorola to license its essential patents to third parties on fair, reasonable and nondiscriminatory terms. Additionally, Apple has shown that it is a third-party beneficiary of those contracts and has a right to enforce them. Apple has proven that Motorola's membership in ETSI required Motorola to make reasonable efforts to disclose any intellectual property rights that might have become essential to standards being considered by ETSI before those standards were adopted, including Motorola's unpublished patent applications that became the '898, '559 and '697 patents. Finally, Apple has shown that Motorola disclosed its '898, '559 and '697 patents to ETSI after Motorola made technical proposals using technology from those patents and after ETSI adopted standards to which Motorola contends those patents are essential.

However, there are still several unresolved issues related **[**68]** to Apple's breach of contract claims. To succeed on its claims, Apple must prove that Motorola breached a contract by failing to make bona fide efforts to disclose its patents to ETSI in a timely manner and by failing to offer a license to its essential patents to Apple on fair, reasonable and nondiscriminatory terms. As to the licensing offer, Apple must prove that Motorola's initial offer of a 2.25% royalty rate and attempts to negotiate were unfair, unreasonable or discriminatory and violated Motorola's commitments to ETSI and IEEE.

Additionally, Apple must prove that it suffered damages that are clearly connected to Motorola's breach. At this point, it is not clear how Apple intends to prove that it was damaged by Motorola's failure to disclose patents to ETSI in a timely manner. Additionally, Apple must prove that any litigation damages it seeks to recover are directly attributable to Motorola's breach.

ORDER

IT IS ORDERED that

1. Defendant Motorola Mobility, Inc.'s motion for partial summary judgment, dkt. #150, is GRANTED IN PART and DENIED IN PART.

The motion is GRANTED with respect to plaintiff Apple Inc.'s claims that Motorola violated *§ 2* of the Sherman Act (count 5), that it **[**69]** violated *Cal. Bus. & Prof. Code § 17200* (count 6), and that it tortiously interfered with contract (count 13), and with respect to Apple's requests for declaratory relief in conjunction with these claims.

The motion is DENIED in all other respects.

2. Plaintiff Apple Inc.'s motion for partial summary judgment, dkt. #143, is GRANTED. The court finds as a matter of law that

a. Motorola entered into binding contractual obligations with ETSI and **[*1088]** IEEE to license its declared essential patents on fair, reasonable and nondiscriminatory terms.
b. Apple is a third-party beneficiary of Motorola's contractual obligations to ETSI and IEEE.
c. In submitting technical proposals to ETSI for inclusion of Motorola technology in ETSI standards, Motorola was obligated by ETSI policy to make a bona fide effort to identify essential intellectual property rights that might be required by the technical proposal before the adoption of the technical proposal into the standard.

d. Motorola was obligated to make a bona fide effort to disclose the applications leading to the issuance of its United States patents 6,175,559, 6,359,898 and 6,246,697 to ETSI before the adoption of Motorola's technical proposals, even when **[**70]** those patent applications were unpublished.
e. Motorola disclosed the patent applications issuing as the '898, '559 and '697 patents after the adoption of the standards to which Motorola contends those patents are essential.

Entered this 10th day of August, 2012.

BY THE COURT:

/s/ BARBARA B. CRABB

District Judge

End of Document

Midwest Auto Auction, Inc. v. McNeal

United States District Court for the Eastern District of Michigan, Southern Division

August 14, 2012, Decided; August 14, 2012, Filed

Case No. 11-14562

Reporter

2012 U.S. Dist. LEXIS 114170 *; 2012 WL 3478647

MIDWEST AUTO AUCTION, INC., Plaintiff, vs. CLARENCE McNEAL, Individually, COUNTY OF WAYNE, METRO AUCTION SERVICES, INC., and BOULEVARD & TRUMBULL TOWING, INC., Defendants.

Core Terms

bid, auction, pricing, antitrust, predatory, alleges, Towing, bidder, competitors, vendor, Violations, expectancy, tortious interference, Sherman Act, motion to dismiss, conspiracy, unlisted, buyer, business relationship, antitrust claim, disappointed, monopolize, consumers, charging, transportation costs, bidding process, relevant market, defendants', predator, protest

LexisNexis® Headnotes

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

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

A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* tests the sufficiency of a complaint. To survive a *Rule 12(b)(6)* motion to dismiss, a complaint's factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true. A court is not bound to accept as true a legal conclusion couched as a factual allegation. Only a complaint that states a plausible claim for relief survives a motion to dismiss. A court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. In sum, to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

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

In ruling on a motion to dismiss, a court may consider the complaint as well as (1) documents referenced in the pleadings and central to plaintiff's claims, (2) matters of which a court may properly take notice, (3) public documents, and (4) letter decisions of government agencies may be appended to a motion to dismiss. When standing is called into question, a court may consider matters outside of the pleadings.

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

HN3[] **Sherman Act, Scope**

To maintain an action under the Sherman Act, a plaintiff must allege facts tending to show a critical antitrust injury. An "antitrust injury" is a prerequisite to maintaining a claim under *§§ 1* and *2* of the Sherman Act, *15 U.S.C.S. §§ 1* and *2*. To establish an antitrust injury, a plaintiff must plead: (1) that the alleged violation tends to reduce competition in some market and (2) that the plaintiff's injury would result from a decrease in that competition rather than from some other consequence of the defendant's actions.

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

HN4[] **Sherman Act, Scope**

The related concepts of antitrust injury and antitrust standing are often confused. This confusion occurs because the two concepts share a common ingredient. The common ingredient is that both requirements limit recovery to those who have been injured by restraint on competitive forces in the economy. Any inquiry to determine whether antitrust injury has been shown is more limited than one to determine whether the plaintiff has standing. The single determinant of antitrust injury is whether the plaintiff has suffered an injury the type the antitrust laws were intended to prevent and that flows from that which makes a defendant's act unlawful. On the other hand, even if an antitrust injury is shown sufficiently, standing may be denied on the basis of other factors. The purpose of the additional inquiries is to confine recovery to cases that promote the congressional intent to ensure that consumers receive the benefits of competitive markets.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] **Public Enforcement, State Civil Actions**

The Michigan Antitrust Reform Act (MARA), *Mich. Comp. Laws § 445.772*, is patterned after the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.*, and federal court interpretations of the Sherman Act are persuasive authority as to the meaning of the MARA. The MARA adopted language from and is interpreted consistent with *15 U.S.C.S. § 1*. Courts have applied the same analysis to claims under the Sherman Act and MARA.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6[] **Public Enforcement, State Civil Actions**

Antitrust liability will not be extended to give succor to dejected buyers or sellers who simply allege that one buyer and one seller colluded to reach a deal that may or may not have been inferior to the deal offered by the disappointed party.

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

HN7[] Sherman Act, Scope

Parties may break a host of state or federal laws and regulations in making a side deal or in otherwise circumventing the bidding process in reaching a final arrangement, but they do not breach *15 U.S.C.S. § 1* where the alleged vertical agreements involve only one buyer and one seller. Without a showing that a judgment in favor of the plaintiff-competitor will confer some benefit on market consumers, it is presumed that antitrust injury is lacking.

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

HN8[] Sherman Act, Scope

See *15 U.S.C.S. § 1*.

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

HN9[] Sherman Act, Scope

Courts proceeding under *15 U.S.C.S. § 1* analyze all other alleged restraints on trade under the rule of reason, which requires the factfinder to decide whether under all circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.

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

HN10[] Per Se Rule & Rule of Reason, Per Se Violations

Per se violations arise from agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

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

HN11[] Price Fixing & Restraints of Trade, Vertical Restraints

Vertical restraints on trade are examined under a rule of reason analysis unless they include some agreement on price or price levels.

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

HN12[] Price Fixing & Restraints of Trade, Vertical Restraints

To show that a vertical restraint on trade violates the rule of reason and *15 U.S.C.S. § 1*, a plaintiff must show: (1) that the antitrust defendant contracted, combined, or conspired; (2) that the combination or conspiracy produced adverse anticompetitive effects (3) within relevant product and geographical markets; (4) that the objects of and conduct pursuant to that contract or conspiracy were illegal; and (5) that the plaintiff was injured as a proximate result of that conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

HN13[] Sherman Act, Claims

Mere parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.

Antitrust & Trade Law > Sherman Act > Claims

HN14[] Sherman Act, Claims

An opportunity to conspire does not necessarily support an inference of illegal agreement.

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

HN15[] Scope, Monopolization Offenses

15 U.S.C.S. § 2 makes it unlawful to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. Liability under *§ 2* is not premised merely on the existence of monopoly power. Simply possessing monopoly power and charging monopoly prices does not violate *§ 2*; rather, the statute targets the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

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

HN16[] Scope, Monopolization Offenses

To establish a claim of attempted monopolization under *15 U.S.C.S. § 2*, a plaintiff must allege and prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > General Overview

HN17[] Public Enforcement, US Department of Justice Actions

No private cause of action exists under *15 U.S.C.S. § 13a*.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

HN18[] Competitive Injuries, Primary Line Injuries

There are two prerequisites to recovery on claims of predatory pricing. First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. That showing is required because as a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control, and because courts must be particularly wary of allowing recovery for above cost price cutting which would perversely, chill legitimate price cutting which directly benefits consumers. Second, to establish a predatory pricing claim, a plaintiff must demonstrate that the competitor had a dangerous probability of recouping its investment in below-cost prices. That element is necessary because without a dangerous probability or recoupment, it is highly unlikely that a firm would engage in predatory pricing.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

HN19[] **Competitive Injuries, Primary Line Injuries**

Courts to analyze predatory pricing claims rigorously, explaining that the costs of erroneous findings of predatory-pricing liability are quite high because the mechanism by which a firm engages in predatory pricing-lowering prices-is the same mechanism by which a firm stimulates competition, and, therefore, mistaken findings of liability would chill the very conduct the antitrust laws are designed to protect.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

HN20[] **Competitive Injuries, Primary Line Injuries**

In a predatory pricing case, the plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

HN21[] **Competitive Injuries, Primary Line Injuries**

In analyzing a predatory pricing claim, the United States Court of Appeals for the Sixth Circuit requires a court to examine a defendant's overall pricing scheme within a particular market to determine if a price is below the average variable cost.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

HN22[] **Competitive Injuries, Primary Line Injuries**

Occasional low pricing is not sufficient to allege an antitrust injury due to predatory pricing.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

HN23[] **Competitive Injuries, Primary Line Injuries**

Courts are skeptical of a plaintiff's attempt to prove predatory pricing through evidence of a low price charged for a single product out of many, or to a single customer. Predation claims cannot be based on occasional instances of allegedly predatory pricing, because they are not likely to drive rivals from the market and to permit the predator to raise prices and profits subsequently. A predatory pricing plaintiff can prevail only by adducing evidence suggesting an overall price structure was predatory, not that a small minority of sales were below average variable cost.

Torts > ... > Business Relationships > Intentional Interference > Elements

HN24[] Intentional Interference, Elements

To establish a claim for tortious interference with a business relationship or expectancy under Michigan law, a plaintiff must show (1) the existence of an advantageous relationship with a third party of which the defendant is aware, (2) with which the defendant intentionally and improperly interferes, (3) resulting in a termination of the relationship or expectancy, and (4) causing damage to the party whose interest has been terminated. One who alleges tortious interference with a business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the business relationship of another.

Torts > ... > Commercial Interference > Business Relationships > General Overview

HN25[] Commercial Interference, Business Relationships

A disappointed bidder on a public contract lacks standing to sue for tortious interference.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN26[] Civil Conspiracy, Elements

Under Michigan law, a claim for conspiracy depends on an underlying viable tort claim.

Antitrust & Trade Law > Sherman Act > Claims

HN27[] Sherman Act, Claims

There is a two-prong test for antitrust injury. It requires: (1) that the alleged violation tends to reduce competition in some market and (2) that the plaintiff's injury would result from a decrease in that competition rather than from some other consequence of the defendant's actions.

Counsel: [*1] For Midwest Auto Auction, Inc., Plaintiff: Felicia Duncan Brock, I.A.B. Attorneys At Law, Dearborn, MI.

For Clarence McNeal, Wayne, County of, Defendants: Aaron C. Thomas, Wayne County Corporation Counsel, Detroit, MI; Adam Michael Wenner, Dickinson Wright PLLC, Detroit, MI; Kenneth J. McIntyre, L. Pahl Zinn, Dickinson Wright, Detroit, MI.

For Metro Auction Services, Inc., Boulevard & Trumbull Towing, Inc., Defendants: Marc A. Deldin, Marc A. Deldin, Attorney at Law, Detroit, MI.

Judges: HON. AVERN COHN, UNITED STATES DISTRICT JUDGE.

Opinion by: AVERN COHN

Opinion

MEMORANDUM AND ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS (Docs. 18 and 20) AND DISMISSING CASE

I. Introduction

This is an action asserting antitrust and tort claims arising out of a bidding process which resulted in an award of a contract to provide auction services for Wayne County. Plaintiff Midwest Auto Auction, Inc. (Midwest) is suing defendants Boulevard & Trumball Towing (B&T), its subcontractor, Metro Auction Services (MAS), Wayne County, and Clarence McNeal (McNeal), the former Purchasing Director for Wayne County. Midwest generally claims violations of federal and state anti-trust law and tortious interference under state law. The First Amended **[*2]** Complaint (FAC) (Doc. 16), which runs 42 pages and 337 paragraphs, asserts the following fifteen claims, phrased by Midwest as follows:

Count I Restraint of Trade Resulting in Sherman Act, *15 U.S.C. §1, Et seq*, and Clayton Act *Section 12* Violations as to Defendant McNeal

Count II Unfair Trade Practices Resulting in Michigan Antitrust, *MCL 445.771 et seq* Violations as to Defendant Clarence McNeal
Count III Tortious Interference with an Advantageous Business Relationship or Expectancy as to Defendant Clarence McNeal
Count IV Civil Conspiracy as to Defendant Clarence McNeal

Count V Restraint of Trade Resulting in Sherman Act, *15 U.S.C. §1, Et seq*, and Clayton Act *Section 12* Violations as to Defendant County of Wayne

Count VI Unfair Trade Practices Resulting in Michigan Antitrust, *MCL 445.771 et seq* Violations as to Defendant County of Wayne

Count VII Restraint of Trade Resulting in Sherman Act, *15 U.S.C. §1, Et seq*, and Clayton Act *Section 12* Violations as to Defendant Metro Auction Services, Inc.

Count VIII Unfair Trade Practices Resulting in Michigan Antitrust, *MCL 445.771 et seq* Violations as to Defendant Metro Auction Services, Inc.

Count IX Defendant Metro Auction Services, Inc. Engaged in Predatory **[*3]** Pricing in Violation of Michigan and Federal Anti-Trust Laws
Count X Tortious Interference with an Advantageous Business Relationship or Expectancy as to Defendant Metro Auction Services, Inc.
Count XI Civil Conspiracy as to Defendant Metro Auction Services, Inc.

Count XII Restraint of Trade Resulting in Sherman Act, *15 U.S.C. §1, Et seq*, and Clayton Act *Section 12* Violations as to Defendant Boulevard & Trumbull Towing, Inc.

Count XIII Unfair Trade Practices Resulting in Michigan Antitrust, *MCL 445.771 et seq* Violations as to Defendant Boulevard & Trumball Towing, Inc.
Count XIV Defendant Boulevard & Trumball Towing, Inc. Engaged in Predatory Pricing in Violation of Michigan and Federal Anti-Trust Laws

Count XV Tortious Interference with an Advantageous Business Relationship or Expectancy as to Defendant Boulevard & Trumball Towing, Inc.

Before the Court are separate motions to dismiss by B&T and MAS (Doc. 20) [1] and Wayne County and McNeal (Doc. 18). Both motions raise essentially the same arguments. That is, that the FAC is subject to dismissal for failure to state a claim under *Rule 12(b)(6)* [2] because Midwest has not plead a plausible claim for antitrust injury. Defendants also contend that **[*4]** Midwest's tort claims fail to state a claim. In short, it is defendants' position that the FAC reveals nothing more than a disappointed bidder who seeks legal redress for its failed bid against its competitors, B&T and MAS, who were awarded the bid from Wayne County. The Court agrees. Accordingly, defendants' motions will be granted and this case will be dismissed.

II. Background/FAC

A. The Invitation to Bid

On February 11, 2010, Wayne County issued an Invitation to Bid for Vehicle and Equipment Auction Service (Invitation) for the "purpose of providing vehicle and equipment auction services for Wayne County DPS Equipment Division.". FAC at ¶ 28. Under the Invitation, Wayne County sought and received bids from five competing vendors for the towing and auctioning of surplus vehicles responsive to the bid. FAC at ¶ 64. Both Midwest and B&T submitted bids in response to the Invitation. FAC at **[*5]** ¶¶ 35, 38. There is no dispute that Wayne County ultimately accepted the lowest responsible bid. FAC at ¶ 39

The Invitation had several requirements relating to geographical distance, licensing, and experience. FAC at ¶ 30. For instance, Wayne County required bidders to have a location within 15-miles from Wayne County's equipment yard purportedly "to minimize costs associated with transportation of items and auctions." FAC at ¶ 32.

From Wayne County's perspective, it was important that the Invitation be competitively bid because the auction was generating revenue for it. A competitively bid contract assured Wayne County that compensation paid to the successful vendor is limited in an effort to generate the best net return. Section 8.01 of the Form Contract ("Contract") (included in the Invitation) defined vendor compensation under the Invitation as follows:

(1) a commission fee by Wayne County for auctioning services, from the auction proceeds;

(2) a buyer's commission charged by the vendor to a buyer at an auction; and

(3) transportation costs by Wayne County if a vehicle were to be towed from the County maintenance yard located on Goddard Road in Romulus.

See Wayne County's Ex. A at 13, **[*6]** App. C at 39. Although these are the only forms of "remuneration," to the successful bidder from Wayne County, the Invitation and Contract do not prohibit the vendor from charging other additional fees at the auctions.

The third form of remuneration, "transportation costs," had three elements: (1) towing hookup (price per hookup); (2) towing rate per mile; and (3) trailer hauling for larger vehicles. Id. at 39, App. C. In calculating each element, the Invitation relied on estimates. Wayne County's Ex. A at 7, 5. ("[t]he quantities indicated are reasonable approximates of the County's anticipate usage"). For instance, the Invitation estimated that Wayne County would haul vehicles about 3,000 miles over the three years of the contract. To minimize transportation costs, Wayne County's Department of Public Works (whose surplus vehicles were auctioned) wanted vendors to be within a 15 mile radius of its Goddard maintenance yard. Id. at 7, 2.

B&T's bid identified two possible locations in its bid, one at 7900 Dix Road inn Detroit, Michigan, which is within the 15 mile radius, and one just outside the radius at 2411 Vinewood, Detroit.

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[1] B&T and MAS's motion is an amended motion to dismiss. They filed an initial motion to dismiss based on the original complaint. The amended motion is aimed at the FAC.

[2] B&T and MAS have also moved to dismiss for lack of subject matter jurisdiction due to lack of standing under *Fed. R. Civ. P. 12(b)(1)*.

The Invitation required bidders to submit pricing for two **[*7]** separate categories: Commission and Transportation Cost. See Ex. A, p. 4 to B&T and MAS's motion. Under the heading "Transportation Cost," the Invitation's price sheet had, among other things, one price line for "Towing Hookup" and one price line for "Towing Rate per mile." Id. at p. 39. Although the price sheet had just one line for "Towing Hookup," Midwest's bid apparently contained two prices for "Towing Hookup." FAC at ¶¶ 52, 53, 55. Indeed, Midwest bid $140.00 per tow for vehicles over 12,000 pounds, and $55.00 per tow for vehicles under 12,000 pounds). B&T's bid, unlike Midwest's, contained just one price for "Towing Hookup," $30.00, which was much lower than Midwest's bid. See Ex. B to B&T and MAS's motion, Official Bid Tabulation; FAC at ¶¶ 52, 53, 55.

According to Wayne County, section 1 is a standard provision in all of its Invitations and grants it discretion to review, accept and reject bids. Id. at 3-6. Paragraph of 10 of section 1 provides in relevant part:

> The County reserves the right to reject any or all bids, or to accept or reject any bid in part and to waive any minor informality or irregularity in bids received if it is determined by Purchasing Director that the **[*8]** best interest of the County will be served by doing so.

Id. at 4, 10.

B. The Bidding Process

When Wayne County issued its Official Bid Tabulation, it identified B&T as the lowest bidder, Martin's Towing & Auto Sales as the second lowest bidder, and Midwest as the third lowest bidder. FAC at ¶ 47; Ex. B. Wayne County used Midwest's price of $140.00 per tow in determining that the it was the third lowest bidder. B&T and MAS's Ex. B; FAC at . ¶¶ 47, 52. Midwest says that Wayne County miscalculated its bid. FAC at ¶ 47. However, Midwest also says that B&T submitted the lowest bid. FAC at ¶ 39.

In the Official Bid Tabulation, Wayne County deemed B&T as "non responsible" because it "exceeded 15 mile limit required in Invitation." B&T and MAS's Ex. B. Wayne County notified M&T of this on May 27, 2010. Initially, Wayne County intended to recommend non party, Martin's Towing & Auto Sales, for award of the Invitation's contract. FAC at ¶ 46.

On June 2, 2010, B&T filed a bid protest. FAC at ¶ 49; See Ex. C to B&T and MAS's motion. Wayne County Ordinance, § 120.161(a), provided for a formal protest procedure. [3]

The protest made two arguments. FAC at ¶ 49. First, B&T was "responsive" because its bid identified a location within the 15-mile exclusionary zone, B&T and MAS's Ex. C, pp.1-2. Second, B&T argued that the 15-mile exclusionary zone would not minimize Wayne County's transportation costs. According to B&T, mileage pricing, not geographical distance, proved more determinative for minimizing Wayne County's cost. FAC at ¶ 51; B&T and MAS's Ex. C, pp. 3-4, n 1-2.

On July 13, 2010, Wayne County, through McNeal, granted the protest, noting that it had overlooked the Dix Highway address which was within the geographical range. FAC at. ¶ 61; Letter, B&T and MAS's Ex. D (July 13, 2010). Wayne County then awarded the contract to B&T (the "Auction Contract"). FAC at ¶ 56.

Also, on July 13, 2010, Wayne County, through McNeal, wrote Midwest advising that it had accepted B&T's bid.

On October 21, 2010, the Wayne County Commission approved B&T as the vendor on **[*10]** the auction contract. See B&T and MAS's Ex. E, Minutes.

C. Midwest's Allegations of Wrongdoing in the Bidding Process

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[3] While Midwest says it "made many unsuccessful attempts to contact [Wayne County] to object **[*9]** to and further discuss the discrepancy in the bid amounts," Midwest does not allege that it submitted a formal bid protest under Wayne County Ordinance § 120.161(a). Instead, Midwest says it made telephone calls to Wayne County. FAC at ¶¶ 48, 52.

Midwest says that Wayne County's decision to award the auction contract to B&T "suspicious" and "miraculous" because "the Invitation required the bidders storage yard and office to be within a 15 mile radius of the county's Goddard Road address." FAC at ¶ 62. As a result, Midwest asserts that B&T and MAS have generated "approximately $40,000" in revenue. FAC at ¶ 65. Midwest also says that "private consumers of auction services constitute less than 15% of the auction services market within the County of Wayne," governmental agencies constitute the majority of the auction services market, and B&T allegedly has a 75% share of this market in Wayne County. FAC at ¶¶ 66, 67. According to Midwest, B&T "in recent years . . . has obtained contracts to auction vehicles, trucks and equipment for the City of Detroit, the U.S. Marshalls (sic) Service, the FBI, the Michigan State Police, and the City of Hamtramck, among others." FAC at ¶ 67. Midwest also asserts that B&T drove its competitors out of Wayne County "contract-by-contract." FAC at ¶¶ 254, 321. Even though Midwest does **[*11]** not tow for the Detroit Police Department, Midwest says that B&T is "attempting to monopolize towing calls in the City of Detroit," and this leads to "an increase in the providing of auctioning services within the County of Wayne . . . [because] whenever a vehicle's owner does not retrieve the impounded vehicle, the vehicle is auctioned per City of Detroit Rules." FAC at ¶¶ 71-77.

Additionally, Midwest says that at the very first auction under the auction contract, B&T and MAS "charged multiple fees in an effort to recoup its losses that resulted from submitting a below average variable cost bid." FAC at ¶ 82. If these fees were added to B&T's bid, Midwest alleges it would have "greatly increased" B&T's bid. FAC at ¶ 83. Charging these alleged excess fees, Midwest says, "has caused a decrease in the number of potential buyers who attend the auctions." FAC at ¶ 89. "Ultimately the consumer Defendant Wayne County was damaged because the revenue it received from the auctions was far less than if Wayne County would have contracted with Plaintiff and/or one of the other bidders." FAC at ¶ 93.

Midwest essentially asserts the following "antitrust injuries:"

- Midwest and other bidders on the **[*12]** auction contract are being "forced out of the auctioning services industry";
- Wayne County is receiving substandard service and "the revenue generated is greatly reduced";
- the "potential purchasers of the auctioned vehicles . . . are forced to pay exorbitant fees";
- these purchasers have "been deprived of free and open competition in the auction service industry within the County of Wayne";
- "price competition between auction service providers has been restrained, suppressed, or eliminated";
- "pricing . . . has dropped below competitive levels."

See e.g., FAC at ¶¶ 210, 230, 252, 283, 302, 319.

III. Legal Standard

HN1[] A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* tests the sufficiency of a complaint. To survive a *Rule 12(b)(6)* motion to dismiss, the complaint's "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. See also *Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio, 502 F.3d 545, 548 (6th Cir. 2007)*. The court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* **[*13]** (internal quotation marks and citation omitted). Moreover, "[o]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id. at 679*. Thus, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id. In sum, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Id. at 678* (internal quotation marks and citation omitted).

HN2[] In ruling on a motion to dismiss, the Court may consider the complaint as well as (1) documents referenced in the pleadings and central to plaintiff's claims, (2) matters of which a court may properly take notice, (3) public documents, and (4) letter decisions of government agencies may be appended to a motion to dismiss. *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 127 S.Ct. 2499, 2509, 168 L. Ed. 2d 179 (2007)*. **[*14]** When standing is called into question, a court may consider matters outside of the pleadings. *Cleveland Branch, NAACP v. City of Parma, 263 F.3d 513, 524 (6th Cir. 2001)*.

Here, the FAC repeatedly refers to, and extensively relies upon, the Invitation and other documents. See FAC at ¶¶ 26, 28-32, 46. As such, the Court has considered these documents in ruling on the motions to dismiss.

IV. Analysis

A. Antitrust Injury

1.

All of the defendants argue that the antitrust claims asserted against them under Counts I, II, V, VI, VII, VIII, IX, XII, XIII, and XIV must be dismissed because Midwest has failed to allege an antitrust injury. The Court agrees. ***HN3***[] To maintain an action under the Sherman Act, a plaintiff must allege facts tending to show a critical "antitrust injury." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. An "antitrust injury" is a prerequisite to maintaining a claim under Section 1 and 2 of the Sherman Act, being *15 U.S.C. §§ 1*, *2*. *Indeck Energy Services, Inc. v. Consumers Energy Co., 250 F.3d 972, 978 (6th Cir. 2000)*. This Court has held that, to establish an antitrust injury, a plaintiff must plead: "(1) that the alleged violation tends to reduce competition **[*15]** in some market and (2) that the plaintiff's injury would result from a decrease in that competition rather than from some other consequence of the defendant's actions." *Baum Research and Development Co. v. Hillerich & Bradsby Co., 31 F. Supp. 2d 1016, 1022 (E.D. Mich. 1998)* (quoting *Tennessean Truckstop, Inc. v. NTS, Inc., 875 F.2d 86, 88 (6th Cir. 1989))*. Stated another way, a private antitrust plaintiff bringing suit under the Sherman Act must plead facts tending to show "antitrust injury," a concept akin to standing. [4] "A private antitrust plaintiff does not acquire standing merely by showing that he was injured in a proximate and reasonably measurable way by conduct of the defendant violating the antitrust laws." III Phillip Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 362a at 209-10 (1995). Midwest has not met this standard.

Midwest's claims under *Section 1 of the Sherman Antitrust Act* and the Michigan Antitrust Reform Act, *MCL § 445.772* (MARA) [5] are not plausible because Midwest has not alleged an antitrust injury to competition arising from

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[4] B&T and MAS have moved to dismiss under *Fed. R. Civ. P. 12(b)(1)* based on Midwest's lack of standing. This argument is based on Midwest's failure to alleged an antitrust injury, which is not exactly the same as Article III standing. As the Court has explained:

> ***HN4***[] The related concepts of antitrust injury and antitrust standing are often confused. This confusion **[*16]** occurs because the two concepts "share a common ingredient." The common ingredient is that both requirements limit "recovery to those who have been injured by restraint on competitive forces in the economy." Any inquiry to determine whether antitrust injury has been shown is more limited than one to determine whether the plaintiff has standing. The single determinant of antitrust injury is whether the plaintiff has suffered an "injury the type the antitrust laws were intended to prevent and that flows from that which makes [a defendant's] act [ ] unlawful." On the other hand, even if an antitrust injury is shown sufficiently, standing may be denied on the basis of other factors. The purpose of the additional inquiries is to confine recovery to cases that promote the congressional intent to ensure that consumers receive the benefits of competitive markets.

Baum, 31 F. Supp. 2d at 1022 n. 6.

[5] Both Michigan and Federal courts have noted that MARA is patterned after the Sherman Act. ***HN5***[] "The Michigan antitrust act is patterned after the Sherman Antitrust Act, *15 U.S.C. § 1 et seq.*, and Federal court interpretations of the Sherman Act are persuasive authority as to the meaning of the Michigan act." *Goldman v. Loubella Extendables, 91 Mich.App. 212, 219, 283 N.W.2d 695 (1979)*. MARA "adopted language from and is interpreted consistent with the Sherman Act, *15 U.S.C. § 1*." *Perceptron, Inc. v. Sensor Adaptive Machs. Inc., 221 F.3d 913, 919 n. 6 (6th Cir. 2002)*. Thus, courts have applied the same analysis to claims under the Sherman Act and MARA.

B&T and MAS's submitting of the lowest bid in response to the Invitation. Midwest **[*17]** has not asserted that B&T's alleged collusion with Wayne County reduced competition in the relevant market and that its injury resulted from this decrease in competition. Instead, Midwest claims economic injury to itself and competitors as a result of not receiving the Auction Contract. See FAC at ¶¶ 64-65. Courts have made clear that the antitrust laws are designed for "the protection of competition, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (emphasis in original).

A careful review of the FAC reveals that there **[*18]** is little specificity in the allegations of the FAC. For the most part, the allegations are general and do not cite to any document supporting them. An example is paragraph 90 which consists of a charts which purports to compare vehicle sale prices at an auction run by B&T and one run by Midwest. However, there is no information as to date, time, place of the described auctions or as to a buyer. There are no exhibits attached to the FAC.

2.

Although Midwest contends otherwise, its antitrust claims are based on its status as a disappointed bidder. The Sixth Circuit has rejected this kind of claim. In *Expert Masonry v. Boone County, 440 F. 3d 336, 346 (6th Cir. 2006)*, the plaintiff, Expert Masonry, sued the defendant, Boone County Fiscal Court, over its award of two construction contracts to co-defendants (collectively DSM). The bid instructions stated that "[defendant] reserved the right 'to reject any or all Bids,' and that [defendant] 'shall have the right to waive informalities and irregularities in a Bid received and to accept the Bid which, in [defendant's] judgment, is in [defendant's] own best interest." *Id. at 349*. Plaintiff, the second lowest bidder, challenged the bidding process **[*19]** claiming that DSM did not meet the bid specifications as it relates to bonding, while plaintiff met this requirement for both bids. Defendant concluded that DSM's bid was sufficient and awarded the contract to it. Plaintiff sued defendant and DSM alleging antitrust violations. The district court dismissed the claims.

The Sixth Circuit affirmed the dismissal on the grounds that the allegations failed to allege an antitrust injury. The court of appeals "decline[d] to extend ***HN6***[] antitrust liability to give succor to dejected buyers or sellers who simply allege that one buyer and one seller colluded to reach a deal that may or may not have been inferior to the deal offered by the disappointed party." *Expert Masonry, 440 F.3d at 348*. The court of appeals also noted that "[i]t is clear that the injury alleged here has not been previously found to be a cognizable antitrust violation under the Sherman Act in analogous situations." *Id. at 346* (citing *Ace Beer v. Kohn, 318 F.2d 283, 287 (6th Cir. 1963))*. The Sixth Circuit explained:

> [I]n the absence of a showing of market power or some other convincing rationale, we decline to extend antitrust liability to give succor to dejected buyers and sellers **[*20]** who simply allege that one buyer and one seller colluded to reach the deal that may or may not have been inferior to the deal offered by the disappointed party.

Id. at 348. The court of appeals further stated that ***HN7***[] "parties may break a host of state or federal laws and regulations in making a side deal or in otherwise circumventing the bidding process in reaching a final arrangement, but they do not breach *Section 1 of the Sherman Act* where the alleged vertical agreements involve only one buyer and one seller." Id. Without a showing that a judgment in favor of the plaintiff-competitor will confer some benefit on market consumers, it is presumed that antitrust injury is lacking.

Midwest's allegations, fairly read, are virtually no different than those in Expert Masonry. Like Expert Masonry, where the disappointed bidder claimed that the successful bidder on a county contract failed to meet the bid specifications, Midwest's FAC alleges that B&T and MAS failed meet the Invitation specifications. The entire premise for Midwest's Section 1 claim is that B&T was not within 15-miles from Wayne County's equipment yard, contrary to the Invitation's requirement. FAC at ¶¶ 30, 32, 40, 49, 62, 64, **[*21]** 100, 143, 260, 327. As in Expert Masonry, where the bid specifications permitted BCFC to reject "any and all bids" or to "waive irregularities," *440 F.3d at 349*, the Invitation in this case granted Wayne County the same authority. Wayne County, however, did not need to waive irregularities because, after receiving the protest, it determined that B&T was a responsible bidder.

While Midwest alleges that the bidding process was "designed to eliminate or destroy competitors and further B&T's attempted monopoly," FAC at ¶ 115, it was the increase in competition which caused the underlying harm. Notably, the purported injury occurred only after Wayne County re-evaluated B&T's bid and award the Auction Contract to B&T. In other words, the competitive bid process allegedly caused the injury. Thus, the main thrust of the FAC - Midwest's inability to compete in the auction services industry stemming from Wayne County's award of the Auction Contract to a competitor - lacks the "necessary predicate." Although Midwest alleges that the bidding process was "designed to eliminate or destroy competitors and to further B&T's attempted monopoly," it was the increase in competition which caused the underlying **[*22]** harm. FAC at ¶ 115. Midwest alleges injury to itself only after Wayne County re-evaluated and awarded B&T the contract. Therefore, the competitive bid process, and nothing else, caused the alleged injury.

The FAC makes clear that resulting injury was to Midwest and its competitors, not to competition:

> As a result of B&T's below average variable cost bid, and McNeal's manipulation of Plaintiff's bid, Martin's Towing, Plaintiff Midwest, A-1 Auto Auction, Inc., Manheim Auctions Government Services, LLC and any other auctioning company that because it was outside of the 15 mile radius did not bid on the contract, as competitors of B&T and MAS, were damaged because of the lost opportunity to provide these auctioning services within the County of Wayne.

FAC at ¶ 64. Paragraph 65 echoes this allegation and asserts that Midwest's business would benefit from the contract: "Had Plaintiff been awarded the Wayne County contract, its revenue would have been enough to sustain its workforce." Id. 65. These allegations fail to make the critical distinction between conduct that injures competition and conduct which injures competitors. The latter injury is not actionable as an antitrust claim. See *Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 825 (6th Cir. 1982)*. **[*23]** To be sure, the very nature of competitive bidding results in 1 winner and many losers. Midwest, as a disappointed bidder, has not suffered an injury cognizable under the Sherman Act.

B. Adverse Effect on the Market

Defendants also contend that the FAC fails to properly allege an adverse effect on the relevant market. The Court agrees. Midwest has not plead any such harm. According to Midwest, in the alleged market of auction services, the buyer, Wayne County, paid less to B&T than the amount Midwest bid. Wayne County paid less to B&T in transportation costs (B&T bid $5,250 compared to Midwest's initial and unchanged bid of $11,625) and slightly less in commission to B&T (3% versus 4% offered by Midwest). In short, Wayne County is the consumer who chose the lowest bidder. "If no consumer interest can be discerned even remotely in a suit brought by a competitor-if, as here, a victory for the competitor can confer no benefit, certain or probable, present or future, on consumers-a court is entitled to question whether a violation of ***antitrust law*** is being charged." *Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 266-67 (7th Cir. 1984)*.

However, Midwest alleges that Wayne County, as **[*24]** the consumer, was injured as a result of B&T's "exorbitant fees." This argument is misplaced. First, as described above, Wayne County pays the vendor in only two ways: (1) commissions from auction proceeds; and (2) transportation costs. The terms of the auction contract defined what Wayne County pays the vendor, and did not expressly prohibit the vendor from charging additional fees at the auctions. If the vendor charged "exorbitant fees" which materially impact its contractual performance (i.e., reduce attendance and in turn revenue), Wayne County may pursue a contractual remedy against the vendor. See *Nynex Corp. v. Discon, 525 U.S. 128, 137, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)* (other remedies for various "competitive practices thought to be offensive to proper standards of business morality"). However, Midwest was not a party to the auction contract and is therefore unable to raise or allege injury to Wayne County. Second, even assuming the fees are exorbitant and Wayne County's revenues from the contract decline, the next time it comes up for bid Wayne County may look for a different vendor. Third, there is no allegation that the reduced revenue is otherwise harming competition in the auction industry services. **[*25]** Wayne County is still receiving revenue and there is no allegation that other consumers (i.e. other governmental entities) were also being harmed.

C. Twombly/Iqbal Deficiencies

Defendants also contend that the FAC fails to allege a plausible claim for relief under the antitrust laws, particularly *§ 1 of the Sherman Act*. Section 1 provides, in pertinent part, that ***HN8***[] "[e]very contract, combination ..., or conspiracy, in restraint of trade or commerce among the several States ... is hereby declared to be illegal." *15 U.S.C. § 1*. Section 1 prohibits a small category of agreements that have been found to be per se illegal, and ***HN9***[] courts analyze all other alleged restraints on trade under the "rule of reason," which as its name suggests, "requires the factfinder to decide whether under all circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." Id.

As an initial matter, although Midwest has not argued that the alleged violations are per se illegal or must proceed under the rule of reason analysis, the alleged actions are not per se illegal in the antitrust context. ***HN10***[] Per se violations arise from "'[a]greements or practices which because of their pernicious **[*26]** effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' " *Foundation for Interior Design Educ. Research v. Savannah Coll. of Arts & Design, 244 F.3d 521, 529 (6th Cir. 2001)* (quoting *Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958))*. Instead of a per se violation, defendants' actions are best described as a "vertical restraint on trade," that is, not a horizontal agreement between competitors, but a "combination[ ] of persons at different levels of the market structure, such as manufacturers and distributors." *Bailey's, Inc. v. Windsor Am., Inc., 948 F.2d 1018, 1027 (6th Cir.2001)* (citation omitted).***HN11***[] "Vertical restraints on trade are examined under a rule of reason analysis unless they include some agreement on price or price levels." *Ezzo's Invs., Inc. v. Royal Beauty Supply, Inc., 243 F.3d 980, 987 (6th Cir. 2001)*.

In order ***HN12***[] to show that a vertical restraint on trade violates the rule of reason and *Section 1 of the Sherman Act*, a plaintiff must show:

> (1) that the antitrust defendant **[*27]** contracted, combined, or conspired; (2) that the combination or conspiracy produced adverse anticompetitive effects (3) within relevant product and geographical markets; (4) that the objects of and conduct pursuant to that contract or conspiracy were illegal; and (5) that the plaintiff was injured as a proximate result of that conspiracy.

International Logistics Grp., Ltd. v. Chrysler Corp., 884 F.2d 904, 907 (6th Cir.1989) (citing *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 805 (6th Cir.1988)*).

There are no specific factual allegations in the FAC showing the plausibility of a bid rigging conspiracy. The pertinent paragraphs in the FAC as to Wayne County and McNeal are:

> 57: "Defendants B&T and MAS, through its varied Fiore representatives, had numerous opportunities to conspire, contract, and combine with Defendant McNeal.
> 58: Defendant McNeal is available via "direct dial telephone"; "internet"; "signed letters"; and "in direct contact with other co-conspirators within Wayne County (i.e., Robert Futuna . . . Benny Napolean)";
> 59: B&T "heavily donate" to Futuna and Napolean's "election efforts"; and
>
> 60: Futuna and Napolean "had numerous opportunities" to conspire with B&T, **[*28]** its owners and McNeal at "varied . . . events (i.e., birthday parties, election parties, campaign fundraisers, and charity events like the annual Easter egg hunt)."

Conclusory allegations of "numerous opportunities" do not pass muster under the pleading requirements under *Twombly* and *Iqbal*. Given the importance of the underlying agreement to a viable Section 1 claim, the Supreme Court in Twombly highlighted an important distinction between "lawful parallel conduct" and "unlawful agreements." "It makes sense to say . . . that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly, 550 U.S. at 556-57*. Where, as here, allegations of parallel conduct are set out in order to establish a Section 1 claim, "they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." Id.

The FAC and associated documents shows separate, independent conduct. Wayne County rejected B&T's bid in writing, **[*29]** and only reconsidered it based on B&T's formal written bid protest. The fact, as alleged by Midwest, that Wayne County initially rejected B&T's bid and only reconsidered it based on a written, formal bid protest evidences separate, parallel conduct by B&T and Wayne County:

> On the official bid chart, Defendant B & T was identified as being non-responsible because its location as tabulated from 2411 Vinewood exceeded the 15 mile limit requirement. FAC at ¶ 40.
>
> On or about May 27, 2010, Defendant County determined that Martin's Towing was the successful bidder . . . ." FAC at ¶ 46.
>
> Upon further inspection, Plaintiff discovered that Defendant County . . . incorrectly tabulated its bid. FAC at ¶ 47
>
> On or about July 12, 2010, Defendant County sent out a letter confirming that it reevaluated the bids and that Defendant B & T would be the lowest responsive and responsible bidder. FAC at ¶ 61

These allegations do not describe any direct conduct between B&T and **[*30]** Wayne County which could plausibly suggest anticompetitive behavior. Without more,***HN13***[] parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly, 550 U.S. at 556-557*.

Moreover, the Sixth Circuit has rejected a plaintiff's effort to survive a *Rule 12(b)(6)* challenge by pleading ***HN14***[] an "opportunity to conspire." See *In re Travel Agent Com'n Antitrust Litigation, 583 F.3d 896, 905 (2009)* (the amended complaint "aver[s] only an opportunity to conspire, which does not necessarily support an inference of illegal agreement . . . [and] plaintiffs' attempt to distinguish Twombly on the basis that plaintiffs allege 'actual agreement' fails.") (emphasis added). "Numerous opportunities" are not sufficient. Indeed, Midwest's allegations of parallel conduct do not possibly suggest an illegal agreement because "it was not only compatible with, but indeed [is] more likely explained by, lawful unchoreographed free-market behavior." *Twombly, 550 U.S at 556-557*.

C. Predatory Pricing

Counts IX and XIV assert claims against B&T and MAS for predatory pricing. B&T and MAS argue that these claims must **[*31]** be dismissed because they are not properly plead. [6] Although the FAC cites *Section 1 of the Sherman Act* "et. seq." It is assumed that Midwest makes a claim under *Section 2* of the Sherman Act for attempted monopolization which encompasses a predatory pricing claim. "***HN15***[] *Section 2* of the Sherman Act makes it unlawful to 'monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.' " *Pacific Bell Telephone Co. v. Linkline Communications, Inc., 555 U.S. 438, 447, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)* (quoting *15 U.S.C. § 2*). Liability under *§ 2* is not premised merely on the existence of monopoly power. As the Supreme Court explained in Pacific Bell, "[s]imply possessing monopoly power and charging monopoly prices does not violate *§ 2*; rather, the statute targets 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.' " *Id. at 447-48* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*); see also, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. **[*32]** Thus, ***HN16***[] to establish a claim of attempted monopolization under *§ 2*, a plaintiff must allege and prove "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*.

One way in which an antitrust plaintiff may establish the first element is by showing that the defendant engaged in a practice of predatory pricing, that is, offering "Below-cost prices that drive rivals out of the market and allow the monopolist to raise its prices later and recoup its losses." *Pacific Bell, 555 U.S. at 448*. "In a typical predatory-pricing scheme, the predator reduces the sale price of its product (its output) to below cost, hoping to drive

[6] B&T and MAS also contend that to the extent Midwest brings these claims under *15 U.S.C. § 13a*, they must be dismissed because ***HN17***[] no private cause of action exists under this section.

competitors out of business. Then, with competition vanquished, the predator raises output prices to a supracompetitive level." *Weyhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 318, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 584-85 n. 8, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986))*. **[*33]** In order for a predatory pricing "scheme to make economic sense, the losses suffered from pricing goods below cost must be recouped (with interest) during the supracompetitive-pricing stage of the scheme." Id. Thus, the Supreme Court has "established ***HN18***[] two prerequisites to recovery on claims of predatory pricing." Id. " 'First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." Id. (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993))*. This showing is required, the Supreme Court explained, because " 'as a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control,' " and because courts must be "particularly wary of allowing recovery for above cost price cutting" which would "perversely, 'chill legitimate price cutting' which directly benefits consumers." *Id. at 319* (quoting *Brooke Group, 509 U.S. at 223-24*). **[*34]** Second, to establish a predatory pricing claim, "a plaintiff must demonstrate that 'the competitor had ... a dangerous probabilit[y] of recouping its investment in below-cost prices.' " *Id. at 318-19* (quoting *Brooke Group, 509 U.S. at 224*) (alteration by Court). This element is necessary because "without a dangerous probability or recoupment, it is highly unlikely that a firm would engage in predatory pricing.' Id. The Supreme Court has described these two prerequisites to a predatory pricing claim as " 'essential components of real market injury' that [are] 'not easy to establish." *Id. at 320* (quoting *Brooke Group, 509 U.S. at 226*). The Supreme Court has also cautioned ***HN19***[] courts to analyze predatory pricing claims rigorously, explaining that "the costs of erroneous findings of predatory-pricing liability [are] quite high because 'the mechanism by which a firm engages in predatory pricing-lowering prices-is the same mechanism by which a firm stimulates competition,' and, therefore, mistaken findings of liability would 'chill the very conduct the antitrust laws are designed to protect." Id. (quoting *Brooke Group, 509 U.S. at 226*) (in turn quoting *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 122 n. 17, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986))*.

Midwest **[*35]** alleges that B&T submitted a bid that was below B&T's average variable cost in response to the Invitation and, to recoup its losses, charged additional, "undisclosed fees" ("Unlisted Fees") that "violate the provisions of the Invitation". FAC at ¶¶ 82, 86, 97, 99. However, Midwest does not cite to any portion of the Invitation that prohibits the unlisted fees, nor offer any explanation to rebut defendants' position that the Invitation does not expressly prohibit the vendor from charging additional fees at the auctions. In short, these allegations do not support a predatory pricing claim.

The FAC, fairly read, demonstrates that B&T and MAS never incurred a loss through predation, as B&T/MAS charged the unlisted fees at the very first auction and every auction thereafter. See FAC at ¶¶ 79, 82, 96-99. Midwest has not plead that B&T/MAS had sales below their measure of costs, then subsequently raised prices to recoup its losses. Midwest also has not alleged that B&T/MAS's fees qualify as supracompetitive monopoly pricing as required to maintain a claim for predatory pricing. ***HN20***[] In a predatory pricing case, "the plaintiff must demonstrate that there is a likelihood that the predatory scheme **[*36]** alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation." *Brooke Group Ltd, 509 U.S. at 225-6*. The FAC fails to allege that the unlisted fees, combined with B&T/MAS' commission pricing, are priced above a competitive level. Merely charging additional prices is insufficient; the predator must charge supracompetitive prices that only a monopolist can charge because the competition has disappeared. See *Weyhauser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 318, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)*.

HN21[] In analyzing a predatory pricing claim, the Sixth Circuit requires a court to examine a defendant's "overall" pricing scheme within a particular market to determine if a price is below the average variable cost. While Midwest alleges that B&T/MAS have monopolized, or attempted to monopolize, the relevant market through obtaining contracts with 6 different governmental agencies, Midwest alleges only "occasional" below average variable cost pricing. FAC at ¶ 67. This is insufficient.

Moreover, the so called unlisted fees are within the relevant market. Midwest says the relevant market in this case is the "auction services market" **[*37]** within Wayne County. In servicing a single contract within this market, Midwest alleges that B&T charges the unlisted fees to purchasers of the vehicles. These unlisted fees, however, are within the relevant product market of auction services. In *Directory Sales Management Corp. v. Ohio Bell Telephone Co., 833 F.2d 606, 613 (6th Cir. 1987)*, the Sixth Circuit held that the plaintiff's predatory pricing claim must fail because the plaintiff was unable to show that the defendant's pricing mechanism produced a loss to the defendant's "operations taken as a whole." Like Directory Sales, where the plaintiff alleged that the Yellow Pages was the relevant product market and the defendant's offer of a free initial listing constituted predatory pricing, Midwest here alleges that the relevant market is providing "auction services" and B&T's towing rate is predatorily low. Because the relevant market here is "auction services," the appropriate inquiry is to consider B&T's "operations taken as a whole." B&T's towing rate, commission charges and the unlisted fees are not separate product markets, just as the Yellow Pages market was not different from the first listing market in Directory Services.

In **[*38]** *Spirit Airlines v. Northwest Airlines, 431 F.3d 917 (6th Cir 2005)*, the Sixth Circuit held that leisure or price sensitive travelers could be considered a separate market from "local or connecting" passengers with respect to the Detroit-Boston and Detroit-Philadelphia flights. The plaintiff claimed that the defendant engaged in predatory pricing that targeted the price sensitive customer, meaning that the price sensitive customer was the relevant market. The defendant argued that the market was broader than just price sensitive customers, and relied upon the holding in Directory Sales in urging the district court to consider the defendant's overall costs for these two flights in analyzing whether it engaged in predatory pricing. Since the defendant made a profit on these two routes, it argued that it did not engage in predatory pricing. The district court agreed. The Sixth Circuit, however, reversed and held that it was reasonable for the trier of fact to conclude that there were two distinct markets, one for the price sensitive customer and another market for other customers. Therefore, in determining if the defendant engaged in predatory pricing, the district court should only consider **[*39]** the defendant's costs with respect to the price sensitive customer.

Here, Midwest's predatory pricing claims are factually distinguishable from *Spirit Airlines*. Midwest has claimed that there is only one market, being the market for auction services. The plaintiff in Spirit Airlines argued that there were two separate and distinct markets. The unlisted fees, as well as the tow rate and commission charges, are part of B&T and MAS's overall pricing within the auction services market. Moreover B&T and MAS, unlike the defendant in Spirit Airlines, never increased prices once competition (e.g. Midwest) was purportedly destroyed, as the unlisted fees were charged at the very first auction and every auction thereafter. See FAC at ¶¶ 79, 82, 96-99.

Finally, ***HN22***[] occasional low pricing is not sufficient to allege an antitrust injury due to predatory pricing. Midwest argues that it has adequately alleged an antitrust claim because it has alleged that "After being awarded the contract; and once becoming the only vendor to provide the services, Defendants B&T/MAS charged the consumers multiple undisclosed fees." Midwest Resp., p. 11, citing FAC at ¶¶ 82, 91. The FAC also identifies six government agencies **[*40]** that B&T alleges services, yet fails to allege that B&T/MAS has engaged in predatory pricing with respect to these agencies. FAC at ¶ 67. ***HN23***[] Courts are skeptical of a plaintiff's attempt "to prove predatory pricing through evidence of a low price charged for a single product out of many, or to a single customer." *Ponder v. Morgan, 892 F.2d 1355, 1362 (8th Cir. 1989)*, citing *Directory Sales, 833 F.2d at 614*; see also *Ramallo Bros. Printing, Inc. v. El Dia, Inc., 392 F. Supp. 2d 118, 140 (Dist. Ct. P.R. 2005)* ("Predation claims cannot be based on occasional instances of allegedly predatory pricing, because they are not likely to drive rivals from the market and to permit the predator to raise prices and profits subsequently. A predatory pricing plaintiff can prevail only by adducing evidence suggesting defendants' overall price structure was predatory, not that a small minority of sales were below average variable cost."). Here, Midwest has alleged B&T and MAS engaged in predatory pricing on but a single contract with Wayne County. Midwest has not alleged that B&T/MAS obtained their purported 75% market share through predatory pricing and subsequent recoupment, or that B&T achieved this **[*41]** purported market share through predatory pricing.

Overall, Midwest has failed to plead a plausible claim for predatory pricing. Counts IX and XIV must therefore be dismissed.

D. State Action Doctrine

Defendants also argue that even if Midwest had properly plead antitrust claims, they are entitled to immunity from these claims under the state action doctrine. While defendants spend a good deal of time on this argument, the Court declines to address it in light of concluding that Midwest has failed to allege any plausible antitrust claims, however well-taken the argument may be.

D. Tort Claims

1.

Defendants also argue that Midwest's tort claims under Counts III, X and XV alleging tortious interference with a business relationship or expectancy fail.

Count III alleges that McNeal, Wayne County's former Purchasing Director, is liable for tortious interference with a business expectancy. Wayne County and McNeal argue that this claim must be dismissed because: (1) the business relationship must be more than a mere expectancy; and (2) a party cannot tortiously interfere with its own contract and/or business expectancy. A competitive bid process does not rise to the requisite level of a business **[*42]** expectancy, and Midwest has not alleged that McNeal was a "third party" to the business relationship. *Dzierwa v. Michigan Oil Co., 152 Mich. App. 281, 287, 393 N.W.2d 610 (1986)*. The Court agrees.

In order ***HN24***[] to establish a claim for tortious interference with a business relationship or expectancy under Michigan law, the plaintiff must show (1) the existence of an advantageous relationship with a third party of which the defendant is aware, (2) with which the defendant intentionally and improperly interferes, (3) resulting in a termination of the relationship or expectancy, and (4) causing damage to the party whose interest has been terminated. *Mino v. Clio School District, 255 Mich. App. 60, 78, 661 N.W.2d 586 (2003)*. "One who alleges tortious interference with a . . . business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the . . . business relationship of another." *CMI Int'l, Inc v. Intermet Int'l Corp., 251 Mich. App. 125, 131, 649 N.W.2d 808 (2002)* (citation omitted).

Here, there are no circumstances under which Midwest can plausibly plead that the business expectancy at issue, a competitively bid county contract, **[*43]** was more than "wishful thinking." *Trepel v. Pontiac Osteopathic Hospital, 135 Mich. App. 361, 377, 354 N.W.2d 341 (1984)*. Midwest has not alleged that there was a reasonable probability it was going to receive the contract. As described above, Wayne County had discretion under the Invitation to accept or reject, in whole or in part, any aspect of the bids. As such, McNeal was well within this discretion when he adjusted Midwest's bid. Midwest has therefore failed to plead a reasonable expectation or probability it was going to be awarded the bid.

Second, a contracting party may not be held liable in tort for interfering with his or her own contract. *Reed v. Michigan Metro Girl Scout Council, 201 Mich. App. 10, 506 N.W.2d 231 (1993)*. "[I]t is now settled law that corporate agents are not liable for tortious interference with the corporation's contracts unless they acted solely for their own benefit with no benefit to the corporation." *Id. at 13* (emphasis added).

While Midwest alleges generally that McNeal received improper consideration and acted outside the scope of his authority, FAC at ¶ at 146, 147, these allegations are conclusory and lack specific factual underpinning. Further, the sole personal benefit alleged **[*44]** in paragraph 145 of the FAC is McNeal's promotion. But other than timing, there is no alleged corollary between the alleged conduct and McNeal's promotion. This is simply insufficient. Finally, by accepting the lowest, responsive bid after B&T's bid protest, McNeal acted pursuant to Wayne County's best interests.

Overall, Midwest has not stated a claim for tortious interference with a business expectation stemming from McNeal's actions. Count III must be dismissed.

Regarding B&T and MAS, which are the subject of Counts X and XV, Midwest's claims falls short. As B&T and MAS point out, the Michigan Court of Appeals has held that***HN25***[] a disappointed bidder on a public contract lacks standing to sue for tortious interference. *Groves v. Dept. of Corrections, 295 Mich. App. 1, 811 N.W.2d 563 (2011)*.

The FAC alleges that Midwest had a valid business expectancy with respect to the Invitation, because it was purportedly in a position to obtain the Auction Contract but for the actions of the defendants. FAC at ¶¶ 259, 260, 326, 327. However, as a disappointed bidder on a public contract, Midwest does not have a valid expectancy. "Indeed, where the government has a great deal of discretion to choose its contractors, **[*45]** a bidder has no expectancy in the contract to be awarded." *Groves, at 5*. Only allegations of fraud, abuse, or illegality provide the basis for a court to review the public bidding process, but only the proper public official may bring such an action. *Id. at 7* (citation omitted).

Here, Wayne County had broad discretion as the Invitation provided Wayne County the right to accept or reject any and all bids. If fraud, abuse, or illegality had actually occurred, that cause of action belonged to Wayne County, not Midwest. Accordingly, Midwest has not stated a claim for tortious interference against B&T or MAS. In other words, because Wayne County is both a governmental entity and is required, as a result of its operating structure, to exercise a great deal of discretion in selecting the lowest responsible bidder, Midwest cannot plausibly have an expectancy interest in the contract at issue. Midwest has therefore failed to state a claim for tortious interference against defendants.

2.

Midwest alleges a civil conspiracy under Counts IV (against McNeal) and XI (against MAS). ***HN26***[] In Michigan, a claim for conspiracy depends on an underlying viable tort claim. *Cleary Trust v. Edward-Marlah Muzyl Trust, 262 Mich.App. 485, 508, 686 N.W.2d 770 (2004)*. **[*46]** Because Midwest has not alleged a valid claim for tortious inference, the civil conspiracy claim stands alone. As such, Midwest's civil conspiracy claims must be dismissed.

E. Midwest's Arguments

In response to defendants' motions, Midwest makes several arguments, the majority of which have already been discussed. Briefly, Midwest says that it has alleged an antitrust injury. Midwest has conflated antitrust injury and antitrust standing. As this Court has noted and stated above "[t]he related concepts of antitrust injury and antitrust standing are often confused." *Baum Research & Dev. Co. v. Hillerich & Bradsby Co., 31 F. Supp. 2d 1016 (E.D. Mich. 1998)*. ***HN27***[] There is a two-prong test for antitrust injury. It requires: "(1) that the alleged violation tends to reduce competition in some market and (2) that the plaintiff's injury would result from a decrease in that competition rather than from some other consequence of the defendant's actions." *Tennessean Truckstop, Inc. v. NTS, Inc., 875 F.2d 86, 88 (6th Cir. 1989)*.

Midwest also argues that it is sufficient, under Twombly and Iqbal, to simply give notice of potential opportunities to conspire to state an antitrust claim. Not so. The gravamen **[*47]** of Midwest's allegations suggesting the existence of a conspiracy by defendants to violate the antitrust laws are as follows:

• McNeal's direct dial telephone which was available on the internet. FAC at ¶ 57;

• Futuna and Napoleon having direct access to McNeal as an employee of Wayne County. FAC at 58; and

• Futuna and Napoleon attending events with the vari[ous] Fiore representatives [related to defendant B&T and MAS] like birthday parties, election parties, campaign fundraisers and charity events like the annual Easter egg hunt.

Midwest relies on *Buddie Contracting v. Seawright, 595 F. Supp. 422 (N.D. Ohio 1984)* to argue it has alleged an antitrust claim. Midwest's reliance is Buddie is misplaced. It was decided before Tennessean Truckstop and makes the now inaccurate statement that ""[t]he terms antitrust injury and antitrust standing are used almost interchangeably in this area of law. For ease of reference, the Court will phrase its discussion of these terms as 'antitrust standing.'" *Id. at 432*. Moreover, *Buddie* is factually distinct. In Buddie, a grand jury indicted a government agent, the successful vendor, and its president for actions taken during the award of a contract. All **[*48]** of them plead guilty to having an unlawful interest in a public contract. Faced later with antitrust claims, the district court held that tampering with the bidding process can result in liability. Unlike the complaint in Buddie, which contained detailed factual allegations based on the criminal case, the FAC contains no specific allegations against defendants to confer antitrust liability.

Similarly, in *In re Polyurethane Foam, 799 F. Supp. 2d 777 (N.D. Ohio 2001)*, which Midwest also cites, the district court relied heavily on "specific admissions . . . [extracted from a governmental investigation] that directly support[ed] the existence of a conspiratorial agreement." *Id. at 782*.

The Court's analysis set forth above demonstrates that Midwest has not plead an antitrust injury. Midwest only alleges that itself and other competitors were harmed by B&T being awarded the contract after a competitive bid process. There are no allegations of reduced competition in the alleged market of the "auction services industry" (i.e. that there are fewer competitors submitting bids for publicly bid contracts). The only allegation of injury is Midwest's alleged financial losses because it was not the **[*49]** lowest bidder. Midwest has not plead any injury resulting from a decrease in the alleged auction services industry. Rather, Midwest's concerns stem from competition between the two companies-with Wayne County in the middle.

V. Conclusion

In the end, this case is about a disappointed bidder on a single contract. The contract went to the lowest bidder, a competitor. This is not an antitrust case and the defendants did not engage in tortious or otherwise unlawful conduct. The FAC fails to plead any plausible claims for relief based on the alleged conduct. Accordingly, defendants' motions to dismiss are GRANTED. This case is DISMISSED.

SO ORDERED.

/s/ Avern Cohn

AVERN COHN

UNITED STATES DISTRICT JUDGE

Dated: August 14, 2012

[Drug Mart Pharm. Corp. v. Am. Home Prods. Corp.](#)

United States District Court for the Eastern District of New York

August 16, 2012, Decided; August 16, 2012, Filed

93-CV-5148 (ILG)

Reporter
2012 U.S. Dist. LEXIS 115882 *; 2012 WL 3544771

DRUG MART PHARMACY CORP., et al., Plaintiffs, -against- AMERICAN HOME PRODUCTS CORP., et al., Defendants.

Subsequent History: Affirmed by *Cash & Henderson Drugs, Inc. v. Johnson & Johnson, 2015 U.S. App. LEXIS 15162 (2d Cir. N.Y., Aug. 27, 2015)*

Prior History: *Drug Mart Pharm. Corp. v. American Home Prods. Corp., 2007 U.S. Dist. LEXIS 93493 (E.D.N.Y., Dec. 20, 2007)*

Core Terms

customers, matching, purchasers, favored, pharmacies, plaintiffs', defendants', Robinson-Patman Act, price discrimination, antitrust, sales, competitive injury, retail, damages, parties, lost sales, transactions, summary judgment, pricing, patients, summary judgment motion, per year, de minimis, competitors, discovery, designated, prescriptions, manufactured, profits, dealer

Counsel: **[*1]** For Drug Mart Pharmacy Corporation, Piptone Ethical Pharmacy, Inc., Plaintiffs: Mary McInnis Boies, LEAD ATTORNEY, Mary Boise & Associates, Bedford, NY; William Duker, LEAD ATTORNEY, Nicholas A. Gravante, Jr., Boies, Schiller & Flexner LLP, New York, NY.

For Jost Pharmacy, Inc., R-R Drugs, Inc., Plaintiffs: Mary McInnis Boies, Mary Boise & Associates, Bedford, NY; Nicholas A. Gravante, Jr., Boies, Schiller & Flexner LLP, New York, NY.

For This Way Pharmacy, Plaintiff: Nicholas A. Gravante, Jr., Boies, Schiller & Flexner LLP, New York, NY.

For Boies/Gravante Plaintiffs, Plaintiff: Marianne Fogarty, Boies Schiller & Flexner, New York, NY; Steven I Froot, Boies Schiller& Flexner LLP, New York, NY.

For Boies/Gravante Plaintiffs, Plaintiff: Nicholas A. Gravante, Jr., LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY; Robert Tietjen, Boies, Schiller & Flexner LLP, Albany, NY.

For Phar-Mor Plaintiffs, 1:95-cv-01261-ILG, Consol Plaintiff: Kirk E. Chapman, LEAD ATTORNEY, Milberg LLP, New York, NY.

For Smithkline Beecham Pharmaceutical Co., Defendant: Mark S. Stewart, LEAD ATTORNEY, Stephen Joel Kastenberg, Ballard Spahr Andrews & Ingersoll, LLP, Philadelphia, PA; Leslie Ellen John, Ballard **[*2]** Spahr Andrews & Ingersoll, Philadelphia, PA.

For Novartis Pharmaceuticals Corporation, Defendant: John Hail Chung, Michael J Gallagher, Robert A. Milne, LEAD ATTORNEYS, Victoria L. Oswald, White & Case LLP, New York, NY; Paul E. Slater, LEAD ATTORNEY, Sperling Slater & Spitz, Chicago, IL.

For Sandoz Inc., Defendant: John Hail Chung, LEAD ATTORNEY, White & Case LLP, New York, NY.

Judges: STEVEN M. GOLD, United States Magistrate Judge.

Opinion by: STEVEN M. GOLD

Opinion

MEMORANDUM & ORDER

GOLD, STEVEN M., U.S.M.J.:

Now pending before the Court is a motion for summary judgment brought by defendants seeking dismissal of Robinson-Patman Act claims asserted by twenty-eight plaintiffs. Docket Entry 677. The parties have consented to have defendants' motion decided by the undersigned Magistrate Judge. Docket Entry 683. For the reasons stated below, defendants' motion is granted.

This complex, long-pending antitrust litigation has been the subject of numerous written decisions by various courts. A sampling of those decisions is listed in *Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp., 472 F. Supp. 2d 385, 390 (E.D.N.Y. 2007)*.[1] Accordingly, familiarity with the facts and procedural background of the case is presumed, and is **[*3]** reviewed here only briefly.

In short, plaintiffs are a number of individually-owned retail pharmacies.[2] Plaintiffs allege that defendants, five manufacturers of brand name prescription drugs ("BNPDs"), offered discounts and rebates to plaintiffs' competitors but not to plaintiffs, and that this constitutes price discrimination in violation of the Robinson-Patman Act.

BACKGROUND

A. Early Procedural History

At the beginning of this case, a variety of plaintiffs including chain stores as well as individually-owned retail pharmacies brought antitrust claims under both the Robinson-Patman Act, *15 U.S.C. § 13*, and the Sherman Act, *15 U.S.C. § 1*. The case was consolidated for all pretrial purposes as a multi-district litigation in the Northern District of Illinois. Def. R.56.1 ¶ 10. *See also In re Brand-Name Prescription Drugs Antitrust Litig., 264 F. Supp. 2d 1372 (Jud. Pan. Mult. Lit. 2003)*.

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[1] *See also Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp., 378 F. Supp. 2d 134 (E.D.N.Y. 2005)*; *In re Brand-Name Prescription Drugs Antitrust Litig., 264 F. Supp. 2d 1372 (Jud. Pan. Mult. Lit. 2003)*; *In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599 (7th Cir. 1997)*; *In re Brand Name Prescription Drugs Antitrust Litig., 1994 U.S. Dist. LEXIS 7146, 1994 WL 240537 (N.D. Ill. May 27, 1994)*.

[2] Plaintiffs originally consisted of 3,700 retail pharmacies operating at 3,987 locations. Def. R.56.1 ¶ 9, Docket Entry 679; Pl. R.56.1 ¶ 9, Docket Entry 685. As of March, 2010, 894 retail pharmacies remained as plaintiffs pursuing damages. Docket Entry 615. In June 2010, plaintiffs stipulated to the dismissal of claims by 3,101 pharmacy locations. Docket Entry 626.

The five defendants remaining in the action are (1) Abbott Laboratories, (2) Johnson **[*4]** & Johnson, (3) Novartis Pharmaceuticals Corp. (formerly Ciba-Geigy and Sandoz), (4) Pfizer Inc. (including two indirect wholly-owned subsidiaries: G. D. Searle LLC, formerly known as G. D. Searle & Co., and Pharmacia & Upjohn Company LLC, formerly known as Pharmacia & Upjohn Company), and (5) Rhone-Poulenc Rorer, Inc. ("RPR") and Hoechst Marion Roussel, Inc., ("HMR"), whose parent companies merged in 1999. Def. Mem. 1 n.1, Docket Entry 678.

Each of the chain store plaintiffs settled its claims years ago. A Sherman Act class of individually-owned retail pharmacies was certified in 1994. *In re Brand-Name Prescription Drugs Antitrust Litig., 264 F. Supp. 2d at 1374*. The **[*5]** plaintiffs in this action opted out of the class. The Sherman Act class plaintiffs settled their claims against several of the defendants and proceeded to trial before United States District Judge Kocoras in the Northern District of Illinois against the others. The Court entered a directed verdict in defendants' favor after trial. *In re Brand Name Prescription Drugs Antitrust Litig., 1999 U.S. Dist. LEXIS 12936, 1999 WL 639173, at *2 (N.D. Ill. Aug. 17, 1999)*; *In re Brand Name Prescription Drugs Antitrust Litig., 1999 U.S. Dist. LEXIS 550, 1999 WL 33889 (N.D. Ill. Jan. 19, 1999)* (granting defendants judgment as a matter of law). On April 21, 1995, Judge Kocoras issued a case management order referred to as Pretrial Order No. 5 ("PTO 5"). This Order called upon the parties to identify twenty of the retail pharmacies that had opted out of the class action and five of the defendants to serve as representative or "Designated Parties." Pursuant to the terms of the Order, discovery was stayed as to the non-designated parties until the conclusion of the first trial of a designated plaintiff's Robinson-Patman claim; upon the expiration of the stay, the non-designated plaintiffs would have eight months to complete fact and expert discovery on their **[*6]** Robinson-Patman Act claims. PTO 5 ¶ 5.

Both the Sherman and Robinson-Patman Act claims of the individual retail pharmacies that opted out of the class were remanded and consolidated before this Court sometime after the entry of Pretrial Order No. 5. In 2005, the parties settled their Sherman Act claims, leaving only plaintiffs' Robinson-Patman claims pending. Docket Entry 519. Apparently anticipating this possibility, Pretrial Order Number 5 provides that any damages recovered by a plaintiff who proceeds to trial on a Robinson-Patman Act claim must be reduced by any portion of those damages previously recovered in connection with the resolution of the plaintiffs' Sherman Act claims. PTO 5 ¶ 11.

B. Dismissal of Designated Plaintiffs' Robinson-Patman Act Claims

When the claims of the individual retail pharmacies were first transferred here, discovery had proceeded, as provided by PTO 5, only with respect to the designated parties. Once the Sherman Act claims of all of the remaining parties were settled, the designated defendants moved for summary judgment on the Robinson-Patman Act claims of the designated plaintiffs.

In 2007, Senior United States District Judge I. Leo Glasser granted defendants' **[*7]** motion for summary judgment "relating to the [seventeen] representative plaintiffs' claims under the Robinson-Patman Act . . . on the ground that plaintiffs have failed to show they are entitled to damages." *Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp., 472 F. Supp. 2d 385, 420-21 (E.D.N.Y. 2007)* ("*Drug Mart II*").[3] At that time, the designated plaintiffs were relying on an expert report that calculated damages based in part on the fact that plaintiffs paid more for BNPDs than favored purchasers did, and on generalized evidence indicating that the share of the market for BNPDs served by favored purchasers had grown while at the same time individual retail pharmacies had lost market share. Judge Glasser rejected plaintiffs' reliance on the fact of a price differential "[b]ecause damages may not be based on the pricing margin caused by the discrimination, but [should be calculated based] on the estimates of plaintiffs' sales absent the discrimination." *Id. at 427*. With respect to plaintiffs' evidence of lost market share, Judge Glasser held that "[u]nder the Robinson-Patman Act, plaintiffs must carry their burden of proof to demonstrate that they *individually* suffered damages. . **[*8]** . . [H]ere, plaintiffs have failed to proffer evidence that specific plaintiff pharmacies lost sales of BNPDs manufactured by defendants to any specific favored purchaser." *Id. at 429* (emphasis added).

Having obtained summary judgment with respect to damages, defendants next sought dismissal of the designated plaintiffs' claims for injunctive relief. Judge Glasser granted defendants' motion for summary judgment, reasoning that, under the particular circumstances presented here, plaintiffs' failure to establish damages was fatal to their injunctive relief claims. *Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp., 2007 U.S. Dist. LEXIS 93493, 2007 WL 4526618 (E.D.N.Y. Dec. 20, 2007)* ("*Drug Mart III*").

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[3] "*Drug Mart I*," a decision not directly relevant here, is reported at *378 F. Supp. 2d 134 (E.D.N.Y. 2005)*.

C. Discovery Proceedings Culminating in the Pending Motion

Pretrial Order No. 5 provides that judgments entered after trial or other dispositions of the claims of designated parties do not have res judicata or collateral estoppel effect on the claims of non-designated parties. PTO 5 ¶ 12. Thus, while Judge Glasser's rulings with respect to the designated plaintiffs are uniquely relevant and highly persuasive precedent, **[*9]** they neither bar nor resolve the claims of the non-designated plaintiffs.

After Judge Glasser dismissed the claims of the designated parties, approximately 3,700 individual retail pharmacy plaintiffs remained. Def. R.56.1 ¶ 19. Confronted with Judge Glasser's decision, these remaining plaintiffs devised a plan to gather evidence in discovery that might show "that specific plaintiff pharmacies lost sales of BNPDs manufactured by defendants to any specific favored purchaser." *Drug Mart II, 472 F. Supp. 2d at 429*. Pursuant to this plan, which came to be known as the "matching process," plaintiffs compiled lists of specific BNPD customers who no longer purchased drugs from them, and then searched the databases of non-party favored purchasers (and one favored purchaser who is a party) to see whether those same individuals were obtaining the same BNPDs from those favored purchasers. The significance of the data developed by the matching process is at the heart of the pending summary judgment motion.

The precise contours of the matching process evolved over time. Indeed, although as noted above Pretrial Order No. 5 contemplated that the non-designated parties would complete fact and expert **[*10]** discovery within eight months, the matching process took considerably longer than that; the process was not completed until May, 2011. Docket Entry 666-1 ¶ 3.

The first conference at which the matching process was discussed in any detail was held on March 4, 2009. At that time, I pressed plaintiffs to explain how they intended to prove that they sustained damages or injury as a result of defendants' price discrimination:

> [I]f you're not going to have a patient-specific theory, then I think you need to say so, live with it, and let the defendants test it if they want to. If you are going to have a patient-specific theory, then identify the patients and ask the third parties what records they have of those patients and produce your list of patients in an electronic form that's compatible with the third parties from whom you're seeking discovery so that they can cheaply and efficiently tell you which of your former patients are now patients of theirs.

3/4/09 Tr., Docket Entry 586, at 10. In response, plaintiffs represented that they would base their case upon evidence that specific customers were lost to particular favored purchasers:

> [W]e are not suggesting that we would do anything other **[*11]** than put forth patient-specific information. And we're not proposing any kind of extrapolations or use of aggregate data or anything like that. . . . As a pharmacist sits in his pharmacy as a plaintiff in this case, he is able to identify a certain universe of patients who he reasonably believes, based on his own personal knowledge and his own business records, is a lost customer in the sense that we mean it in this litigation, because he knows that that particular patient was getting a long-term maintenance drug from him for a period of years, and that patient is now in a plan where there is a mail-order pharmacy option, and the patient is now getting his maintenance drugs, or some of them at least, filled by the mail-order pharmacy.

Id. at 13-14.

Several court conferences were held to address the details of the matching process and how it would be executed. One such conference was held on November 13, 2009. At that time, plaintiffs reported that they had identified 1.2 million customers who had been purchasing specific BNPDs from 500 plaintiffs but were no longer doing so. Based on that preliminary data, plaintiffs surmised that "at the end of the day we're going to have some material **[*12]** number that isn't going to be three for a pharmacy, or five for a pharmacy." 11/13/09 Tr., Docket Entry 604, at 16.

Yet another conference was held on March 24, 2010. Plaintiffs' counsel reported that it had now become clear that only 894 of the original 3,700 retail pharmacy plaintiffs would be able to identify customers they believed they had lost to favored purchasers. 3/24/10 Tr., Docket Entry 616, at 4. Counsel predicted at that time that these 894 retail pharmacies would demonstrate, through the matching process, that they had lost millions of transactions to favored purchasers. *Id*. at 6. In June 2010, the claims of 3,101 pharmacy locations were dismissed with prejudice by stipulation. Def. R.56.1 ¶ 59; Stipulation of Dismissal, Docket Entry 626.

Another court conference was held after the matching process data had been analyzed and before defendants brought this motion for summary judgment. At that time, plaintiffs raised the possibility that they would seek additional discovery before the motion was made. 8/11/11 Tr., Docket Entry 667, at 26. Although I afforded plaintiffs an opportunity to apply to take additional discovery, *id*. at 26-27, they never did so.

*1. **[*13]** The Matching Process*

The parties ultimately entered into a stipulation that states in pertinent part that,

> after compiling a database of potential lost customers from their data, Plaintiffs have undertaken a so-called 'matching process' to identify which of those potential lost customers may have filled prescriptions at one of five so-called favored purchasers: Caremark, AdvancePCS, Express Scripts, and Medco (collectively, the "PBMs"), and Omnicare, a long-term care pharmacy. ***The matching process was designed to determine the universe of potential lost customers that Plaintiffs claim they lost as a result of the pricing practices of Defendants*** and was subject to the following limitations: (i) the universe of so-called favored purchasers was limited to the four PBMs and Omnicare; (ii) the universe of BNPDs was limited to manufacturer Defendants' top-selling maintenance drugs; and (iii) the time periods searched were limited to data currently maintained by the PBMs and the Plaintiffs.[4]

Stipulation ¶ 1, Docket Entry 666-1 (emphasis added).

In **[*14]** April, 2010, plaintiffs produced a list of potential lost customers from 831 pharmacy locations.[5] Def. R.56.1 ¶ 58. In light of the voluminous data involved and the expense of comparing plaintiffs' lists with those of the favored purchasers, a subset of thirty plaintiffs was randomly selected to participate in the first round of the matching process. Def. R.56.1 ¶ 62. Two of the thirty plaintiffs subsequently dismissed their claims, leaving twenty-eight pharmacies involved in the matching process. Def. R.56.1 ¶¶ 63, 64. These plaintiffs then compared their database of lost customers with electronically stored customer lists, some going back as far as 1998, from the five favored purchasers whose data were examined as part of the matching process. Def. R.56.1 ¶¶ 40, 66. The matching process employed the following criteria:

> If the alleged favored purchaser's data showed a mail order fill of the same drug (say, drug x) for a matched patient within six months of the last fill at the Plaintiff pharmacy, the transaction was . . . counted as a match. Any subsequent prescriptions for drug x, or a therapeutic alternative, were . . . counted as matches against the manufacturer of drug x as well.

Def. **[*15]** R.56.1 ¶ 67.

When the matching process was finally completed, the results were considerably less impressive than plaintiffs had anticipated. *See* 3/23/12 Tr., Docket Entry 700, at 53 (plaintiffs' counsel's acknowledgement that they expected to see more matches). As stated by defendants, the twenty-eight pharmacies participating in the matching process had identified from their own records approximately 164,501 potential lost customers for 168 BNPDs over a twelve-year time frame from 1998 to 2010.[6] Def. R.56.1 ¶ 65. *See also* Plaintiffs' Letter dated 5/29/09, Docket Entry 594

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[4] "PBMs" are pharmacy benefit managers. Def. R.56.1 ¶ 39.

[5] Plaintiffs had previously produced a list of approximately 2,770,426 potential lost customers for 500 pharmacies. Def. R.56.1 ¶ 50.

[6] For purposes of statistical analysis, defendants point out that the equivalent of ten years of data was collected and analyzed. Herscovici Decl. ¶ 13. Plaintiffs originally identified thirteen favored purchasers and three distributors. Tietjen Decl. Ex. 6, Docket

(identifying 168 BNPDs and a time frame applicable to each). When plaintiffs' data was compared to the data of the five favored purchasers, approximately 5,500 matched potential lost customers and 17,346 matched potential lost transactions were identified.[7] Def. R.56.1 ¶¶ 79, 80 (identifying 5,515 matched customers); *id*. ¶ 89 (identifying 5,454 matched customers); Herscovici Decl. ¶ 5 & n.3.[8] Plaintiffs further refined the results of the matching process, and by the time they submitted **[*16]** their opposition to defendants' summary judgment motion, plaintiffs had calculated a total of 5,147 lost customers and 15,043 lost transactions. Plaintiffs' Memorandum in Opposition ("Pl. Opp."), Docket Entry 684, at 22.

Some plaintiffs could not identify any matched customers at all with respect to BNPDs manufactured by one or more defendants, and those plaintiffs voluntarily dismissed their corresponding claims. Stipulation and Order of Dismissal, Docket Entry 697; Pl. Opp. 22 (identifying individual pharmacies with zero matching results). *See also* 3/23/12 Tr. at 60. In addition, each of the more than 800 remaining plaintiffs has voluntarily dismissed its claims against defendant Hoffman La Roche as a result of the minimal number of matches with respect to this defendant by the twenty-eight plaintiffs. Docket Entry 694.

As demonstrated by these results, only approximately 3% (5,147 of 164,501) of the potential lost customers plaintiffs culled from their own records could be "matched" to a customer who subsequently filled the same prescriptions with one or more favored purchasers. This implies, of course, that 97% of the customers plaintiffs identified as lost based upon their own records could not be found in the databases of favored purchasers searched during discovery. Moreover, even these figures are substantially reduced if the 2,586 **[*18]** lost customers claimed by plaintiff Pharma-Card are excluded; as discussed below, Pharma-Card's results include a large number of customers claimed by plaintiffs but not identified by the matching process.

The results are even less significant when considered in context. Defendants, relying on data reported by the National Community Pharmacists Association, point out that independent retail pharmacies filled between 22,000 and 28,000 BNPD prescriptions per year during the period of time relevant to The matching process.[9] In contrast, the data from the matching process reveals that, on average, each plaintiff pharmacy lost less than 200 (5,147/28) customers and only approximately 537 (15,043/28) transactions over the entire period examined by the matching process, or approximately 18 customers and 54 transactions per year. Pl. Opp. 22-24. This average loss of 54 transactions per year is only about one quarter of one per cent of the more than 20,000 BNPD transactions conducted per year by the average retail pharmacy.

The de minimis nature of these results is further illustrated when they are broken down and analyzed by defendant. According to defendants, when examined in this manner, the results are that approximately 88% of plaintiffs' claims against particular defendants are based on five or fewer lost customers per year. Joint Memorandum of Law in Support of Individual Defendants' Motions for Summary Judgment," Docket Entry 678 ("Def. Mem.") at 3.[10] On the

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Entry 686. Three of the favored purchasers were able to produce data beginning from 1998. Pl. R.56.1 ¶ 66. Express Scripts matched data beginning from January, 2002; Advance PCS collected data from January, 2006. *Id*. Plaintiffs contend that Express Scripts, Medco and CVS/Caremark currently account for 50% of the PBM marketplace. Pl. Opp. at 7 n.19, Docket Entry 684.

[7] Although defendants challenge several aspects of the results of the matching process as calculated by plaintiffs, I rely — as do defendants in large part — on plaintiffs' tabulations of matched lost customers for purposes of deciding the pending motion.

[8] "Herscovici Decl." refers to the Declaration of Steven Herscovici, Ph, D., submitted in support **[*17]** of defendants' motion for summary judgment, Docket Entry 681.

[9] Although plaintiffs note that the five favored purchasers that were searched as part of the matching process account for only 50% of the PBM marketplace, and that only the **[*19]** most common prescription drugs were included in the search protocol, plaintiffs offer no alternative base figure for comparison.

[10] After defendants submitted their summary judgment motion, plaintiffs further refined their results and dismissed some of their claims. Defendants then filed an amended memorandum of law to reflect plaintiffs' changes to the matching results. Docket Entry 698. In the amended memorandum, defendants calculate that 87% of plaintiffs' claims are based on five or fewer lost customers per year. Docket Entry **[*20]** 698-1 at 10.

other hand, plaintiffs calculate that, excluding the dismissed claims, approximately 31% of plaintiffs' remaining claims against particular defendants are based on five or fewer lost customers per year. Pl. Opp. at 22.

Many pharmacies lost no more than ten customers per defendant over the relevant twelve-year time period, or less than one customer per year. For example, 19 of the 28 pharmacy plaintiffs could identify only ten or fewer matched Novartis (formerly Ciba-Geigy and Sandoz) customers over the entire ten-plus year period, or less than one lost customer per year. Pl. Opp. at 22. The following chart summarizes the de minimis number of lost customers with respect to each of the defendants:

Defendant	**No. of pharmacies with 10 or less lost customers total**	**Percentage of pharmacies with 10 or less lost customers**	**No. of pharmacies that lost only 1 customer total**	**No. of dismissed claims for zero matches**
Abbott	16	57%	5	3
Novartis	19	68%	3	1
Johnson & Johnson	18	64%	6	4
Upjohn/Pfizer	4	14%	0	1
Hoechst Marion Roussel (Marion Merrell Dow)/Rhone Poulenc Rorer ("HMR (MMD)/RPR")	12	43%	2	2
Total	69	49%	6	11

Pl. Opp. at 22. Excluding Upjohn, the defendant that consistently had the highest number of matches, and Pharma-Card, which I conclude for reasons discussed below has substantially overstated its results, none of the plaintiff pharmacies lost more than 50 total customers per defendant over the relevant twelve-year time period, or less than five **[*21]** customers per year per defendant. *Id*.

When examined on a per-plaintiff basis — again, with the arguable exception of plaintiff Pharma-Card — similarly insignificant results are obtained. Even Klein's Pharmacy, the plaintiff with the highest number of lost transactions identified by the matching process, lost a total of only 2,521 transactions, or approximately 252 transactions per year. Pl. Opp. at 23. This amounts to only slightly more than 1% of the total BNPD transactions conducted by an average retail pharmacy during any one year (252/22,000).

In short, no matter how analyzed, the matching process identified only a de minimis number of lost customers and transactions.

2. Plaintiff Pharma-Card Prescription Services

As noted above, plaintiff Pharma-Card claims to have lost a large number of customers other than those identified by the matching process. More specifically, Pharma-Card asserts that it lost approximately 2,586 customers as a result of defendants' price discrimination, or nearly half of the 5,500 lost customers claimed by all 28 of the plaintiffs.[11] Def. R.56.1 ¶ 89. Most of these customers, however, were not identified by the matching process, but were instead added to the **[*22]** results manually by plaintiffs based upon the belief held by Pharma-Card's employees that certain customers were lost to favored purchasers because of defendants' price discrimination. *Id*. ¶ 85(a) (denied by plaintiffs); *see* Pl. Opp. at 17-19. Almost 2,000 of these customers were submitted for matching, but only five were identified in the records of the favored purchasers as having filled subscriptions for BNPDs with them. Def. R.56.1 ¶¶ 90-91; Def. Mem. at 28-29. Moreover, at least during part of the twelve-year period covered by the matching process, Pharma-Card operated at fourteen separate retail locations. Pl. Opp. at 17. Even if all 2,586 customers were properly included in the matching process results, it would show only that approximately 184 customers were lost per retail location, or that Pharma-Card lost only about 18 customers per year at each of its locations.[12]

3. Other Evidence of Damages

Finally, plaintiffs seek to rely on their own affidavits in which they claim to have lost customers and transactions in addition to those identified through the matching process. Teitjen Decl., Docket Entry 686, Exs. 20-48. These affidavits are not properly considered as evidence of plaintiffs' lost sales for at least two reasons. First, plaintiffs offer no convincing explanation for the failure of the matching process to identify the lost customers referenced in these affidavits.[13] Second, and perhaps most significantly — and this applies with equal force to those Pharma-Card customers that were manually added to the matching process results — plaintiffs entered into a stipulation, filed with the Court on August 8, 2011, explicitly providing that the matching process would "determine ***the universe*** **[*24]** of potential lost customers that Plaintiffs claim they lost as a result of the pricing practices of Defendants."[14] Stipulation ¶ 1, Docket Entry 666-1 (emphasis added).

DISCUSSION

A. Standards Governing Summary Judgment

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as **[*25]** a matter of law." *Fed. R. Civ. P. 56(a)*. In reaching a summary judgment determination, the court must resolve ambiguities and draw reasonable inferences in favor of the nonmoving party. *Johnson v. Killian, 680 F.3d 234, 236 (2d Cir. 2012)*.

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[11] In their memorandum in opposition to summary judgment, plaintiffs contend that Pharma-Card lost 2,773 customers. Pl. Opp. at 22.

[12] Pharma-Card identified a total of 1,669 lost transactions through the matching process. Pl. Opp. at 23. I presume that the number of claimed lost transactions is smaller than the number **[*23]** of lost customers because lost transactions were determined solely from the matching process and not manually supplemented. Even if Pharma-Card operated at a single retail location, this would amount to approximately 160 lost transactions per year, a tiny sum when compared to the more than 22,000 BNPD transactions conducted annually by the average retail pharmacy.

[13] Plaintiffs do contend that some customers were lost to favored purchasers other than those whose data was used in the matching process. Pl. Opp. at 15, 19. It was plaintiffs, though, who selected the favored purchasers whose data would be included.

[14] In addition, reports of customers as related by pharmacy employees are arguably hearsay. *See, e.g.*, Teitjen Decl. Ex. 20, Tallman Aff. ¶ 8 & Ex. B at 4; *id*. Ex. 23, Mouret Aff. ¶ 10; *id*. Ex. 29, Ellison Aff. ¶ 10. However, the Second Circuit has explicitly permitted testimony of the same type pursuant to *Federal Rule of Evidence 803(3)* when offered in antitrust cases to prove customers' motives. *Hydrolevel Corp. v. Am. Soc'y of Mech. Eng'rs, Inc., 635 F.2d 118, 128 (2d Cir. 1980)*; *Herman Schwabe, Inc. v. United Shoe Mach. Corp., 297 F.2d 906, 914 (2d Cir.)*, *cert. denied*, ***369 U.S. 865, 82 S. Ct. 1031, 8 L. Ed. 2d 85 (1962)***.

Two additional principles inform my review of defendants' motion. First, the Second Circuit has held that "summary judgment is particularly favored [in antitrust cases] because of the concern that protracted litigation will chill pro-competitive market forces." *PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 104 (2d Cir. 2002)* (citing *Tops Mkts, Inc. v. Quality Mkts, Inc., 142 F.3d 90, 95 (2d Cir. 1998))*. *See also* *Am. Banana Co., Inc. v. J. Bonafede Co., Inc., 407 Fed. Appx. 520, 522 (2d Cir. 2010)*. The Circuit stressed in *Pepsico* that a party may demonstrate that it is entitled to summary judgment by pointing to an absence of evidence to support the nonmoving party's case. *PepsiCo, 315 F.3d at 105*.

Second, the Supreme Court, in its most recent decision addressing the Robinson-Patman Act, urged lower courts to construe the Act narrowly.[15] *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 181, 126 S. Ct. 860, 163 L. Ed. 2d 663 (2006)*. The Court cited its much earlier decision **[*26]** in *Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 63, 73 S. Ct. 1017, 97 L. Ed. 1454, 49 F.T.C. 1763 (1953)*, which it described as "cautioning against Robinson-Patman constructions that extend beyond the prohibitions of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Id. at 181*. Even Justice Stevens, who dissented in Volvo, noted that the Act "may well merit [noted ***antitrust law*** scholar] Judge [Robert] Bork's characterization as 'wholly mistaken economic theory.'" *546 U.S. at 187*. *See also* *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204, 227 (3d Cir. 2008)* (describing the Supreme Court's decision in *Volvo* as narrowly construing the Robinson-Patman Act).

With this guidance in mind, I now consider whether plaintiffs' evidence, revealing as it does that plaintiffs lost only a trivial number of customers and sales to favored purchasers, is nevertheless sufficient to support a Robinson-Patman Act claim. For the reasons explained below, I conclude that it is not.

B. The Robinson-Patman Act

Section 2(a) of the Robinson-Patman Act (the "Act"), an amendment to the Clayton Act, renders it

> unlawful for any person engaged in commerce, . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of **[*28]** such discrimination, or with customers of either of them.

15 U.S.C. § 13(a).[16]

To succeed on a Robinson-Patman claim, a plaintiff must establish: "(1) that seller's sales were made in interstate commerce; (2) that the seller discriminated in price as between the two purchasers; (3) that the product or commodity sold to the competing purchasers was of the same grade and quality; and (4) that the price discrimination had a prohibited effect on competition." *George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d*

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[15] The Court has, on other occasions, stated that the Robinson-Patman Act should be construed liberally and "broadly to effectuate its purpose." *Abbott Labs. v. Portland Retail Druggists Ass'n, Inc., 425 U.S. 1, 11, 96 S. Ct. 1305, 47 L. Ed. 2d 537 (1976)*, *quoted in* *Jefferson Cnty. Pharm. Ass'n, Inc. v. Abbott Labs., 460 U.S. 150, 159, 103 S. Ct. 1011, 74 L. Ed. 2d 882 (1983)*. Although *Volvo* does not disavow these prior decisions, the *Volvo* decision does seem to place more emphasis on the possible anti-competitive effects of the **[*27]** Robinson-Patman Act than prior decisions. At least one scholar has noted that the Robinson-Patman Act has "come into disfavor" during the last quarter century. Daniel J. Gifford & Robert T. Kudrle, *The Law and Economics of Price Discrimination in Modern Economies: Time for Reconciliation?*, *43 U.C. DAVIS L. REV. 1235, 1269 (2010)*.

[16] Plaintiffs also assert claims pursuant to *Sections 2(d)* and *2(f)* of the Robinson-Patman Act, discussed *infra*.

136, 141 (2d Cir. 1998). As is frequently the case, only the fourth element — proof of what is referred to as "competitive injury" — is at issue here.[17] Indeed, as the Second Circuit has stated,

> [t]he language in Section 2(a) relating to injury to competition is the key to the legality of most differential pricing practices and has engendered significant legal authority as courts have struggled to determine what degree and type of market consequences will constitute the proscribed statutory effect on competition in various commercial situations.

George Haug Co., 148 F.3d at 141.

A plaintiff seeking damages under the Act must not only demonstrate a competitive injury as required by the Act itself, but must also satisfy Section 4 of the Clayton Act, 15 U.S.C. § 15, by establishing an "antitrust injury." Id. at 422-24. That is because the Robinson-Patman Act does not provide for a private right of action; instead, "the private right of action for a § 2(a) Robinson-Patman Act claim, as for all private plaintiff antitrust rights of action, is provided by § 4 of the Clayton Act." Drug Mart II, 472 F. Supp. 2d at 422. The "antitrust injury" requirement "compels plaintiffs to show that they were in fact injured by price discrimination, that the injury is of the type the Act was intended to prevent, and that the injury is causally connected **[*30]** with the violation of the Act." Id. at 423 n. 44 (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)).

In enacting Robinson-Patman, "Congress sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers; specifically, Congress responded to the advent of large chainstores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand." Volvo, 546 U.S. at 175. The purpose of the Act is to prohibit "price discrimination only to the extent that it threatens to injure competition." Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993). The Supreme Court emphasized this point in *Volvo*, where it warned against "interpretation[s of the Act] geared more to the protection of existing *competitors* than to the stimulation of *competition*." 546 U.S. at 181 (emphasis in original).[18]

The parties' submissions do not directly address whether defendants' pricing practices have had any impact on the competitiveness of the market for BNPDs. For example, neither side has presented any evidence regarding whether or how defendants' discount and rebate programs have affected the availability of BNPDs to patients or the amounts patients, or their health insurance providers, must pay for them. Rather, both sides focus on whether the injury, or lack thereof, sustained by plaintiffs is sufficient to demonstrate competitive **[*32]** or antitrust injury. Because the parties have not addressed the impact on competition generally, and because it is difficult to conceive of an adverse impact on competition absent a significant diversion of sales, I do not separately consider whether defendants' pricing practices have adversely affected competition in the market for BNPDs from a consumer's point of view.

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[17] Defendants **[*29]** do not contest, for purposes of the pending motion, plaintiffs' allegations of discriminatory pricing. Indeed, the Seventh Circuit, ruling on appeal from a grant of judgment as a matter of law against the plaintiff class, stated that "the manufacturers of brand name prescription drugs engage in price discrimination . . . . Everyone knows this." In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 786 (7th Cir. 1999).

[18] In opposing summary judgment, plaintiffs cite cases suggesting that a showing of injury to a competitor is sufficient to establish competitive injury, even in the face of proof that competition remains healthy. Pl. Opp. at 40 (citing Chroma Lighting v. GTE Products Corp., 111 F.3d 653, 657 (9th Cir. 1997) **[*31]** (referring to "Congressional intent to protect individual competitors, not just market competition") and J.F. Feeser, Inc. v. Serv-a-Portion, Inc., 909 F.2d 1524, 1535 (3rd Cir. 1990) (holding that "evidence of injury to a competitor may satisfy the component of competitive injury necessary to show a violation of the Robinson-Patman Act")). *See also* Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1418 n.6 (11th Cir. 1990) (citing cases and finding that "the legal focus of the competitive injury inquiry is on the competitor, not the consumer"). The language from *Volvo* quoted in the text raises a question about the continued viability of these holdings.

1. Competitive Injury

There are "three categories of competitive injury that may give rise to a Robinson-Patman Act claim: primary line, secondary line, and tertiary line." *Volvo, 546 U.S. at 176*. This case, like *Volvo*, involves a secondary line claim, or a claim of "price discrimination that injures competition among the discriminating seller's customers," described as "'favored' and 'disfavored' purchasers."[19] *Id*. "A hallmark of the requisite competitive injury [in a secondary line claim] . . . is the diversion of sales or profits from a disfavored purchaser to a favored purchaser." *Id. at 177*. In other words, and as plaintiffs' commitment to the matching process reflects, a Robinson-Patman Act claimant may not rely on the effect of price discrimination on the market generally. Rather,

> [t]he plaintiff disfavored purchaser **[*33]** must show that it lost customers or profits because the favored purchaser used its favored advantage either to lower its resale prices or otherwise to attract business. It is for that reason that a plaintiff asserting a claim under the Act must proffer individualized proof of lost customers or profits as against each defendant.

Drug Mart I, 378 F. Supp. 2d at 139. *See also* *O'Connell v. Citrus Bowl, Inc., 99 F.R.D. 117 (E.D.N.Y. 1983)* (denying plaintiffs' motion for class certification of Robinson-Patman Act claims because each putative class member's proof of competitive injury would be highly individualized).

The Robinson-Patman Act prohibits price discrimination only "where the effect of such discrimination **[*34]** may be substantially to lessen competition." *15 U.S.C. § 13(a)*. Applying this statutory language, the Supreme Court in *Volvo* held that an automobile manufacturer defendant was entitled to judgment as a matter of law following a jury verdict in favor of a plaintiff car dealer. In *Volvo*, the plaintiff car dealer claimed that, with respect to certain trucks designed to a customer's specifications, defendant Volvo offered other dealers more favorable price concessions than it received. Plaintiff's difficulty in establishing a Robinson-Patman Act violation stemmed from the fact that he rarely competed with other Volvo dealers over the same truck customers. In fact, plaintiff was able to present evidence of only two occasions over five years when it competed against another Volvo dealer for a particular sale, and a "loss of only one sale of 12 trucks that would have generated $30,000 in gross profits." *546 U.S. at 180*. While the Court focused primarily on the absence of proof that Volvo dealers simultaneously competed with each other for the same retail customers, it also indicated that the limited evidence of lost sales presented by the plaintiff was insufficient to establish competitive **[*35]** injury, stating that "if price discrimination between two purchasers existed at all, it was not of such magnitude as to affect substantially competition between [plaintiff] and the 'favored' Volvo dealer." *Id*. *See also* *United Magazine Co., Inc. v. Curtis Circulation Co., 279 Fed. Appx. 14, 17-18 (2d Cir. 2008)*; *Interstate Cigar Co. Inc. v. Sterling Drug Inc., 655 F.2d 29, 31 (2d Cir. 1981)* (stating that plaintiffs failed to establish that any price discrimination or discount to a favored purchaser "would tend to lessen competition substantially").

Other courts have similarly rejected Robinson-Patman Act claims for failure to demonstrate a substantial anti-competitive impact. For example, the Fifth Circuit, on remand from the Supreme Court, rejected another car dealer's claim because, among other things, the plaintiff failed to establish that the incentive programs he challenged were likely to have a substantial effect on competition. *Chrysler Credit Corp. v. J. Truett Payne Co., Inc., 670 F.2d 575, 581 (5th Cir. 1982)*. In words directly applicable to defendants' pending motion, the Fifth Circuit stated:

> In order to show a violation of *Section 2(a)* of the Robinson-Patman Act a plaintiff **[*36]** must demonstrate the likely effect of the alleged price discrimination was to allow a favored competitor to draw significant sales or profits away from him, the disfavored competitor.

[19] A plaintiff seeking to establish competitive injury in a secondary-line case must prove that it was a disfavored purchaser engaged in actual competition with a favored purchaser(s) at the time of the price differential. *Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 584 (2d Cir. 1987)*. Defendants apparently do not dispute, at least for purposes of this motion, that plaintiffs and the favored purchasers whose data was used in the matching process were in competition.

670 F.2d at 580. *See also* O'Connell, 99 F.R.D. at 122 (favorably citing the language from *J. Truett Payne* quoted above). In Boise Cascade Corp. v. Federal Trade Commission, 837 F.2d 1127, 267 U.S. App. D.C. 124 (D.C. Cir. 1988), a contention of competitive injury was rejected in part because the number of accounts (162) that switched from the disfavored purchasers to the favored purchaser "was quite small." 837 F.2d at 1145. *See also* Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d 1163, 1171 (7th Cir. 1978) (dismissing primarily because of a lack of competition between plaintiff and any favored purchaser for the same customers and stating that a plaintiff who "has not alleged that its sales lost due to secondary price discrimination were more than 'de minimus'" has failed to establish a cognizable competitive injury); Erickson's Flooring & Supply Co. v. Basic Coatings, Inc., 2007 U.S. Dist. LEXIS 76642, 2007 WL 3036747, at *6 (E.D. Mich. Oct. 15, 2007) (finding that "only one instance of discriminatory pricing towards one other distributor in relation **[*37]** to only one customer [was insufficient]. Indeed, Plaintiff's claim is weaker than the one pressed in *Volvo Trucks*, because Plaintiff does not claim that the allegedly lower prices given to Erickson's Decorating even cost it any sales; it alleges that this discrimination hurt its profit margin at only one point in time, in relation to only one customer. . . . Plaintiff has provided no evidence that the alleged price concession might have had anything approaching a "substantial" effect on competition."). Here, the effect of defendants' pricing practices has been carefully measured, and the results undermine any contention that plaintiffs have suffered a significant loss of sales.

The decision in De Modena v. Kaiser Foundation Health Plan, Inc., 743 F.2d 1388 (9th Cir. 1984), *cert. denied*, *469 U.S. 1229, 105 S. Ct. 1230, 84 L. Ed. 2d 368 (1985)*, is of particular interest because it involved, like this case, allegations of price discrimination in the market for prescription drugs. Defendants in *De Modena* operated health plans that provided medical care to their members in return for monthly dues. The services defendants provided to their members included a prescription drug plan. Plaintiffs, retail pharmacies, brought Robinson-Patman **[*38]** Act claims, contending that defendants were able to acquire drugs at discriminatorily low prices. The Court in *De Modena* held that, with respect to drugs provided to their own members, defendants were protected from liability by an exception to the Robinson Patman Act applicable to transactions made by non-profit institutions for their own purposes. The court found, though, that defendants also made sales to "walk-in" customers who were not their members, and that these sales were thus not covered by the "own purposes" exception described above. The district court dismissed plaintiffs' claim despite these walk-in sales on the grounds that they constituted less than one percent of defendants' total drug sales and were therefore de minimus. The Ninth Circuit reversed, but not on the ground that the district court wrongly concluded that a de minimis number of sales is not actionable; rather, the Ninth Circuit held that whether the sales at issue were de minimis or not should be determined by measuring their effect on competition, not by calculating the portion of defendants' sales they represented. 743 F.2d at 1394-95. Indeed, if a de minimis number of diverted sales were sufficient, **[*39]** it would not matter how they were measured, and the Ninth Circuit would have had no reason to remand.

In this case, of course, the matching process measured the number of customers drawn from plaintiffs to favored purchasers, and defendants in support of their motion seek to examine that number in the context of the BNPD sales volume of a typical retail pharmacy. The reasoning in De Modena accordingly supports defendants' position here.

In response to defendants' argument that the limited number of lost sales demonstrated by the matching process precludes their Robinson-Patman Act claims, plaintiffs invoke what has come to be known as the "*Morton Salt*" inference. The inference takes its name from the decision in FTC v. Morton Salt Co., 334 U.S. 37, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499 (1948), where the Supreme Court stated:

> It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing **[*40]** in itself is sufficient to justify our conclusion that . . . findings of injury to competition were adequately supported by evidence.

334 U.S. at 49-51. In *Volvo*, the Supreme Court described *Morton Salt* as recognizing that "a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time." 546 U.S. at 177.

Plaintiffs contend, in essence, that the results of the matching process do not preclude their claims because the *Morton Salt* inference provides them with an alternative means of demonstrating likely competitive injury. As a general matter, plaintiffs are correct: a Robinson-Patman plaintiff may typically establish competitive injury in one of two ways: "proof of lost sales or profits, or under the *Morton Salt* test, proof of a substantial price discrimination between competitors over time." J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1535 (3d Cir. 1990) (internal citations omitted).

The problem for plaintiffs is that this is not a typical case. The *Morton Salt* inference is just that — an inference — and it is subject to rebuttal. Thus, as noted above, the Supreme Court **[*41]** in *Volvo* referred to the *Morton Salt* inference as a "permissible" one that "may" arise under certain circumstances. Even before *Volvo*, the Supreme Court had pointed out that, "[i]n the absence of direct evidence of displaced sales," the *Morton Salt* inference "may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 435, 103 S. Ct. 1282, 75 L. Ed. 2d 174 (1983). Similarly, in *Boise Cascade*, the Circuit Court held that

> The [*Morton Salt*] inference can . . . be overcome by evidence showing an absence of competitive injury within the meaning of Robinson-Patman. That is to say, a sustained and substantial price discrimination raises an inference, but it manifestly does not create an irrebuttable presumption of competitive injury.

837 F.2d at 1144.

Here, plaintiffs have undertaken an extensive, costly and time-consuming effort to trace the customers they claim to have lost to favored purchasers because of price discrimination, but have essentially come up empty. Moreover, their efforts to point to other evidence of competitive injury fail for several reasons, not the least of which is that they have stipulated **[*42]** that the results of the matching process would define the "universe of potential lost customers" they would claim they lost as a result of the defendants' pricing practices. Stipulation ¶ 1, Docket Entry 666-1. Under these circumstances, any inference has been rebutted; the assumption that a substantial price difference over time would result in customers leaving plaintiffs for favored purchasers has been carefully tested, but no meaningful evidence of lost sales has been developed.

As plaintiffs contend, there is authority that suggests that the Act has no substantiality requirement. *See, e.g.,* H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc., 879 F.2d 1005, 1020-22 (2d Cir. 1989) (assuming that plaintiff suffered a competitive injury even though plaintiff cited only three instances of lost sales but finding that plaintiff failed to establish a causal connection between any lost sales and alleged Robinson-Patman violations); Precision Printing Co., Inc. v. Unisource Worldwide, Inc., 993 F. Supp. 338, 353 (W.D. Pa. 1998) (finding that plaintiff "raise[d] a genuine issue of material fact on the issue of competitive harm" based on evidence that "at least one customer **[*43]** shifted business away from plaintiff because it was no longer price-competitive" but denying/granting summary judgment because there was no Robinson-Patman violation); Capital Ford Truck Sales, Inc. v. Ford Motor Co., 819 F. Supp. 1555, 1578 (N.D. Ga. 1992) (holding that "[t]he *de minimis* injury doctrine applies only when a plaintiff has no direct evidence of lost sales and adduces proof of competitive injury through evidence of substantial price discrimination over time"); *see also* 3A FED. JURY PRAC. & INSTR. § 150.205 (requiring plaintiff to "show there is a reasonable possibility that the alleged price discrimination may have harmed competition. Plaintiff is not required to show that the alleged price difference actually harmed competition.") (citing Corn Products Refining Co. v. Fed. Trade Comm'n, 324 U.S. 726, 65 S. Ct. 961, 89 L. Ed. 1320, 40 F.T.C. 892 (1945)); The Bohack Corp. v. Iowa Beef Processors, Inc., 715 F.2d 703, 711 n.9 (2d Cir. 1983) (affirming a jury charge that stated that "the plaintiff must establish by a fair preponderance of the evidence that it suffered a loss of sales and consequently a loss of profit because of the illegal price discrimination . . . . The loss of Bohack may be shown by showing that the **[*44]** price discrimination diverted sales from Bohack that Bohack lost sales and therefore profit. It is not necessary that you find that competition was in fact lessened, injured or damaged, but only that the acts of the defendant may have substantially lessened competition, injured or destroyed some competition."); *Cf.* *Gen. Auto Parts Co. v. Genuine Parts Co., 2007 U.S. Dist. LEXIS 15473, 2007 WL 704121, at *6 (D. Idaho Mar. 5, 2007)* (denying summary judgment after finding that there were disputes of fact on whether any price discrimination "might" have substantially lessened competition). However, after reviewing all of the pertinent authorities, and relying in particular on the Supreme Court's most recent pronouncement in *Volvo*, I conclude that a Robinson-Patman claim requires a showing of substantial competitive injury and that the de minimis sales identified by the matching process are insufficient to establish such an injury. *546 U.S. at 180*.

For all these reasons, I conclude that plaintiffs have failed to demonstrate sufficient competitive injury to sustain their Robinson-Patman Act claims. Accordingly, defendants are entitled to summary judgment.

2. Antitrust Injury

As noted above, a plaintiff seeking to recover **[*45]** damages on a Robinson-Patman claim must establish an antitrust injury. An antitrust injury is an "(1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the statute." *Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 220 (2d Cir. 2004)* (citing *Brunswick Corp. v. Pueblo Bowl—O—Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. *See also* *Dayton Superior Corp. v. Marjam Supply Co., 2011 U.S. Dist. LEXIS 17221, 2011 WL 710450 at * 6 (E.D.N.Y. Feb. 22, 2011)*. Even if plaintiffs' claims were not subject to dismissal for failure to raise a question of fact with respect to competitive injury, I would grant defendants' summary judgment motion because plaintiffs have, largely for the reasons discussed above, also failed to present evidence of antitrust injury.

Price discrimination does not entitle a disfavored purchaser to "automatic damages." *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 561, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)*. Rather,

> [f]or purposes of Robinson-Patman secondary line cases, antitrust injury is the competitor's unfair competitive edge that is used to attract sales or profits from the plaintiffs. Thus, the injury must be traced **[*46]** to the competitor's competitive use of their price advantage.[20]

Drug Mart II, 472 F. Supp. 2d at 424 (citing *Uniroyal, Inc. v. Jetco Auto Serv., Inc., 461 F. Supp. 350, 358 (S.D.N.Y. 1978))*. In other words, "[i]f the price discrimination . . . was the cause of the plaintiffs' injury, the plaintiffs should be able to match up their losses with gains to the favored competitors." *Id. at 424-25* (quoting *Hasbrouck v. Texaco, Inc*., 1980 WL 1843 at *19 (E.D. Wash. Mar. 31, 1980), *aff'd in part, rev'd in part*, *663 F.2d 930 (9th Cir. 1981)*. Except to the minimal extent described above, plaintiffs here, despite tremendous effort, have been unable to "match up their losses" with gains to the favored purchasers. Plaintiffs have identified less than 3% of their total lost customers as having purchased BNPDs from favored purchasers, undermining any inference that price advantages enjoyed by favored purchasers caused plaintiffs' injury. Where the evidence of lost sales is as de minimis as it is here, it cannot support a finding of a causal connection between lost sales and the alleged price discrimination.

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[20] Judge Glasser discussed the standard to apply in analyzing antitrust injury as follows:

> First, **[*47]** the plaintiffs must prove the fact of antitrust injury; second, they must make a showing regarding the amount of damages in order to justify an award by the trier of fact. . . . [P]laintiffs' burden of proving the fact of damage under *§ 4* of the Clayton Act is satisfied by its proof of some damage flowing from the unlawful conspiracy. Once causation is established, the jury is permitted to calculate the actual damages suffered using a "'reasonable estimate, as long as the jury verdict is not the product of speculation or guess work.'" The plaintiffs therefore must proffer evidence of some damage, with the recognition that the actual amount need not be proven to the same degree of certainty as proving some quantum of damages.

Drug Mart II, 472 F. Supp. 2d at 423-24 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)* and *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562, 51 S. Ct. 248, 75 L. Ed. 544 (1931))*.

Although there appear to be few precedents on point, the relevant decisions do suggest that a trivial effect on a claimant's sales is insufficient to demonstrate antitrust injury. For example, in *Allen Pen Co. v. Springfield Photo Mount Co., 653 F.2d 17 (1st Cir. 1981)* **[*48]** (Breyer, J.), the First Circuit rejected plaintiff's claim, holding that because "the affected sales were but a tiny fraction of its total business," plaintiff was unable "to show any significant actual injury." *Id. at 23*. A similar analysis contributed to the dismissal in *Hygrade Milk and Cream Co. v. Tropicana Products, Inc., 1996 U.S. Dist. LEXIS 6598, 1996 WL 257581 at *18-19 (S.D.N.Y. May 16, 1996)* (rejecting claim of antitrust injury where lost sales were, at best, "insignificant").

Because they are essentially unable to match up a significant number of the customers they lost with those the favored purchasers gained, plaintiffs have failed to demonstrate antitrust injury. *But see* *U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1377 (2d Cir. 1988)* (affirming that an antitrust plaintiff may recover nominal damages under the Clayton Act, albeit in the context of a Sherman Act claim). Defendants are therefore entitled to summary judgment on this ground as well.

3. Equitable Relief

Plaintiffs seek equitable relief as well as damages. Injunctive relief "against threatened loss or damage by a violation of the antitrust laws" is available pursuant to *Section 16* of the Clayton Act, *15 U.S.C. § 26*. If **[*49]** a Robinson-Patman plaintiff establishes all the elements of its prima facie claim, including competitive injury, injunctive relief may be granted without any showing of antitrust injury.

Although the matter was not explicitly raised by the parties in their motion papers, plaintiffs' claims for equitable relief are foreclosed by Judge Glasser's decision in *Drug Mart III, 2007 U.S. Dist. LEXIS 93493, 2007 WL 4526618 (E.D.N.Y. Dec. 20, 2007)*. In that decision, Judge Glasser considered whether his decision granting defendants summary judgment with respect to plaintiffs' damages claims was dispositive of, or even relevant to, plaintiffs' claims for equitable relief. Judge Glasser determined that plaintiffs' equitable relief claims could not survive, and rendered a thorough decision that explained his reasoning in great detail. Little would be served by retracing Judge Glasser's steps here; I therefore simply summarize his decision as follows. Citing *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*, Judge Glasser recognized that, generally, a plaintiff may obtain equitable relief from price discrimination merely by demonstrating a threat of antitrust injury, and need not establish actual injury and damages. **[*50]** *2007 U.S. Dist. LEXIS 93493, [WL] at *6*. Judge Glasser went on to conclude, however, that

> where the allegedly anticompetitive conduct has been ongoing for a substantial period of time, the distinction between *Section 4*'s requirement of actual injury and Section 16's more liberal requirement of threatened injury tends to shrink or disappear. If the plaintiff cannot show itself to have suffered some actual injury of the type the antitrust laws were intended to prevent from a purportedly anticompetitive practice in which the defendant has engaged for a substantial portion of time, the plaintiff is effectively presumed to be unable to establish the existence of a threat of future injury arising from that same conduct in the future, at least absent some plausible explanation why a practice that has not created a cognizable injury in the past creates a credible risk of doing so in the future if permitted to continue.

*Drug Mart III, 2007 U.S. Dist. LEXIS 93493, 2007 WL 4526618, at *13* (relying on *Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666, 187 U.S. App. D.C. 11 (D.C. Cir. 1977)*, *Ashley Meadow Farms, Inc. v. Am. Horse Shows Ass'n, Inc., 617 F. Supp. 1058 (S.D.N.Y. 1985)*, and *Machovec v. Council for the Nat'l Register of Health Serv. Providers in Psych., Inc., 616 F. Supp. 258 (E.D. Va. 1985))*.

Accordingly, **[*51]** Judge Glasser granted summary judgment to the designated defendants with respect to the designated plaintiffs' claims for equitable relief. Because plaintiffs have failed to demonstrate competitive injury, Judge Glasser's decision controls here, and it requires dismissal of plaintiffs' claims for injunctive relief.

4. Section 2(d) and 2(f) Claims

Plaintiffs also bring claims pursuant to Sections 2(d) and 2(f) of the Act. *15 U.S.C. §§ 13(d)*, *(f)*.[21] Because 2(f) claims are derivative in nature and I find that plaintiffs failed to establish their 2(a) claims, defendants' motion for summary judgment with respect to the 2(f) claims is granted. *See Intimate Bookshop, Inc. v. Barnes & Noble, Inc., 88 F. Supp. 2d 133, 137 (S.D.N.Y. 2000)*. *Section 2(d)* does not require plaintiffs to establish competitive injury, *Blue Tree Hotels, 369 F.3d at 219* (citing *FTC v. Simplicity Pattern Co., 360 U.S. 55, 65, 79 S. Ct. 1005, 3 L. Ed. 2d 1079 (1959))*; *Hygrade Milk & Cream Co., 1996 U.S. Dist. LEXIS 6598, 1996 WL 257581, at *13*; under the Clayton Act, however, plaintiffs must establish antitrust injury. Because I find that plaintiffs have failed to establish antitrust injury, defendants' motion for summary judgment with respect to the 2(d) claims is also granted.

CONCLUSION

For all these reasons, defendants' motion for summary judgment is granted.

SO ORDERED.

Dated: Brooklyn, New York

August 16, 2012

/s/

STEVEN M. GOLD

United States Magistrate Judge

End of Document

[21] *Section 2(d)* **[*52]** prohibits

> any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

15 U.S.C. § 13(d). *Section 2(f)* provides that it is "unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." *Id*. *§ 13(f)*.

Clean Conversion Techs., Inc. v. CleanTech Biofuels, Inc.

United States District Court for the Southern District of California

August 20, 2012, Decided; August 20, 2012, Filed

Case No. 12-cv-239-L(JMA)

Reporter
2012 U.S. Dist. LEXIS 117279 *; 2012 WL 3585171

CLEAN CONVERSION TECHNOLOGIES, INC., Plaintiff, v. CLEANTECH BIOFUELS, INC., et al., Defendant.

Subsequent History: Related proceeding at *Clean Conversion Techs., Inc. v. CleanTech Biofuels, Inc., 2013 Cal. App. Unpub. LEXIS 1616 (Cal. App. 4th Dist., Mar. 5, 2013)*

Core Terms

Patents, allegations, antitrust, technology, conversion, market power, monopolize, license, Sherman Act, rights, competitors, biomass, motion to dismiss, relevant market, terminate, barriers, consolidate, conspiracy, municipal, lawsuit, fails

Counsel: [*1] For Clean Conversion Technologies, Inc., a Washington corporation, Plaintiff: James M Peterson, LEAD ATTORNEY, Higgs Fletcher and Mack, San Diego, CA; Kevin L. Wheeler, LEAD ATTORNEY, Higgs, Fletcher & Mack, LLP, San Diego, CA.

For Cleantech Biofuels, Inc., a Delaware corporation, Defendant: Brandon Quoc Tran, LEAD ATTORNEY, Buchalter Nemer PC, Irvine, CA.

For Steve Vande Vegte, an individual, Defendant: Jonathan A. Michaels, LEAD ATTORNEY, Michaels Law Group, APLC, Newport Beach, CA.

Judges: M. James Lorenz, United States District Court Judge.

Opinion by: M. James Lorenz

Opinion

ORDER DENYING DEFENDANT'S MOTION TO DISMISS [DOC. 14]

On January 30, 2012, Plaintiff Clean Conversion Technologies, Inc. ("CCT") commenced this action seeking injunctive relief and damages for alleged violations of the Sherman Act (*15 U.S.C. §§ 1-2*), the Clayton Act (*15 U.S.C. § 18*), the California Cartwright Act (*Cal. Bus. & Prof. Code § 16720, et seq.*), and California's Unfair Competition Law ("UCL") (*Cal. Bus. & Prof. Code § 17200, et seq.*). Defendant CleanTech Biofuels, Inc. ("CleanTech") now moves to dismiss the complaint. [1] CCT opposes.

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[1] Defendant Steve Vande Vegte ("SVV") does not join in CleanTech's motion.

The Court found this motion **[*2]** suitable for determination on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d.1). (Doc. 17.) For the following reasons, the Court **DENIES** CleanTech's motion.

I. BACKGROUND

A. Pressurized Steam Classification ("PSC") Conversion

CleanTech is a Delaware corporation engaged in the business of producing cellusitic biomass from municipal solid waste. (Compl. ¶ 85.) CCT is a Washington corporation and CleanTech competitor in the PSC conversion market. (*Id.* ¶¶ 1, 102-05.)

"PSC conversion is used to convert solid, contaminated municipal waste . . . into certain kinds of usable commercial materials—specifically, various kinds and types of ferrous metals, non-ferrous metals, plastics, glass, and usable biomass." (Compl. ¶ 14.) "Usable biomass in turn can be transformed into various commercial materials and other kinds of materials." (*Id.*) Without PSC conversion, a very substantial portion of contaminated municipal waste must be buried in landfills, incinerated, or only partially treated by other methods. (*Id.* ¶ 46.)

B. Antitrust Allegations

Beginning in 2008, CleanTech set out to obtain all of the patented PSC conversion technology in existence at the time. (*See* Compl. ¶¶ 87-95.) **[*3]** In September 2008, CleanTech acquired Biomass North America Licensing, Inc. ("Biomass"), the owner of several important patent applications relating to PSC technology—the "Noll Patents"—at that time. (*Id.* ¶ 93.) This transaction gave CleanTech the rights to practice PSC technology described by several patents and patent applications, most importantly the technology described in several U.S. Patent Applications and their related Canadian Patent Applications. (*Id.*) In October 2008, CleanTech purchased another set of PSC patents—the "Eley Patents"—from World Waste Technologies, Inc. ("World Waste"). (*Id.* ¶ 94.) In both instances, CleanTech structured the transactions so that Biomass and World Waste would derive substantial profits by cooperating with CleanTech's attempted monopolization of the PSC conversion market. (*Id.* ¶ 97.) Furthermore, CleanTech's purchase of the Eley Patents from World Waste did not reflect the market value of the patents. (*Id.* ¶ 101.) Rather, CleanTech paid a huge premium in order to accomplish its goal of consolidating the PSC technology in one entity. (*Id.*)

After acquiring the Eley Patents, CleanTech allegedly put into motion a scheme to terminate the Master License **[*4]** Agreement for those patents so that it could corner the market for PSC conversion. (Compl. ¶¶ 96, 100.) However, the Eley Patents had already been exclusively licensed to one of CleanTech's competitors, Clean Earth Solutions. (*Id.* ¶¶ 98-99, 104.) Clean Earth Solutions and its exclusive license of the Eley Patents was one of the final impediments to CleanTech cornering of the PSC market. (*Id.*) Thus, immediately after CleanTech purchased the Eley Patents from World Waste, it set in motion a scheme to terminate Clean Earth Solution's exclusive license. (*Id.* ¶ 100.) Working with Vande Vegte, CleanTech allegedly conspired to have litigation initiated against Clean Earth Solutions to pressure it into giving up its rights to the PSC technology in the Eley Patents ("SVV litigation"). (*Id.* ¶ 103.) As a result of the debt load caused by the SVV litigation, Clean Earth Solutions sold its license under the Eley Patents to CCT. (*Id.* ¶¶ 1, 102-05.) Vande Vegte then used this transfer as a basis of another lawsuit filed against Clean Earth Solutions and CCT for fraudulent transfer. [2]

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[2] Both parties refer to a second lawsuit between Vande Vegte and CCT in their moving papers even though this *vital* second **[*5]** lawsuit is not clearly alleged anywhere in the complaint. (*See* Def.'s Mot. 7:11-12; Pl.'s Opp'n 4:4-6.) CleanTech cites Paragraph 106 of the complaint, which only passingly mentions "concurrent litigation" against Clean Earth Solutions with no mention of CCT; CCT conveniently does not identify any allegation in the complaint that discusses the second lawsuit.

CleanTech seized the license transfer as an opportunity to attempt to terminate the license itself. (Compl. ¶ 106.) In March 2011, CleanTech's President, Ed Hennessey, approached CCT and stated that he "had talked with Steve Vande Vegte and can make this [State Court] lawsuit go away if you cooperate with me" in working together to market the PSC conversion technology. (*Id.* ¶¶ 106-07.) Based on the allegations in the complaint, it is unclear which state-court lawsuit Mr. Hennessey was referring to.

In September 2011, Mr. Hennessey and Vande Vegte contacted the original inventor of the PSC technology in the Eley Patents, Dr. Michael Eley, in an effort to convince him that he should participate in their attempt to monopolize the PSC market. (Compl. ¶¶ 100, 109.) Then, on November 10, 2011, Mr. Hennessey put in CleanTech's 10-Q filing **[*6]** that it was the company's "intention to 'consolidate the ownership' of the intellectual property rights to PSC technology to corner the PSC market by excluding all other market participants." (*Id.* ¶ 108.)

CCT commenced this action on January 20, 2012, alleging claims against CleanTech for various antitrust violations. Specifically, CCT alleges CleanTech's "overall scheme" to monopolize the PSC market violated *Sections 1* and *2* of the Sherman Act as well as conspiracy to monopolize under the same statute. (Compl. ¶¶ 114, 124.) Additionally, CCT brings suit under the Clayton Act, the California Cartwright Act, and California's UCL. (*Id.* ¶¶ 131, 140, 144.)

II. LEGAL STANDARD

The court must dismiss a cause of action for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. A motion to dismiss under *Rule 12(b)(6)* tests the legal sufficiency of the complaint. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. The court must accept all allegations of material fact as true and construe them in light most favorable to the nonmoving party. *Cedars-Sanai Med. Ctr. v. Nat'l League of Postmasters of U.S., 497 F.3d 972, 975 (9th Cir. 2007)*. Material allegations, even **[*7]** if doubtful in fact, are assumed to be true. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. However, the court need not "necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003)* (internal quotation marks omitted). In fact, the court does not need to accept any legal conclusions as true. *Ashcroft v. Iqbal, 556 U.S. 662, 677, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*

"While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (internal citations omitted). Instead, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Id.* Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 129 S. Ct. at 1949* (citing *Twombly, 550 U.S. at 570*). **[*8]** "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint may be dismissed as a matter of law either for lack of a cognizable legal theory or for insufficient facts under a cognizable theory. *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984)*.

III. DISCUSSION[3]

[3] CleanTech claims that CCT's opposition was untimely. (Def.'s Reply 6:23-28.) This argument is completely baseless and frivolous. Based on the May 7, 2012 hearing date for this motion, CCT's opposition was due April 23, 2012. CleanTech concedes that that is indeed the due date for the opposition. The docket shows that CCT filed its opposition on April 23, 2012. (Doc. 20.) Accordingly, the Court rejects CleanTech's claim and will consider CCT's opposition in assessing the merits of CleanTech's motion.

CleanTech moves to dismiss CCT's complaint on three grounds: (1) CCT lacks standing to pursue its antitrust **[*9]** claims because it fails to allege an antitrust injury; (2) litigation between CCT and Vande Vegte cannot serve as the basis for this action because the litigation is privileged under the *Noerr-Pennington* doctrine and California's absolute litigation privilege; and (3) CCT fails to allege "market power" under the Sherman Act. The Court will address each argument below.

A. Standing

Only those plaintiffs who meet the requirements for "antitrust standing" may pursue a claim under the antitrust acts. *Am. Ad Mgmt., Inc. v. Gen. Tel. Co., 190 F.3d 1051, 1054-55 (9th Cir. 1999)*. To have antitrust standing, a plaintiff must adequately allege "an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1102 (9th Cir. 1999)*. The Ninth Circuit has defined antitrust injury as injury to the process of competition and consumer welfare. *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 901 (9th Cir. 2008)*; *Amarel v. Connell, 102 F.3d 1494, 1509 (9th Cir. 1997)* (citing *Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 528, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*. The **[*10]** plaintiff therefore must show more than injury to itself as a competitor, "but rather injury to the competition." *Austin v. McNamara, 979 F.2d 728, 739 (9th Cir. 1992)*. In addition, to have antitrust standing a plaintiff must be a "participant in the same market as the alleged malefactors." *Glen Holly Entm't, Inc. v. Tektronix Inc., 352 F.3d 367, 373 (9th Cir. 2003)* (internal quotation marks omitted). "In other words, the party alleging the injury must be either a consumer of the alleged violator's goods or services[,] or a competitor of the alleged violator in the restrained market." *Eagle v. Star-Kist Foods, Inc., 812 F.2d 538, 540 (9th Cir. 1987)*.

CleanTech contends that CCT lacks standing to pursue its Sherman Act and Cartwright Act claims because "[t]here is no antitrust violation for intending to enforce legitimate patents rights" and CCT fails to allege an antitrust injury. (Def.'s Mot. 6:23-7:6.) CleanTech does not elaborate much on the former except to add that "CCT could not suffer an antitrust injury arising from CleanTech enforcing its patent rights." (*Id.*) It does, however, elaborate a bit more on the latter, contending that "termination of the license agreement under which **[*11]** CCT intended to use the Eley Patents is not a basis for antitrust injury," and "[n]either is the purported litigation against CCT[.]" (*Id.*) CCT responds that it properly alleges its standing, identifying allegations throughout the complaint that purportedly show an antitrust injury. (Pl.'s Opp'n 7:19-8:16.)

To begin, CCT alleges that it participates in the business of producing cellustic biomass as a licensee of PSC technology. (Compl. ¶¶ 85, 102, 110, 121, 133, 139.) From these allegations, the Court can reasonably infer that CCT is a participant in the same market as CleanTech. *See Glen Holly Entm't, 352 F.3d at 373*.

Moving on, CCT alleges harms that are precisely the type that antitrust laws were designed to prevent. Specifically, it alleges that but for the conspiracy to completely eliminate CleanTech's competition in the market for PSC conversion technology, there would be participants other than CCT who could provide competitive bids and options to consumers. (Compl. ¶ 101, 121, 133.) CCT also alleges that CleanTech's conspiracy suppressed, eliminated, and interfered with competition and continues to do so through a scheme of strategic litigation, market manipulation, and back-room **[*12]** agreements to manipulate market participants out of the market—including CCT—and disrupt the natural competition in the relevant market for PSC conversion technology and services. (*Id.* ¶ 102.) Further, the complaint includes allegations that CleanTech's conduct produced various anticompetitive effects including: (a) adversely affecting competition in the market for PSC technology and services (*id.* ¶ 110), (b) increasing prices in the PSC market (*id.* ¶ 114), (c) monopolizing the market related to municipal waste by PSC conversion (*id.* ¶ 121), and (d) raising the barriers to entry into the PSC market (*id.* ¶ 122). CCT does not allege that it suffered antitrust injury from CleanTech's enforcement of its patent rights. Rather, CCT alleges that it, as well as the market as a whole, suffered an injury to competition as a result of CleanTech's effort to conspire to consolidate the market and monopolize the market power into one entity. (*Id.* ¶¶ 110, 113, 120, 121, 122, 133, 136, 137.)

Accordingly, the Court finds that CCT properly alleges an antitrust injury and thus has standing to pursue its antitrust claims. *See* Austin, 979 F.2d at 739.

B. Market Power

In order to state a valid claim under **[*13]** the Sherman Act, a plaintiff must allege both that a "relevant market" exists and that the defendant has power within that market. *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1044 (9th Cir. 2008)*. CCT brings one of its antitrust claims under *§ 1* of the Sherman Act, which governs restraint of trade and tying, and another under *§ 2* of the Sherman Act, which governs monopolization and attempted monopolization. The "relevant market" and "market power" requirements apply identically under these two sections of the Sherman Act. *Id. at 1044 n.3*. CleanTech does not challenge CCT's Clayton Act claim. And though ***antitrust law*** requires allegations of product market, a geographic market, and harm to competition, CleanTech does not challenge any of CCT's allegations related to those requirements. *See* *id. at 1045*. Rather, CleanTech only challenges the sufficiency of CCT's market-power allegation. Thus, that is the issue that the Court will address below.

"Market power is the ability to raise price profitability by restricting output; when a party has sufficient market power to exclude competition or control prices, that party possesses monopoly power." *DocMagic, Inc. v. Ellie Mae, Inc., 745 F. Supp. 2d 1119, 1136 (9th Cir. 2010)* **[*14]** (citation and internal quotation marks omitted). Market power need not be pled with specificity, and whether a defendant actually possesses market power is a factual question. *Newcal, 513 F.3d at 1045, 1051*. A plaintiff may plead market power through allegations of direct evidence showing the effects of anticompetative behavior, or indirect evidence of market power. To demonstrate market power indirectly, a plaintiff must define the relevant market, and show that (1) the defendant has a dominant share of that market, and (2) that there are significant barriers to entry and existing competitors lack the capacity to increase their output in the short run. *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1439 (9th Cir. 1995)* (the "barriers to entry" test looks at not only whether "there are significant barriers to entry [but also whether] . . . existing competitors lack the capacity to increase their output in the short run"). Additionally, to bring a claim for attempted monopolization, rather than pleading monopoly power, a plaintiff may plead a "dangerous probability" that the defendant may be able to achieve monopoly power. *Newcal, 513 F.3d at 1044 n.3*.

CleanTech argues that "the **[*15]** only allegation of market power is that CleanTech holds the Eley Patent and Noll Patent," and there are no other allegations to support any antitrust violations regarding those patents. (Def.'s Mot. 11:11-17.) It contends that CCT's Cartwright Act claims fail for the same reasons. (*Id.* at 11:18-12:6.) In response, CCT argues that "it alleges facts sufficient to support an indirect inference that Cleantech possesses market power in the PSC market," identifying allegations throughout the complaint to support its argument. (Pl.'s Opp'n 10:18-11:3.)

As briefly discussed above, CCT adequately alleges that the relevant market here is the PSC conversion market. (*See* Compl. ¶¶ 85, 102, 110, 121, 133, 139.) CCT also alleges that CleanTech has taken action to remove competitors from that market in order to dominate it. (*Id.* ¶¶ 93-97, 100-02, 113-14, 121-23, 133, 136-37.) Specifically, CleanTech acquired both competing patents, the Eley patents and Noll patents, concerning the PSC conversion process in the United States with the intent to "consolidate the ownership" of the intellectual-property rights to the PSC technology in order to corner the PSC market by excluding all other market participants. **[*16]** (*Id.* ¶¶ 95-97, 108-10.) A prime example of this exclusionary behavior is CleanTech's alleged attempt to exclude CCT—the *only* licensee under the Eley Patents—from the PSC market by terminating a license agreement that granted CCT rights to use the Eley Patents. (*Id.* ¶¶ 98-106.) This type of exclusionary behavior also constitutes a substantial barrier to entry into the market for any company considering developing its own offering of PSC services. (*See id.* ¶¶ 72, 77.) Additionally, CCT alleges that in a market which already maintains high entry costs in research, development, and manufacturing of the equipment, it is unlikely that there will be additional entry into the PSC market as a result of CleanTech's behavior. (*Id.* ¶ 122.) From these allegations, the Court can reasonably infer that

CleanTech has indirect market power in the PSC conversion market, and that there is a "dangerous possibility" that CleanTech may be able to achieve monopoly power. [4] *See* Rebel Oil, 51 F.3d at 1439.

Finally, CleanTech's argument regarding patent rights and market power are misguided. Contrary to CleanTech's contentions, CCT does not allege that CleanTech obtained its patents through fraud on the Patent Office. Moreover, CCT is not a patent-infringement plaintiff and is not alleging that as a part of CleanTech's conspiracy to monopolize the PSC market that CleanTech improperly maintained infringement actions against CCT. Instead, CCT alleges that CleanTech, through its conspiracy with Vande Vegte, attempted to consolidate market power in one entity, wrongfully terminated at least one patent, and created artificially high barriers to entry into the PSC market. (Compl. ¶¶ 112-16, 119-22, 133, 136-37.) Therefore, the Court rejects CleanTech's argument that this action is a matter of patent-enforcement **[*18]** rights.

C. *Noerr-Pennington* Doctrine

The *Noerr-Pennington* doctrine protects activities by parties to influence government policy or legislation for antitrust claims. *See* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); United Mine Workers v. Pennington, 381 U.S. 657, 670, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965). The doctrine nominally began as a judicially-created limitation on the scope of the Sherman Act with respect to activities by parties to petition the government to take a certain course of action beneficial to them and harmful to competitors. *See, e.g.,* Noerr, 356 U.S. at 135. The doctrine has since been extended to protect those who petition for other forms of governmental actions. *See, e.g.,* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972) (administrative and judicial proceedings); City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991) (municipal ordinances). The doctrine has also been expanded to include litigation to protect rights such as patents. *See* Prof'l Real Estate Investors v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993). The *Noerr-Pennington* doctrine protects "not only petitions sent directly to the court in the course of **[*19]** litigation, but also 'conduct incidental to the prosecution of the suit.'" Sosa v. DIRECTV, Inc., 437 F.3d 923, 934-35 (9th Cir. 2006). The Ninth Circuit has held that "communications between private parties are sufficiently within the protection of the Petition Clause to trigger the *Noerr-Pennington* doctrine, so long as they are sufficiently related to petitioning activity." Id. at 935.

CleanTech contends that the litigation between Vande Vegte and CCT—which the Court again emphasizes is not alleged in the complaint—does not fall within one of the recognized circumstances to lose *Noerr-Pennington* protection, and thus the litigation is protected by the doctrine. (Def.'s Mot. 8:21-25.) CCT responds that the litigation is not protected by the *Noerr-Pennington* doctrine because references to the litigation do not involve "petitioning activity that falls under the *Noerr-Pennington* umbrella." (Pl.'s Opp'n 12:17-25, 18:17-14:12.) CleanTech appears to challenge an allegation that it characterizes as stating that "Clean Tech conspired with SVV to engage in litigation against CCT to monopolize the relevant market." (Def.'s Mot. 7:11-12.) However, the application of the *Noerr-Pennington* doctrine **[*20]** appears to substantively center around the allegation that "CleanTech's president, Ed Hennessey manifested the Defendants' intent to manipulate and conspire to monopolize the PCS [sic] market when he told CCT on March 3, 2011, that he 'had talked with Steve Vande Vegte and can make this [State Court] lawsuit go away if you will cooperate with me' in working together to market the PSC conversion technology." [5] (Compl. ¶ 107.)

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[4] The Cartwright Act is California's ***antitrust law*** that "was modeled after the Sherman Act." Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001). Accordingly, "[t]he analysis under **[*17]** California's ***antitrust law*** mirrors the analysis under federal law because the Cartwright . . . was modeled after the Sherman Act." *Id.* (citations omitted). Therefore, because CleanTech's argument against CCT's Cartwright Act claim is predicated on the insufficiency of CCT's Sherman Act claims, CleanTech also fails to show that CCT's Cartwright Act claim is insufficiently pled as well.

[5] Though it is unclear which litigation that the "State Court lawsuit" refers to, the analysis below applies to both the SVV litigation and the unalleged second lawsuit between Vande Vegte and CCT.

CCT refers to litigation only in that Mr. Hennessey, CleanTech's president, used it at leverage to attempt to compel CCT to "work[] together to market the PSC conversion technology." (*See* Compl. ¶ 107.) But based on the allegations in the complaint, Mr. Hennessey does not appear to be party to the SVV litigation or the litigation between Vande Vegte and CCT; the SVV litigation is between Vande Vegte and Clean Earth Solutions (*id.* ¶ 103), and the unalleged second litigation appears to be between Vande Vegte and CCT. And though at first glance the offer seems to be for some **[*21]** sort of settlement, that would be an inaccurate characterization because Mr. Hennessey is not a party to either litigation, and thus he lacks the authority to make the lawsuit "go away."

More importantly, CleanTech puts the cart before the horse. Litigation is only implicated in order to support an alleged scheme to violate ***antitrust law***. CleanTech does not, however, provide any substantive analysis as to whether the *Noerr-Pennington* doctrine even applies. It neither specifically identifies any petitions sent directly to the court in the course of nor any conduct incidental to the prosecution of the either litigation. *See Sosa, 437 F.3d at 934-35*. Rather, CleanTech merely starts its analysis from the presumption that the doctrine applies, and then goes on to argue that the unalleged litigation between Vande Vegte and CCT does not fall within the "sham" exception. (*See* Def.'s Mot. 7:15-19, 7:20-8:25.) CleanTech has not shown that it is entitled to the benefit of such a presumption. Simply put, CleanTech fails specifically identify any petitioning activity, and also fails to show that either litigation is entitled to *Noerr-Pennington* protection. Therefore, without more, the Court cannot **[*22]** conclude that either litigation is protected by the *Noerr-Pennington* doctrine. [6]

IV. CONCLUSION & ORDER

In light of the foregoing, the Court **DENIES** CleanTech's motion to dismiss. (Doc. 14.)

IT IS SO ORDERED.

DATED: August 20, 2012

/s/ M. James Lorenz

M. James Lorenz

United States District Court Judge

End of Document

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[6] CleanTech further moves to dismiss CCT's UCL claim on the grounds that it is barred by California's absolute litigation privilege. "The usual formation is that the privilege applies to any communication (1) made in judicial or quasi judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve objects of the litigation; and (4) that have some connection or logical relation to the action." *People v. The Pac. Lumber Co., 158 Cal. App. 4th 950, 958, 70 Cal. Rptr. 3d 501 (2008)* (internal citations and quotation marks omitted). CleanTech fails to identify any communication or action that falls under this protection. Therefore, the Court rejects CleanTech's absolute-litigation-privilege argument.

Fromer v. Comcast Corp.

United States District Court for the District of Connecticut

August 21, 2012, Decided; August 21, 2012, Filed

No. 3:09cv2076 (SRU)

Reporter

886 F. Supp. 2d 106 *; 2012 U.S. Dist. LEXIS 117807 **; 2012-2 Trade Cas. (CCH) P78,015; 2012 WL 3600298

ROBERT FROMER, Plaintiff, v. COMCAST CORP., et al., Defendants.

Core Terms

arbitration, arbitration agreement, class action, unenforceable, vindicate, federal statute, argues, rights, arbitration provision, antitrust claim, subscriber, costs, parties, statutory right, compel arbitration, attorney's fees, unconscionable, Sherman Act, invalidate, void

Counsel: **[**1]** For Robert Fromer, Ind & o/b/o all others similarly situated, Plaintiff: Anthony J. Medico, Frank Napolitano, III, LEAD ATTORNEYS, Law Offices of Medico and Napolitano, Greenwich, CT; William M. Sweetnam, LEAD ATTORNEY, PRO HAC VICE, Sweetnam, LLC, Northbrook, IL.

For Comcast Corp., Comcast of CT Inc, Comcast Cable Communications Inc, Comcast Cable Communications Holdings Inc, Defendants: Angela Daker, David P. Draigh, Jaime Bianchi, Terrence Finneran, LEAD ATTORNEYS, PRO HAC VICE, White & Case, LLP, Miami, FL; Arthur J. Burke, James W. Haldin, LEAD ATTORNEYS, PRO HAC VICE, Davis Polk & Wardwell, New York, NY; Brett J. Boskiewicz, LEAD ATTORNEY, Robinson & Cole, LLP-HTFD, Hartford, CT; Craig A. Raabe, Elizabeth R. Leong, LEAD ATTORNEYS, Robinson & Cole, Hartford, CT.

Judges: Stefan R. Underhill, United States District Judge.

Opinion by: Stefan R. Underhill

Opinion

[*107] **RULING ON MOTION TO COMPEL ARBITRATION**

This case involves a putative class action brought by a Comcast subscriber who is attempting to sue the defendants under the Connecticut Unfair Trade Practices Act ("CUTPA") and the Sherman Act. An arbitration agreement exists between the two parties, and at issue here is whether the class action waiver provision of **[**2]** that agreement is enforceable.

At the time the parties wrote their briefs, there was some question whether the Second Circuit's doctrine on class arbitration had been overruled by the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)*. Two days before the oral argument on the motion to compel, the Second Circuit issued an opinion holding that the Second Circuit's doctrine had not been overruled. *In re American Express Merchants Litig., 667 F.3d 204 (2d Cir. 2012)* ("*American Express III*").

During the hearing, I granted the parties' request to submit supplemental briefing in light of *American Express III* and the issues raised during oral argument. The parties submitted additional briefs, which I have reviewed. For the reasons that follow, the defendants' motion to compel arbitration, doc. 57, is **DENIED**.

I. Background

The plaintiff, Robert Fromer, is a customer of Comcast Corporation, Comcast of Connecticut, Inc., Comcast Cable Communications, LLC, and Comcast Cable Communications Holdings, Inc. (collectively, **[*108]** "Comcast"). Fromer first subscribed to Comcast's cable television service on October 21, 1999, and to its high-speed internet service on April 18, 2002. **[**3]** Defs.' Mot. to Compel Arbitration ("Defs.' Mot. to Compel"), Ex. 1 at ¶ 5. In July 2007, Comcast included an arbitration notice along with Fromer's monthly bill. *Id.* at ¶ 7; Defs.' Mot. to Compel, Ex. A.

On July 26, 2007, Fromer began subscribing to Comcast Digital Voice. Defs.' Mot. to Compel, Ex. 1 at ¶ 9. When Comcast connected Fromer's Digital Voice service, it installed an embedded media terminal adapter ("eMTA"). [1] *Id.* at ¶ 10. At that time Comcast also gave Fromer a work order. *Id.* The work order stated:

> If this Work Order relates to the initial installation of services, I acknowledge receipt of Comcast's Welcome Kit(s) which contain the Comcast subscriber agreement(s), the Comcast subscriber privacy notice(s) and the other important information about the service(s). I agree to be bound by the Comcast subscriber agreement(s) which constitute the agreement(s) between Comcast and me for the service(s).

Defs.' Mot. to Compel, Ex. B at 1. The welcome kit included an arbitration agreement. Defs.' Mot. to Compel, Ex. C at 20-22.

In March 2008, Comcast included a Subscriber Agreement with Fromer's monthly bill. Defs.' Mot. to Compel, Ex. 1 at ¶ 14. The 2008 Subscriber Agreement also contained an arbitration clause. Defs.' Mot. to Compel, Ex. D at 9-11. The arbitration agreement provided:

> If you have a Dispute (as defined below) with Comcast that cannot be resolved through the informal dispute resolution process described in this Agreement, you or Comcast may elect to arbitrate that Dispute in accordance with the terms of this Arbitration Provision rather than litigate the Dispute in court.

Id. at 9. Under the agreement, a "dispute" is defined as:

> [A]ny dispute, claim or controversy between you and Comcast regarding any aspect of your relationship with Comcast that has accrued or may thereafter accrue, whether based in contract, statute, regulation, ordinance, tort (including, but not limited to, fraud, misrepresentation, fraudulent inducement, negligence or any other intentional tort), or any other legal or equitable theory.

Id. The agreement also said that the arbitrators were to determine "the validity, enforceability or scope of this Arbitration Provision (with the exception **[**5]** of the enforceability of the class action waiver clause provided in paragraph F(2))." *Id.*

The arbitration agreement contained an opt-out provision:

> IF YOU DO NOT WISH TO BE BOUND BY THIS ARBITRATION PROVISION, YOU MUST NOTIFY COMCAST IN WRITING WITHIN THIRTY (30) DAYS OF THE DATE THAT YOU FIRST RECEIVE THIS AGREEMENT . . . . YOUR DECISION TO OPT OUT OF THIS ARBITRATION PROVISION WILL HAVE NO ADVERSE EFFECT ON YOUR RELATIONSHIP WITH COMCAST OR THE DELIVERY OF SERVICES TO YOU BY COMCAST.

Id. at 10.

Additionally, the arbitration agreement contained a class action waiver:

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[1] "An eMTA is a device that allows a Digital Voice subscriber to make phone calls, as well as to access the Internet for data services, over a HSI [high-speed **[**4]** internet] connection." *Id.* at ¶ 10.

> THERE SHALL BE NO RIGHT OR AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED OR LITIGATED **[*109]** ON A CLASS ACTION OR CONSOLIDATED BASIS OR ON BASES INVOLVING CLAIMS BROUGHT IN A PURPORTED REPRESENTATIVE CAPACITY ON BEHALF OF THE GENERAL PUBLIC (SUCH AS A PRIVATE ATTORNEY GENERAL), OTHER SUBSCRIBERS, OR OTHER PERSONS SIMILARLY SITUATED UNLESS THE STATUTE UNDER WHICH YOU ARE SUING PROVIDES OTHERWISE.

Id. "If the class action waiver clause is found to be illegal or unenforceable, the entire Arbitration Provision will be unenforceable, and the dispute will be decided by a court." *Id.* at 11.

On December 21, 2009, Fromer brought a class action **[**6]** against Comcast alleging (1) a violation of the Sherman Antitrust Act for unlawful bundling of the DV service with the eMTA modem, and (2) violation of CUTPA. Doc. 1. Comcast has now filed a motion to compel arbitration on both counts. Doc. 57.

II. Discussion

A. The Arbitration Agreement and the Federal Arbitration Act Govern These Claims

Fromer does not dispute that both the Sherman Act and the CUTPA claims fall within the bounds of the arbitration agreement. That agreement allows for arbitration of any dispute, claim, or controversy between Fromer and Comcast regarding any aspect of Fromer's relationship with Comcast; it is clear that the claim of unfair bundling falls within the reach of the arbitration agreement. It is also clear that the Federal Arbitration Act ("FAA") applies here, because this is a contract "evidencing a transaction involving commerce." *9 U.S.C. § 16(a)(2)*.

Fromer also does not allege that the arbitration agreement was procedurally unconscionable. Instead, Fromer argues that the class action waiver renders the arbitration agreement substantively unconscionable, and therefore, unenforceable.

B. The *American Express* Line of Cases

In *Green Tea Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)*, **[**7]** the Supreme Court enforced an arbitration agreement between a financial institution and a consumer attempting to bring a claim under the Truth in Lending Act. The plaintiff in *Green Tea* argued that,

> the arbitration agreement's silence with respect to costs and fees creates a "risk" that she will be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum, and thereby forces her to forgo any claims she may have against petitioners. Therefore, she argues, she is unable to vindicate her statutory rights in arbitration.

Id. at 90. The Court acknowledged that "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as [the plaintiff] from effectively vindicating her federal statutory rights in the arbitral forum." *Id*. The Court refused to prohibit arbitration, however, because the plaintiff had failed to show that she would "bear such costs if she goes to arbitration." *Id.* "[W]here, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id. at 92*.

Although the Supreme **[**8]** Court's pronouncement in *Green Tea* was technically dicta, it still evidenced that the Supreme Court envisioned that arbitration agreements could be voided where arbitration would be so expensive as to preclude a litigant from vindicating her rights. The Second Circuit created a framework for employing *Green Tree in In re American Express Merchants' Litigation, 554 F.3d 300* ***[*110]*** *(2d Cir. 2009)* ("*American Express I*"). In that case, the plaintiffs attempted to bring a tying antitrust claim under the Sherman Act and the Clayton Act; the defendant sought to compel arbitration. The arbitration clause at issue contained a class action waiver provision. The Second Circuit held that the class action waiver provision could not be enforced because the plaintiffs' antitrust claims could, "for all intents and purposes, only be pursued through the aggregation of individual claims, either in class action litigation or in class arbitration." *Id. at 317*. The Court held that the plaintiffs could not pursue their claims individually because, with expert fees, the costs of the case could be as much as $1 million, and no plaintiff could expect to receive more than $38,500. *Id.* Moreover, although the Sherman **[**9]** Act allowed a plaintiff, if successful, to "recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee," that would still leave the plaintiff unable to pay the expert witness fees. *Id. at 317-18* (internal citations omitted). The Second Circuit also noted that the possibility of attorneys' fees was insufficient to overcome this problem, because no plaintiff was assured of victory, and potential plaintiffs had to factor the risk of losing into their calculations of the risks and benefits of litigation. *Id. at 318*.

Shortly after the Second Circuit issued its decision in *American Express I*, the Supreme Court decided *Stolt-Nielsen S.A. v. AnimalFeeds Int'l, 559 U.S. 662, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010)*. The plaintiff in that case had attempted to bring a class arbitration. The arbitration agreement was silent with regard to whether class arbitrations were permissible, and the Supreme Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id. at 1775*.

After the Supreme Court decided *Stolt-Nielsen*, it vacated the Second Circuit's decision in *American* ***[**10]*** *Express I* and ordered the Second Circuit to reconsider its decision in light of *Stolt-Nielsen*. The Second Circuit responded with *In re American Express Merchants Litigation, 634 F.3d 187 (2d Cir. 2011)* ("*American Express II*"), which reaffirmed the holding in *American Express I*. The Court noted that "*Stolt-Nielsen* states that parties cannot be forced to engage in a class arbitration absent a contractual agreement to do so," but concluded that "[i]t does not follow, as Amex urges, that a contractual clause barring class arbitration is *per se* unenforceable." *Id. at 193*. The Court remarked that class actions are an important vehicle for vindicating statutory rights, and that public policy concerns can bar enforcement of an agreement to arbitrate. *Id. at 194, 197*. Because the record made clear that the cost of arbitration could be prohibitive, the plaintiffs were effectively deprived of the statutory protections of antitrust laws, and the class action waiver was void. *Id. at 197-99*.

A little more than a month after the Second Circuit decided *American Express II*, the Supreme Court issued *AT&T Mobility, LLC v. Concepcion.* The Court held that California's *Discover Bank* rule, which classified **[**11]** most class arbitration waivers as unconscionable, was preempted by the FAA. In doing so, the Court discussed the dangers of class actions in the arbitration setting: class action arbitration often involved absent parties, sacrificed arbitration's informality, and increased the risk to defendants, since "[t]he absence of multilayered review makes it more likely that errors will go uncorrected." *131 S. Ct. at 1750-52*.

In response to *Concepcion*, the Second Circuit requested additional briefing on whether *American Express II* was inconsistent **[*111]** with *Concepcion*. The result was *American Express III,* which again held the arbitration agreement to be invalid. The Second Circuit first noted that *American Express II* had not been overruled by *Concepcion: Concepcion* invalidated state procedures that were inconsistent with the FAA, while *American Express II* rested on a "vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability." *667 F.3d at 213* (emphasis added) (internal citations omitted). The Court remarked that *Stolt-Nielsen* and *Concepcion* do not "require that all class-action waivers be deemed per se unenforceable," *id. at 214*, and that *Green Tree* had **[**12]** not been overruled by *Concepcion. Id.* at 216. The Court then held that when an arbitration agreement effectively prevents the exercise of statutory rights, the agreement is void. As in *American Express I* and *American Express II*, the Court held that the costs of arbitration were so high — and the amount that could plausibly be recovered so low — that rational actors were unlikely to arbitrate. It is clear, then, that the *American Express* line of cases is still the law of the Second Circuit.

Comcast next argues that I should decline to follow *American Express III* because the Second Circuit neglected to consider that its decision violated the Rules Enabling Act. Comcast argues that a refusal to enforce the arbitration agreement would elevate *Federal Rule of Civil Procedure 23* into a substantive right. Comcast argues that because the *American Express III* Court did not discuss the Rules Enabling Act, I may consider whether the Rules Enabling Act prohibits the outcome reached by the Second Circuit. This argument is misguided for two reasons. First, the cases cited by Comcast do not stand for the proposition that a district court may decline to follow an appellate court if it determines that **[**13]** the appellate court's decision was incorrect for reasons not considered by the higher court. Instead, in the main case cited by Comcast, the district court held that the Second Circuit had not reached the legal issue in question, and thus that there was no precedent to follow. *Jackson v. Ashcroft, No. 3:02cv1739, 2003 U.S. Dist. LEXIS 17241, 2003 WL 22272593, at *3-4 (D. Conn. Sept. 28, 2003)*. The Court did not hold that the Second Circuit would have ruled differently if it had reached the question at issue, but instead held that the Second Circuit had not needed to reach that question. [2]

Moreover, the parties in the *American Express III* action discussed the Rules Enabling Act issue. The appellees in that action, like Comcast here, argued that the invalidation of the arbitration agreement would allow *Rule 23* to enlarge a substantive right, in conflict with the Rules Enabling Act. Br. for Defs.-Appellees at 21. The appellants countered that the question was not whether the class action wavier should be struck down because it limited **[**14]** a procedural right; instead, they argued that it must struck down because it limited substantive statutory rights. "It is not the Federal Rules of Civil Procedure that place limitations upon the FAA, . . . but substantive federal statutes, such as the Sherman and Clayton Acts." Reply Br. for Pls.-Appellants at 7-8. Thus, although the Second Circuit did not discuss the Rules Enabling Act in *American Express III*, it was clearly aware of the arguments, and did not find them persuasive. [3] This court, therefore, must follow *American Express III.*

[*112] Finally, Comcast argues that, even if I am bound by *American Express III*, the facts here are distinguishable. Specifically, Comcast argues that the plaintiffs in *American Express III* could not have opted out of the arbitration agreement without terminating the entire contract. Fromer, on the other hand, had the ability to opt out of the arbitration provision of his agreement. Nevertheless, the distinction is unimportant. An inability to opt out of an arbitration agreement affects the agreement's procedural unconscionability. What is at issue in this case is whether the agreement was *substantively* unconscionable. Indeed, the Court in *American Express III* did not mention the lack of an opt-out provision as a basis of its decision. Thus, *American Express III* applies to this case.

C. Viability of Claims without Class Action

Under *American Express III*, if Fromer can show that the class action **[**16]** waiver here effectively precludes him from pursuing federal statutory remedies, the waiver is void.

1. *Expense of Antitrust Claims*

The party who "seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs." *American Express III, 667 F.3d at 217* (internal citations omitted). Fromer has produced evidence that economic proof in his case "will require professional services costing in the neighborhood of $500,000 to $750,000." Pl.'s Opp'n to Def.'s Supplemental Mot., Ex. 1 at 5 (Decl. of Economist Gordon Rausser). Comcast suggests there may be evidentiary issues related to Fromer's submission. "[D]oes the Court accept the . . . affidavit at face value? Will there be an evidentiary hearing of battling experts?" Def.'s Supplemental Mot. at 8. I need not engage these questions, however, because Comcast has not introduced any countervailing evidence.

Fromer states that the monthly Comcast charges for eMTA are just a few dollars a month. Fromer's eMTA was installed in July 2007, so he has only been billed for those charges approximately fifty-five times. Assuming the monthly **[**17]** charge is approximately $3 (*see* Defs.' Mot. to Compel, Ex. F), Fromer's damages amount to $165.

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[2] Another case cited by Comcast, *R.B. Ventures, Ltd. v. Shane*, dealt not with precedential effect, but with collateral estoppel. *No. 91cv5678, 1999 U.S. Dist. LEXIS 12702, 1999 WL 632840 (S.D.N.Y., Aug. 18, 1999)*.

[3] Comcast also argues that the Second Circuit failed to consider the fact that its decision violated the American Rule on attorneys' fees. Under the American Rule, "each party is to bear its own costs of litigation, unmitigated by any fee-shifting exceptions." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, 522 F.3d 182, 186 (2d Cir. 2008)*. According to Comcast, *American Express III* is contrary to the American Rule "because it provides access to class-action procedures and fees even though the Sherman Act — which should be the controlling statutory pronouncement on the issue — does not." Defs.' Supp. Memo. at 6. As noted above, **[**15]** I cannot ignore *American Express III* just because the Second Circuit did not expressly discuss the American Rule argument. In any case, Comcast's argument is unconvincing. *American Express III* does not require the parties to cover each other's fees. Instead, it merely protects access to statutory remedies.

The Sherman Act allows for treble damages, so Fromer could expect to recover $495. That means Fromer can expect to recover approximately $1 for every $202 spent in litigation; in *American Express*, no plaintiff could expect to recover more than $1 for every $26 spent.

2. *Chance to Recover Fees*

Comcast argues that Fromer can vindicate his rights in arbitration because of the availability of attorneys' fees. [4] Comcast is **[*113]** correct that the Clayton Act provides for reasonable attorneys' fees. *15 U.S.C. § 15*. Nevertheless, the Second Circuit considered and rejected that very argument in *American Express III*. The Second Circuit concluded that the possibility of attorneys' fees was insufficient to convince potential plaintiffs to pursue their claims. "Even with respect to reasonable attorney's fees, which are shifted under *Section 4* of the Clayton Act, the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs." *American Express III, 667 F.3d at 218* (internal citations omitted). Therefore, because the class action waiver **[**18]** in this case effectively precludes Fromer from pursuing federal statutory remedies, the class arbitration waiver is void.

The arbitration agreement provides that "[i]f the class action waiver is found to be illegal or unenforceable, the entire Arbitration Provision will be unenforceable, and the dispute will be decided by a Court." Defs.' Mot. to Compel, Ex. D at 11. The arbitration agreement, therefore, is unenforceable with respect to the antitrust claims.

D. CUTPA Claim

Fromer has also alleged violations of CUTPA. Fromer argues that the arbitration agreement cannot be enforced with regards to his CUTPA **[**19]** claim for same reasons that his antitrust claim cannot be arbitrated; i.e., CUTPA depends upon the private cause of action for its enforcement, and those statutory rights contained within it cannot be vindicated without the availability of class actions. Fromer's argument, however, misses the most crucial distinction between the CUTPA claim and the antitrust claim: CUTPA is a state statute, while the Sherman Act is a federal statute.

In *Concepcion*, the Supreme Court held that the FAA preempted state law that, in effect, required the availability of class-wide arbitration. *131 S. Ct. at 1748*. In *American Express III*, the Second Circuit made clear that its holding was not precluded by *Concepcion*, because *Concepcion* had not addressed "whether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights." *667 F.3d at 212* (emphasis added). The Second Circuit then engaged in a lengthy discussion about the necessity of vindicating federal statutory rights. The Court concluded, "[e]radicating the private enforcement component from **[**20]** our ***antitrust law*** scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes." *Id. at 218*.

Judge Pooler, the author of *American Express III*, emphasized in her concurrence to the denial of the rehearing en banc that the distinction between *Concepcion* and *American Express III* was that the former dealt with state law, while the latter dealt with federal statutory law. "While *Concepcion* addresses state contract rights, *Amex III* deals with federal statutory rights — a significant distinction." *In re American Express Merchants' Litig., 681 F.3d 139, 140 (2d Cir. 2001)* (Pooler, J., concurring). She continued,

> Because its analysis focused wholly on the issue of preemption of state law by federal law, *Concepcion* is silent on the holdings of the Court's earlier cases which enforce arbitration clauses only **[*114]** when those clauses permit parties to effectively vindicate their federal statutory rights.

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[4] The arbitration agreement itself only provides for filing fees. The arbitration agreement provides that "Comcast will advance all arbitration filing fees and arbitrator's costs and expenses upon your written request given prior to the commencement of the arbitration. You are responsible for all additional costs that you incur in the arbitration, including, but not limited to, attorneys or expert witnesses." Defs.' Mot. to Compel, Ex. D at 10 (emphasis added). Moreover, if the arbitration concludes in Comcast's favor, Fromer is required to reimburse Comcast for the arbitration fees. *Id*.

> In stark contrast, *Amex III* raises a different issue: whether the FAA always trumps rights created by a competing federal statute, as opposed to rights existing under a common law of unconscionability. At issue here is not the right **[**21]** to proceed as a class, but the ability to effectively vindicate a federal statutory right that predates the FAA.

Id. The reasoning in *American Express III* does not apply to the CUTPA claim, and the inability to vindicate that statutory right does not provide a basis for the arbitration agreement unenforceable with regard to that claim.

Fromer also argues that the CUTPA claim should not be arbitrated because the demise of the class action waiver with regard to the antitrust claim leads to the demise of the arbitration agreement as a whole. In support, he points to the language of the arbitration agreement, which provides: "[i]f the class action waiver is found to be illegal or unenforceable, the entire Arbitration Provision will be unenforceable, and the dispute will be decided by a court." Defs.' Mot. to Compel, Ex. D at 11.

Comcast argues that this clause does not destroy arbitration for the CUTPA claim, because the class action waiver has only been deemed unenforceable with regards to the antitrust claim. In other words, the question is whether the arbitration agreement was intended to stand and fall with respect to each claim, or with respect to each lawsuit.

Under the arbitration agreement, **[**22]** a "dispute" is defined as:

> [A]ny dispute, claim or controversy between you and Comcast regarding any aspect of your relationship with Comcast that has accrued or may thereafter accrue, whether based in contract, statute, regulation, ordinance, tort (including, but not limited to, fraud, misrepresentation, fraudulent inducement, negligence or any other intentional tort), or any other legal or equitable theory.

Defs.' Mot. to Compel, Ex. D at 9. The breadth of that definition suggests that a "dispute" is more akin to a lawsuit than a claim. It is also difficult to imagine that the parties intended to pursue analogous claims in both federal court and arbitration. Such a strategy would be inefficient, wasteful, and duplicative. Thus, because the class action waiver was found to be unenforceable with regard to the antitrust claim, "the entire Arbitration Provision [is] unenforceable."

III. Conclusion

For the reasons stated above, I **DENY** the defendants' motion to compel arbitration, doc. 57. It is so ordered. Dated at Bridgeport, Connecticut, this 21st day of August 2012.

/s/ Stefan R. Underhill

Stefan R. Underhill

United States District Judge

TriPharma, LLC v. First Fruits Bus. Ministry

United States District Court for the Central District of California

August 21, 2012, Decided; August 21, 2012, Filed

Case No. SACV 12-404 JVS (ANx)

Reporter
2012 U.S. Dist. LEXIS 196024 *

Tripharma, LLC v. First Fruits Business Ministry et al.

Subsequent History: Motion granted by *Tripharma, LLC v. First Fruits Bus. Ministry, LLC, 2012 U.S. App. LEXIS 22190 (Fed. Cir., Oct. 23, 2012)*

Later proceeding at *Tripharma, LLC v. First Fruits Bus. Ministry LLC, 2012 U.S. Dist. LEXIS 208506 (C.D. Cal., Dec. 4, 2012)*

Dismissed by, Motion granted by *Tripharma, LLC v. First Fruits Bus. Ministry, 2012 U.S. Dist. LEXIS 208505 (C.D. Cal., Dec. 4, 2012)*

Motion denied by *Tripharma v. First Fruits Bus. Ministry, 2013 U.S. Dist. LEXIS 199910 (C.D. Cal., Jan. 4, 2013)*

Motion granted by, Dismissed by, in part, Injunction granted at *Tripharma, LLC v. First Fruits Bus. Ministry, 2013 U.S. Dist. LEXIS 198524 (C.D. Cal., Apr. 2, 2013)*

Costs and fees proceeding at, Motion granted by, in part, Motion denied by, in part, Motion denied by *Tripharma, LLC v. First Fruits Bus. Ministry, 2013 U.S. Dist. LEXIS 208962, 2013 WL 12486050 (C.D. Cal., May 20, 2013)*

Appeal dismissed by *TriPharma, LLC v. First Fruits Bus. Ministry LLC, 2013 U.S. App. LEXIS 22335 (Fed. Cir., Nov. 4, 2013)*

Motion granted by *Tripharma, LLC v. First Fruits Bus. Ministry LLC, 2017 U.S. Dist. LEXIS 237642, 2017 WL 11690056 (C.D. Cal., Dec. 1, 2017)*

Motion denied by *Tripharma LLC v. First Fruits Bus. Ministry LLC, 2022 U.S. Dist. LEXIS 131548, 2022 WL 2784761 (C.D. Cal., May 4, 2022)*

Related proceeding at *Tripharma LLC v. First Fruits Bus. Ministry LLC, 2022 U.S. Dist. LEXIS 154665, 2022 WL 3643757 (C.D. Cal., July 7, 2022)*

Core Terms

rights, arbitration, Patent, forum state, products, contacts, preliminary injunction, personal jurisdiction, studies, prongs, arbitration award, Beverage, website, marks, venue, sublicense, alleges, merits, exclusive license, exclusive right, negotiations, advertising, motion to dismiss, quotation, effects, factors, exercise of personal jurisdiction, distributing, injunction, marketing

Counsel: **[*1]** Attorneys for Plaintiffs: Not Present.

Attorneys for Defendants: Not Present.

Judges: Honorable James V. Selna.

Opinion by: James V. Selna

Opinion

CIVIL MINUTES - GENERAL

Proceedings: (IN CHAMBERS) Order Granting Plaintiff's Motion for Preliminary Injunction (fld 6-8-12) and Denying Defendant First Fruits Business Ministry 's Motion to Dismiss (fld 5-29-12) and Defendant Roger Catarino's Motion to Dismiss (Fld 7-2-12)

Presently before the Court are the Motions to Dismiss for Lack of Personal Jurisdiction of two defendants, as well as the plaintiff's Motion for Preliminary Injunction. (Docket Nos. 22, 65 & 29.) As set forth herein, the Court denies the Motions to Dismiss and grants the Motion for Preliminary Injunction on the terms set forth in the concluding section of this Order. The preliminary injunction shall take effect upon TriPharma's posting of a bond in the amount of $25,000.

I. Background

To fully understand the factual allegations of the present case, it is helpful to first understand an on-going related case and an arbitration award related thereto.

A. Related Case

The allegations made in the present action implicate the related case, TriPharma LLC v. Max International, LLC, et al., SACV 10-00196 JVS (ANx), **[*2]** which arises out of the parties' sale of competing nutritional supplements, and which the Court briefly summarizes here. Plaintiff in the present case, TriPharma, LLC ("TriPharma"), is also the plaintiff in the related case. In the related case, TriPharma alleges that defendant Max International, LLC ("Max Int'l") deceptively marketed its product MaxWLX as being studied by the University of Connecticut and the University of Minnesota when in fact it was TriPharma's product that was the subject of those studies. (Max FAC ¶ 55.)[1] In addition to Max Int'l, has named as a defendant Imagenetix, Inc. ("Imagenetix"), from which TriPharma derives the right to the products it markets.

In the related case, TriPharma asserts a claim for patent infringement. Specifically, TriPharma alleges it possesses an exclusive license to practice United States Patent No. 6,899,892, entitled "Methods to Reduce Body Fat" that patents a method to achieve weight loss in mammals (including humans) by decreasing the amount of blood leptin through dietary intake of "viscous polysaccharides."[2] (Max FAC ¶ 54 & Ex. A (892 Patent).) The formula was invented by Daniel D. Gallaher and Laura Freiburger, patented in May 2005, and assigned to the Regents of the University **[*3]** of Minnesota ("UMinn"). (Max FAC Ex. A.) UMinn, in turn, entered into an exclusive license agreement with Imagenetix, effective September 2, 2005, which granted Imagenetix "substantially all the rights associated with the 892 Patent." (Max FAC ¶ 62.) After securing that exclusive license from UMinn, Imagenetix then

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[1] In this subsection, the Court's citation to the "Max FAC" refers to the First Amended Complaint in the related case. In the sections that follow, a citation to the "FAC" should be understood to refer to the operative pleading in the present case. By the same token, the Court citation within this subsection to documents by "Docket No." likewise refer to the docket in the related case.

[2] And even more specifically, the 892 Patent claims a method to achieve weight loss in mammals (including humans) by decreasing the amount of blood leptin through dietary intake of "viscous, water-soluable, non-nutritive, non-starch, indigestible polysaccharides." Id.

granted to Plaintiff TriPharma an exclusive sublicense to the rights associated with the 892 Patent on October 1, 2007. (Max FAC ¶ 64.)

On September 13, 2010, the Court granted TriPharma's Motion to Compel arbitration of its claims against Imagenetix.[3] (Docket No. 71.)

B. TriPharma v. Imagenetix Arbitration Award

Pursuant to the Court's order compelling arbitration, the parties proceeded to arbitration. As described more fully below, the November 2, 2011, arbitration award, which bears JAMS Case No. 1240020032, generally reaffirmed TriPharma's rights under its sublicensing agreement with Imagenetix, and held that agreement would remain in force until October 1, 2014. (See generally FAC Ex. C (Docket No. 21-3 to -5).)

The arbitration award defined the issue before the arbitrator as "the scope of the exclusive sublicense" granted to TriPharma by Imagenetix through a series of agreements. (Id. at 22.) The **[*4]** parties' positions differed on this issue. (Id.) Imagenetix contended that the scope was limited to one specific formula of weight loss product that had been clinically studied at the University of Connecticut. (Id.) In contrast, TriPharma maintained that "the sublicense broadly encompassed all products under the 892 UMinn Patent." (Id.)

Applying California law, after determining that the relevant contractual language was ambiguous, the arbitrator analyzed extrinsic evidence before ultimately concluding the Imagenetix-TriPharma sublicense should be given the broad interpretation advanced by TriPharma, encompassing any formulation covered by the 892 Patent. (Id. at 22-27.) Specifically, the arbitrator noted that "the most reasonable interpretation of the wording of the Amended and Restated Agreement grant[ed] to TriPharma a broad exclusive right to Imagenetix' patented and clinically tested weight loss product." (Id. at 27.)

Significantly, the arbitrator found Imagenetix had breached its agreement with TriPharma in several ways: First, by selling products containing a formulation covered by the 892 Patent, "by failing to use its best efforts to prevent any party other than TriPharma from seeking customers for" such products, and "by **[*5]** violating TriPharma's exclusive license to utilize the Patent, marketing claims and study or clinical information conducted on and for" such products. (Id. at 27-28.) The arbitrator awarded over $2 million in actual damages, an additional $250,000 in punitive damages, over $1,000,000 in attorney fees and costs, and interest of approximately $560,000. (Id. at 38.)

The arbitrator found that TriPharma's failure to comply with a provision requiring certain minimum purchases from Imagenetix, the purported basis for Imagenetix's termination of TriPharma's license, "did not constitute a breach" of the license agreement "because [TriPharma's] inability to maintain such minimum orders was caused by Imagenetix's breaches." (Id. at 28.) Therefore, the arbitrator "denie[d] Imagenetix' request for a declaration that it properly terminated" the agreement. (Id. at 32.) Moreover, the arbitrator imposed a six-month period of forbearance in which TriPharma would be excused from the minimum purchase requirements. (Id. at 30.)

In addition to the damages awarded, the arbitrator issued a "permanent" injunction, that "extended the term of the [license] Agreement for two years" (Id. at 30 & 32.) Specifically, and unequivocally, the arbitrator stated: "Imagenetix must now comply **[*6]** with the terms of the Agreement prohibiting it from selling or distributing any weight loss product based on the 892 Patent to anyone other than TriPharma." (Id. at 30.)

On March 5, 2012, the arbitration award was confirmed by the San Diego Superior Court,[4] and it was reduced to judgment on April 27, 2012. (FAC ¶ 40)

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[3] Recently, on July 17, 2012, the Court stayed TriPharma's claims against Max Int'l pending adjudication of the present action.

[4] TriPharma requests the Court take judicial notice of the Superior Court's Order, as well as other documents. (See generally Request for Judicial Notice ("RJN") (Docket No. 44) & Exhibits thereto.) The Court grants TriPharma's request. See *Fed. R. Evid. 201* (judicial notice); *Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001)* (courts may judicially notice public documents).

C. Factual Allegations in the Present Case

The present action was filed after the arbitration of TriPharma's claim against Imagenetix. As in the related case, TriPharma's claims in this action are based on its role as "the exclusive licensee to distribute products based on [the 892 Patent]." (FAC ¶ 15.) Moreover, at in the related case, TriPharma alleges that its previous business affiliate, Defendant First Fruits Business Ministry, LLC ("FFBM")[5] deceptively marketed its product "Trim Fit" as that product studied by the University of Connecticut ("UConn") and the University of Minnesota.[6] (FAC ¶ 19.) However, this case goes beyond that of a simple competitor versus competitor dispute over the rights to use a patented method.

Although not named a Defendant in the present case, Imagenetix' actions still figure prominently. TriPharma alleges that Imagenetix acted in concert with other TriPharma's **[*7]** competitors, i.e., the First Fruits entities sued in the present case, to attempt to undercut TriPharma's contractual rights to exploit the 892 Patent. Specifically, TriPharma alleges that although Imagenetix granted TriPharma an exclusive sublicense to the 892 Patent rights, while the arbitration matter was pending, and after TriPharma had worked to build up goodwill associated with the 892 Products,[7] Imagenetix first acquired all rights to the 892 Patent (by purchasing the 892 Patent from UMinn) and then sold those rights to First Fruits in March 2011. (FAC ¶¶ 32-37, 43, 50-51.) First Fruits acquired the rights in March 2011, but did not record the assignment of the 892 Patent until July 28, 2011, just prior to the close of evidence in the TriPharma-Imagenetix arbitration. (FAC ¶ 51.)

Around that time, First Fruits began to sell a beverage called "TrimFit," to label the containers with the number of the 892 Patent, and to label TrimFit's containers with a statement "that [TrimFit's] effectiveness is confirmed by 'clinical studies' . . . that . . . dictate that consumers should drink three bottles per day for best results." (FAC ¶¶ 53-55.) Moreover, on a Lifetime Television Network Program, Catarino falsely stated "that TrimFit was the subject **[*8]** of the Studies" and "that TrimFit is a patented ingredient." (FAC ¶¶ 58-59.) Specifically, a video from that program, which was subsequently embedded on the Network's website from July 2011 until the filing of the FAC, Catarino stated:

> The University of Minnesota took 7 years working and receiving the patent, which we have purchased from them. The proprietary formula that we developed, the Trisynex, then we studied it in clinical studies at the University of Connecticut. And the results were amazing. The people, the women, who were on the active ingredient in 8 weeks lost an average of 20 pounds and 17 percent body fat and inches around the waist, buttocks and thighs.

(FAC ¶ 61.) First Fruits also includes references to the Studies on their website for TrimFit. (FAC ¶ 57.)

As part of its marketing efforts, First Fruits has also arranged for TrimFit to be featured in the television reality program "Biggest Loser," in which contestants compete in losing weight. (FAC ¶ 69.)

D. Claims Asserted in the Present Case

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[5] TriPharma also sued First Fruits Beverage Company LCC. The Court refers to these two Defendants collectively as "First Fruits". The Court refers separately to First Fruits Business Ministry, LLC as "FFBM" in connection with FFBM's Motion to Dismiss claims against it for lack of personal jurisdiction. Where appropriate, First Fruits Beverage Company LLC is referred to separately as "FF Beverage".

In addition to the entity Defendants, TriPharma asserts claims against individuals Roger J. Catarino ("Catarino") and Greg Guss ("Guss"). Guss is Vice Present of Sales and Marketing for one of the First Fruits entities. (FAC ¶ 10.) Catarino is the President and Chief Executive Officer ("CEO") of both entities. (FAC ¶ 11.)

[6] More specifically, TriPharma alleges that First Fruits "falsely advertise[d] and label[ed] the consumer beverage TrimFit as the 892 Product which was tested under" studies conducted by UConn and UMinn ("the Studies"). (FAC ¶ 19.) Beyond the mere exclusive right to sell, market and distribute any products that are based on the 892 Patent, TriPharma also claims "the exclusive right to refer to and utilize the Studies to sell, market[,] and distribute the 892 Product." (Id. ¶ 19.)

[7] Products can contain a number of different formulations of viscous polysaccharides. (FAC ¶ 18; cf. FAC Ex. A at 1 ("METHODS TO REDUCE BODY FAT") & 4:41-44 ("Any water-soluble, non-nutritive, indigestible, non-starch, viscous polysaccharide available to one of skill in the art can be used in the compositions and methods of the invention.")

Against this factual background, TriPharma asserts the following claims: (1) violation of the Patent Act's prohibition against false marking, *35 U.S.C. § 292*;[8] (2) violation of various provisions **[*9]** of the Lanham Act, *15 U.S.C. §§ 1114 et seq.*, including the Act's prohibitions against false advertising, false designation of origin, and unfair competition found in *15 U.S.C. § 1125(a)*; (3) declaratory relief; (4) tortious interference with contractual relations; (5) unjust enrichment; (6) violation of the California False Advertising Law, *Cal. Bus. & Prof. Code §§ 17500, et seq.* ("FAL"); and (7) Violation of the California Unfair Competition Law, *Cal. Bus. & Prof. Code §§ 17200, et seq.* ("UCL").

E. Motions Before the Court

Presently before the Court are the Motions to Dismiss for Lack of Personal Jurisdiction filed by Defendants Catarino and First Fruits Business Ministry, LLC ("FFBM") (Docket Nos. 22 & 65.) Also before the Court is TriPharma's Motion for Preliminary Injunction. (Docket No. 29.)

III. Legal Standard Governing the Court's Exercise of Personal Jurisdiction

To establish personal jurisdiction over a nonresident defendant, a plaintiff must show that the forum's jurisdictional statute confers personal jurisdiction over the defendant, and that the exercise of jurisdiction accords with federal constitutional due process. *FDIC v. British-Am. Ins. Co., 828 F.2d 1439, 1441 (9th Cir. 1987)*. The plaintiff bears the burden of demonstrating that the Court's exercise of jurisdiction over the defendant is appropriate. *Sher v. Johnson, 911 F.2d 1357, 1361 (9th Cir. 1990)*.

"Where, as here, the existence of personal jurisdiction **[*10]** is challenged and the defendant appears specially to contest its presence in the jurisdiction, the plaintiff has the burden to come forward with some evidence to establish jurisdiction." *Dist. Council No. 16 of Int'l Union of Painters & Allied Trades v. B & B Glass, Inc., 510 F.3d 851, 855 (9th Cir. 2007)*. "The court may consider evidence presented in affidavits to assist it in its determination and may order discovery on the jurisdictional issues." See *Doe v. Unocal Corp., 248 F.3d 915, 922 (9th Cir. 2001)*. "When a district court acts on a defendant's motion to dismiss without holding an evidentiary hearing, the plaintiff need make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss." Id. A prima facie showing of personal jurisdiction is established when a plaintiff offers evidence that, if believed, would support the court's exercise of jurisdiction over the defendant. *Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir.1995)*.

Where not controverted by evidence, the Court must presume the truth of the allegations in the complaint. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1119 (9th Cir. 2002)*. However, where a plaintiff's allegations are contradicted by defendant's evidence, that presumption is overcome. *Alexander v. Circus Circus Enters., Inc., 972 F.2d 261, 262 (9th Cir.1992)*. If both parties provide evidence supporting different versions of a fact, the Court resolves competing inferences in the plaintiff's favor. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1129 (9th Cir. 2003)*.

Where there is no applicable statute authorizing federal jurisdiction, **[*11]** the district court applies the law of the state in which the district sits. *Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004)*. California's long-arm statute, *California Civil Procedure Code section 410.10*, extends this jurisdiction to the maximum extent permitted by federal constitutional due process, so the jurisdictional analyses under state and federal law are the same. *Id. at 800-01*.

Absent one of the traditional bases for jurisdiction,[9] the Constitution requires that a defendant have at least "minimum contacts" with the relevant forum such that the exercise of jurisdiction "does not offend traditional notions

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[8] TriPharma refers to the "False Marking Act" and cites *15 U.S.C. § 292*. (FAC at 15.) Elsewhere in the FAC, and in context, it becomes clear that TriPharma bases its claim on the Patent Act's prohibition against false marking.

[9] The traditional bases personal jurisdiction are service of a defendant in the forum state, consent of the defendant, and domicile of the defendant within the forum state. See *Burnham v. Superior Court, 495 U.S. 604, 610-11, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990)* (the party is served within the state); *Nat'l Equip. Rental v. Szukhent, 375 U.S. 311, 316, 84 S. Ct. 411, 11 L. Ed. 2d*

of fair play and substantial justice." *Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)*.

Personal jurisdiction may be either "general" or "specific." *Brand v. Menlove Dodge, 796 F.2d 1070, 1073 (9th Cir. 1986)*.

A. General Jurisdiction

"A defendant is subject to general jurisdiction only where the defendant's contacts with a forum are 'substantial' or 'continuous and systematic.'" *Easter v. Am. W. Fin., 381 F.3d 948, 960 (9th Cir. 2004)* (citation omitted). The standard for a finding of general jurisdiction over nonresident defendants is "exacting." *Schwarzenegger, 374 F.3d at 801*. "[T]he defendant[s] must engage in 'continuous and systematic general business contacts,' that 'approximate physical presence' in the forum state." *Id*. (citations omitted).

B. Specific Jurisdiction

If a defendant's contacts with the forum state are not substantial or continuous and systematic, the court may exercise **[*12]** specific jurisdiction over the defendant only if the claims are arise out of defendants actions that are sufficiently related to forum state. See *Brand, 796 F.2d at 1073*. Specifically, the Ninth Circuit applies a three-pronged test to determine whether specific jurisdiction exists:

> (1) the non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Schwarzenegger, 374 F.3d at 802. The plaintiff bears the burden of establishing the first two prongs, and the failure to establish both will result in dismissal for lack of personal jurisdiction. Id. If the plaintiff establishes both, then the burden shifts to the defendant as to the third prong, and the defendant must "present a compelling case that the presence of some other considerations would render justice unreasonable." *Panavision, 141 F.3d at 1322* (internal **[*13]** quotation marks omitted).

1. Purposeful Availment or Purposeful Direction

The first prong requires a defendant to purposefully avail himself of the privileges of conducting activities in the proposed forum or purposefully direct his activities toward the forum. Id. Availment and direction are two distinct concepts; the "availment" analysis is most often used in suits sounding in contract, whereas the "direction" analysis is most often used in suits sounding in tort. Id.

The latter is measured by the "Calder-effects" test, which examines whether a defendant has "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Yahoo! Inc., 433 F.3d at 1206* (internal quotation marks omitted) (referring to *Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)*).

2. Relatedness

To satisfy the second prong of the specific jurisdiction test, the claim must arise out of or result from the defendant's forum-related activities. The test is a bright line "but for" test that essentially requires the Court to determine whether the plaintiff would not have been injured "but for" the defendant's conduct directed toward the plaintiff in the forum state. *Panavision, 141 F.3d at 1322*.

3. Reasonableness

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354 (1964) (the party consents); *Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)* (the party is domiciled in the state).

Assuming the plaintiff **[*14]** makes the required prima facie showing regarding the first two prongs, the burden shifts to the defendant to show the Court's exercise of personal jurisdiction would be unreasonable, i.e., that the exercise of jurisdiction "comports with 'fair play and substantial justice.'" *Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1487-88 (9th Cir. 1993)*.

That determination requires a balancing of seven non-dispositive factors:

> In determining whether the exercise of jurisdiction over a nonresident defendant comports with "fair play and substantial justice," the court must consider seven factors: (1) the extent of the defendants' purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendants' state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

Id.

IV. First Fruits Motion to Dismiss for Lack of Personal Jurisdiction

TriPharma contends the Court may exercise specific jurisdiction over FFBM. (Opp'n at 6.) The Court agrees.

A. Purposeful **[*15]** Direction

TriPharma contends that FFBM has purposefully directed its activities toward the forum state, as may be determined by reference to the "Calder-effects" test. (Opp'n at 8.) The factual basis underlying this contention is complex. TriPharma contends, and there is an evidentiary basis upon which to conclude, that after communicating with TriPharma regarding a possible joint venture regarding rights to the 892 Patent, FFBM changed direction and entered into negotiations directly with Imagenetix designed to place FFBM in a position to undercut TriPharma's rights to the 892 Patent as an exclusive licensee. (Id.)

Specifically, during the pendency of the TriPharma-Imagenetix arbitration, TriPharma, through its CEO Evan Dameshek, attempted to partner with Catarino to first have Imagenetix purchase all rights to the 892 Patent from UMinn and then sell those rights to TriPharma and one or more of the First Fruits entities.[10] (Dameshek Decl. (Docket No 43) ¶¶ 23 & 36.) For a time, Catarino personally and actively participated in this endeavor.

On November 10, 2010, the Dameshek sent an email to Catarino, regarding TriPharma's desire to acquire the 892 Patent and the reasons why acquisition of the patent would benefit both **[*16]** TriPharma and First Fruits' long-term business goals:

> Since we have not had an opportunity to speak about the IP, I figured that I'd send you an email. I was informed today by the company from whom I license my rights that they are now attempting in earnest to sell the IP. . . . Although their sale will not impact our agreement, nor my ability to supply you with product, it will probably impact . . . down the road. We will definitely be at the mercy of whomever purchases the IP . . . . Point is, if you truly have an interest in buying it, now's the time. Let me know if and how you want to proceed.

(Id., Ex. 3 at 6.) Dameshek's and Catarino's exploration of such a deal continued through early January 2011. (See generally id. Ex. 3 (email string).) However, very shortly thereafter, Catarino stopped responding to Dameshek's communications on the issue. (Id. ¶ 36.)

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[10] With the Reply, Defendants offer the Supplemental Catarino Declaration to establish that Catarino's discussions with Dameshek were exclusively on behalf of FF Beverage and did not involve FFBM. (See Supp'l Catarino Decl. (Docket No. 55-1) ¶ 12.) The emails between the two CEOs are admittedly lacking in specificity as to which First Fruits entity or entities would partner in the acquisition. Nevertheless, even assuming the initial emails to Dameshek were on behalf FF Beverage, Catarino has also acknowledged his actions on behalf of FFBM in acquiring the rights to the 892 Patent. (See RJN (Docket No. 44) Ex. 2 (Catarino Decl.) ¶¶ 3-4.)

Around the same time, in January 2011, the CEO of Imagenetix broke off negotiations with Dameshek, stating he preferred to await the results of the arbitration. (Id. ¶ 36.) Also around the same time, Catarino stopped paying amounts to TriPharma under a sublicensing agreement. (Id.) Shortly thereafter, TriPharma learned (after the **[*17]** fact) that Imagenetix had on March 7, 2011, acquired the rights to the 892 Patent and that FFBM had acquired them. (RJN (Docket No. 44) Ex. 2 (Catarino Decl.) ¶ 3;[11] Dameshek Decl. ¶ 37.)

This chain of events supports the inference made by TriPharma in bringing the present claims, namely, that Imagenetix and Catarino brokered a deal to have FFBM acquire all rights to the 892 Patents in an attempt to undercut TriPharma's existing rights as the exclusive licensee under the 892 Patent. By its very nature, this arrangement is expressly aimed at damaging the rights of TriPharma, which is located in California. Because TriPharma is now called upon to defend its rights to the 892 Patent with the filing of the present action, FFBM's act in acquiring the rights to the 892 Patent in this manner has caused harm that FFBM should have understood would be suffered in the forum state.

Thus, applying the *Calder*-effects test, the Court concludes that FFBM has purposely directed its actions toward the forum state.

B. Relatedness of Claim to Forum-Related Activities

Here, the claims are clearly related to the actions directed toward the forum state. FFBM attempts to preclude TriPharma's rights by claiming its own rights are superior to, or completely negated, **[*18]** TriPharma's rights. FFBM's basis for that position arises directly out of its forum-directed activities.

C. Reasonableness

Because TriPharma has established the first two prongs of specific personal jurisdiction test, the burden shifts to FFBM to overcome the presumption that the exercise of personal jurisdiction is reasonable. As noted previously, seven non-dispositive factors must be balanced. FFBM makes no attempt to address these factors. (See Motion at 8-9.) TriPharma addresses these factors, but fails to cite to the record regarding the factual bases underlying its argument as to some, and fails to adequately explain the legal arguments underlying others. (Opp'n at 20.) Nevertheless, the burden as to this portion of the test is on FFBM, and FFBM has failed to carry its burden.[12]

D. Ruling

Because the Court finds that FFBM's actions were purposefully directed toward the forum state, that TriPharma's claims arise out of or are related to the those actions, and that the exercise of personal jurisdiction is otherwise reasonable, the Court denies FFBM's Motion to Dismiss for lack of personal jurisdiction.

V. Catarino's Motion to Dismiss for Lack of Personal Jurisdiction

The appropriateness **[*19]** of the Court's exercise of personal jurisdiction is measured separately as to each defendant. *Calder, 465 U.S. at 789-90*. Although the Court has concluded that exercise over FFBM is appropriate based mostly on Catarino's actions, it does so because a business entity can act only through its shareholders,

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[11] The Catarino Declaration was offered as part of an action filed in the Southern District of California to vacate the TriPharma-Imagenetix arbitration award. The Court takes judicial notice of this document.

[12] Moreover, the Court notes that a number of factors weigh strongly in favor of a conclusion that the exercise of jurisdiction over FFBM is reasonable. Because FFBM is jointly represented by FF Beverage, which has not challenged the Court's jurisdiction, the burden of the FFBM defending in this forum is minimal, and this factor weighs strongly in favor of a finding of reasonableness. Moreover, the Court discerns no conflict with another state, and a strong interest in California in adjudicating the claims asserted against TriPharma, whose principal place of business is in the state. Thus, the third and fourth factors weigh in favor of a finding of reasonableness. Additionally, given this Court's familiarity with the present action, the TriPharma-Imagenetix arbitration, and other related cases based upon rights to the 892 Patent, the fifth factor, related to judicial efficiency, weighs in favor of a finding of reasonableness. Finally, the sixth factor, related to the plaintiff's interest in convenient and effective relief, also weighs in favor of finding of reasonableness. Accordingly, on the merits, the Court also finds the exercise of personal jurisdiction reasonable.

officers, members, and/or principals. A separate analysis is required to address the question of whether Defendant Catarino's own contacts with the state of California constitute sufficient minimum contacts with the forum such that the Court's exercise of personal jurisdiction over him as an individual is constitutional. The Court answers this question in the affirmative.

TriPharma contends the Court has specific personal jurisdiction over Catarino based on his contacts with California in negotiating FFBM's acquisition of the 892 Patent and his role as the "pitch man" in a video embedded in a website that offers for sale one of the accused products. The Court considers each separately.

A. FFBM's Acquisition of the 892 Patent

1. Purposeful Direction

At the outset, the Court must pause to address an issue regarding the nature and character of Catarino's actions that may be considered in determining whether the Court may exercise personal **[*20]** jurisdiction over Catarino. Catarino argues that the Court may not consider actions taken by him on behalf of FFBM based on the fiduciary shield doctrine. (Opp'n at 7-8.) The Court disagrees.

"The fiduciary shield doctrine protects individuals from being subject to jurisdiction solely on the basis of their employers' minimum contacts within a given jurisdiction." *Allstar Mktg. Group, LLC v. Your Store Online, LLC, 666 F. Supp. 2d 1109, 1119 (C.D. Cal. 2009)*. "In other words, the mere fact that a corporation is subject to local jurisdiction does not necessarily mean its nonresident officers, directors, agents, and employees are suable locally as well." *Id. at 1119-20* (internal quotation marks, alteration marks, and citations omitted). However, that fact that a defendant takes actions on behalf of an entity employer does not mean that those actions cannot be considered as the individual's contacts with the forum state. See, e.g., *Calder, 465 U.S. at 789-90 (1984)* ("Petitioners are correct that their contacts with California are not to be judged according to their employer's activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant's contacts with the forum State must be assessed individually."); *Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781, n.13, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)* ("[W]e today reject the suggestion that employees who act in their **[*21]** official capacity are somehow shielded from suit in their individual capacity.").

TriPharma urges the Court to find that the contacts Catarino had in negotiating the deal to acquire the 892 Patent (and thus, to attempt to cut off TriPharma's rights thereto) confers jurisdiction over Catarino in an individual capacity as well as over FFBM, and under the same rationale. (Opp'n at 15-21.) TriPharma does so on the basis that Catarino was the so-called "moving force" or "guiding light" behind these actions. (Id. at 16.)

"Courts typically consider a corporate officer's contacts on behalf of a corporation as his or her personal contacts for purposes of personal jurisdiction when the contacts support some identifiable theory of liability pursuant to which the officer's contacts on behalf of the corporate employer may justifiably be imputed to the employee." *Allstar Mktg. Group, 666 F. Supp. 2d at 1120* (noting that Ninth Circuit's approval of First Circuit law finding corporate officer liability in cases in which the officer was a "guiding spirit" or "central figure" in the relevant corporate activity). Thus, where a corporate officer's contacts make him the "primary participant in the alleged wrongdoing," his contacts have been found sufficient to confer **[*22]** jurisdiction. Id. (collecting cases). This includes situations in which "officers were active participants in . . . tortious conduct." *Id. at 1121*.

Here, Catarino makes the point — a valid one — that he "did not personally direct any sales of . . . products in California." (Catarino Decl. (Docket No. 66-1) ¶ 17.) However, TriPharma contends the Court's exercise of jurisdiction over Catarino is proper based on actions other than mere sales of accused products.

Catarino also makes the point that his negotiations for the purchase of the patent by FFBM were conducted by telephone while he was located in another State, and that he did not travel to California to further this effort. (Id. ¶ 12; see also RJN (Docket No. 44) Ex. 2 (Catarino Decl.) ¶¶ 3-4 (describing the negotiations in more detail).) Nevertheless, this fact does not preclude a finding of minimum contacts on this basis. To the contrary, under the purposeful direction analysis, all that is required is an intentional act (committed anywhere) that is aimed at the forum state that the defendant understands is likely to be suffered in forum state. See *Yahoo! Inc., 433 F.3d at*

1206. It appears from the record, and the Defendants have not presented evidence to the contrary, **[*23]** that although at the time of the negotiations, Catarino needed to eventually secure the approval of his fellow members of FFBM, he in fact personally conducted all the negotiations with Imagenetix necessary to effectuate FFBM's acquisition of the 892 Patent. As such, the fiduciary shield doctrine does not preclude the Court's consideration of these actions, and these actions are sufficient to constitute the "intentional act" by a defendant under the first prong of the *Calder*-effects test.

The remaining two prongs are met under the analysis applicable to FFBM, namely, that Catarino personally brokered a deal with Imagenetix (subject to approval by his fellow members) to have FFBM acquire all rights to the 892 Patents in an attempt to undercut TriPharma's existing rights as the exclusive licensee under the 892 Patent. By its very nature, this arrangement is expressly aimed at damaging the rights of TriPharma, which is located in California. Because TriPharma is now called upon to defend its rights to the 892 Patent with the filing of the present action, and because Catarino's primary role in effectuating this transaction by FFBM is not subject to the fiduciary shield doctrine, FFBM's act in acquiring the rights to the 892 Patent in this **[*24]** manner has caused harm that Catarino should have understood would be suffered in the forum state.

Thus, applying the Calder-effects test, the Court concludes that Catarino has purposely directed its actions toward the forum state.

2. Relatedness

Here, the claims are clearly related to the actions directed toward the forum state. FFBM attempts to preclude TriPharma's rights by claiming its own rights are superior to, or completely negated, TriPharma's rights. FFBM's basis for that position arises directly out of Catarino's forum-directed activities on its behalf.

3. Reasonableness

Because TriPharma has established the first two prongs of specific personal jurisdiction test, the burden shifts to Catarino to overcome the presumption that the exercise of personal jurisdiction is reasonable. As noted previously, seven non-dispositive factors must be balanced. Catarino makes no attempt to address these factors. (See generally Motion.) TriPharma addresses these factors, but fails to cite to the record regarding the factual bases underlying its argument as to some, and fails to adequately explain the legal arguments underlying others. (Opp'n at 22-23.) Nevertheless, the burden as to this portion **[*25]** of the test is on Catarino, and Catarino has failed to carry its burden.[13]

B. Catarino's Role as Video Pitch Man

1. Purposeful Direction

Catarino appeared personally on Lifetime Television Network in a program entitled "The Balancing Act," to promote and advertise the accused product "Trimfit." (Dameshek Decl. (Docket No. 43) ¶ 41.) TriPharma alleges, and Catarino has not disputed, that Catarino therein refers to Trimfit as a patented product or as containing patented ingredients, whose effectiveness had been confirmed by "clinical studies." (FAC ¶¶ 54-55.) More specifically, TriPharma alleges that Catarino references the UMinn studies of "the proprietary formula that we developed," including certain measurable reductions in body fat attributable to that formula." (FAC ¶ 61.) From August 2001 to the date of the filing of the FAC, the video was available to viewers at TrimFitWater.com with the click of the mouse. (Dameshek Decl. (Docket No. 69-1) ¶ 44.) Clicking the "Buy On Line" icon links the website user to Thirstmonger.com, where TrimFit could be purchased. (Id. ¶ 40.)

The maintenance of a wholly passive website — that is, one that merely provides information and is not interactive — **[*26]** cannot without more satisfy the express aiming prong. See *Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997)*; *Holland Am. Line Inc. v. Wartsila N. Am., Inc., 485 F.3d 450, 460 (9th Cir. 2007)* ("We consistently have held that a mere web presence is insufficient to establish personal jurisdiction."). However, it is

[13] The Court's analysis in footnote 12 is equally applicable to Catarino.

also clear "that operating even a passive website in conjunction with something more — conduct directly targeting the forum — is sufficient to confer personal jurisdiction." *Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1129 (9th Cir. 2010)* (internal quotation marks and citation omitted). To what extent operation of a website might establish the purposeful direction needed to establish personal jurisdiction "is directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet." *Cybersell, 130 F.3d at 419*.

Here, the website is not wholly passive. Instead, it provides a method whereby the user who is persuaded by Catarino's pitch can easily order TrimFit to be delivered by clicking a familiar "by online" icon. Catarino makes the point that this action merely links the user to another website, and an online purchase is facilitated there. The Court is unconvinced that this separation renders TrimFitWater.com wholly passive in the manner contemplated by *Cybersell*. Even Cybersell made a distinction between websites that are commercial and nature, i.e. **[*27]** , that are meant to sell products, and those that are instead merely informational. In addition to providing information to those who have or have not already purchased the product, TrimFitWater.com is clearly meant to market and sell the product whose name it bears. As such, it is clearly commercial in nature. To conclude otherwise based on an intermediate link to another website would elevate form over substance in a manner the Court is unsupported by Cybersell and its progeny.

Thus, Catarino's participation in the marketing and advertising on an interactive commercial website constitutes the intentional act required by the *Calder*-effects test. This act was also aimed at the forum state. TrimFitWater's label offers the purchaser the opportunity to learn more by visiting the website, and TrimFitWater is offered for sale in California. (Dameshek Decl. (Docket No. 69) ¶ 24; Dameshek Decl. (Docket No. 43) Ex. 6 (TrimFit Water label, also referencing the 892 Patent).) Moreover, due to the rights claimed by TriPharma under the 892 Patent, this advertising has caused harm to TriPharma that Catarino should have understood would be suffered in the forum state.

2. Relatedness

Here, the claims are clearly related **[*28]** to the actions directed toward the forum state. Catarino personally promotes the sale of a product, the sale of which TriPharma claims tortiously interferes with its contractual rights and violates it patent rights.

3. Reasonableness

Because TriPharma has established the first two prongs of specific personal jurisdiction test, the burden shifts to Catarino to overcome the presumption that the exercise of personal jurisdiction is reasonable. As noted previously, seven non-dispositive factors must be balanced. Catarino makes no attempt to address these factors. (See generally Motion.) The Court's discussion regarding reasonableness with regard to Catarino's role in FFBM's acquisition of the 892 Patent applies equally here.

C. Ruling

Because the Court finds that Catarino's actions were purposefully directed toward the forum state, that TriPharma's claims arise out of or are related to the those actions, and that the exercise of personal jurisdiction is otherwise reasonable, the Court denies Catarino's Motion to Dismiss for lack of personal jurisdiction.

VI. Venue

Both FFBM and Catarino move to dismiss for improper venue.

A party challenging venue must move pursuant to *Rule 12(b)(3) of the Federal Rules of Civil Procedure* and *28 U.S.C. § 1406(a)*, which provides that a district **[*29]** court shall dismiss or transfer a case if venue is improper. Venue in federal courts is governed entirely by statute. See *Leroy v. Great Western United Corp., 443 U.S. 173, 181, 99 S. Ct. 2710, 61 L. Ed. 2d 464 (1979)*. If the Court finds that the case has been filed "in the wrong division or district," it must "dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought. *28 U.S.C. § 1406(a)*.

The venue statute provides for three alternatives:

> (b) Venue in general. — A civil action may be brought in —
>
> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
>
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
>
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b). For venue purposes, "residency" is defined as the domicile of a natural person. *28 U.S.C. § 1391(c)(1)*. An entity resides in any district in which it is subject to the court's jurisdiction. *28 U.S.C. § 1391(c)(2)*.

The first venue **[*30]** alternative is inapplicable because the Defendants are not all residents of the State in which the district is located.

FFBM contends that the second alternative is likewise inapplicable because a substantial part of the events or omissions did not occur in the Central District. The Court disagrees.

Where claims asserted are tort-like claims, the Ninth Circuit often looks to the locus of the injury to determine whether a substantial part of the events or omissions occurred in the district. See, e.g., *Fiore v. Walden, 657 F.3d 838, 859 (9th Cir. 2011)*. TriPharma, which resides in this district, asserts a tortious interference claim.

As for trademark claims, courts in the Ninth Circuit, and elsewhere, have held that venue is appropriate in any district in which consumers are likely to be deceived, whether that occurs in a single district or in many districts. See, e.g., *Cottman Transmission Sys., Inc. v. Martino, 36 F.3d 291, 295 (3d Cir. 1994)* *Allstar Mktg. Group, LLC v. Your Store Online, LLC, 666 F. Supp. 2d 1109, 1128 (C.D. Cal. 2009)* (collecting cases); *Golden Scorpio Corp. v. Steel Horse Bar & Grill, 596 F. Supp. 2d 1282 (D. Ariz. 2009)*. Moreover, TriPharma's false marking claim, although arising under patent law, is similar to the trademark claims, in that it claims that products are marked in a manner likely to deceive the consumers who purchase them. Thus, the venue analysis is the same. TriPharma has represented, and Defendants have not contended otherwise, that the accused products **[*31]** are offered for sale to the public in this judicial district.[14]

Thus, it is clear to the Court that the second alternative for venue applies because "substantial part of the events or omissions giving rise to the claim occurred" in this district. *28 U.S.C. § 1391(b)(2)*.

The third alternative applies only when neither of the first two applies.

The Court denies the Motions to Dismiss for Improper Venue.

VII. Motion for Preliminary Injunction

A. Relief Sought

TriPharma seeks a preliminary injunction prohibiting all Defendants from selling TrimFit or any products bearing the 892 Patent number, and from referring to the Studies in connection with the sale of any product. TriPharma also seeks to prevent all Defendants from selling or advertising any product that comes within the scope of the 892 Patent. (See Notice of Motion (Docket No. 29) at 1.) Essentially, TriPharma seeks the relief clearly entitled to any party with the exclusive right market and sell products that practice the 892 Patent.

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[14] TriPharma has offered ample evidence that TrimFit Water is offered for sale in the forum state, but has failed to offer evidence, as opposed to mere representation, that it is offered for sale in the Central District of California. (See, e.g., Dameshek Decl. (Docket No. 69-1) ¶ 24 (referring to introduction of TrimFit Water to distributors that "cover virtually all of the territory of California"). Nevertheless, given that Defendants do not contend otherwise, and that it indeed appears from the record that the product is distributed nationwide, the Court accepts this representation.

B. Factual Basis

Here, TriPharma and FF Beverage claim such an exclusive right, but each does so through a separate chain of custody, each involving Imagenetix as the first link in that chain. TriPharma claims an exclusive right based on the 2005 grant **[*32]** of an exclusive license from 892 Patent Holder UMinn to Imagenetix, and Imagenetix's subsequent grant of a sublicense to TriPharma. Imagenetix purported to terminate the sublicense according to its terms, but an arbitration award (now confirmed and reduced to judgment) reinstated it. In contrast, FF Beverage claims a right to exclusive use of the 892 Patent based on Imagenetix's 2011 purchase of it from UMinn. From there, Imagenetix sold the 892 Patent to FFBM, which in turn granted an exclusive license to FF Beverage.

The evidence of record reveals that FFBM purchased the 892 Patent from Imagenetix subject to the then-pending arbitration. Specifically, as part of the FFBM-Imagenetix purchase agreement, Imagenetix represented that it had ownership rights "free and clear of any and all liens or encumbrances . . . other than . . . (3) the outcome of the arbitration pending before JAMS . . . No. 1240020032 . . . , in which TriPharma claims certain rights to the UMinn Patent which Imagenetix disputes." (Docket No. 69-3 at 3.) Because of the uncertainty created by the then-pending arbitration, the parties included an escape clause in the FFBM-Imagenetix purchase agreement, which expressly permitted FFBM, *at its option*, to recover **[*33]** the entire purchase price from Imagenetix plus interest at a stated rate if Imagenetix was not the "prevailing party" of the arbitration. (Id. at 6.) The agreement specifies that Imagenetix would not be considered the "prevailing party" "if the Arbitrator determines that TriPharma owns all or any of the rights under the [892] Patent." (Id.)

C. Legal Standard

For a preliminary injunction to issue, the plaintiff has the burden to establish (1) a likelihood of success on the merits, (2) the likelihood of irreparable injury if the preliminary relief is not granted, (3) the balance of hardships favors the plaintiff, and (4) advancement of the public interest. *Winter v. NRDC, Inc., 555 U.S. 7, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008)*; see also *Raich v. Ashcroft, 352 F.3d 1222, 1227 (9th Cir. 2003)*. As an alternative to this "traditional" approach, in the Ninth Circuit, the plaintiff may meet this burden if it "demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." *Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1120 (9th Cir. 2005)* (internal quotations and citation omitted).[15] "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. They are **[*34]** not separate tests but rather outer reaches of a single continuum." Id. (internal quotations and citations omitted). "To reach this sliding scale analysis, however, a moving party must, at an 'irreducible minimum,' demonstrate some chance of success on the merits." *Global Horizons, Inc. v. United States DOL, 510 F.3d 1054, 1058 (9th Cir. 2007)* (citing *Arcamuzi v. Cont'l Air Lines, Inc., 819 F.2d 935, 937 (9th Cir.1987)*). This alternative also still requires that the injunction be in the public interest. *Wild Rockies, 632 F.3d at 1135*.

D. Claim Preclusive Effect of TriPharma-Imagenetix Arbitration Award

Before applying the preliminary injunction standard, the Court must resolve a threshold legal argument underlying Defendants' primary defense, namely, that it has the right to use the 892 Patent and to refer to the Studies in its marketing. Specifically, Defendants do not dispute that FF Beverage distributes TrimFit with a label that bears the 892 Patent number; rather, Defendants contend that FF Beverage has the right to do so by virtue of its licensing agreement with FFBM. However, because the TriPharma-Imagenetix arbitration award affirmed TriPharma's exclusive license, because that award is given claim preclusive effect in the same manner as an adjudicated claim, and because FFBM is in privity with Imagenetix, Defendants are bound by the arbitration award.

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[15] For a time, some doubt existed regarding the continuing viability of this alternative test; however, the Ninth Circuit recently removed that doubt, reaffirming the validity of this "serious questions" test. See *Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-35 (9th Cir. 2011)*.

As a general matter, **[*35]** claim preclusion[16] (or "res judicata" as it is also sometimes called) "applies not only to judicial proceedings but also to arbitration proceedings." *Thibodeau v. Crum, 4 Cal. App. 4th 749, 755, 6 Cal. Rptr. 2d 27, 30 (1992)* (citing *Lehto v. Underground Constr. Co., (1977) 69 Cal.App.3d 933, 939, 138 Cal.Rptr. 419*.) Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. *Mycogen Corp. v. Monsanto Co., 28 Cal. 4th 888, 896-97, 123 Cal. Rptr. 2d 432, 51 P.3d 297, 301-02 (2002)*. "Cause of action" is broadly construed to encompass not just the actual legal theories advanced or relief actually in the underlying action, but also claims based on other legal theories that could have been brought or relief that could have been sought.[17] *Id. at 302* ("Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief.").

Imagenetix is clearly bound by the confirmed arbitration award. In that award, the arbitrator concluded that "the Amended and Restated Agreement grant[ed] to TriPharma a broad exclusive right to Imagenetix' patented and clinically tested weight loss product." (FAC Ex. 3 at 27.) The arbitrator found that the exclusive license, which Imagenetix had purported to terminate pursuant to its terms, be reinstated until October 1, 2014. (*Id. at 30*). The subsequent **[*36]** judgment confirming the arbitrator's award regarding the exclusive nature of TriPharma's rights to the 892 Patent is binding as to Imagenetix and those in privity to it, including Defendants, under the doctrine of claim preclusion. In short, because the arbitration award found TriPharma possessed exclusive rights until October 1, 2014, to the commercial exploitation of the 892 Patent, Defendants are precluded by the doctrine of claim preclusion from asserting otherwise.[18]

This doctrine precludes Defendants' position now that the TriPharma-Imagenetix agreement(s) were *void ab initio* because of the failure to follow certain formalities regarding notice of the sublicensing arrangement to UMinn. This is a legal theory — i.e., one putting in issue the validity of the agreement(s) upon which TriPharma necessarily relied to advance its breach of contract claim in the arbitration — that could have been advanced during the

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[16] The present case does not, as suggested by Defendants, involve the limitation placed on the related doctrine of issue preclusion set forth in *Vandenberg v. Superior Court, 21 Cal. 4th 815, 825, 88 Cal. Rptr. 2d 366, 982 P.2d 229, 234 (1999)*, which held that "a private arbitration award, even if judicially confirmed, may not have nonmutual collateral estoppel effect under California law unless there was an agreement to that effect in the particular case." Id.; cf. *Murphy v. Murphy, 164 Cal. App. 4th 376, 398, 78 Cal. Rptr. 3d 784 (2008)* (differentiating between issue preclusion and claim preclusion). In setting forth its central holding regarding issue preclusion, the California Supreme Court expressly preserved existing California law regarding the claim preclusive effect of arbitration awards. *Vandenberg, 21 Cal. 4th at 825 n.2* ("Nothing in our decision imposes or implies any limitations on the strict res judicata, or claim preclusive, effect of a California law private arbitration award.")

[17] It is clear that this broad construction of "cause of action" likewise applies to arbitrated disputes. *Thibodeau v. Crum, 4 Cal. App. 4th at 755* (noting, as to the scope of the claim preclusive effect to be given an arbitration award, "arbitrating parties are obliged, . . . to place before their arbitrator all matters within the scope of the arbitration, related to the subject matter, and relevant to the issues.").

[18] Defendants have presented evidence that Imagenetix has again purported to terminate the exclusive license based on TriPharma's failure to meet the minimum purchases requirement. (Opp'n at 12; Catarino Decl. (Docket No. 38) ¶¶ 21-22 & Ex. 17 (letter from Imagenetix to TriPharma purporting to terminate exclusive license).) TriPharma has presented evidence that Imagenetix has refused to provide it with the product it has ordered, and that Imagenetix has refused to cooperate in permitting TriPharma to obtain products from a third-party supplier. (Dameshek Decl. (Docket No. 57) ¶¶ 3-4 & Ex. 10.) It appears that Imagenetix takes issue with TriPharma's use of the trademark "Trisynex", to which Imagenetix claims rights, in connection with TriPharma's order. (Id. Ex. 10 at 4 (April 25, 2012 email combining a purported repudiation of the arbitration award, an express refusal to fill TriPharma's purchase order, and a demand that TriPharma cease and desist use of the mark "Trisynex"); cf. Catarino Decl. (Docket No. 38) Ex. 17 (Imagenetix's May 30, 2012 purported termination of agreement).) This issue was raised in post-hearing briefs, but the arbitrator refused to resolve it because it was not raised before the close of the hearing, and it appears to remain outstanding. (FAC Ex. C at 32-33.) Nevertheless, in light of the uncontroverted evidence that Imagenetix refused to provide the ordered product to TriPharma, the Court concludes that the purported termination of the exclusive license does not alter its analysis regarding the preliminary relief sought with the present motion.

arbitration. As noted above, the doctrine of claim preclusion applies not only to legal theories actually relied upon, but to all legal theories that merely could have been raised, but were not.

At the hearing, Defendants argued that as a matter of strategy, Imagenetix could not have raised **[*37]** this argument because acceptance of this argument would likewise lead to the conclusion that Imagenetix granted TriPharma an invalid sublicense, while at the same time warranting that the sublicense was valid, which could expose Imagenetix to liability.[19] (July 30, 2012 Hr'g Tr. at 10-11.) Building on this point, Defendants argued for the first time at oral argument that there was no privity between First Fruits and Imagenetix because privity cannot be found where a would-be privy's interests are not adequately represented by the precluded party.

Generally, an assignment of property interest in a patent gives rise to privity between the assignor and assignee for purposes of claim preclusion. *Enovsys LLC v. Nextel Communications, Inc., 614 F.3d 1333, 1343 (Fed. Cir. 2010)*. However, application of claim preclusion must comport with due process requirements, and to be consistent with due process requirements, a non-party's interests must be adequately represented in order for it to be bound by a judgment to which it is not a party. See, e.g., *Taylor v. Sturgell, 553 U.S. 880, 892-93, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008)*.

Case law belatedly cited by Defendants fails to convince the Court that due process concerns are implicated where, as here, a purported conflict arises by virtue of certain strategic concerns that, although preventing assertion **[*38]** of a particular legal theory by the precluded party, would not similarly constrain that party's privy. Instead, the Court concludes that FFBM falls squarely into a uncontroversial category recognized by the Supreme Court as to which "nonparty preclusion [is] justified based on [a] pre-existing substantive legal relationship . . . between the person to be bound and a party to the judgment." *Taylor v. Sturgell, 553 U.S. 880, 894, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008)* (internal quotation marks, alteration marks, and citation omitted). Recently, the Court identified as examples of such relationships both "preceding and succeeding owners of property," and "assignee[s] and assignor[s]." Id. Notably, the Supreme Court recognized that "[t]hese exceptions originated 'as much from the needs of property law as from the values of preclusion by judgment.'" Id. (quoting 18A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4448 (2d ed.2002).) Successors in interest and assignees are bound by judgments involved their predecessors in interest and assignors "in an effort to protect conflicting property interests." Id.

Even if due process in the abstract required such a precise alignment of legal strategies available to both predecessors and successors in interest, the Court would be unlikely **[*39]** to conclude that it is required under the facts of the present case. Here, FFBM entered into the agreement to purchase with express notice of the then-pending arbitration, and the parties to the agreement included as one of the terms an option to rescind the agreement and recover the purchase price in the event Imagenetix failed to prevail in the arbitration. FFBM apparently failed to exercise that option, and instead pursued a course of conduct that gave rise to the present action. In the related context of class actions, in which absent class members are generally bound by a judgment entered on a class-wide basis, courts routinely find that due process concerns are satisfied where class representatives "fairly and adequately represent the interests of the class" and where absent class members are given the opportunity to opt out. *Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1994)*. Class representatives are found to be adequate where there is "a *sharing* of interests between representatives and absentees" rather than any precise alignment of all available legal strategies. Id. (internal quotation marks and citation omitted). Here, Imagenetix and FFBM shared the overriding and common interest in asserting that TriPharma lacked rights **[*40]** to the 892 Patent, and this interest was shared by the two in a manner sufficient to satisfy due process concerns. Moreover, FFBM, when given an opportunity to opt out from the judgment, did not avail itself of that opportunity, further supporting this conclusion.[20]

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[19] For purposes of the present discussion, the Court assumes this point is a valid one. The Court does not express any opinion on the merits of this argument.

[20] Absent class members are given a pre-judgment opportunity to opt out. That FFBM had the benefit of an analogous *post-judgment* option — one that could be exercised when the details of the adjudication are known and the consequences thereof can be assessed with greater clarity — makes even clearer that due process concerns are not implicated here.

Notably, to the extent that the concept of due process of law evolved to provide some assurance of fundamental fairness to all litigants, that principle has been clearly protected under the present facts. FFBM negotiated a deal to acquire property that was expressly subject to a pending adverse claim against it. FFBM negotiated an option to rescind the deal in the eventuality of an adverse adjudication. When that eventuality came to pass in a manner expressly contemplated as possible by the parties, and when FFBM failed to avail itself of the option it negotiated to ameliorate that contemplated adverse eventuality, FFBM most assuredly acted at its own peril and may not now successfully contend it was deprived of the fundamental right of due process of law as a result of its own actions.

Thus, consistent with due process, the Court concludes that the doctrine of claim preclusion bars FFBM from asserting the position that **[*41]** TriPharma lacks exclusive rights to the 892 Patent.

E. Application of Preliminary Injunction Standard

1. Likelihood of Success on the Merits

As detailed below, TriPharma has established a likelihood of success on the merits on its claim for tortious interference with contractual relations and its state-law UCL claim. Because the Court finds a likelihood of success on the merits as to these claims, and because the Court's conclusion on this issue alone supports the relief sought by TriPharma, the Court does not discuss whether TriPharma has established a likelihood of success on the merits of any other claims.

a. Tortious Interference with Contractual Relations

A plaintiff asserting a a claim for tortious interference with contractual relations must establish: (1) a valid contract between the party and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach of the contractual relationship; and (5) resulting damage. *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist., 106 Cal.App.4th 1219, 1239, 132 Cal. Rptr. 2d 57 (2003)*.

Here, TriPharma has presented evidence of all these elements. First, TriPharma has presented evidence of its agreement with third-party Imagenetix granting it **[*42]** the exclusive right to commercially exploit the 892 Patent. Second, as of at least November 30, 2011, when Catarino submitted a declaration acknowledging that the TriPharma-Imagenetix arbitration award "re-instated" TriPharma's exclusive license, Defendants had knowledge of the agreement. (RJN (Docket No. 44) Ex. 2 (Catarino Decl.) ¶¶ 7-8.) Third, TriPharma has also offered evidence regarding each Defendant's intentional actions. As discussed previously, Defendant FFBM, with Catarino's personal involvement, acquired the 892 Patent and has purported to take all rights to commercially exploit it, free and clear of TriPharma's rights. Defendant FF Beverage has distributed a product bearing the 892 Patent number. (See Dameshek Decl. (Docket No. 43) Ex. 6 (TrimFit Water label bearing the 892 Patent number).) Fourth, TriPharma has presented evidence of actual interference with its rights, including the inability to exclusively market products covered by the 892 Patent. Specifically, Defendants' actions in launching a new product modeled on TriPharma's product "SoL'eau" as their own, renamed "TrimFit" has unquestionably interfered with TriPharma's exclusive right to market products based on the 892 Patent. (See Dameshek Decl. (Docket No. 69) ¶¶ 24-26; **[*43]** Dameshek Decl. (Docket No. 43) Ex. 6 (TrimFit Water label, bearing the 892 Patent number).) Finally, damages are easily inferred from this evidence, in the form of lost good will and lost profits. From this evidence, the Court concludes TriPharma has established a strong likelihood of success on the merits of its tortious interference claim.

b. UCL

The UCL prohibits "unlawful, unfair or fraudulent business act[s] or practice[s]" and "unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code § 17200*. A plaintiff may pursue a UCL claim under any or all of three theories: the "unlawfulness," "fraudulent," or "unfairness" prongs. *South Bay Chevrolet v. General Motors Acceptance Corp., 72 Cal. App. 4th 861, 878, 85 Cal. Rptr. 2d 301 (1999)*. TriPharma argues Defendants actions fall under both the "fraudulent" and "unfair" prongs.

Under the UCL, a fraudulent business practice is one that is likely to deceive the public and may be based on representations that are untrue. *McKell v. Washington Mut., Inc., 142 Cal. App. 4th 1457, 1471, 49 Cal. Rptr. 3d*

227 (2006). Defendants' actions in marketing a product with reference to the 892 Patent and the Studies in violation of TriPharma's exclusive rights to do so fall under this category of acts prohibited by the UCL.

"Unfair" means "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the **[*44]** same as a violation of the law, or otherwise significantly threatens or harms competition." *Commc'ns v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. Here, TriPharma has presented evidence that Defendants are marketing and selling a product by referring to a patent as to which TriPharma has the exclusive license to practice. Similarly, TriPharma has presented evidence that Defendants are referring to certain clinical studies in connection with the sale of those products when TriPharma has been found to have the exclusive right to make such references. These actions fall under the "unfairness" prong of the UCL.

As to both the "fraudulent" and "unfair" prongs of the UCL, the Court finds TriPharma has established a strong likelihood of success on the merits.

2. Irreparable Injury

Here, TriPharma has offered evidence that Defendants' marketing efforts is expressly designed to capitalize on its goodwill, which was gained through a number of marketing and promotion efforts. (Dameshek Decl (Docket No. 30) ¶¶ 12-21.) Generally, harm to the goodwill established by a business is unquantifiable and, as such, constitutes irreparable injury. See, e.g., *Rent-A-Center, Inc. v. Canyon Tele. & Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir.1991)* ("Intangible injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable **[*45]** harm."); *Optinrealbig.com, LLC v. Ironport Sys., Inc., 323 F.Supp.2d 1037, 1050 (N.D. Cal. 2004)* ("Damage to a business's goodwill is typically irreparable injury because it is difficult to calculate."); *MySpace, Inc. v. Wallace, 498 F. Supp. 2d 1293, 1305-06 (C.D. Cal. 2007)* (finding irreparable harm based on the damage to goodwill where defendants used social network computer site to illegally "spam" users).

Here, there is evidence that FF Beverage has actually created confusion regarding its affiliation with TriPharma and damage to TriPharma's goodwill. (Dameshek Decl. ¶¶ 52.) A distributor of TriPharma's SoL'eau has sued TriPharma, alleging that FF Beverage, after informing the distributor that SoL'eau had been re-christened as "TrimFit," actually came and removed SoL'eau from the distributor and, when FF Beverage failed to replace the product with TrimFit, the distributor sued TriPharma. Id.

TriPharma has established the likelihood of irreparable injury.

3. Balance of Hardships

In determining whether to grant preliminary injunctive relief, court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter, 555 U.S. at 24 (2008)* (internal quotation marks and citation omitted).

TriPharma has offered scant evidence directly related to the hardships it might suffer in the absence **[*46]** of an injunction. (See Reply at 23-24 (citing no evidence).) Instead, it relies on a legal argument based on Ninth Circuit authority in an analogous factual setting that effectively precludes a defendant from arguing that the balance of hardships weighs against imposition of an injunction. (Id.) Specifically, in the Ninth Circuit, and elsewhere, "a defendant who knowingly infringes another's copyright 'cannot complain of the harm that will befall it when properly forced to desist from its infringing activities.'" *Cadence Design Sys., Inc. v. Avant! Corp., 125 F.3d 824, 829 (9th Cir. 1997)* (quoting *Triad Sys. Corp. v. Se. Exp. Co., 64 F.3d 1330, 1335 (9th Cir. 1995)*.) This holding applies where a plaintiff establishes a strong likelihood of success on the merits. *Cadence, 125 F.3d at 830*.

Here, it is clear to the Court that the 892 Patent is a commercially valuable intellectual property right. For instance, in the arbitration award, the arbitrator awarded to TriPharma approximately $1.7 million based on Imagenetix's actions in selling products based on the 892 Patent in violation of TriPharma's license. (FAC Ex. C at 31.) Moreover, FF Beverage, has offered evidence that revenue from TrimFit accounts for 60% of its revenue (amounting to "several millions dollars on a bimonthly basis") and keeps employed 40% of its workforce. (Catarino

Decl. ¶¶ 41 &43.) In light of the **[*47]** Court's conclusion that Defendants are bound by the arbitrator's finding that TriPharma has an exclusive license to the 892 Patent, and based on binding authority that requires the Court to give little if any weight to the hardships to Defendants in this case, the Court concludes that this evidence establishes that the balance of the hardships tips in favor of TriPharma.

4. Public Interest

An injunction is in the public interest because "[t]he public has an interest in avoiding confusion between two companies' products." *Internet Specialties West, Inc. v. Milon-DiGiorgio Enters., Inc., 559 F.3d 985, 993 n.5 (9th Cir. 2009)*.

F. Ruling

As set forth above, the Court finds that TriPharma has established a strong likelihood of success on the merits, a likelihood of irreparable injury in the absence of an injunction, a balance of hardships that tips in its favor, and that issuance of an injunction is in the public interest. Therefore, the Court grants the Motion for Preliminary Injunction on the terms detailed below.

VIII. Bond

For the first time at the hearing on this matter, Defendants sought the posting of a bond as security in the event the Court issued a preliminary injunction.

Rule 65(c) of the Federal Rules of Civil Procedure conditions issuance of a preliminary injunction upon the applicant's giving of security, generally in the form of the posting of **[*48]** a bond. Specifically, *Rule 65(c)* provides that "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." *Fed. R. Civ. P. 65(c)*. "Despite this seemingly mandatory language, *Rule 65(c)* invests the district court with discretion as to the amount of security required, *if any*." *Johnson v. Couturier, 572 F.3d 1067, 1086 (9th Cir. 2009)* (internal quotation marks omitted; emphasis in the original).

Because the Court has determined that TriPharma has a high likelihood of succeeding on the merits of its claims, and because the Court has made this ruling based primarily upon conclusions of law rather than a disputed factual record, the Court imposes only a nominal bond requirement on TriPharma. The injunction set forth below shall become effective upon the posting of a bond by TriPharma in the amount of $25,000.

IX. Preliminary Injunction

As set forth herein, the Court denies the Motions to Dismiss (Docket Nos. 22 & 65) and grants the Motion for Preliminary Injunction, which shall become effective upon TriPharma's posting of a $25,000 bond. (Docket No. 29.) **[*49]**

Accordingly, for the reasons set forth above, and pursuant to *Rule 65(c) of the Federal Rules of Civil Procedure*, Defendant First Fruits Business Ministry LLC, Defendant First Fruits Beverage Company LLC, and their officers, directors, employees, and agents (including but not limited to Defendant Roger J. Catarino), and additionally all those individuals and entities acting in concert with them[21] are enjoined and prohibited from directly or indirectly engaging in the following actions:

> (1) Selling or distributing, or advertising or offering for sale or distribution, any weight loss product utilizing a formula that is within the scope of the 892 Patent;

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[21] Pursuant to *Rule 65(d)(2)(C) of the Federal Rules of Civil Procedure*, in addition to being applicable to the entities and individuals specifically identified above, upon notice, this injunction is also applicable to any individual or entity who acts jointly with or in concert with any one or more of them.

(2) Selling or distributing, or advertising or offering for sale or distribution, the product presently sold and distributed by First Fruits Beverage Company, TrimFit™;

(3) Selling or distributing any product, or advertising or offering for sale any product by reference to the 892 Patent or clinical studies relating thereto; and

(4) Affixing the Patent number to any label or container of any weight loss product sold or distributed, or advertised or offered for sale or distribution.

IT IS SO ORDERED.

TruePosition, Inc. v. LM Ericsson Tel. Co.

United States District Court for the Eastern District of Pennsylvania

August 21, 2012, Decided; August 21, 2012, Filed

CIVIL ACTION No. 11-4574

Reporter

2012 U.S. Dist. LEXIS 117744 *; 2012-2 Trade Cas. (CCH) P78,024; 2012 WL 3584626

TRUEPOSITION, INC., Plaintiff, v. LM ERICSSON TELEPHONE COMPANY (TELEFONAKTIEBOLAGET LM ERICSSON), QUALCOMM, INC., ALCATEL-LUCENT USA, INC., EUROPEAN TELECOMMUNICATIONS STANDARDS INSTITUTE, and THIRD GENERATION PARTNERSHIP PROJECT a/k/a 3GPP, Defendants.

Prior History: *TruePosition, Inc. v. LM Ericsson Tel. Co., 844 F. Supp. 2d 571, 2012 U.S. Dist. LEXIS 1646 (E.D. Pa., Jan. 6, 2012)*

Core Terms

technology, working group, positioning, alleges, standardization, conspiracy, amended complaint, networks, standalone, asserts, Defendants', simulations, implementations, products, antitrust, mobile, motion to dismiss, Sherman Act, carriers, anticompetitive, handset, progress, telecommunications, manufactured, ripeness, factors, alleged conspiracy, direct evidence, accuracy, meetings

Counsel: **[*1]** For TRUEPOSITION, INC., Plaintiff: JOHN G. HARKINS, JR., LEAD ATTORNEY, HARKINS CUNNINGHAM, PHILADELPHIA, PA; NNEKA I. UKPAI, LEAD ATTORNEY, PRO HAC VICE, AYMERIC DUMAS-EYMARD, DAVID GOLDEN, DOUGLAS ROSENTHAL, SETH GREENSTEIN, PRO HAC VICE, CONSTANTINE CANNON LLP, WASHINGTON, DC; ALYSIA SOLOW, GORDON SCHNELL, TALINE SAHAKIAN, PRO HAC VICE, CONSTANTINE CANNON LLP, NEW YORK, NY; COLLEEN HEALY SIMPSON, EVELYN ROSE MARIE PROTANO, HARKINS CUNNINGHAM LLP, PHILADELPHIA, PA.

For THIRD GENERATION PARTNERSHIP PROJECT, also known as 3GPP, Defendant: RICHARD S. TAFFET, LEAD ATTORNEY, DEREK CARE, BINGHAM MCCUTCHEN LLP, NEW YORK, NY.

For LM ERICSSON TELEPHONE COMPANY, (TELEFONAKTIEBOLAGET LM ERICSSON), Defendant: STEVEN E. BIZAR, LEAD ATTORNEY, BUCHANAN INGERSOLL & ROONEY P.C., PHILADELPHIA, PA; ARMAN Y. ORUC, CONOR A. REIDY, PRO HAC VICE, SIMPSON THAHER & BARTLETT LLP, WASHINGTON, DC; KEVIN J. ARQUIT, PRO HAC VICE, SIMPSON THACHER & BARTLETT LLP, NEW YORK, NY; PERI L. ZELIG, PRO HAC VICE, SIMPSON THACHER & BARTLETT LLP, NEW YORK, NY.

For QUALCOMM INC., Defendant: ROBERT N. FELTOON, LEAD ATTORNEY, CONRAD O'BRIEN, PHILADELPHIA, PA; GARY A. BORNSTEIN, PRO HAC VICE, CRAVATH SWAINE & MOORE LLP, NEW YORK, **[*2]** NY; ROGER G. BROOKS, CRAVATH, SWAINE AND MOORE, NEW YORK, NY.

For ALCATEL-LUCENT USA INC., Defendant: A. STEPHEN HUT, JR., ALI M. STOEPPELWERTH, BRIAN M. BOYNTON, PRO HAC VICE, WILMER CUTLER PICKERING HALE & DORR LLP, WASHINGTON, DC; FRANCIS P. NEWELL, PETER MICHAEL RYAN, COZEN O'CONNOR, PHILADELPHIA, PA.

Judges: ROBERT F. KELLY, SR. J.

Opinion by: ROBERT F. KELLY, SR.

Opinion

MEMORANDUM

ROBERT F. KELLY, Sr. J.

Presently before the Court is the Joint Motion to Dismiss the Amended Complaint of TruePosition, Inc. Filed By Alcatel-Lucent USA, Inc. ("ALU"), LM Ericsson Telephone Company (Telefonaktiebolaget LM Ericsson) ("Ericsson") and Qualcomm, Inc. ("Qualcomm"), (collectively, the "Corporate Defendants"), the response in opposition by Plaintiff, TruePosition, Inc. ("TruePosition"), the Corporate Defendants' Joint Reply, as well as the separate Memoranda by ALU. For the reasons provided below, the Joint Motion to Dismiss will be denied.

I.FACTUAL HISTORY[1]

TruePosition **[*3]** describes itself as a "leading innovator in developing and marketing high accuracy location products that operate over cellular telecommunications networks." (Am. Compl. ¶ 3.) "More than 55 million cellular callers in the United States each year are located by TruePosition's products, assisting police, fire, and ambulance services in saving lives and enabling law enforcement to combat criminal activity and terrorist threats." (Id.) According to regulatory requirements set forth by the Federal Communications Commission ("FCC"), all mobile voice networks must be able to locate 911 callers. (Id.) In order to meet current FCC requirements, TruePosition's positioning technology, known as Uplink Time Difference of Arrival ("UTDOA"),[2] has been deployed on more than 90,000 cell tower sites in the United States. (Id.) TruePosition's UTDOA technology is implemented through Location Measurement Units ("LMU") that are located at multiple cell towers.[3] (Id. ¶ 24.) Multiple LMUs measure the difference in time that they receive signals sent over the cellular network by a handset (referred to as the "uplink" transmission). (Id.) These measurements enable the distance of the handset from each cell **[*4]** tower to be calculated. (Id.) By collecting multiple measurements, the handset location can be narrowed to within FCC requirements. (Id.)

This action stems from the alleged anticompetitive conduct of major players in the international telecommunications market within the context of a Standard Setting Organization ("SSO"). (Id. ¶¶ 1-9.) TruePosition alleges that Ericsson, Qualcomm and ALU conspired to exclude its positioning technology, UTDOA, from standards promulgated by Third Generation Partnership Project a/k/a 3GPP ("3GPP"). (Id.) 3GPP is a non-profit standard setting organization of which Plaintiff and the Corporate Defendants are members.[4] (See Am. Compl.) 3GPP is a not-for-profit SSO whose business is to fairly and impartially create global standards for mobile telecommunications technologies based on objective technical merit. (Id. ¶ 14.) The 3GPP standards are designed to be implemented globally through six regional SSOs, known as Organizational **[*5]** Partners, including Defendant European Telecommunications Standards Institute ("ETSI").[5] (Id.) This case arises from the alleged exclusion of

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[1] A complete factual history of this action is set forth in *TruePosition, Inc. v. Ericsson, et al., No. 11-4574, 844 F. Supp. 2d 571, 2012 U.S. Dist. LEXIS 1646, 2012 WL 33075 (E.D. Pa. Jan. 6, 2012)*. Although this Memorandum Opinion is based upon the original Complaint, it gives a sound factual history of the action.

[2] Positioning technology" refers to technology used to locate mobile handsets.

[3] In the United States, two major carriers (AT&T Wireless and T-Mobile) have implemented TruePosition LMUs at approximately 90,000 cell sites." (Am. Compl. ¶ 47.)

[4] 3GPP is named as a defendant in this action. Trueposition only recently served the Amended Complaint on 3GPP. 3GPP filed a Motion to Dismiss Plaintiff TruePosition, Inc.'s Amended Complaint on August 15, 2012. (Doc. No. 131.) This Motion will be addressed at a later time.

TruePosition's positioning technology from the 3GPP standard for the newest and most advanced 4G (Fourth Generation) or Long Term Evolution ("LTE") mobile telecommunications networks. (Id. ¶ 2.) Inclusion in the 3GPP 4G LTE standard is vital to the commercial success of TruePosition's UTDOA positioning technology. (Id. ¶ 4.) Notably, "[e]xclusion from the standard guarantees commercial failure and, in most instances, absolute foreclosure from the market." (Id.)

According to TruePosition, the Corporate Defendants collaboratively manipulated 3GPP's processes and procedures to gain unfair advantages for their preferred location technologies, and to prevent or delay standardization of TruePosition's technology. (Id. ¶ 6.) TruePosition further alleges that 3GPP participated in the conspiracy to exclude UTDOA from its standards by failing in its obligations to ensure that the Corporate Defendants complied with 3GPP Rules. (Id. ¶¶ 114-122.) TruePosition alleges that the direct consequence of the Defendants' conspiracy is that it, the UTDOA technology, and other competitors that market UTDOA-based products, have been foreclosed from competition for 4G positioning products, and have been harmed in their continued ability to develop and market 2G (Second Generation) and 3G (Third Generation) products that can be upgraded for 4G networks. (Id. ¶ 8.)

II. PROCEDURAL HISTORY

TruePosition filed a Complaint on July 20, 2011. Therein, TruePosition alleged that the conduct described above violated United **[*7]** States ***antitrust law*** giving rise to two causes of action: (1) violations of Section 1 of the Sherman Act, *15 U.S.C. § 1*; and (2) violations of *Section 2* of the Sherman Act, *15 U.S.C. § 2*.[6] TruePosition's Section 1 claim was asserted against all Defendants, while TruePosition's *Section 2* claim was only asserted against Ericsson and ALU.

A majority of Defendants moved to dismiss the Complaint. Instead of dismissing the action, we allowed TruePosition to file an amended complaint curing any defects set forth in our January 6, 2012 Memorandum Opinion. TruePosition filed an Amended Complaint on February 3, 2012. (See Am. Compl.) The Amended Complaint contains only one count asserted against all Defendants entitled "Combination Conspiracy in Violation of Section 1 of the Sherman Act (*15 U.S.C. § 1*)." (Id. ¶¶ 139-153.) TruePosition seeks monetary damages, treble damages, attorneys' fees and costs, prejudgment interest and injunctive relief. (Id. ¶ 154.) The Corporate Defendants filed a Joint Motion to Dismiss the Amended Complaint. (Doc. No. 103.) ALU also filed its own separate Memorandum **[*8]** in Support of the Corporate Defendants' Joint Motion to Dismiss. (Doc. No. 104.) TruePosition responded to the arguments made by the Corporate Defendants and they, in turn, filed their Replies. (Doc. Nos. 106, 107, 110 and 112.) For the reasons set forth below, the Corporate Defendants' Joint Motion to Dismiss TruePosition's Amended Complaint is denied.

III. LEGAL STANDARD

Pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a complaint may be dismissed for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. When reviewing a motion to dismiss pursuant to *Rule 12(b)(6)*, the complaint must be construed in the light most favorable to the plaintiff. *Burtch v. Milberg Factors, Inc., 662 F.3d 212, 220 (3d Cir. 2011)* (citing *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 314 (3d Cir. 2010))*. *Federal Rule of Civil Procedure 8(a)(2)* requires "only 'a short and plain statement of the claim showing the pleader is entitled to relief' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it

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[5] ETSI was voluntarily dismissed from this action on August 10, 2012. (Doc. No. 130.) Prior to its dismissal, ETSI filed a Motion to Dismiss. (Doc. No. 102.) In their Joint Motion to Dismiss, the Corporate Defendants joined in ETSI's dismissal motion. (Doc. No. 103.) We find that the only novel issue that is relatable to **[*6]** the Corporate Defendants is ETSI's argument concerning ripeness. We will address the ripeness issue at the end of this Memorandum Opinion. Infra Section IV.D.

[6] Pursuant to *28 U.S.C. § 1331*, federal question jurisdiction exists based upon the Sherman Act, *15 U.S.C. § 1*.

rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

"[A] plaintiff's **[*9]** obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of the cause of action will not do." Twombly, 550 U.S. at 555. In Twombly, the United States Supreme Court "set forth the 'plausibility' standard for overcoming a motion to dismiss and refined the approach in Iqbal." Burtch, 662 F.3d at 220 (citing Twombly, 550 U.S. at 557; Ashcroft v. Iqbal, 556 U.S. 662, 680, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). In other words, Rule 8 requires that a complaint contain factual allegations that, taken as a whole, render the plaintiff's entitlement to relief plausible. West Penn Allegheny Health System, Inc. v. UPMC, 627 F.3d 85, 98 (3d Cir. 2010). "This 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.'" Id. (quoting Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008); Twombly, 550 U.S. at 556). When deciding the sufficiency of a complaint "courts should disregard the complaint's legal conclusions and determine whether the remaining factual allegations suggest that **[*10]** the plaintiff has a plausible - as opposed to merely conceivable - claim for relief." Id. (citing Iqbal, 129 S. Ct. at 1949-50; Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009)). Under both Twombly and Iqbal, a court must take the following three steps in order to determine the sufficiency of a complaint:

> First, the court must take note of the elements a plaintiff must plead to state a claim. Second, the court should identify the allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief.

Id. (quoting Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010)). "It is, of course, true that judging the sufficiency of a pleading is a context-dependent exercise." West Penn, 627 F.3d at 98 (citing Iqbal, 129 S. Ct. at 1950; Twombly, 550 U.S. at 567-68; Phillips, 515 F.3d at 232).

IV. DISCUSSION

Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the **[*11]** several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. Under Section 1 of the Sherman Act, a plaintiff must plausibly allege the following three elements: (1) an agreement; (2) imposing an unreasonable restraint of trade within a relevant product market; and (3) resulting in antitrust injury, that is "injury of the type the antitrust laws were intended to prevent and . . . that flows from that which make defendants' acts unlawful." Ins. Brokerage, 618 F.3d at 315.

A. Agreement

To prevail on a Section 1 claim, a plaintiff is required to establish the existence of an agreement, at times also referred to as a conspiracy or concerted action. West Penn, 627 F.3d at 99 (citing Twombly, 550 U.S. at 553; Gordon v. Lewistown Hosp., 423 F.3d 184, 207 & n.16 (3d Cir. 2005)). The existence of an agreement "requires some form of concerted action, which we define as unity of purpose or a common design and understanding or a meeting of minds or a conscious commitment to a common scheme." Burtch, 662 F.3d at 221 (citations omitted). Regardless of the motivation, unilateral action is not a violation of Section 1. Id. (citation omitted). An agreement may be pleaded by **[*12]** a plaintiff by either alleging direct or circumstantial evidence or a combination of the two. Id.

1. Direct Evidence

"Direct evidence of a conspiracy is 'evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.'" *Burtch, 662 F.3d at 225* (quoting *Ins. Brokerage, 618 F.3d at 324 n.23*) ("A document or conversation explicitly manifesting the existence of the agreement in question is an example of direct evidence.") In this case, TruePosition argues that it has presented direct evidence of an agreement between the Corporate Defendants. Upon examination of the Amended Complaint, we find only conclusory allegations of direct evidence of an agreement.

TruePosition states that "[i]n November 2008, upon information and belief, the corporate defendants agreed to prevent standardization of TruePosition's positioning technology so that their preferred technologies would attain an insurmountable head start in relevant markets." (Am. Com. ¶ 2.) Notably, the Amended Complaint neither contains any allegations that specify a time or place that an actual agreement occurred, nor the identities of any particular individuals who made such an agreement. **[*13]** See *Twombly, 550 U.S. at 565 n.10* (stating that plaintiff's failure to allege a "specific time, place, or person involved in the alleged conspiracies" left "no clue as to which of the [defendants] (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place."); *Great Western Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 179 (3d Cir. 2010)* ("The complaint sets forth merely a conclusory allegation of agreement at some unidentified point[, which] does not supply facts adequate to show illegality. . . . Specifically, Great Western has failed to allege except in general terms the approximate time when the agreement was made, the specific parties to the agreement (i.e., which judges), the period of the conspiracy, or the object of the conspiracy.") Nowhere in the Amended Complaint are there any substantive allegations specifically detailing any facts regarding direct evidence of an illicit agreement.

TruePosition's allegations and arguments of direct evidence of an agreement are conclusory in nature and, therefore, are not entitled to the assumption of truth. See *Burtch, 662 F.3d at 224* ("Under Iqbal, we next identify allegations that **[*14]** are no more than conclusions, [and] are not entitled to the assumption of truth . . . [and] disregard naked assertions. . . ."); see also *Twombly, 550 U.S. at 557* ("[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.") Consequently, TruePosition has failed to adequately plead direct evidence of a specific agreement.

2. Circumstantial Evidence

In light of TruePosition's failure to plausibly allege direct evidence of an agreement, we must determine whether TruePosition has adequately alleged circumstantial evidence to plausibly show that an agreement exists between the Corporate Defendants. "Circumstantial evidence of parallel behavior must be pled in 'a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.'" *Burtch, 662 F.3d at 226* (quoting *Twombly, 550 U.S. at 557*). "The law is well-established that 'evidence of parallel conduct by alleged co-conspirators is not sufficient to show an agreement.'" Id. (quoting *Ins. Brokerage, 618 F.3d at 321*). "Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement **[*15]** at some unidentified point does not supply facts adequate to show illegality." *Twombly, 550 U.S. at 556-57*. In itself, parallel conduct is insufficient to state a plausible claim because "it is 'consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.'" Id. (quoting *Twombly, 550 U.S. at 554*).

"Alleging parallel conduct 'is thus much like a naked assertion of conspiracy in a § 1 complaint; it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief.'" Id. (quoting *Twombly, 550 U.S. at 557*). In In re Insurance Brokerage Antitrust Litigation, the Court of Appeals for the Third Circuit ("Third Circuit") identified at least three types of facts, often referred to as "plus factors," that tend to demonstrate the existence of an agreement. *Ins. Brokerage, 618 F.3d at 321-22*. The three "plus factors" are the following: "(1) evidence that the defendant had a motive to enter into a . . . conspiracy; (2) evidence that the defendant acted contrary to its interests; **[*16]** and (3) evidence implying a traditional conspiracy." *Id. at 321-22* (citation and internal quotation marks omitted). The Third Circuit ruled that "plaintiffs relying on parallel conduct must allege facts that, if true, would establish at least one 'plus factor.'" *Id. at 323*.

Also, the Third Circuit has "cautioned that the first two plus factors may indicate that 'defendants operate in an oligopolistic market, that is, may simply restate the (legally insufficient) fact that market behavior is interdependent and characterized by conscious parallelism.'" *Burtch, 662 F.3d at 227* (quoting *Ins. Brokerage, 618 F.3d at 322*); see also *In re Baby Food Antitrust Litig., 166 F.3d 112, 117 (3d Cir. 1999)*. "Evidence of the third plus factor is 'non-economic evidence that there was an actual, manifest agreement not to compete, which may include proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.'" Id. (quoting *Ins. Brokerage, 618 F.3d at 322*).

"[W]hen evidence shows communications which provided an opportunity for agreement, a plaintiff must still produce evidence **[*17]** permitting an inference that an agreement in fact existed." *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1013 (3d Cir. 1994)* (citation omitted). "The evidence must give rise to more than speculation." Id. (citation omitted). "Requiring plausibility to infer an agreement from circumstantial evidence 'does not impose a probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement.'" Id. (quoting *Twombly, 550 U.S. at 556*).

With these standards in mind, we review the Amended Complaint's allegations granting reasonable inferences to TruePosition's nonconclusory well-pleaded factual allegations. Unlike TruePosition's unsuccessful attempt at plausibly alleging direct evidence, the Amended Complaint satisfactorily alleges parallel conduct. The Amended Complaint is replete with allegations of parallel conduct by the Corporate Defendants pertaining to their various roles within the standardization process. In addition, the Amended Complaint details the standardization process of the 4G LTE Standard and the Corporate Defendants' alleged concerted acts to obstruct or stop **[*18]** the inclusion of UTDOA within the Standard.

TruePosition articulates the relevant times in which representatives of the Corporate Defendants held central positions of Chairmanship over key committees and working groups making crucial decisions about the standardization of the positioning technologies at issue. (Am. Compl. ¶¶ 41.) According to TruePosition, the Corporate Defendants needed each other in order to successfully obstruct the standardization of TruePosition's UTDOA technology. (Id.) "The corporate defendants . . . controlled the Chairmanships of, and had key members in, every committee essential to progress the corporate defendants' positioning work item." (Id.) (listing the Corporate Defendants' positions). TruePosition asserts that "the corporate defendants could not have foreclosed U-TDOA standardization and secured an insurmountable head start for [their preferred positioning technology], except by coordinating their violations of 3GPP rules and procedures at key points in the standardization process, and permitting those violations through their authority as Chairmen." (Id.)

Although TruePosition has successfully alleged parallel conduct by the Corporate Defendants, "[t]he **[*19]** law is well-established that 'evidence of parallel conduct by alleged co-conspirators is not sufficient to show an agreement.'" *Burtch, 662 F.3d at 226* (quoting *Ins. Brokerage, 618 F.3d at 321*); see also *Twombly, 550 U.S. at 556-57* ("Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.") Thus, we now examine whether the plus factors advanced by TruePosition lend plausibility to the allegations of conspiratorial parallel conduct.

a. Plus Factors

As previously explained, when relying upon circumstantial evidence to sufficiently plead the existence of an agreement, as is this case, at least three types of facts, often referred to as "plus factors," tend to demonstrate the existence of an agreement: "(1) evidence that the defendant had a motive to enter into . . . conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy." *Ins. Brokerage, 618 F.3d at 321-22* (stating "plaintiffs relying on parallel conduct must allege facts that, if true, would establish at least one 'plus factor'"). Here, viewing **[*20]** all of the non-conclusory allegations as a whole, we conclude that TruePosition's Amended Complaint plausibly alleges parallel conduct by the Corporate Defendants that is consistent with a conspiracy.

Regarding the first two plus factors (i.e., evidence that defendants had a motive to enter into a conspiracy and evidence that defendants acted contrary to their interests), we conclude that TruePosition has not adequately shown that these factors alone demonstrate the existence of an agreement. Without delving into a lengthy discussion about the two factors, it is sufficient to say that neither the first nor second plus factor set forth by TruePosition adequately raise a suggestion of a preceding agreement. In fact, they can be seen as merely parallel conduct that could just as well be independent action motivated by self-interest and legitimate business practices. We caution that "a fine line demarcates concerted action that violates ***antitrust law*** from legitimate business practices." *Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992)*. We will, however, consider TruePosition's allegations concerning the first two plus factors within our overall analysis of **[*21]** whether TruePosition's Amended Complaint has plausibly alleged parallel conduct that is consistent with conspiracy. Although we conclude that TruePosition has not sufficiently alleged the first two plus factors, we do find that it has adequately presented allegations of the third plus factor (i.e, evidence implying a traditional conspiracy). When viewing the Amended Complaint as a whole, TruePosition's allegations against the Corporate Defendants are plausible.

"[W]hen allegations of parallel conduct are set out in order to make a § 1 claim," that conduct must be placed in "some setting suggesting the agreement necessary to make out a § 1 claim." *Twombly, 550 U.S. at 557*; see also *In re Blood Reagents Antitrust Litig., 756 F. Supp. 2d 623, 631 (E.D. Pa. 2010)* ("Twombly emphasized context.") The unique backdrop of the alleged conspiracy in this case is within a standard setting organization and involves the evolving worldwide mobile telecommunications industry. In order to explore the unique context of this lawsuit, we begin by examining the standard setting organizational role of 3GPP and positioning technology related to mobile telecommunication prior to, and after, 2008, the year **[*22]** in which the alleged conspiracy began.

Background Prior To 2008

Founded in 1994 as "Associated Radio Location Tracking, Inc.," TruePosition first started developing location products for analog mobile phones and a 2G digital phone technology used in the United States. (Am. Compl. ¶ 18.) By 2002, TruePosition developed UTDOA-based products that potentially could interface with 2G networks. (Id.) TruePosition sells high accuracy positioning and networking technology as a standalone Location Measurement Unit, LMU. (Id. ¶ 19.) These standalone LMUs are collocated with, and must interoperate with, the RAN equipment at a cell tower site, but are separate from the RAN equipment.[7] (Id.) The ability of TruePosition's LMUs to interoperate with multiple vendors' RAN equipment is crucial to the ability of TruePosition (and other LMU vendors) to compete in the markets for positioning equipment. (Id. ¶ 20.) TruePosition markets a universal LMU that is used to determine the locations of mobile phones on networks for 2G mobile telecommunications technology, known as Global System for Mobile Communications ("GSM"), and/or 3G mobile phone networks based on the 3GPP standard known as Universal Mobile Telecommunications **[*23]** System ("UMTS"). (Id. ¶ 21.) According to TruePosition, its customers can maximize their investments in positioning hardware by using the same LMU hardware for current and future networking technologies, and by upgrading their positioning technologies more quickly and inexpensively than through the modification of positioning technology embedded in RAN equipment because LMUs work in tandem with the network equipment and no upgrade of the phones is needed. (Id.)

TruePosition's high accuracy positioning technology, UTDOA, is primarily used in the United States to locate mobile phones that call emergency services such as E-911 (enhanced 911 for 911 calls). (Id. ¶ 22.) The FCC requires mobile carriers such as AT&T Wireless (AT&T), Verizon Wireless, T-Mobile, and Sprint, to provide for the increasingly accurate location of mobile handsets that call E-911 services. (Id.) The FCC has recently promulgated more precise requirements, and is considering even more stringent requirements for the future regarding locating indoor calls. (Id.) Carriers that fail to satisfy FCC requirements are subject to enforcement proceedings **[*24]** and fines. (Id.) TruePosition's UTDOA technology meets current FCC requirements, can meet the recently announced

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[7] RAN stands for Radio Access Network. (See Am. Compl. Glossary of Acronyms.)

future FCC requirements, and is uniquely adapted to provide indoor location. (Id.) TruePosition alleges that UTDOA alone provides a high level of accuracy that reliably meets the FCC regulatory requirements. (Id. ¶ 25.)

As previously explained, TruePosition's UTDOA method is implemented in LMUs located at multiple cell towers. (Id. ¶ 24.) Multiple LMUs measure the difference in the time they receive signals sent over the cellular network by a handset (referred to as "uplink" transmission). (Id.) By collecting multiple measurements, the handset location can be narrowed within FCC requirements. (Id.) Special signals from the handset are not needed nor is there a need for special hardware or software in the handset. (Id.) No calculations are performed by the handset. (Id.) TruePosition asserts that its UTDOA is superior to the technology promoted by the Corporate Defendants known as "OTDOA" (Observed Time Difference of Arrival) because OTDOA is handset-based requiring a downlink transmission. (Id. ¶ 29.) That is, the handset calculates its location based on the difference in **[*25]** timing between signals received over a cellar network from several cell towers. (Id.) Consequently, OTDOA requires specialized hardware and software of the type manufactured by Qualcomm in every handset, as well as RAN equipment of the type manufactured by Ericsson and ALU. (Id.) TruePosition alleges that Ericsson and Qualcomm each hold patents that are essential to the implementation of OTDOA.[8] (Id. ¶ 30.) According to TruePosition, OTDOA-based positioning equipment has not been successfully deployed commercially. (Id. ¶ 31.)

Importantly, TruePosition asserts that the superiority of UTDOA was demonstrated in 2G and 3G networks. (Id. ¶ 32.) Major United States mobile carriers attempted in 1999-2001 to implement a predecessor of OTDOA technology, known as "EOTD" (Enhanced Observed Time Difference), but discovered that it failed to locate 911 callers to the level of accuracy required by FCC regulations. (Id.) In the late 1990s, a European-based ETSI (European Telecommunications Standards Institute) standard for 2G GSM mobile telecommunication technology proliferated throughout Europe and was beginning to be adopted by several major United States carriers. (Id. ¶ 42.) Positioning for 2G GSM at that time was dominated by a few large companies, including Ericsson, ALU and Qualcomm. (Id.) These vendors favored EOTD positioning technology for the following two reasons: Ericsson and Qualcomm's alleged **[*27]** patents essential to EOTD technology would mean substantial royalties if EOTD was included in the standards; and since 3GPP (Third Generation Partnership Project) did not enable standalone EOTD products, Ericsson and ALU could incorporate EOTD positioning within their RAN equipment and prevent competition from standalone LMU vendors. (Id.)

The EOTD technology offered by the Corporate Defendants, and deployed by major United States carriers in 1999-2001, was a failure because it did not meet FCC regulatory requirements. (Id. ¶ 43.) As a result, the carriers that had heavily invested in GSM RAN equipment faced millions of dollars in fines from the FCC for failing to meet the deadlines to implement E-911 mobile phone location requirements. (Id.) The carriers rectified this failure by implementing UTDOA products from manufacturers, including TruePosition and Andrew Corporation, in standalone UTDOA products offered by TruePosition and Andrew Corporation. (Id. ¶ 44.) However, no ETSI standard specified the method for interoperability with UTDOA technology. (Id.) In the absence of a standard, TruePosition created a "work-around" solution so that its LMUs could obtain from the GSM RAN equipment **[*28]** two necessary pieces of information, namely, the precise time when the E-911 call was placed and the radio channel information used by the handset to place the call. (Id.) Ericsson and ALU independently opposed TruePosition's efforts. (Id.)

TruePosition's "work around" solution was successful, but costly for the carriers. (Id. ¶ 45.) As a result, the carriers required their RAN vendors, primarily Ericsson and ALU, to join with TruePosition in a "UTDOA System Study

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[8] ALU, which does not have essential patents in OTDOA, argues that it does not have a vested interest in excluding UTDOA from the 4G LTE Standard. (ALU's Supplemental Mem. Law Support Corp. Defs.' Joint Mot. to Dismiss Am. Compl. at 6.) ALU argues that it would benefit, not suffer, from having another option to put into its RAN equipment, particularly if, as TruePosition contends, the UTDOA option is desired by ALU customers (i.e., U.S. telecommunications carriers). (Id. at 7.) TruePosition counters ALU's argument by stating that "[ALU] specifically sought to delay standardization until it could build UTDOA into its own RAN equipment; it successfully promoted standardization **[*26]** of its preferred UTDOA configuration, not one it could 'buy' from TruePosition; and then it proposed to standardize UTDOA so that only a RAN equipment manufacturer like [ALU] could compete to make and sell UTDOA equipment." (TruePosition's Opp'n to Joint Mot. to Dismiss Am. Comp. and Supplemental Mem. of ALU at 37.)

Group" to create a standard interface for TruePosition's LMUs to interoperate with RAN equipment. (Id.) Within approximately one year, the group completed and brought the work to ETSI, and, by 2004, UTDOA was included in the ETSI standard for 2G GSM, including standalone LMUs. (Id.) The standard for the next generation of mobile phone technology called UMTS or 3G was created by 3GPP. (Id. ¶ 46.) AT&T insisted that another study group be formed in 2004 because it wanted the ability to use TruePosition's standalone LMUs with 3G UMTS. (Id.) In 2005 (approximately within 18 months), UTDOA was incorporated within the 3GPP standards for 3G UMTS, including standalone LMUs, despite the independent opposition by both Ericsson and ALU. **[*29]** (Id.)

Since 2005, UTDOA in a standalone implementation has been included in standards for 2G GSM and 3G UMTS systems and has been successfully deployed in standalone LMUs in the United States for public safety E-911 uses and in other countries of the world for security and law enforcement. (Id. ¶ 47.) TruePosition and other companies have successfully marketed UTDOA-based standalone products in the United States, and in foreign countries of the world for security and law enforcement uses. (Id.) In the United States, two major carriers (AT&T Wireless and T-Mobile) have implemented TruePosition LMUs at approximately 90,000 cell sites which locate more than 55 million E-911 callers each year. (Id.)

UTDOA technology is equally applicable to LTE or 4G systems. (Id. ¶ 48.) There is no technological reason why UTDOA in a standalone LMU configuration cannot interoperate with RAN equipment for a LTE network. (Id.) However, the "work around" that enabled UTDOA standalone implementations without standardization is not possible for 4G LTE network equipment due to the different architecture of LTE networks. (Id.) Thus, 3GPP standardization for UTDOA is necessary for standalone LMUs on a LTE network. **[*30]** (Id.) Exclusion from the 3GPP standard for LTE would render UTDOA useless for 4G networks, and make ungradable universal LMUs, such as those sold by TruePosition, virtually unmarketable for 2G and 3G networks. (Id.) It is the Corporate Defendants' alleged concerted actions attempting to foreclose UTDOA standardization in 4G LTE within 3GPP that is the crux of this action.

According to 3GPP policies, TruePosition alleges that it should have been a foregone conclusion that UTDOA in standalone implementations would be included in 3GPP Release 9 (the first release intended for actual deployment of LTE systems).[9] TruePosition asserts that it should have been included due to the prior standardization of UTDOA in the standards for earlier-generation 2G and 3G mobile communications technology, its proven effectiveness to meet regulatory standards, and its marketplace success. (Id. ¶ 49.) Likewise, TruePosition asserts that any standardization work for UTDOA for 4G should have progressed and been completed at least as quickly as the standardization of UTDOA for 2G GSM and 3G UMTS (i.e., within approximately 12-18 months). (Id.) As of today's date, it has not been included in Release 10 (the **[*31]** second release for actual deployment of 4G LTE systems).[10]

2008 Work Item Alleged Conspiracy To Exclude UTDOA From Release 9 And 3GPP Standards

Focusing first on Release 8, TruePosition explains that it did not include any positioning technology; therefore, **[*32]** work needed to be done by the 3GPP System Architecture Group ("SA2 Group") to lay the technological foundation to provide for positioning in 4G networks. (Id. ¶ 50.) The positioning discussions were led by Stephen Edge ("Edge") of Qualcomm, and TruePosition actively participated in the effort because it wanted to ensure that a

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[9] The 3GPP organizational structure relies on a Radio Access Network Technical Specification Group ('RAN TSG' or 'RAN Plenary') to create technical documents, known as 'Specifications,' for the structure and operation of RAN networks and equipment." (Am. Compl. ¶ 36.) "The RAN TSG consists of five Working Groups (RAN1 through RAN5), each covering different aspects of the network, that perform that technical work of evaluating proposed work items and developing the draft Specification." (Id.) Updates to 3GPP Specifications are issued sequentially in a series of "Releases." (Id. ¶ 38.) The technologies and methods stated in each Release may build upon or add to a prior release. (Id.) When a Release is completed by 3GPP, it is adopted and promulgated as a standard by 3GPP's regional Organizational Partners. (Id.)

[10] Release 11 of 3GPP's Specification for 4G LTE technology is to be completed, at its earliest, by September 2012. (Am. Compl. ¶ 91.)

sound technological foundation would be established for UTDOA positioning for 4G LTE. (Id. ¶ 51.) TruePosition alleges that in November 2008, before work was completed by the SA2 Group, Qualcomm, Ericsson and ALU agreed to privately prepare their own work item to include specific positioning technologies in Release 9 of the 3GPP standards.[11] (Id. ¶ 52.) The work item ("2008 Work Item") was written by Qualcomm's Edge. (Id.)

TruePosition alleges that Qualcomm's early draft of the 2008 Work Item proposed to include UTDOA in the standardization effort, but Ericsson and ALU told Qualcomm that they would not support it if UTDOA was included and insisted that it be removed from the draft. (Id. ¶ 53.) Noting that the draft of the 2008 Work Item did not include UTDOA, TruePosition avers that Qualcomm acceded to the demands of Ericsson and ALU. (Id.) It is noteworthy that TruePosition argues that Ericsson and ALU had each unsuccessfully independently opposed TruePosition's efforts to create the "work-around" solution so that its LMUs could work with the 2G GSM RAN. (Id. ¶ 44.) This is important because one of the premises upon which TruePosition's conspiracy claim lies is that Ericsson and ALU needed to coordinate their efforts with each other and Qualcomm in order to successfully preclude and forestall TruePosition's UTDOA technology from being included in the 4G LTE standard. (Id.)

TruePosition alleges that the SA2 Group met for several days in November 2008 to continue the foundational work. (Id. ¶ 54.) TruePosition asserts that Qualcomm kept the drafting of **[*34]** the 2008 Work Item, as well as its text, secret from the SA2 Group, and from TruePosition, whose representative had one or more one-on-one conversations with Edge regarding positioning, by never disclosing the draft nor the Corporate Defendants' intention of submitting the 2008 Work Item. (Id.) TruePosition alleges that the Corporate Defendants intended and agreed that the intention and the text of the draft would not be shared with TruePosition or other UTDOA manufacturers because they intended to use the Work Item in an effort to exclude or delay the standardization for UTDOA. (Id.)

Interestingly, the draft of the 2008 Work Item contained a background section describing the "Justification" for the Work Item acknowledging that UTDOA technology is capable of meeting regulatory requirements for positioning. (Id. ¶¶ 55-56.) However, out of all of the technologies listed in the "Justification" section, only UTDOA was omitted from the section of the document that proposed the technologies to be included within the 3GPP standard. (Id.)

At the December 2008 RAN Plenary Group meeting in Athens, Greece, the Plenary Group met to determine the features to be included and prioritized for Release **[*35]** 9. (Id. ¶ 57.) Several days after the deadline for making technical submissions passed, Qualcomm submitted the 2008 Work Item proposing to include positioning technologies in the 4G LTE standard. (Id.) Such a late submission violated 3GPP rules. (Id.) TruePosition alleges that such a late submission had to be intentional because the Corporate Defendants held key chairman positions within 3GPP and, therefore, knew the rules and proper procedures.[12] (Id. ¶ 58.) TruePosition also argues that the Corporate Defendants had to agree and plan on the late submission because the only way that the 2008 Work Item would be accepted in violation of the rules is due to the fact that the Chairman of the RAN Plenary Group was a senior employee of ALU possessing the power to refuse any objection based on lateness of the submission by a Qualcomm representative. (Id. ¶ 59.) According to 3GPP rules, a Chairman must defer consideration of late submissions that prejudice 3GPP members and unfairly favor others. (Id.) TruePosition argues that if 3GPP's due process rules had been followed, the Corporate Defendants would not have gained any advantage by the dilatory filing of the Work Item, and it would have **[*36]** had a fair opportunity required by 3GPP rules to consider, review,

[11] Work Items are proposals to include technology features in 3GPP standards initially created through private discussions among members of a Working Group outside of the formal meeting context. (Id. ¶ 37.) In order to be considered by the RAN Plenary Group, a Work Item proposal must list the support of at least four members although Work Item proponents often have a longer list including companies that have no direct interest in the outcome **[*33]** or do not intend to contribute to the project. (Id.)

[12] In the Amended Complaint, TruePosition states that "the Chairman of the Plenary Group and of each RAN Working Group has extraordinary authority to determine which technologies will be included in the Specification, and the order in and speed at which each element of the Specification must be drafted, reviewed, simulated, and completed." (Am. Compl. ¶ 39.) "Chairman positions are almost exclusively filled by representatives from major multinational telecommunications equipment manufacturers, such as the Corporate Defendants." (Id. ¶ 40.)

and respond to the proposal. (Id. ¶¶ 58-59.) The late submission of the proposal was accepted by the ALU RAN Plenary Group Chairman. (Id. ¶ 59.)

TruePosition states that it was ambushed by the submission. (Id. ¶ 60.) TruePosition explains that it, as well as other companies, anticipated and understood that technologies already standardized in 3G would be rolled into the 4G standards once the SA2 Group's foundational work was completed in March 2009, and that any positioning work items for new technologies (such as OTDOA) would only be ripe for submission at that time. (Id.) TruePosition **[*37]** also expresses its surprise at the fact that Stephen Edge, who led the SA2 Group's effort to create the foundation for LTE positioning, did not mention the possibility of an imminent work item submission. (Id.) TruePosition also points out that the exclusion of UTDOA from the proposal was even more suspect given that UTDOA had been commercially successful, widely deployed, and demonstrably met the FCC positioning requirements in contrast to the OTDOA technology proposed in the submission which was unproven technology with no extant commercial implementations since it was derived from the failed EOTD technology and replaced in the United States with TruePosition's UTDOA-based LMUs. (Id. ¶ 61.)

The 2008 Work Item submission listed nine supporting companies in addition to the Corporate Defendants. (Id. ¶ 62.) TruePosition asserts that some of the nine companies did not have any business interests in deploying UTDOA or OTDOA, and others, including AT&T Wireless, lent support to the 2008 Work Item because they mistakenly believed that it sought to standardize the technologies listed in the "Justification" section as "useful and even essential," specifically including UTDOA. (Id. ¶ 63.) TruePosition **[*38]** states that AT&T representatives learned that the 2008 Work Item excluded UTDOA standardization after it was submitted to the RAN Plenary Group in Athens, Greece. (Id.) On the day that the 2008 Work Item was going to be considered by the RAN Plenary Group, TruePosition, AT&T, and Polaris Wireless convened a meeting with a representative of Qualcomm. (Id. ¶ 64.) At this meeting, a representative of AT&T told the Qualcomm representative that AT&T wanted UTDOA added to the 2008 Work Item. (Id.) Refusing AT&T's request, the Qualcomm representative's sole justification was that major companies that had signed on to the 2008 Work Item would oppose any work item that includes UTDOA.[13] (Id.) TruePosition alleges that it believes that the Qualcomm representative was referencing Ericsson and ALU as the "major companies." (Id.) AT&T is a major purchaser of Ericsson and ALU RAN equipment, as well as a major seller of mobile phones using Qualcomm chipsets. (Id.) According to TruePosition, the Corporate Defendants were able to collectively refuse AT&T's request because by acting together they wielded sufficient power in the marketplace to avoid serious commercial repercussions from a major customer **[*39]** that they could not, otherwise, face acting alone. (Id.)

During the meeting when the RAN Plenary Group Chairman from ALU brought up the submission of the 2008 Work Item, a TruePosition representative requested that the discussion be deferred due to the prejudicial non-compliance with the 3GPP rules for submission deadlines. (Id. ¶ 66.) A representative from Polaris Wireless supported the deferral request based upon non-compliance and asserted that the proposal was premature since the SA2 Group had not completed its foundational work. (Id.) TruePosition's representative proposed to add UTDOA to the 2008 Work Item, but the Chairman refused the request reasoning the alleged complexity and potential delay of adding UTDOA. (Id. ¶ 67.) TruePosition asserts that such reasons were baseless because the only requirement needed for the proven UTDOA technology for standalone implementation was a method to deliver to the LMU the time and channel of the E-911 call, as had been **[*40]** done in both the 2G and 3G standards. (Id.) Also, TruePosition asserts that such reasons were baseless since OTDOA was unproven, more complex and would require extensive new engineering work in the 4G standards. (Id.) TruePosition states that, in furtherance of the agreement among the Corporate Defendants, the ALU Chairman denied the requests for delay, but made the submission the sole focus of further discussions of positioning technologies at the meeting. (Id.) TruePosition argues that the Chairman, who was a representative of ALU, acted in furtherance of the agreement of the Corporate Defendants because he violated the 3GPP safeguards against unfair and biased conduct by conducting the meeting in a manner that favored one positioning technology submission to the prejudice of other proposals. (Id. ¶ 68.)

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[13] Truepositon argues that the Qualcomm representative's denial of AT&T's request is an act against its own interest in furtherance of the conspiracy due to AT&T's significant power within the mobile telecommunications market.

In light of the aforementioned facts, TruePosition asserts that the Corporate Defendants needed an agreement between each other not only to exclude UTDOA from the 2008 Work Item proposal, but to circumvent the due process safeguards set in place by the rules and regulations of 3GPP. TruePosition argues that the exclusion of UTDOA from the proposal was deliberately intended by the **[*41]** Corporate Defendants to preclude or delay UTDOA standardization for 4G LTE, and to seize a first mover advantage for technologies in which those companies held substantial patent portfolios and business interests. (Id. ¶ 61.)

Corporate Defendants' Alleged Continuing Efforts To Exclude Or Delay The Standardization Of UTDOA

In addition to the allegations that the Corporate Defendants successfully colluded with each other in order to foreclose UTDOA from being included in the 2008 Work Item, TruePosition argues that they have been continuing to work together in order to exclude or delay UTDOA standardization since that time. At the March 2009 RAN Plenary Group meeting, TruePosition submitted a proposal to add UTDOA to the positioning Work Item (which was supported by several companies, including AT&T), but the Corporate Defendants actively opposed it and the Chairman (a representative of ALU) rejected it. (Id. ¶ 69.)

TruePosition also proposed a separate Work Item for UTDOA standardization ("UTDOA Work Item") which AT&T, among other companies, supported. (Id. ¶ 70.) ALU also signed on to TruePosition's UTDOA Work Item.[14] (ALU's Supplemental Mem. Law Support Corp. Defs.' Joint Mot. to Dismiss **[*42]** at 5.) TruePosition asserts that, in furtherance of the conspiracy, the Corporate Defendants sought to ensure that the work on the standardization of UTDOA would proceed before committees that they collectively controlled, so that they could derail or delay any separate work item for UTDOA. (Am. Compl. ¶ 70.) Additionally, TruePosition asserts that the Corporate Defendants coordinated their efforts so that they were able to assure control over the progress of the two positioning work items so as to guarantee a significant head start to OTDOA in the relevant markets. (Id.)

Once securing the assignment of TruePosition's UTDOA Work Item to RAN1 Working Group, which is chaired by a representative of Ericsson, the Corporate Defendants allegedly furthered their conspiracy by the RAN1 Chairman proposing two rigorous restrictions on the UTDOA Work Item that were not imposed on OTDOA. (Id. ¶ 71.) Also, the Ericsson RAN1 Chairman delayed **[*43]** any work on the UTDOA Work Item until June 2009, which, TruePosition, points out is the same delay that ALU previously had requested privately from TruePosition. (Id.) This proposed delay by the Ericsson RAN1 Chairman, TruePosition alleges, was made in coordination with ALU. (Id.) These restrictions, which TruePosition asserts are unfair and unprecedented, were approved and imposed by the ALU RAN Plenary Group Chairman. (Id.)

In June and July 2009, the RAN1 Working Group began evaluating UTDOA. (Id. ¶ 72.) At the meeting, TruePosition alleges that it timely submitted a list of simulation testing assumptions representing a reasonable range of field conditions for UTDOA. (Id.) TruePosition conducted extensive and burdensome simulations that demonstrated the ability of UTDOA to meet the set of requirements and that UTDOA for 4G was capable of meeting FCC requirements, as it had been doing for 2G and 3G networks. (Id.) Each time that TruePosition brought new simulation results proving the accuracy of UTDOA under the requested assumption to the RAN1 Working Group, the Chairman (an Ericsson representative) would insist that the last requested assumptions were insufficient, and make them more **[*44]** stringent. (Id. ¶ 73.) TruePosition alleges that no other positioning technology was subjected to these restrictions. (Id.) In spite of positive simulation results for UTDOA, the RAN1 Working Group Chairman from Ericsson ruled that UTDOA could not progress beyond an "evaluation" stage. (Id.)

Regarding technical tests simulating how OTDOA would perform, the results yielded inconsistent results. (Id. ¶ 76.) Due to the unresolved technical issues, several companies were unwilling to approve progress for OTDOA. (Id.) TruePosition asserts that the Ericsson Chairman of the RAN1 Working Group, as well as the other Corporate

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[14] Although the fact that ALU signed on to TruePositon's UTDOA Work Item does not alone negate all of the allegations of its involvement in an illegal conspiracy, we have given this fact serious consideration in our evaluation of TruePosition''s claims against ALU.

Defendants, were able to get changes through the working group that supported OTDOA, and the Ericsson Chairman sealed the accelerated treatment of OTDOA to secure its inclusion in Release 9. (Id.)

In October 2009, TruePosition was the only company to submit UTDOA simulations for the meeting. (Id. ¶ 77.) Just twelve hours before the UTDOA session was to start, and eight days past the deadline for any submissions, Ericsson submitted a report to the RAN1 Working Group regarding UTDOA subjects that were outside the purview of the RAN1 Working Group. (Id.) Relying on the report, **[*45]** Ericsson used it as an excuse to delay RAN1 Working Group's consideration of UTDOA by insisting that the RAN2 and RAN3 Working Groups needed to be consulted before the RAN1 Working Group could reach any decisions on UTDOA. (Id.) TruePosition asserts that Ericsson's argument was not legitimate because, in its first contribution against UTDOA after its Chairman position expired, Ericsson insisted on the need for prior input from the RAN2 and RAN3 Working Groups because the RAN3 Working Group was chaired by a Qualcomm representative and the Vice Chairman was from Ericsson. (Id. ¶ 78.) Through the Corporate Defendants' control of the RAN3 Working Group, TruePosition alleges that they positioned themselves to create more roadblocks to the consideration of UTDOA which kept it out of Release 9 and 4G LTE standards. (Id.) Even though Ericsson's late submission violated 3GPP rules, the new Chairman of the RAN1 Working Group (a representative of ALU) accepted Ericsson's submission. (Id. ¶ 79.)

TruePosition states that throughout the ensuing series of RAN1 Working Group meetings discussing simulations for UTDOA, the alleged conspiracy by the Corporate Defendants continued to take shape. (Id. ¶ **[*46]** 80.) For instance, TruePosition states that the ALU RAN1 Working Group Chairman, with Ericsson's support, denied TruePosition the sufficient time to discuss UTDOA so as to make progress in the RAN1 Working Group meetings. (Id.) Ericsson repeatedly insisted in the RAN1 Working Group that TruePosition could not assume that the RAN2 and RAN3 Working Groups would support the needed changes for UTDOA when running its simulations, but RAN1 Working Group simulations for OTDOA had expressly been permitted to presume that all necessary support for OTDOA would be provided in the RAN2 and RAN3 Specifications. (Id.) According to TruePosition, the ALU RAN1 Working Group Chairman approved Ericsson's position. (Id.) Over a series of meetings, TruePosition alleges that Ericsson consistently made the performance requirements for UTDOA more stringent and unreasonable. (Id.) The RAN1 Working Group did not impose such atypical simulation conditions on other LTE positioning technologies, including OTDOA. (Id.) In furtherance of the agreement among the Corporate Defendants, TruePosition alleges that the ALU RAN1 Working Group Chairman approved Ericsson's demands delaying the progress for UTDOA over multiple **[*47]** months of meetings. (Id.)

In November 2009, at an important RAN1 Working Group meeting, TruePosition alleges that both Ericsson and Qualcomm submitted simulations skewed against UTDOA, using sham assumptions of extreme conditions far more severe than the simulation conditions for OTDOA.[15] (Id. ¶ 81.) Specifically, TruePosition alleges that Ericsson and Qualcomm submitted their late submissions in order to justify a decision by the ALU RAN1 Working Group Chairman to defer the UTDOA Work Item until future meetings, and allow OTDOA to be included in Release 9. (Id.) In furtherance of the conspiracy, as well as in violation of 3GPP rules, TruePosition alleges that the ALU RAN1 Working Group Chairman accepted the late submissions, denied TruePosition and others an adequate opportunity to review and respond to the submissions, gave credit to the submissions, and used the submissions to further the conspiracy to delay and oppose the standardization for UTDOA. (Id.)

The Release 9 cut-off period regarding **[*48]** the Corporate Defendants' 2008 Work Item and TruePosition's UTDOA Work Item concerning positioning technology was extended to the March 2010 RAN Plenary Group meeting. (Id. ¶ 81.) At one meeting, Ericsson opposed further progress for UTDOA on the premise that its simulation results were inconsistent. (Id.) TruePosition asserts that the only inconsistent results were regarding the simulation results performed by Ericsson and Qualcomm and permitted by the ALU RAN1 Working Group Chairman. (Id.) With the support of AT&T, TruePosition objected arguing that the Corporate Defendants' proposed simulation parameters were patently unreasonable. (Id. ¶ 82.) When challenged, TruePosition alleges that Ericsson

[15] The November 2009 RAN1 Working Group meeting was an important meeting because it was supposed to be the final session before the cut-off for including technologies in Release 9. (Am. Comp. ¶ 81.)

could not prove the need for such extreme requirements and could not provide any valid reason why UTDOA needed to meet more stringent requirements than other comparable LTE work items. (Id.)

During the March 2010 RAN Plenary Group meeting, AT&T and T-Mobile USA supported the advancement of UTDOA past the evaluation phase and into specification work. (Id. ¶ 83.) Due to opposition from Ericsson, as well as the controversies surrounding the simulations by Ericsson and Qualcomm, and approved by **[*49]** ALU, the RAN Plenary Group Chairman assigned the task of establishing an agreed set of assumptions at the RAN1 Working Group level, and then conducting new simulations and coming to a conclusion by September 2010. (Id.) This, TruePosition asserts excluded UTDOA from Release 9 and pushed it into Release 10, while the OTDOA 2008 Work Item was allowed another extension in Release 9. (Id.) In June 2012, OTDOA was officially included in Release 9. (Id.)

TruePosition asserts that the Corporate Defendants held positions of power within two of the three RAN Working Groups; namely, a representative of ALU was the Chairman of the RAN1 Working Group and a Qualcomm representative was Chairman of the RAN3 Working Group. (Id. ¶ 84.) Even though the representative from Ericsson no longer held a position as Chairman of the RAN1 Working Group, TruePosition asserts that Ericsson still improperly attended planning meetings of the RAN Group leadership. (Id.) TruePosition alleges that the Corporate Defendants used these behind closed doors opportunities, including a September 2012 RAN Plenary Group meeting, to delay and prejudice the leadership against UTDOA standardization. (Id.)

According to TruePosition, **[*50]** ALU was focused primarily on OTDOA, but was considering the development of an implementation of UTDOA that eliminated the need for standalone LMUs. (Id. ¶ 85.) Having consistently manufactured UTDOA positioning equipment, TruePosition was ready to compete for sales to 4G carriers. (Id.) After sessions were held in Athens, Greece, and Biarritz, France, a representative from ALU asked TruePosition to delay work on standardizing UTDOA. (Id.) After each request, TruePosition's representatives refused. (Id.)

In mid-2012, TruePosition sets forth that in furtherance of the conspiracy, ALU abused its position as RAN1 Work Group Chairman and confidently stated in public that UTDOA would be standardized in Release 11, even though, at that time, UTDOA had only been pushed out of Release 9 and into Release 10. (Id.) At a September 2010 RAN Plenary Group meeting, an ALU representative admitted to TruePosition that ALU intended to delay standardization of UTDOA into Release 11. (Id.) During this meeting, TruePosition and two major United States carriers supported UTDOA moving forward promptly out of the RAN1 Working Group onto the specification work performed in the RAN2 and RAN3 Working Groups enabling **[*51]** UTDOA to remain on schedule for standardization in Release 10. (Id. ¶ 86.) Even though neither Ericsson nor Qualcomm produced additional accuracy simulations, TruePosition alleges that the Corporate Defendants acted together and used their leadership positions to manufacture arguments and controversies in order to successfully delay a decision on the progress for UTDOA until the next RAN Plenary Group meeting in December 2010. (Id.)

In October 2010, at a RAN1 Working Group meeting, TruePosition and others submitted and presented simulation results favorable to UTDOA standardization. (Id. ¶ 87.) ALU sought to standardize for UTDOA only a technology known as Sounding Reference Signal ("SRS") method. (Id.) According to TruePosition, this SRS method required and burdened far more of a carrier's network resources than the Semi-Persistent Scheduling ("SPS") method developed and advocated by TruePosition, and which TruePosition simulations proved to be accurate and reliable well within FCC requirements. (Id.) TruePosition presented simulations for a combined SPS/SRS implementation that showed more accurate and more reliable results than SRS alone; however, ALU presented UTDOA simulation data **[*52]** showing better results for SRS alone than even a combined SRS/SPS implementation. (Id.) According to TruePosition, the ALU results were flawed and pretextual because it was not technologically possible that SRS alone would perform better than a combined SRS/SPS solution. (Id.) Based on ALU's results, the Corporate Defendants opposed any effort relating to SPS standards support. (Id.) In an attempt to end the discussion, the ALU RAN1 Working Group Chairman wanted to defer the entire UTDOA Work Item until the next RAN Plenary Group Meeting. (Id.) Rather than further delaying the standardization of UTDOA, TruePosition placed on the record an objection to the omission of the SRS method. (Id.)

After TruePosition and others presented their timely-submitted simulations, Ericsson informed the ALU RAN1 Working Group Chairman that it, just moments earlier, posted a revised contribution which was a document that proposed a section outlining a new and controversial "Way Forward" for future evaluations that was prejudicial to and would significantly delay UTDOA standardization. (Id. ¶ 88.) Despite the fact that the contribution violated 3GPP rules by failing to be announced or timely distributed **[*53]** to the Working Group, the ALU Chairman proceeded to use Ericsson's "Way Forward" as the baseline for the meeting record. (Id.) Such action by the ALU Chairman was in violation of 3GPP procedures. (Id.)

The RAN1 Working Group compiled a report of the UTDOA simulation results for submission to the RAN Plenary Group Meeting to be held in December 2010. (Id. ¶ 90.) This Plenary Group Meeting was where decisions would be made regarding whether UTDOA might be included in Release 10. (Id.) Although a TruePosition representative was the rapporteur responsible for the UTDOA Work Item, and should have been tasked with creating the report, the ALU RAN1 Working Group Chairman assigned the responsibility for the compilation of the report to an ALU representative. (Id.) TruePosition alleges that it was an Ericsson representative who created the compilation and knowingly included the facially-flawed and discredited Qualcomm results. (Id.) Ericsson removed the flawed Qualcomm results after TruePosition again objected to it based on many unexplained discrepancies in the Qualcomm paper. (Id.) Due to the removal of the flawed results by Ericsson and Qualcomm, TruePosition agreed to withhold its objections **[*54]** to other contentious items. (Id.) After those items passed, TruePosition claims that the ALU Chairman permitted the Ericsson representative to reinsert the flawed Qualcomm data, and accepted the table with the "sham" Qualcomm results resorted, all without the knowledge of the RAN1 Working Group as a whole. (Id.)

At the December 2010 RAN Plenary Group meeting, UTDOA was accepted as a work item. (Id. ¶ 91.) In light of the controversies that TruePosition alleges the Corporate Defendants manufactured during the RAN1 Working Group Meetings, the RAN Plenary Group subjected UTDOA standardization to the following two conditions: (1) UTDOA standardization would be pushed out to Release 11 (September 2012 would be the earliest); and (2) UTDOA would be standardized only for the SRS transmission method favored by the Corporate Defendants and would not provide for either the option to use only the SPS method or a hybrid of both the SRS and SPS methods. (Id.) According to TruePosition, the Corporate Defendants were successful in their concerted efforts to obtain, at a minimum, a three-year head start for OTDOA products over TruePosition's UTDOA technology, which is "[a] potentially insurmountable **[*55]** lead in the fast-paced race to implement 4G networks in the United States." (Id. ¶ 92.) TruePosition also asserts that they obtained additional competitive advantages by limiting standardization solely to the less effective SRS implementations of UTDOA rather than the superior SPS or SPS/SRS hybrid methods. (Id.)

TruePosition does not end its conspiracy theory here, but goes on to allege that the Corporate Defendants further conspired to limit any UTDOA standardization to implementations integrated within RAN equipment and to exclude standardization of standalone implementations. (Id.) At the RAN Plenary Group meeting in December 2010, the RAN Plenary Group reviewed the Work Item on positioning to determine whether the item could roll from Release 10 to Release 11. (Id. ¶ 93.) On the final day of the meeting, a representative of Ericsson orally recited a long list of proposed changes to the text of the Work Item. (Id.) Ericsson requested that the Chairman issue the Work Item with its requested changes and note them as approved without any further review. (Id.) TruePosition objected to the late comments. (Id.) According to TruePosition, the Ericsson representative had not distributed **[*56]** his comments in writing to the RAN Plenary Group; however, he had given them in advance to an ALU representative because the ALU representative already had prepared a version of the Work Item from the written changes provided to him from Ericsson, and asked for their approval. (Id.) Again, TruePosition's representative objected noting that the RAN Plenary Group did not have time to review the document, the proposed changes were substantive and substantial and TruePosition had comments about the changes. (Id.) Thus, TruePosition asserts that the version of the report released after the meeting differed from the circulated draft and now indicated that this assignment discussion had not concluded and would continue to be debated at the March 2011 RAN Plenary Group Meeting. (Id.)

According to normal procedure, the UTDOA Work Item would progress into the RAN2 Work Group, which is chaired by a Samsung representative. (Id. ¶ 94.) TruePosition alleges that, in furtherance of the conspiracy, Ericsson and Qualcomm argued at the RAN Plenary Group meeting that the UTDOA Work Item should be assigned to the RAN3 Working Group, which is chaired by a Qualcomm representative with an Ericsson representative **[*57]** as Vice

Chairman. (Id.) The Plenary Group decided that the RAN2 Working Group would handle the "stage 2" work and the RAN3 Working Group would take over at "stage 3." (Id.) TruePosition states that the Ericsson RAN3 Vice Chairman revealed his intention to fight this assignment by declaring that after the RAN2 Working Group makes its decisions about UTDOA standardization, the RAN3 Working Group will "fix" them. (Id.) TruePosition alleges that Ericsson and Qualcomm opposed the transfer of the UTDOA Work Item into the RAN2 Working Group because the RAN2 Chairman from Samsung had been open and neutral towards standardization. (Id. ¶ 95.) The Samsung RAN2 Working Group Chairman had accepted proposals to standardize, as options, different positioning methods in commercial use, including in a standalone LMU that could be offered by vendors other than RAN network equipment or handset manufacturers. (Id.) He had observed that it was logical to include standardization in standalone LMUs, and not just in RAN equipment, due to the more than 90,000 existing standalone UTDOA commercial implementations in the United States. (Id.) Pointing out that ALU had proposed to exclude all standalone UTDOA **[*58]** implementations, TruePosition says that Qualcomm and Ericsson objected to this statement by the Samsung RAN3 Working Group Chairman. (Id.)

TruePosition alleges that in furtherance of the conspiracy, the Corporate Defendants succeeded in their attempt at reducing the role in the standardization process of the Samsung chaired RAN2 Working Group. (Id. ¶ 96.) During the RAN Plenary Group meeting in March 2011, the Ericsson RAN3 Vice Chairman asked to return the discussion to the topic of TruePosition's first document, even though the discussion concerning all of the documentation in TruePosition's UTDOA Work Item had previously been concluded and a different agenda topic had been discussed. (Id.) The Ericsson RAN3 Working Group Chairman challenged the placement of TruePosition's UTDOA Work Item in the RAN2 Working Group which TruePosition states was an issue that had been previously decided. (Id.) After a lengthy debate, the Plenary Group Chairman settled the issue by indicating that the work would start in the RAN2 Working Group, but the RAN3 Working Group would review the RAN2 Working Group's work. (Id.) This, TruePosition points out, was a virtually unprecedented request by the Ericsson **[*59]** RAN3 Vice Chairman. (Id.)

During the 2011 RAN2 Working Group meeting, Ericsson, supposedly in concert with ALU, objected to standardization for TruePosition's technology by criticizing the alleged complexity of supporting standalone LMUs. (Id. ¶ 97.) AT&T, which had purchased tens of thousands of standalone LMUs, supported standardization and prevailed by referring to the successful LMU deployment in the United States, and insisting that it would be logical and beneficial to preserve its option to upgrade LMUs that it had acquired and might acquire in the future. (Id.)

During the May-June 2011 RAN Plenary Group meeting, Ericsson, again, insisted that the RAN3 Working Group would review the work of the Samsung chaired RAN2 Working Group before it could include UTDOA within its portion of the Specification. (Id. ¶ 98.) The Samsung Chairman remarked that companies should have sufficient resources to send representatives to complete the work within the RAN2 Working Group, and made an usual public remark expressing concern that certain big companies should not use referrals between groups to "play games" with RAN2 Working Group's standardization process. (Id.)

The August 2011 RAN2 Working **[*60]** Group meeting had a key decision involving an architecture design for UTDOA scheduled to be presented by TruePosition. (Id. ¶ 99.) ALU strenuously opposed TruePosition's design and wanted to standardize a different architecture favoring only RAN equipment vendors and prejudicing standalone equipment manufacturers. (Id.) ALU also preempted TruePosition's presentation proposing that the architecture decision be sent to the RAN3 Working Group (where Qualcomm and Ericsson hold Chairman positions). (Id.) According to TruePosition, the neutral Samsung Chairman of the RAN2 Working Group, and the majority of the Group, approved TruePosition's architecture. (Id.) In conjunction with ALU, Ericsson reminded the group that the RAN3 Working Group would review all RAN2 Working Group decisions. (Id.)

In November 2011, the RAN1 Working Group held a meeting where Ericsson submitted a lengthy contribution that would require all standalone LMU deployments to use separate antenna. (Id. ¶ 100.) Notably, the 90,000 LMUs currently deployed by TruePosition share the same antenna used by RAN equipment, and there are no technological reasons to require a separate antenna. (Id.) In fact, separate antenna for **[*61]** standalone LMUs would substantially increase deployment costs to the RAN vendors' competitors in the positioning markets, i.e., TruePosition. (Id.) Ericsson's submission was circulated on the day that the meeting began and, therefore, was well past the deadline in violation of 3GPP rules. (Id.) Nevertheless, the ALU Chairman of the RAN1 Working Group refused to enforce the 3GPP due process rules accepting the untimely submission. (Id.) ALU supported Ericsson's proposal. (Id.)

From the outset, all simulations of UTDOA were performed using "Wideband" signaling, and all work on UTDOA standardization proceeded for nearly three years on the basis that Wideband would be used for UTDOA. (Id. ¶ 101.) Beginning in September 2011, over the course of several RAN1 and RAN3 Working Groups, Ericsson insisted that UTDOA should be standardized for less than full Wideband signaling, and such would need to be completed before any UTDOA standardization could progress. (Id.) According to TruePosition, this action promoted the conspiracy by interposing months of additional delay against UTDOA standardization. (Id.) Additionally, it would render standalone implementations less effective than UTDOA implementations **[*62]** integrated into RAN equipment because the RAN vendor would always have the discretion to use Wideband signaling for positioning technology integrated into its own equipment, no matter what 3GPP standards prescribe. (Id.) As for standalone implementations that need to interoperate with RAN equipment, they would be limited according to the standard. (Id.) TruePosition offered a compromise to allow Wideband UTDOA standardization first and consider other solutions in parallel, but the Qualcomm RAN3 Working Group Chairman deemed TruePosition's UTDOA Work Item to be at a stalemate where no further progress could occur. (Id.) He then informed the RAN Plenary Group in the December 2011 meeting about the stalemate. (Id.) TruePosition states that the Corporate Defendants' collusive actions have brought the standardization of UTDOA to a virtual standstill. (Id.)

b. Analysis of Law With The Facts

In order to determine whether a complaint states a plausible entitlement to relief, the Court must first identify, and then disregard, those factual allegations which constitute nothing more than "legal conclusions" or "naked assertions." See *Blood Reagents, 756 F. Supp. 2d at 628* (citing *Iqbal, 129 S. Ct. at 1950*; **[*63]** *Twombly, 550 U.S. at 555, 557)*. In the recitation of the extensive facts of this case, we disregarded all of TruePosition's conclusions and assertions that virtually all of the Corporate Defendants' actions were due to their agreement to conspire against TruePosition and its UTDOA technology. We did not give credence to such assertions. Instead, we only included the factual assertions within the Amended Complaint that did not include speculation about motive by TruePosition.

"The resulting 'nub' of plaintiff's Complaint must describe more than parallel conduct; it must include 'factual enhancements' that raise the entitlement to relief above the speculative level." Id.; see also *Alvord-Polk,, 37 F.3d at 1013* ("The evidence must give rise to more than speculation.") It is important to point out that the allegations in the Complaint must be viewed as a whole. Id. (citations omitted). In order to survive a motion to dismiss, the allegations "must be placed in a context that raises a suggestion of a preceding agreement." Id. (citing *Insurance Brokerage, 618 F.3d at 300, 314-16)*.

In this case, the resulting "nub" of TruePosition's Amended Complaint includes factual enhancements raising an **[*64]** entitlement to relief above the speculative level. The Amended Complaint is replete with examples of parallel conduct by the Corporate Defendants within the confines of a standard setting organization. This action is not an antitrust action involving the typical example of parallel conduct found in price fixing, but, instead, involves the behavior of the Corporate Defendants in an organization that sets the standards of an industry that are pivotal to the success of themselves, as well as their competitors. As the Court of Appeals for the Third Circuit ("Third Circuit") stated,

> That 'private standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws [is] only on the understanding that it will be conducted in a nonpartisan manner offering procompetitve benefits,' . . . and in the presence of 'meaningful safeguards' that 'prevent the standard-setting process from being biased by members with economic interests in stifling product competition.

Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 309-10 (3d Cir. 2007) (citing *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501, 506, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)*; *Am. Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 572, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982))*. **[*65]** Notably, "a standard-setting organization . . . can be rife with opportunities for anti-competitive activity." *Hydrolevel, 456 U.S. at 571*. It is within the context of a standard setting organization that the acts of the Corporate Defendants must be viewed.

While the Corporate Defendants attempt to have the Court examine each allegation against them in isolation, we view the allegations in the Amended Complaint as a whole. See *Blood Reagents, 756 F. Supp. 2d at 630* ("[T]he allegations in a complaint must be viewed as a whole."). "[I]n assessing whether a trade association (or any group of competitors) has taken concerted action, a court must examine all the facts and circumstances to determine whether the action taken was the result of some agreement, tacit or otherwise, among members of the association." *Alvord-Polk, 37 F.3d at 1008* (footnote omitted). It is clear that in the standard setting organizational setting, opportunities for agreement are prolific. However, "when evidence shows communications which provided an opportunity for agreement, a plaintiff must still produce evidence permitting an inference that an agreement in fact existed." *Alvord-Polk, Inc., 37 F.3d at 1013*.

Viewing **[*66]** the allegations in the Amended Complaint as a whole, TruePosition has sufficiently pleaded facts permitting an inference that the Corporate Defendants entered into an agreement to preclude TruePosition's UTDOA positioning technology from the 2008 Work Item and to prevent or protract UTDOA's standardization. If we were to "cherry pick" each allegation in the Amended Complaint against each specific Corporate Defendant, our analysis of whether TruePosition has plausibly alleged an agreement would be piecemeal and inconsistent. Neither the alleged scope of the conspiracy nor how all of the allegations are intermingled on top of one another would be adequately assessed. It is by viewing the Amended Complaint in its entirety that the total scope of the alleged conspiracy can be fully understood.

From the exclusion of TruePosition's UTDOA technology from the section of the 2008 Work Item proposing the technologies to be included within the 3GPP standard until the alleged prevention and push back of standardization using positions of power within the RAN Working Groups, it is plausible that the Corporate Defendants agreed on a common plan to prevent or delay the standardization of UTDOA while, **[*67]** at the same time, obtaining a considerable lead for a proposed positioning technology that would directly or indirectly benefit them in different ways. By viewing the allegations in the Amended Complaint as a whole, and not dismembering them, we consider the following as actions, amongst others, as support for the inference that the Corporate Defendants acted as part of a conspiracy: submitting the proposal of the 2008 Work Item which included UTDOA within the "Justification" section, but did not include it within the section proposing the technologies to be included within the 3GPP standard; consistent late submissions; questionable timing of submissions and objections; using positions of power within the RAN Working Groups to circumvent 3GPP due process rules; imposing unreasonable and questionable preconditions, as well as testing and simulation parameters, on the standardization of UTDOA that were not placed upon other proposed positioning technologies; supposedly submitting false and pretextual simulation results in an attempt to discredit UTDOA and to prevent its inclusion in Release 9 while advancing their own proposed positioning technology; attempting to preclude standardization **[*68]** of UTDOA for standalone equipment implementations when all of the successful existing implementations of UTDOA rely upon only standalone implementations; the exclusion of SPS transmission methods by restricting any standardization solely to SRS methods; exclusion of TruePosition's preferred Wideband SRS method; and using their positions as Chairmen of relevant 3GPP committees to suppress competition from UTDOA, as well as other positioning technologies by others, and to advance technologies beneficial to them.

When viewing the Amended Complaint in its entirety, the allegations give rise to more than speculation. TruePosition's allegations of conspiracy are indeed plausible. That is not to say that we find the allegations probable, which is not required at this stage, but we do find that when read together they do raise a reasonable expectation that discovery will reveal evidence of an illegal agreement. Accordingly, we conclude that TruePosition has sufficiently alleged the first requirement of a *Section 1* Sherman Act claim that the Corporate Defendants were parties to an agreement. This conclusion, however, does not end our analysis. We must now satisfy ourselves that the second requirement **[*69]** of a *Section 1* claim under the Sherman Act - the unreasonable restraint element - is met.

B.Unreasonable Restraint on Trade

In addition to demonstrating the existence of a conspiracy or agreement, "the plaintiff must show that the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade." *Ins. Brokerage, 618 F.3d at 316*; see also *Am. Needle. Inc. v. NFL, __ U.S. __, 130 S. Ct. 2201, 2209, 176 L. Ed. 2d 947 (2010)* ("The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade."); *Burtch, 662 F.3d at 221* (stating that the second requirement of *Section 1* of the Sherman Act mandates that a plaintiff show "that the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade"). It is well established that this provision only prohibits "unreasonable" restraints of trade. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 75 (3d Cir. 2010)*. This requirement is analyzed under either the per se standard or the rule of reason standard. *Burtch, 662 F.3d at 221*

"The per se illegality rule applies when a business practice 'on its face, has **[*70]** no purpose except stifling competition.'" Id. (quoting *Eichorn v. AT&T Corp., 248 F.3d 131, 143 (3d Cir. 2001))*. Agreements falling under established per se illegality categories are "conclusively presumed to unreasonably restrain competition." *Id. at 222* (citing *Ins. Brokerage, 618 F.3d at 316*). "Paradigmatic examples are 'horizontal agreements among competitors to fix prices or to divide markets.'" Id. (citation omitted). "Per se illegality 'is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" Id. (quoting *Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830 (3d Cir. 2010))*. We do not reach TruePosition's argument that the conspiracy is per se illegal because we find that TruePosition has met the more demanding "rule of reason" standard.

Agreements that do not fall under per se illegality are analyzed under the "rule of reason" to determine whether they are an unreasonable restraint on trade. "Under the rule of reason analysis, the plaintiff bears the initial burden of showing that the alleged [agreement] produced an adverse, anticompetitive effect within the relevant geographic **[*71]** market." Id. (quote and quotation marks omitted); see also *Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 660 F. Supp. 2d 590, 602 (W.D. Pa. 2009)* ("In actions involving a vertical restraint . . . courts apply the 'rule of reason' analysis.") Satisfying this burden typically includes a demonstration of defendants' market power. Id. (citations omitted). At the pleading stage, a plaintiff may satisfy the unreasonable restraint element by alleging that the conspiracy produced anticompetitive effects in the relevant markets. *West Penn, 627 F.3d at 100* -101 (citations omitted). Anticompetitive effects include the following: increased prices; reduced output; and reduced quality. Id.

Here, the Amended Complaint alleges that the relevant products in this case are highly accurate positioning technologies that locate mobile devices by making measurements of signals from the cellular network. (Am. Compl. ¶ 123.) The two relevant markets for these products are for public safety and for law enforcement and security.[16] (Id.) TruePosition states that "the market for high accuracy positioning technology for mobile communications devices for purposes of public safety (e.g., E-911) is defined geographically **[*72]** by those governments that have mandated positioning capability through regulations." (Id. ¶ 134.) "The geographic market for high accuracy positioning technology for public safety purposes currently is the United States because it is the only government with regulations that currently mandate high accuracy positioning capability." (Id. ¶¶ 10, 134.) TruePosition, which spent approximately twenty-five million dollars on research and development relating to positioning technology, states that the geographic innovation market is global for purposes of security and law enforcement. (Id.)

The Amended Complaint plausibly suggests that by excluding UTDOA technology from 3GPP standards for 4G LTE networks, the conspiracy **[*73]** has foreclosed competition for UTDOA positioning products. (Id. ¶ 137.) This foreclosure has limited consumer and manufacturer choices, as well as constrained and slowed down innovation.

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[16] TruePosition explains that "[h]igh accuracy positioning capability is a necessary feature where required by government regulation or by a government request for proposals." (Am. Compl. ¶ 125.) "Certain governments require highly accurate positioning capability to promote public safety and to support domestic security and law enforcement." (Id.) TruePosition states that customers for highly accurate positioning capability include wireless carriers and law enforcement. (Id.)

(Id.) These allegations are sufficient to suggest that the conspiracy produced anticompetitive effects in the relevant markets. We note "that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support an inference of conspiracy." *Alvord-Polk, 37 F.3d at 1011 n.13*. Competition is a hallmark of a free market. However, when viewing the allegations in the Amended Complaint as a whole, especially in the standard setting organizational context, we do not find that the alleged anticompetitive effects of the alleged actions of the Corporate Defendants are outweighed by any countervailing pro-competitive benefits. See *Insurance Brokerage, 618 F.3 at 316*.

C. Antitrust Injury

"An antitrust injury is an 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful." *West Penn, 627 F.3d at 101* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. "The injury should **[*74]** reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." Id. (quotation and quotation marks omitted) It is the antitrust-injury requirement that assists in ensuring "that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for . . . damages." Id. (citing *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))* ("[An] injury, although causally related to an antitrust violation, nevertheless will not qualify as an 'antitrust injury' unless it is attributable to . . . a competition-*reducing* aspect or effect of the defendant's behavior.") The antitrust laws were enacted to protect competition, not competitors. *Atl. Richfield, 495 U.S. at 338* (citation omitted). "As a general matter, the class of plaintiffs capable of satisfying the antitrust-injury requirement is limited to consumers and competitors in the restrained market . . . and to those whose injuries are the means by which the defendants seek to achieve their anticompetitive ends." Id. **[*75]** (citations and internal citations omitted).

TruePosition alleges an antitrust injury within the confines of the Sherman Act. That is, TruePosition has shown injury flowing from the alleged anticompetitive activities of the Corporate Defendants. Stressing that 3GPP standardization is an absolute prerequisite for competition in the relevant positioning markets, TruePosition's allegations that the Corporate Defendants' conspiracy has foreclosed present competition for UTDOA positioning products for 4G networks leads to the conclusion that TruePosition has currently been foreclosed from developing, manufacturing or selling its UTDOA positioning products for 4G LTE networks to carriers in the United States and worldwide. (Am. Compl. ¶¶ 137-38.) Also stemming from its allegations of the Corporate Defendants' alleged conspiracy, TruePosition asserts that is has been foreclosed from bidding for potential contracts to sell its UTDOA positioning products and from upgrading for 4G networks the existing universal LMUs already purchased by its customers for 2G and 3G networks. (Id. ¶ 138.) Additionally, it argues that its efforts to sell positioning equipment for 2G and 3G networks has been substantially **[*76]** harmed because it cannot assure potential customers that the equipment can be upgraded until 3GPP creates a standard for standalone UTDOA implementations on 4G networks. (Id.)

Examination of TruePosition's alleged injuries reveals that they are the type for which compensation promotes the designated purpose of the ***antitrust law***; namely, the preservation of competition. The Corporate Defendants' alleged conspiracy which includes allegations of abuse of power of influential positions within a standards setting organization resulting in the preclusion or forestalling of another company's technology directly threatens competition. "There is no doubt that members of [trade and standard setting associations] often have economic incentives to restrain competition and that the product standards by such associations have a serious potential for anticompetitive harm." *Allied Tube & Conduit Corp., 486 U.S. at 500* (citations omitted). It is not just the fact that the alleged conspiracy in this case is set within the confines of a standard setting organization, but it is the alleged abuse of positions of power within that organization and the alleged results of such actions leading to the stalling **[*77]** and preclusion of another company's technology from an industry standard that impairs competition by depriving access of some consumers to a desired product, as well as extinguishing quality competition within the relevant market.

In light of the foregoing, we conclude that TruePosition has plausibly alleged an antitrust injury. Making this finding establishes that TruePosition's Amended Complaint has plausibly alleged the three requisite elements of a Section 1 claim under the Sherman Act. It is important to point out that it is possible that the actions of the Corporate Defendants were not the result of collusive illegal behavior in violation of the Sherman Act. However, at this early stage of the litigation, "neither Twombly nor Insurance Brokerage requires an antitrust plaintiff to plead facts that, if true, definitively rule out all possible explanations." *Blood Reagents, 756 F. Supp. 2d at 642* (citations omitted). Considering all of the well-pleaded factual allegations against the backdrop of a standard setting organization, the Amended Complaint plausibly avers a conspiracy between the Corporate Defendants in violation of *Section 1* of the Sherman Act.

D.Ripeness

As previously explained **[*78]** in footnote 5, the Corporate Defendants joined in ETSI's Motion to Dismiss, and the only pertinent argument relatable to them is the ripeness of TruePosition's claims. "Article III of the Constitution limits the federal judicial power to Cases or Controversies." *Constitution Party of PA v. Cortes, 712 F. Supp. 2d 387, 395 (E.D. Pa. 2010)* (quoting *Khodara Envtl., Inc. v. Blakey, 376 F.3d 187, 193 (3d Cir. 2004))* (quotation marks omitted). "Courts enforce the case-or-controversy requirement through the several justiciability doctrines, including standing, ripeness, mootness, the political-question doctrine, and the prohibition on advisory opinions."[17] Id. (quoting *Toll Bros., Inc. v. Twp. of Readington, 555 F.3d 131, 137 (3d Cir. 2009))* (quotation marks omitted). "The ripeness doctrine determines 'whether a party has brought an action prematurely, and counsels abstention until such time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine.'" *Pittsburgh Mack Sales & Serv., Inc. v. Int'l Union of Operating Eng'rs, 580 F.3d 185, 190 (3d Cir. 2009)* (quoting *Peachlum v. City of New York, 333 F.3d 429, 433 (3d Cir. 2003))*. The ripeness **[*79]** doctrine exists "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Doe v. County of Centre, PA, 242 F.3d 437, 453 (3d Cir. 2001)*.

The ripeness argument in this case is based upon the assertion that TruePosition's antitrust claim is not fit for judicial review because it is based entirely on an uncertain or contingent future event that may not occur as anticipated, or may not occur at all; namely, the exclusion of UTDOA technology from the 4G LTE Specification, which is still being developed. The Amended Complaint does include allegations pertaining to the inclusion of TruePosition's UTDOA Work Item into 3GPP's 4G LTE Specification. This claim may indeed be altered should the UTDOA Work Item be included in the Specification. However, TruePosition's Amended Complaint is not solely based upon this **[*80]** one and only claim. It also includes additional claims and allegations concerning actions by the Corporate Defendants that, if true, exemplify antitrust activity in violation of *Section 1* of the Sherman Act. TruePosition asserts that it has already suffered concrete injury by losing sales and having its UTDOA products appear less marketable as a result of being excluded from the 4G LTE Standard for the past few years. Also, TruePosition argues that by being excluded from the Specification thus far, a competing technology, OTDOA, has gained an insurmountable head start. As for the 4G LTE Specification, TruePosition's Amended Complaint alleges, due to the coordinated actions of the Corporate Defendants, that its UTDOA Work Item has been subjected to conditional terms (i.e., omission of the SRS method) that are not optimal for UTDOA technology. "Where . . . the defendant is alleged to have engaged already in conduct that violates a plaintiff's rights, the force of a ripeness challenge is diminished." *Dasrath v. Continental Airlines, Inc., 228 F. Supp. 2d 531, 546 (D.N.J. 2002)* (citing *Doe v. County of Centre, 242 F.3d at 453*).

In light of the foregoing, we conclude that TruePosition's **[*81]** action is not premature. TruePosition has purportedly suffered injury due to the alleged antitrust actions of the Corporate Defendants since 2008. Inclusion within the 4G LTE Standard alone would not remedy all of the alleged antitrust wrongs supposedly suffered by

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[17] The standing and ripeness doctrines are related, as '[e]ach is a component of the Constitution's limitation of the judicial power to real cases and controversies.'" ***Constitution Party of PA, 712 F. Supp. 2d at 395*** (quoting *Presbytery of N.J. of Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1462 (3d Cir. 1994))*.

TruePosition. In addition, it would be a hardship to withhold relief due to the allegations of antitrust violations and resultant harm already supposedly experienced by TruePositon. As a result, the dispute at issue is sufficiently concrete to satisfy the constitutional and prudential requirements of the ripeness doctrine. Consequently, the Corporate Defendants' argument for dismissal based upon ripeness is denied.

V. CONCLUSION

In order to survive the Corporate Defendants' Motion to Dismiss, TruePosition has plausibly stated a claim for a violation of *Section 1* of the Sherman Act. The allegations of an illegal conspiracy between the Corporate Defendants are plausible when viewed in context and as a whole. The Corporate Defendants' argument for dismissal premised upon ripeness is denied. The Corporate Defendants' Motion to Dismiss is denied. Likewise, the Corporate Defendants' request for oral argument is denied.

An appropriate **[*82]** Order follows.

ORDER

AND NOW, this 21st day of August, 2012, upon consideration of the Joint Motion to Dismiss the Amended Complaint of Trueposition, Inc. Filed by Alcatel-Lucent USA Ins., Ericsson Telephone Company (Telefonakiebolaget LM Ericsson), and Qualcomm Inc. (Doc. No. 103), the Memorandum in Support of the Joint Motion to Dismiss the Amended Complaint of Trueposition filed by Alcatel-Lucent USA Inc., the Response and Replies thereto, it is hereby **ORDERED** that the Motion is **DENIED.**

BY THE COURT:

/s/ Robert F. Kelly

ROBERT F. KELLY, SR. J.

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Clayworth v. Pfizer, Inc.

Court of Appeal of California, First Appellate District, Division Two

August 22, 2012, Opinion Filed

A131804

Reporter
2012 Cal. App. Unpub. LEXIS 6173 *; 2013-1 Trade Cas. (CCH) P78,340

JAMES R. CLAYWORTH et al., Plaintiffs and Appellants, v. PFIZER, INC. et al., Defendants and Respondents.

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

Subsequent History: Review denied by Clayworth (James R.) v. Pfizer, Inc., 2012 Cal. LEXIS 11132 (Cal., Nov. 28, 2012)

Prior History: **[*1]** Alameda County Super. Ct. No. RG04172428.

Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 111 Cal. Rptr. 3d 666, 233 P.3d 1066, 2010 Cal. LEXIS 6620 (July 12, 2010)

Core Terms

prices, drugs, discovery, plaintiffs', conspiracy, defendants', motions, pharmaceutical, third amended complaint, documents, summary judgment, depositions, products, declaration, floor, merits, practices, pass-on, disqualification, cause of action, summary judgment motion, Marketing, parties, unfair, allegations, antitrust, conspired, wholesale, Cartwright Act, exhibits

Judges: Richman, J.; Kline, P.J., Haerle, J. concurred.

Opinion by: Richman, J.

Opinion

Fifteen retail pharmacies sued 20 defendants, alleging they conspired to fix the prices on their pharmaceuticals sold in the United States at prices higher than those of the same drugs in Canada in violation of the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.) and the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.). Defendants moved collectively (and in three cases, individually) for summary judgment, arguing that plaintiffs could not produce evidence creating a triable issue of fact that defendants engaged in price fixing. The trial court agreed, and in comprehensive orders granted summary judgment for defendants. Plaintiffs appeal, contending that the trial court erred in granting summary judgment, and also asserting numerous procedural claims, including some that would have caused the motions not to be heard when they were—and not by the judge who heard them. We conclude that none of the procedural claims has merit, and on our de novo review further conclude that summary judgment was properly granted. We thus affirm.

BACKGROUND[1]

The Parties

Plaintiffs are 15 retail pharmacies in California.[2] Defendants are, with two exceptions, research-based pharmaceutical companies that manufacture and distribute brand-name pharmaceuticals throughout the United States.[3] The California Supreme Court has described the relationship between plaintiffs and defendants as follows: "[Defendants] sell their drugs to wholesalers at a price referred to as the wholesale acquisition cost. In turn, various independent entities use the wholesale acquisition cost to calculate and publish benchmark drug prices, termed the average wholesale price, for use in the industry. Wholesalers resell the drugs to [plaintiffs] at prices based on a percentage of the average wholesale price. . . . [¶] In turn, [plaintiffs] sell the drugs to . . . consumers . . . ." (*Clayworth, supra, 49 Cal.4th at p. 765*.)

The Complaint

On August 26, 2004, plaintiffs filed a complaint alleging antitrust violations and unfair business practices arising out of defendants' price-setting practices for pharmaceuticals sold in the United States. Shortly thereafter, the case was designated complex and assigned to the Honorable Ronald M. Sabraw for all purposes. In the order designating the case as complex, Judge Sabraw early on signaled his intent to actively manage the case, setting an initial case management conference and advising that "the parties must be prepared to discuss at length the nature of the case, both factually and legally, as well as the projected management of the case at each stage. This is not a perfunctory **[*5]** exercise. The primary objective of the [conference] is to develop a comprehensive plan for a just, speedy and economical determination of the litigation."

Plaintiffs amended their complaint once as a matter of right, and defendants successfully demurred to that amended complaint, as well as a second amended complaint that followed. In the orders sustaining the demurrers,

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[1] The factual background of this case **[*2]** is well known to the parties and the court. We include only the salient facts here, and defer to the California Supreme Court's opinion in *Clayworth v. Pfizer (2010) 49 Cal.4th 758, 111 Cal. Rptr. 3d 666, 233 P.3d 1066* (*Clayworth*) for additional background information.

[2] Plaintiffs are James Clayworth, R.Ph., an individual, dba Clayworth Pharmacy and Clayworth Healthcare; Marin Apothecaries, **[*3]** Inc., dba Ross Valley Pharmacy; Golden Gate Pharmacy Services, Inc., dba Golden Gate Pharmacy; Pediatric Care Pharmacy, Inc.; Chimes Pharmacy, Inc.; Mark Horne, R.Ph., an individual, dba Burton's Pharmacy; Meyers Pharmacy, Inc.; Benson Toy, R.Ph., an individual, dba Marin Medical Pharmacy; Seventeen Fifty Medical Center Pharmacy, Inc.; Tony Mavrantonis, R.Ph., an individual, dba Jack's Drug; Julian Potashnick, R.Ph., an individual, dba Leo's Pharmacies; Jerry Shapiro, R.Ph., an individual, dba Uptown Drug, Co.; Tilley Apothecaries, Inc., dba Zweber's Apothecary; RP Healthcare, Inc.; Rohnert Park Drugs, Inc.; and JGS Pharmacies, Inc., dba Dollar Drugs.

[3] The manufacturer defendants are Abbott Laboratories; AstraZeneca LP; Novartis Pharmaceuticals Corp.; Allergan, Inc.; Boehringer Ingelheim Pharmaceuticals, Inc. (Boerhringer); Eli Lilly & Company; Johnson & Johnson; Janssen Pharmaceutical, Inc.; Ortho-McNeil Pharmaceutical, Inc.; Ortho Biotech, Inc.; GlaxoSmithKline PLC (GSK); Pfizer, Inc.; Hoffman-La Roche; Aventis Pharmaceuticals, Inc.; Amgen, Inc. (Amgen); Purdue Pharma L.P.; Merck & Co., Inc.; Bristol-Myers-Squibb Company; and Wyeth. The two non-manufacturer defendants are Johnson & **[*4]** Johnson Health Care Systems Inc. (JJHCS), described in this litigation as "the contracting physical distribution and electronic connectivity arm for the operating companies inside of the [Johnson & Johnson] corporation," and Pharmaceutical Research and Manufacturers of America (PhRMA), a U.S.-based nonprofit trade association of which all defendants are members. PhRMA was previously known as the Pharmaceutical Manufacturers Association, or PMA. We use PhRMA throughout for consistency purposes.

Judge Sabraw directed plaintiffs to clarify their theories of the case and satisfy the specificity-in-pleading requirements applicable to antitrust claims.

The result was the complaint operative here: a 23-page, third amended complaint filed on May 6, 2005 "for violations of the Cartwright Act (*Bus. & Prof. Code §16700 et seq.*) and the Unfair Competition Law (*Bus. & Prof. Code §17200 et seq.*[)] [UCL]." It set forth five causes of action, the first three alleging violations of the Cartwright Act, the last two alleging violations of the UCL.

The thrust of the third amended complaint was that defendants conspired "to eliminate price competition and fix prices in the United States" by agreeing "they would not sell their drugs at or below the price at which they sold those same drugs in Canada . . . ." This theory, which became **[*6]** known in this litigation as the "Canadian floor conspiracy," was detailed in paragraph 5, a paragraph plaintiffs repeatedly referenced throughout the third amended complaint as embodying the alleged conspiracy. Paragraph 5 alleged as follows:

"5. The Defendants, pursuant to their unlawful combination and agreement, charge more for their drugs sold in the United States, including California, than they charge for the same drugs sold outside of the United States, including Canada. The Defendants agreed to eliminate price competition and fix prices in the United States, including California, by, *inter alia:*

"(a) Using the prices charged in Canada as a floor or minimum price level;

"(b) Acting in concert to restrict reimportation and/or purchase of lower priced foreign drugs;

"(c) Restricting price competition from generics and brand name variations of existing drugs;

"(d) Selling drugs for fixed prices above the prices in Canada (so that the prices charged in the United States, including California, would be higher than the prices for the same drugs sold outside of the United States, including Canada);

"(e) Agreeing that they would not sell their drugs at or below the price at which they sold **[*7]** those same drugs in Canada, and/or other countries outside of the United States; and

"(f) Agreeing and ensuring each other that they would maintain their agreement to charge more in the United States, including California, than they charged outside of the United States, particularly Canada."

According to the third amended complaint, PhRMA was the instrument through which the conspiracy was facilitated: "[E]ach of the Defendants has executive-level officers that serve on the Board of Directors for PhRMA and its committees and subcommittees. PhRMA's Board of Directors, its committees and subcommittees meet on a regular basis. It is partly within these meetings that the Defendants' chief executive officers and chief marketing officers agreed between and among themselves to fix the prices at which their drugs are sold in the United States, including California." Discussions concerning the conspiracy purportedly took place at "PhRMA conventions, conferences, or events, and events organized by Defendants' [*sic*] at corporate offices, hotels, yachts, and resorts . . .," where "Defendants' highest officials, including their chairmen, presidents, chief executive officers, and top marketing executives" **[*8]** engaged in communications to further their agreement to fix prices.

As noted, the first three causes of action asserted violations of the Cartwright Act. The first alleged a trust to restrain trade, or more specifically to restrict commerce, "by agreeing to maintain high non-competitive prices for drugs sold in the United States, including California, and to eliminate sources of lower and competitive-priced drugs from coming into the United States, including California, to protect the price-fixing conspiracy alleged in paragraph 5 . . . ." The second alleged a trust to fix prices, namely "to increase and/or maintain the high price of drugs sold in the United States, including California, relative to prices in Canada and other countries." And the third alleged a trust to prevent competition and limit availability by "eliminat[ing] sources of lower and competitive priced pharmaceuticals in the United States, including California, as alleged herein, and [by] increas[ing] or maintain[ing] the high non-competitive prices of pharmaceuticals sold in the United States, including California, relative to prices in other countries."

All three trusts were accomplished, plaintiffs alleged, by "agreeing **[*9]** to maintain high artificial prices in the United States, including California; restricting importation of lower priced pharmaceuticals into the United States, including California; and taking collective action to stop such importation by placing foreign wholesalers and retailers on artificial quotas to stop these customers from shipping lower-priced drugs into the United States, including California; refusing to sell to foreign wholesalers and retailers who ship lower-priced drugs into the United States, including California; agreeing with wholesalers and retailers not to sell to persons who ship drugs into the United States, including California; and requiring all foreign wholesalers and retailers of Defendants' drugs to refuse to sell drugs to United States and California citizens at prices the same or lower than the sales price for these same drugs in Canada."

The fourth cause of action alleged an unfair business practice in violation of the UCL. Specifically, plaintiffs asserted that defendants engaged in "unfair competition . . . by charging the plaintiffs more for the same drugs than they charge others outside the United States, particularly Canada; and charging 'the same low **[*10]** prices charged in Canada and Europe' to favored customers in the United States. These price differentials for the same drugs are unfair."

The fifth cause of action alleged illegal business practices in violation of the UCL, namely that defendants' violations of the Cartwright Act also constituted illegal business practices.

Plaintiffs prayed for restitution, treble damages, and injunctive relief, that the court "enjoin[] and restrain[] Defendants from charging higher prices to Plaintiffs than Defendants charge customers outside the United States, including Canada, for the same drugs." Plaintiffs also sought attorney fees and costs.

Significantly, nowhere in the third amended complaint did plaintiffs allege that defendants conspired to tie increases in their pharmaceutical prices to the Consumer Price Index (CPI).

Demurrer to the Third Amended Complaint

Defendants filed a demurrer to the third amended complaint. On July 1, 2005, Judge Sabraw entered an order overruling it in part and sustaining it in part. He observed that in his orders sustaining the demurrers to the first and second amended complaints, he directed plaintiffs "to (1) clarify their legal theories and (2) state facts in support **[*11]** of those theories." He concluded that the conspiracy claims in the third amended complaint satisfied those directives, because plaintiffs alleged the dates, means, and effects of the alleged conspiracy, as well as "overt acts in furtherance of the conspiracy, including the charging of higher prices in California and (otherwise legal) efforts to restrict the importation of drugs into the United States." This, Judge Sabraw reasoned, "allege[d] sufficient parallel conduct by the Defendants to raise an inference of coll[u]sion and permit the claim to proceed under the heightened standards for pleading a claim under the Cartwright Act." Judge Sabraw thus overruled defendants' demurrer as to the first three causes of action for violations of the Cartwright Act, as well as the fifth cause of action alleging illegal business practices under the UCL.

Turning to the fourth cause of action, the "unfair" UCL claim, Judge Sabraw explained that it was "unclear at the Court of Appeal level what standard the trial courts should apply in an 'unfair' UCL claim" because "'[t]he Supreme Court has not yet enunciated a legal test for unfairness in consumer actions under the unfair competition law.'" Given **[*12]** the split of authority on this issue,[4] he concluded he would follow the law requiring that "UCL unlawful

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[4] Compare *Quacchia v. DaimlerChrysler Corp. (2004) 122 Cal.App.4th 1442, 1453, 19 Cal. Rptr. 3d 508* ["conduct can be 'unfair' even if no other law prohibits the challenged conduct" and is "'determined by weighing the utility of the practice against the gravity of the harm to the consumer'"]; *Scripps Clinic v. Superior Court (2003) 108 Cal.App.4th 917, 940, 134 Cal. Rptr. 2d 101* ["the public policy which is a predicate to the action must be 'tethered' to specific constitutional, statutory or regulatory provisions"]; and *In re Firearm Cases (2005) 126 Cal.App.4th 959, 980-981, 24 Cal. Rptr. 3d 659* [UCL unfair claims in the consumer context use the definition of unfairness in the Federal Trade Commission Act, *15 U.S.C. § 45(n)*, which provides that a practice may be deemed unfair it if "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition"].

and unfair claims brought by private parties . . . be tethered to specific constitutional, statutory or regulatory provisions." (See *Scripps Clinic v. Superior Court, supra, 108 Cal.App.4th at p. 940*; *Gregory v. Albertson's, Inc. (2002) 104 Cal.App.4th 845, 854, 128 Cal. Rptr. 2d 389*.) And under this standard, "Plaintiffs have not identified any fundamental policy in any constitutional, statutory, or regulatory provision that precludes Defendants from seeking the highest price for their products." Judge Sabraw further explained that he "would normally grant Plaintiffs leave to amend to state a claim against a defendant that is related to a pending claim against that defendant," but he observed that this was not "a normal case . . . ." Instead, he described it as "a complex case alleging antitrust claims against all the major companies in a large industry," and concluded that it was "appropriate to focus the claims in this case on the central allegation that all Defendants have unlawfully conspired or colluded to sell their drugs in California for prices that are higher than the prices charged in Canada." **[*13]** He thus sustained the demurrer to plaintiffs' fourth cause of action without leave to amend, but also without prejudice to plaintiffs pursuing the claim in a separate lawsuit.

Discovery

After Judge Sabraw entered his July 1, 2005 order on the demurrer to the third amended complaint, **[*14]** defendants answered, and the case was finally at issue. But even before that point, the parties were already engaging in discovery, which had apparently started as far back as December 2004, if not before.[5]

Over the following two years, the parties participated in nearly monthly case management conferences before Judge Sabraw. Following each conference, Judge Sabraw issued thorough and detailed case management orders typically addressing a wide range of issues. While we need not discuss all of them here, we discuss a few at length for illustrative purposes—and because some of the discovery issues are relevant to plaintiffs' claims on appeal.

In an April 18, 2005 case management order, Judge Sabraw directed the parties to be prepared on April 21 to "discuss how to focus the discovery, substantive motions, and trial in this case." Noting that the "lawsuit appears to allege that the Defendants have conspired not to sell prescription **[*15]** drugs in California for prices that are below or equal to the prices in Canada," he advised that "[t]he trial will be focused on the claims asserted and the discovery should be focused on obtaining evidence to prove or disprove those claims. This is not a general administrative investigation into the business practices of the pharmaceutical industry." Judge Sabraw then proceeded to suggest certain case management ideas, but reiterated that "[c]ounsel should be prepared to discuss these . . . ideas and propose their own at the hearing/case management conference."

The April 21 case management conference apparently proceeded as scheduled, and on April 28 Judge Sabraw issued a follow-up order. There, he addressed the specific pharmaceuticals that would be subject to discovery, establishing the following procedures for selecting what would become known as the "Identified Drugs":

"FOCUSING DISCOVERY—THE 'IDENTIFIED DRUGS.'

"[T]he Court will require that on or before May 5, 2005, each Defendant produce to the Plaintiffs a list that identifies its 20 top selling drugs (by gross sales) for each year 2000 through 2004. The Court will also require Defendants' liaison counsel to provide those lists **[*16]** to the Court on or before May 10, 2005 . . . . From these lists, the Court will identify 5-15 drugs for each Defendant and those drugs will be 'the identified drugs.' . . . .

"Plaintiffs and Defendants may file briefs of no more than 10 pages on May 10, 2005, suggesting how many drugs should be identified for each defendant, which drugs should be identified, and why any particular drug (or sub-market of drug) should be identified. The briefs may include as attachments a proposed table for each defendant identifying the suggested drug and any other relevant information about the drug (sub-market for drug, prior investigations or lawsuits regarding the drug, average disparity from Canada price etc).

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[5] The record contains an "Order regarding February 1, 2005 Case Management Conference" in which Judge Sabraw noted that there was no stay on discovery and ordered the parties "to meet and confer about Defendants' responses to Plaintiffs' First Set of Interrogatories."

"If any party wants a hearing on the Court's selection of the identified drugs, liaison counsel must notify the Court on or before May 10, 2005. If a hearing is requested, the Court will conduct a hearing on the issue of which drugs will be the identified drugs on May 25, 2005 at 10:00 a.m."

Judge Sabraw then turned to the general scope of discovery and made the following recommendations regarding appropriate guidelines, recommendations subsequently entered as an order of the court:

"GLOBAL ISSUES—SUBSTANTIVE **[*17]** SCOPE

"The discovery must be focused on the claims asserted. Without some focus on 'the needs of the case,' *C.C.P. 2019(b)(2)*, the discovery sought would be similar to that disapproved of in *Calcor Space Facility, Inc. v. Superior Court (1997) 53 Cal.App.4th 216, 222, 61 Cal. Rptr. 2d 567*, where the Court noted '[Plaintiff's] 12-page demand might as well be condensed into a single sentence: Produce everything in your possession which in any way relates to gun mounts.' This case concerns price fixing. Except as limited by other parts of this order, Defendants should provide all information directly relevant to (1) what prices Defendants charged for the identified drugs and (2) how they set those prices. The relevance of information will probably decrease as it moves away from pricing issues." The information, he continued, should relate to "(1) price setting practices (including national policies) that affect or have affected the price of the identified drugs in California and (2) California specific policies" for the time period "January 1, 1995 through the present."

The parties submitted the required briefing regarding the "Identified Drugs," and a hearing followed. Judge Sabraw then issued a preliminary **[*18]** list of the "Identified Drugs," and afforded the parties an opportunity to make objections and suggest substitutions. A tentative ruling with further revisions followed, as well as another hearing.

On July 11, 2005, Judge Sabraw entered an order regarding "the Identified Drugs" that would be the subject of discovery. This is how he put it: "The initial discovery, and perhaps all discovery, will be limited to the pricing and price setting practices for the Identified Drugs. Defendants have represented to the Court that each of the following Identified Drugs is (1) marketed in the United States, (2) marketed in Canada, (3) sold through retail pharmacies, and (4) is a discrete drug. Plaintiffs have suggested that the list of Identified Drugs be modified further based on the following considerations: (5) whether the drug is a top seller; (6) whether the drug caters to a small population; (7) whether the brand name is different in the United States and Canada; (8) whether the drug has is [*sic*] subject to competition from generic drugs; (9) whether the drug has been discontinued; and (10) whether the drug has a pricing history. The Court finds that the additional considerations suggested **[*19]** by Plaintiffs although relevant, are not sufficiently material to be used as determinative criteria in selecting the Identified Drugs." With that, Judge Sabraw identified defendants' top and high selling drugs, listing at least eight drugs for all manufacturer defendants, except for Boehringer (for which he identified four) and Amgen (for which he later identified three). All told, there were 111 pharmaceuticals subject to discovery.

Extensive discovery ensued, both written and testimonial. In terms of written discovery, plaintiffs served on each defendant two sets each of requests for production of documents, requests for admission, and special interrogatories, as well as three sets of form interrogatories.

Deposition discovery included plaintiffs taking, by defendants' calculation, nearly 60 depositions.[6] A significant issue arose concerning "apex" depositions, described as "depositions of senior officers (CEO, President, Vice President, Chairpersons of the Board, members of the Board of Directors) of the defendants." Plaintiffs noticed apex depositions very early in the discovery process, but Judge Sabraw stayed them, ordering plaintiffs to seek leave of court prior to renoticing **[*20]** them, which leave would be granted upon a showing that "the 'apex' deponent has 'unique or superior personal knowledge of discoverable information.' "[7] He further explained he "would expect that such a showing would ordinarily follow completion of written discovery and PMK [person most knowledgeable] depositions." However, later revisiting the issue at plaintiffs' request, Judge Sabraw permitted plaintiffs "to take one

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[6] As plaintiffs do not dispute defendants' calculation, we accept it as a reliable representation.

[7] See *Liberty Mutual Ins. Co. v. Superior Court (1992) 10 Cal.App.4th 1282, 13 Cal. Rptr. 2d 363*.

apex deposition per Defendant. That apex deposition can be the chairman, the president, the CEO, or some other senior executive. Plaintiffs may select the apex deponent for each Defendant." Plaintiffs subsequently took a total of 19 apex depositions, including more than one for some defendants.

Plaintiffs were also permitted to notice up to three PMK depositions per defendant, with additional PMK depositions upon a showing of good cause. There was no limit on percipient witness depositions. Despite this access to discovery, plaintiffs apparently made, as Judge Sabraw would later describe it, "a strategic **[*21]** decision to pursue written discovery and to seek to depose only high-level employees of the Defendants and [not] depose sub-apex witnesses concerning the Defendants' price-setting practices."

In addition to seeking discovery from defendants, plaintiffs also pursued discovery from third parties that had some relationship to the manufacture, distribution, and/or sale of drugs. In that regard, plaintiffs sought discovery from McKesson (a distributor), First Data Bank (a publisher of pharmaceutical industry information), Health Net (an insurance provider), AmeriSourceBergen (a drug wholesaler), and Walgreens (a large chain pharmacy).

Both sides filed numerous discovery motions, and Judge Sabraw ruled on each and every one (and often motions for reconsideration) with attention and detail. While the record does not reflect every discovery motion filed, it does show at least 22 filed by plaintiffs and 15 by defendants. These were in addition to the numerous—and we mean numerous—discovery disputes Judge Sabraw and his research attorney resolved informally.

Discovery continued right up to November 30, 2006, when plaintiffs filed opposition to the summary judgment motions at issue here. Plaintiffs **[*22]** were permitted to depose any witness who submitted a declaration in support of defendants' motions. Accordingly, after the motions were filed, plaintiffs took at least 15, perhaps as many as 24, additional depositions of officers and employees of various defendants.

Motions for Summary Judgment or Adjudication

On August 21, 2006, after more than a year and a half of discovery, plaintiffs moved for summary adjudication of certain affirmative defenses asserted by defendants, most notably the pass-on defense. Under this defense, defendants asserted that plaintiffs could not prevail because they did not sustain damages from any alleged overcharges since they passed on the claimed overcharges to their customers or their customers' insurers. Whether the pass-on defense was a cognizable defense in California was an open question, and plaintiffs argued that California law did not recognize it, and it should be dismissed.

On September 15, 2006, defendants filed a joint opposition to plaintiffs' motion, as well as a joint cross-motion for summary judgment or, in the alternative, summary adjudication regarding the applicability of the pass-on defense (collectively with plaintiffs' motion, the pass-on **[*23]** motions). In both, defendants argued that the pass-on defense was viable in California and defeated all of plaintiffs' claims. The pass-on motions were set to be heard on November 30, 2006, a date later continued to December 5.

Also on September 15, Amgen filed a separate motion for summary judgment or, in the alternative, summary adjudication (the Amgen motion). The Amgen motion went to the merits of plaintiffs' claims, namely plaintiffs' allegations that defendants conspired to fix drug prices in the United States at higher levels than those in Canada. The motion was supported by a notice of motion; a memorandum of points and authorities; a separate statement of undisputed material facts; and a request for judicial notice of certain sections of the Canadian Patent Act. Amgen also submitted three declarations, of: Pete Feldman, senior director, strategic planning and operation, in Amgen's oncology business unit; Michael Savin, its vice president in sales and marketing operations; and Mack Anderson, its counsel. The declarations sought to authenticate 66 exhibits contained in a "compendium of exhibits" submitted in support of the motion. Amgen's motion was originally set to be heard **[*24]** on November 30, the same day as the pass-on motions.

Two weeks later, on September 29, three more summary judgment motions were filed: (1) a motion of all defendants (except for Amgen, PhRMA, and JJHCS)[8] for summary judgment (the joint motion); (2) a motion of PhRMA for summary judgment (the PhRMA motion); and (3) a motion of JJHCS for summary judgment (the JJHCS motion), which, when referred to collectively with Amgen's motion, will be called the "merits motions." These three motions were set to be heard on December 15, 2006.

Like Amgen's motion, the joint motion was directed at the merits of plaintiffs' allegations, arguing that plaintiffs could not demonstrate a triable issue of material fact concerning the existence of the Canadian floor conspiracy. It was the most voluminous of the merits motions, consisting of a notice of motion; a 34-page memorandum of points and authorities; a separate statement of undisputed facts; a request for judicial notice of "the Canadian Patent Act and certain guidelines promulgated by the PMPRB, a quasi-judicial body established by the Patent Act in 1987"; and a declaration of Aton Arbisser, counsel for **[*25]** Novartis, authenticating documents submitted in a 1046-page compendium of exhibits. The compendium contained discovery responses and excerpts of deposition testimony, as well as 14 declarations of defendants' CEOs and other high ranking officers and executives.

PhRMA's motion differed from the joint motion in that it focused on PhRMA's role in the alleged conspiracy. It argued that it was a "bona fide trade association" that "advoca[tes] for public policies that advance the discovery of life-saving and life-enhancing new medications for patients by pharmaceutical and biotechnology research companies." PhRMA disputed that it was a "sham" organization established to facilitate the alleged conspiracy, and argued that the *Noerr-Pennington*[9] doctrine permitted it "to petition the government to take, or refrain from taking, action[s] . . ., even if such efforts benefit the advocate and even if they are intended to restrict or eliminate competition." PhRMA's motion consisted of a notice of motion; a memorandum of points and authorities; a separate statement of undisputed material facts; and a compendium of exhibits, which included the declarations of Alan F. Holmer, president and CEO of PhRMA **[*26]** until January 2005, and Jennifer A. Carmassi, its counsel.

Lastly, JJHCS's motion focused on its assertion that it did not manufacture, distribute, sell, or set the prices of pharmaceuticals sold in the United States or Canada. It consisted of a notice of motion; a memorandum of points of authorities; a separate statement of undisputed facts; and declarations of Curt M. Selquist, chairman of JJHCS, and Samuel R. Miller, its counsel.

Plaintiffs' Request for a Continuance

On November 13, 2006, plaintiffs sought a continuance of the merits motions pursuant to *Code of Civil Procedure section 437c, subdivision (h)* (437c(h) request). The 437c(h) request was based on what plaintiffs claimed to be newly discovered evidence, described by them as follows: "(1) evidence that the Defendants have employed the sporting theory of justice regarding Plaintiffs' discovery, especially regarding PhRMA documents; (2) evidence that Defendants entered into a price fixing agreement through PhRMA; (3) evidence that pricing and price-setting practices were conducted at meetings at PhRMA." **[*27]** More specifically, plaintiffs cited deposition testimony by Peter Dolan, former CEO of Bristol Meyers Squibb, that they claimed established that prices and price-setting practices regarding the U.S. and Canada were discussed at PhRMA meetings; deposition testimony of Hoffman-La Roche's Kevin O'Leary concerning a "Pledge" made by various pharmaceutical manufacturers to limit price increases to increases in the CPI; and documents recently produced by GSK purporting to show its efforts to prevent the reimportation of its pharmaceuticals into the United States.

Plaintiffs' request came on for hearing on November 20 on shortened time. Following argument, Judge Sabraw denied plaintiffs' request, finding that they had failed to identify as required by the statute facts that "may exist but cannot, for reasons stated, then be presented." (*Code Civ. Proc., § 437c, subd. (h)*.) As he put it: "Plaintiffs have not

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[8] PhRMA and JJHCS separately joined in this motion.

[9] See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc. (1961) 365 U.S. 127, 139-140, 81 S. Ct. 523, 5 L. Ed. 2d 464*, and *Mine Workers v. Pennington (1965) 381 U.S. 657, 670, 85 S. Ct. 1585, 14 L. Ed. 2d 626*.

identified information essential to opposing the motions for summary judgment that they could not have obtained at an earlier date. To the extent the motion is based on the Court's discretionary ability to continue the motions for summary judgment, the court exercises its discretion and **[*28]** denies the motion because Plaintiffs have had an adequate opportunity to prepare their cases and develop evidence to oppose the motions for summary judgment." Judge Sabraw went on to note that plaintiffs "d[id] not so much identify facts essential to justify opposition that may exist as identify facts that they have already discovered and seek the opportunity to obtain further information about those facts."

Apparently addressing a complaint by plaintiffs that they had been "thwarted" in discovery, Judge Sabraw responded, "[I]t is because the court has imposed parameters on discovery as to scope, type, and scheduling of discovery. At the outset, the Court stated, 'The trial will be focused on the claims asserted and the discovery should be focused on obtaining evidence to prove or disprove those claims. This is not a general administrative investigation into the business practices of the pharmaceutical industry.' . . . . The evidence does not support the argument that the Plaintiffs have been thwarted because Defendants have failed to comply with their discovery obligations as defined by the Court. The motions for summary judgment will not be continued based on the possibility that **[*29]** the Court might make substantial changes in the discovery parameters."

Plaintiffs filed a petition for a writ of mandate in this court, seeking to compel Judge Sabraw to grant their *section 437c(h)* request. We summarily denied it.

Plaintiffs' Oppositions to the Merits Motions

On November 30, 2006, plaintiffs filed opposition to the merits motions, submitting a single opposition to the joint motion and the motions of PhRMA and JJHCS.[10] The opposition was supported by a separate statement responding to defendants' undisputed material facts and submitting additional facts of their own; a declaration of plaintiffs' counsel Joseph M. Alioto, Jr. attaching 77 exhibits; and a request for judicial notice of 11 of the exhibits appended to the Alioto declaration. In the opposition, plaintiffs renewed their request for a continuance under *section 437c, subdivision (h)*, reiterating their "belie[f] that additional facts exist that are essential to their opposition of Defendants' motions for summary judgment."

On December 13, 2006, defendants filed replies in support of the merits motions, and responded to plaintiffs' additional facts in their separate statement response.

Tentative Ruling Granting Defendants' Pass-On Motion and Plaintiffs' Attempt to Challenge Judge Sabraw

Meanwhile, on December 1, Judge Sabraw issued a 26-page tentative ruling on the motions set for hearing on December 5, specifically the pass-on motions and the Amgen motion. There, Judge Sabraw analyzed the pass-on issue, ultimately holding that the affirmative defense was available in California and defeated plaintiffs' claims. Consequently, the tentative ruling granted summary judgment for defendants, and dropped plaintiffs' pass-on motion and Amgen's merits motion as moot.

After Judge Sabraw issued his tentative ruling, but before the motions came on for hearing, plaintiffs moved to disqualify him, via plaintiffs' "Objection/Motion for Disqualification" filed December 4. Plaintiffs took exception with various of Judge Sabraw's discovery orders, his denial of their request to continue the summary judgment motions, and his so-called **[*31]** "rush to judgment" in granting summary judgment in the tentative ruling, claiming that he "systematically demonstrated a prejudice towards plaintiffs and favoritism towards defendants" and was not impartial. Plaintiffs' statement of disqualification was lengthy, supported by a 19-page declaration by plaintiffs'

[10] Plaintiffs had previously filed separate opposition to the Amgen motion. It was supported by a separate statement disputing Amgen's material facts, a request for judicial notice of six assorted **[*30]** documents, and a declaration of plaintiffs' counsel Russell F. Brasso attaching 24 exhibits.

counsel Alioto in which he purported to detail Judge Sabraw's objectionable conduct. The declaration, in turn, appended over 100 pages of exhibits.

On December 5, the day the pass-on motions and Amgen's merits motion were set to be heard, Judge Sabraw struck plaintiffs' statement of disqualification as untimely, nevertheless agreeing to continue the hearing to December 15 to afford plaintiffs an opportunity to seek a writ of mandate. On December 12, plaintiffs did petition for a writ of mandate. On December 14, we denied it.

Hearing on the Pass-On Motions

On December 15, the pass-on and merits motions came on for hearing before Judge Sabraw, following which argument he took the motions under submission. On December 19, Judge Sabraw granted summary judgment in favor of defendants, holding, consistent with his tentative ruling, that the pass-on defense was a cognizable defense in **[*32]** California. As such, plaintiffs could not demonstrate that they sustained any damages because the undisputed evidence showed that they increased their prices to consumers corresponding to any price increase imposed by defendants. He also concluded that plaintiffs lacked standing to assert a claim under the UCL since they did not suffer any damages. Since the pass-on defense defeated all of plaintiffs' claims, defendants were entitled to summary judgment, which was thereafter entered. Because the case was resolved based on the pass-on defense, Judge Sabraw dropped the merits motions as moot.

Plaintiffs' First Appeal

Plaintiffs appealed from the judgment. We affirmed, agreeing with Judge Sabraw that the pass-on defense was viable under California law and that the undisputed evidence established that plaintiffs did not suffer any damages and thus could not recover on their Cartwright Act or UCL claims. (*Clayworth v. Pfizer, Inc.,* July 25, 2008, A116798) [nonpub. opn.].)

Plaintiffs successfully petitioned the California Supreme Court for review, and that court reversed, holding that the pass-on defense was not permitted in California and that summary judgment was improperly granted. (*Clayworth, supra, 49 Cal.4th at p. 763*.) **[*33]** It then remanded for further proceedings. (*Id. at p. 791*.)

Plaintiffs' Attempts to Disqualify Judge Brick After Remand

After learning that on remand to the Alameda County Superior Court the matter would likely be assigned to the Honorable Steven A. Brick, on August 5, 2010, Covington & Burling, LLP (Covington), counsel for defendant Boeringher, filed a substitution of attorney removing itself as counsel. The substitution was apparently prompted by the fact that Judge Brick's sister-in-law was a partner of the Covington firm.

On September 2, 2010, the matter was in fact assigned to Judge Brick for all purposes. Twelve days later, plaintiffs filed a statement for the disqualification of Judge Brick, demanding his "mandatory disqualification" under *Code of Civil Procedure section 170.1, subdivision (a)(5)*, and also claiming that "his family connection to Covington" was sufficient to establish a doubt about his impartiality such that he should also be disqualified under subdivision (a)(6)(A)(iii).[11] The statement was based not only on Covington's prior representation of Boeringher in this case, but also its continued representation of Boeringher, as well as numerous other defendants, in unrelated **[*34]** matters.

After defendants objected to plaintiffs' request, plaintiffs filed a supplemental statement of disqualification, and Judge Brick filed a verified answer disputing the existence of any facts requiring his disqualification. The

[11] Plaintiffs also filed a peremptory challenge pursuant to *Code of Civil Procedure section 170.6*. The challenge was denied on the ground that they previously filed a successful *section 170.6* challenge to the Honorable Jon S. Tigar.

disqualification request was assigned to the Honorable Faye D'Opal of the Marin County Superior Court, following which assignment plaintiffs filed a second supplemental statement of disqualification, this one appending 148 more pages of exhibits.[12]

On November 24, 2010, Judge D'Opal entered a six-page order denying the disqualification request. She held that (1) no lawyer from Covington was a "lawyer in the proceeding," making *section 170.1, subdivision (a)(5)* inapplicable, and (2) a family relationship with **[*35]** a lawyer who works in a law firm that is not appearing before the judge but represented certain defendants on unrelated matters was not a fact upon which a person might reasonably entertain doubt that the judge would be able to be impartial, making subdivision (a)(6) inapplicable.

Once again, plaintiffs petitioned this court for a writ of mandate. Once again, we denied it. This time, plaintiffs petitioned the California Supreme Court for review, which was denied.

Hearing On the Merits Motions

With the case now revived in the superior court, the parties picked up where they left off when Judge Sabraw had entered summary judgment for defendants—with the four merits motions still to be resolved.

On January 14, 2011, Judge Brick held the twenty-first case management conference in the case. In a statement prepared for that conference, plaintiffs urged that discovery be reopened before the court ruled on the merits motions: "Defendants, unlike Plaintiffs, are not interested in up-dated discovery. They prefer a rush to judgment based on discovery that was propounded more than 4 years ago. [¶] Under *CCP §§ 2030.070*, *2031.050*, Plaintiffs (and Defendants) are entitled to obtain 'any later acquired **[*36]** discovery' to supplement the previous discovery responded to more than 4 years ago. Obviously, under any reasonable judicial measure, Plaintiffs should be permitted to update the written discovery previously propounded to and verified by 17 Defendants." Plaintiffs reiterated this position in the section of their statement identifying any "potentially dispositive motions": "Defendants have proposed that their 'mooted motions' for summary judgment be *revived* and *decided* before any discovery can be undertaken by Plaintiffs. Plaintiffs object to Defendants' joint proposal to rush to judgment and request that discovery be permitted up to an [*sic*] including the discovery cut-off date of August 15, 2011. In the meantime, the parties can disclose and depose expert witnesses . . . . Any summary judgment motions should not be heard until expert witness depositions are completed."

Judge Brick disagreed, and his order following the conference set argument on the merits motions for February 17, 2011, when they in fact came on for hearing, based on the original motion papers, oppositions, and replies filed in the fall of 2006.[13] After hearing lengthy argument spanning the morning and much of the **[*37]** afternoon, Judge Brick took all four motions under submission.

Orders Granting Summary Judgment

On March 7, 2010, Judge Brick entered three separate orders granting the merits motions. The first order, 36 pages of thorough analysis, granted the joint motion and the Amgen motion. After detailing the relevant procedural history and the applicable standard of review, Judge Brick considered defendants' moving burden. This, he concluded, defendants satisfied by providing "admissible evidence describing, in varying levels of detail, the process by which the 'list price' ('wholesale acquisition cost' or 'WAC') was set and periodically reevaluated within each Defendant company. . . . [¶] Defendants' detailed declarations state facts showing that prices were independently determined, based upon Defendants' individual market analyses which generally utilized public information. [Citation.] They tend to belie collusion on pricing. They also tend to show that Defendants responded to market forces by providing

[12] Judge D'Opal subsequently struck this second supplement "as no facts suggesting new grounds for disqualification learned of or arising after the filing of the first statement of disqualification [were] presented therein."

[13] The only newly-filed paper appears to be defendants' joint objections to plaintiffs' evidence, filed on January 28, 2011.

rebates and discounts to customers that had the power to influence **[*38]** the volume of prescriptions written. [Citation.] This showing is sufficient to meet Defendants' initial burden of demonstrating independence rather than collusion."

Judge Brick then considered the request in plaintiffs' opposition for a continuance, which he denied because "[p]laintiffs have not shown that facts essential to justify an opposition may exist or valid reasons that those facts could not have been obtained through more diligent efforts and presented with their opposition . . . ."

With that, Judge Brick turned to the substance of plaintiffs' opposition, noting that plaintiffs bore the burden of "'present[ing] evidence that would allow a reasonable trier of fact . . . to find an unlawful conspiracy more likely than not.'" And, he held, plaintiffs failed to satisfy this burden.

In terms of direct evidence, Judge Brick explained that plaintiffs "based a significant portion of their written opposition on evidence of a different agreement, arguing that they have *direct evidence* of an agreement to raise prices in line with the Consumer Price Index ('CPI')." He described this as "problematic" for two reasons. First, the third amended complaint alleged a conspiracy to fix drug prices **[*39]** in California by using Canadian prices as a floor; it did not allege an agreement to tie price increases to the CPI. Second, plaintiffs would be collaterally estopped from amending to plead the alleged CPI conspiracy because plaintiffs were class members—and, apparently, one plaintiff a class representative—in a prior, unsuccessful action based on the same theory. (See *In re Brand Name Prescription Drugs Antitrust Litig. (N.D. Ill. Feb. 10, 2000, Civ. A. No. 94 C 897) 2000 U.S. Dist. LEXIS 1735, 2000 WL 204064 at *1*.)

Judge Brick then turned to plaintiffs' indirect evidence of conspiracy, and noted that while "[t]hey argued the doctrine of 'conscious parallelism' in their papers with respect to their unpleaded CPI theory," the doctrine also "arguably relate[d] to the Canadian floor theory, as well," which plaintiffs confirmed at the hearing they had not abandoned. He thus undertook an analysis of plaintiffs' circumstantial evidence of the Canadian floor conspiracy, ultimately concluding that plaintiffs did "not provide[] any competent evidence with respect to the pricing of Defendants' drugs (vis-à-vis Canada, or otherwise) during the relevant time period," or any evidence tending to prove that the alleged parallel **[*40]** conduct was "conscious." There was "a complete failure of proof."

Having found no evidence of parallel pricing, conscious or otherwise, Judge Brick could have stopped there. But he did not, and proceeded to examine plaintiffs' evidence on the "plus factors" required to corroborate evidence of conscious parallelism, concluding that plaintiffs' evidence on the "plus factors" failed to suggest collusion. In light of that, he granted the joint motion for summary judgment.

In the same order, Judge Brick also granted summary judgment in favor of Amgen. He concluded that Amgen met its moving burden by "provid[ing] detailed testimony demonstrating that, during the relevant time frame it set prices in the U.S. (including for the Identified Drugs) independently from other Defendants through a bottom-up, collaborative process; that this process involved a large number of employees, who considered a wide range of permissible, precompetititve factors and there was little if any involvement by Amgen's CEO/Chairman in this process; and that pricing information (including pricing actions or price setting policies) was not discussed with or released to other Defendants, other than when a new price was **[*41]** made public." Amgen's evidence further showed that "[p]ricing for Canada is set by different employees, through a different process."

Judge Brick then concluded that, as in their opposition to the joint motion, plaintiffs failed to carry their burden of presenting evidence showing that the conspiracy was "'more likely than not.'" First, he reiterated, the direct evidence cited by plaintiffs in claimed support concerned an alleged conspiracy to increase prices in step with the CPI, which failed for the two reasons explained above. Second, plaintiffs claimed to have satisfied their burden by presenting evidence that Amgen wrongfully offered "secret rebates" to customers. Again, Judge Brick held that this alleged conspiracy was not pleaded in the third amended complaint and could not defeat summary judgment. He therefore concluded that the absence of evidence regarding the Canadian floor conspiracy constituted grounds for granting summary judgment for Amgen.

Judge Brick closed his order by ruling on evidentiary matters. He granted the requests for judicial notices by both plaintiffs and defendants, and sustained in part and overruled in part both sides' objections to evidence. This included **[*42]** sustaining 32 of defendants' objections, three of which rulings plaintiffs assert as error here, which we discuss below.

By separate orders, Judge Brick also granted the motions of PhRMA and JJHCS. As to PhRMA's motion, he preliminarily explained that the motion was technically moot because of his ruling on the joint motion. Nevertheless, he went on to address the merits of the motion, concluding that PhRMA carried its initial burden of demonstrating that it was engaged in "legitimate and routine trade association activities" and that it did not participate in or aid and abet the alleged conspiracy. Plaintiffs, he held, failed to present evidence creating a triable issue as to whether PhRMA was engaged in illegitimate information-sharing activities. As he explained it, "Plaintiffs nominally dispute all of PhRMA's material facts concerning its mission and activities, . . . but none of the evidence cited by Plaintiffs creates a triable issue that PhRMA is not engaged in activities that are legitimate information sharing, as opposed to anti-trust violations. It bears mention that numerous of Plaintiffs' responses to undisputed facts do not comply with the California Rules of Court. They **[*43]** fail to identify the evidence that they assert creates a triable issue or provide a citation to the relevant exhibit, page and line number. [Citations.] In some instances, Plaintiffs simply cross-referenced all of their 'Additional Facts' they provided in responses to the Joint Motion (without providing further detail). In others, Plaintiffs failed to cite to any evidence at all, and instead resort to argument. Such tactics do not create triable issues." Despite these failings, Judge Brick went on to examine the exhibits in the record and found no evidence supporting plaintiffs' alleged facts.

Lastly, as to JJHCS's motion, Judge Brick held that JJHCS met its initial burden by providing admissible evidence demonstrating that "it [did] not have any involvement in setting list prices for any pharmaceutical products sold in California (or the U.S.) or in Canada." Plaintiffs, in turn, failed to carry their burden. Specifically, their written opposition was the same one submitted in opposition to the joint motion, which was largely premised on the unpleaded CPI theory and did not present arguments specific to JJHCS. From what Judge Brick could "glean[]" from plaintiffs' separate statement **[*44]** responding to JJHCS' material facts, however, plaintiffs attempted to demonstrate triable issues as to the following: "(1) JJHCS engaged in the alleged price-fixing conspiracy through its parent, Johnson & Johnson, a separately incorporated 'umbrella' holding company headed by William Weldon, suggesting that the two entities are, in essence, alter egos; (2) JJHCS participated in PhRMA meetings—through Johnson & Johnson's head, Mr. Weldon, and thus was involved in the alleged conspiracy; (3) JJHCS negotiates contracts involving net prices; (4) JJHCS participated in a senior prescription discount program, which involved an agreement on prices; and (5) JJHCS agreed to restrict price competition from generics and brand name variations." But, according to Judge Brick, plaintiffs failed to plead alter ego allegations or introduce any evidence that would support them. Further, he concluded, plaintiffs produced no evidence that JJHCS had any involvement in setting list prices.

Judgment was entered for defendants on March 14, 2011. This timely appeal followed.

DISCUSSION

A. Plaintiffs' Claims on Appeal

Plaintiffs assert numerous errors on appeal, only one of which attacks the summary judgment, **[*45]** arguing essentially that plaintiffs presented evidence creating triable issues of material fact regarding the existence of a conspiracy to fix prices, and thus no defendant, including PhRMA, JJHCS, or Amgen on their individual motions, was entitled to summary judgment. The remaining claims assert procedural errors that, if well taken, would have had the merits motions heard at a later time—and by a different judge. These specific claims are: (1) Judge Sabraw abused his discretion in limiting discovery; (2) plaintiffs' request for Judge Brick's disqualification should have been granted because he had a conflict of interest that prevented him from ruling on the merits motions; (3) Judge Brick erred in denying plaintiffs' request to reopen discovery before the merits motions were heard; (4) Judge Brick erred in sustaining defendants' objections to plaintiffs' exhibits 1, 111, and 117; and (5) Judge Sabraw erred in sustaining the demurrer without leave to amend on plaintiffs' fourth cause of action for unfair business practices. Since certain of these procedural issues would necessitate reversal if well taken, we begin with discussion of these issues.

B. Judge Sabraw Properly Managed the [*46] Case, Including the Scope and Course of Discovery

Plaintiffs' first procedural argument is that the trial court "erroneously limited plaintiffs' discovery." Hardly.

Before turning to a discussion of why, we digress briefly to discuss the subject of case management—and in particular as it pertains to antitrust cases.

Volkswagen of America, Inc. v. Superior Court (2001) 94 Cal.App.4th 695, 114 Cal. Rptr. 2d 541 involved the validity of a San Francisco Superior Court general order in asbestos cases. Holding that the Judicial Council did not intend to preempt such an order in complex litigation, our colleagues in Division Five set forth the two factors supporting the holding, a discussion pertinent here:

"First, effective January 1, 2000, the Judicial Council adopted [California Rule of Court,] rule [3.400] et seq. to govern complex civil cases. Rule [3.400](a) defines a complex case as 'an action that requires *exceptional judicial management* to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.' (Italics added.) The Judicial Council could not have intended rule [3.400](a) to **[*47]** stand like an unarmed sentry warning courts of impending disaster from complex litigation while leaving them powerless to take the steps necessary to meet the onslaught. . . .

"This conclusion is supported by a second factor. The Judicial Council adopted rule [3.400] et seq. on October 22, 1999. (See Judicial Council of Cal., minutes of meeting (Oct. 22, 1999) pp. 18-19.) On that same date, and as part of the same process, the Judicial Council authorized the Administrative Office of the Courts to distribute to all judges in this state a manual that explains how complex cases should be managed. (See Judicial Council of Cal., minutes of meeting, *supra,* p. 18.) The manual [is] entitled Deskbook on the Management of Complex Civil Litigation . . . (Judicial Council of Cal., Deskbook on the Management of Complex Civil Litigation [(2011)] § 3.52, pp. 3-35, 3-37 (hereafter Deskbook).)" (*Volkswagen of America, Inc. v. Superior Court, supra, 94 Cal.App. at pp. 704-705*.)

The Deskbook notes in its preface that "[s]tate and federal judges around the country have been actively managing complex litigation for several decades, and complex litigation has been the subject of intense scholarly scrutiny **[*48]** and evaluation. Drawing upon the wealth of materials available, this deskbook relies upon the Federal Judicial Center's *Manual on Complex Litigation, Third Edition,* and the National Center of State Courts' *Managing Mass Tort Cases: A Resource Book for State Trial Court Judges.* . . . The Complex Civil Litigation Task Force was convinced that the recommendations found in these sources reflect the best thinking available today on how to manage complex cases. We want to acknowledge our gratitude to the authors of these sources for providing the initial direction and basis upon which the task force relied in developing recommendations that are consistent with California authorities and practices. [¶] . . . . [T]he deskbook is intended to provide judges with ideas about management that have proven useful and effective over the years. We hope you find this deskbook to be a useful tool." (Deskbook, *supra,* at p. xv.)

Chapter 3 of the Deskbook addresses specialized areas, the first of which is antitrust. (See § 3.01 et seq.) Antitrust is "included in the list of provisionally complex cases in *California Rules of Court, Rule 3.400(c)* because litigation involving such claims can require voluminous **[*49]** documentary and testimonial evidence; extensive discovery; complicated legal, factual, and technical (particularly economic) questions; numerous parties and attorneys; and substantial sums of money calling for 'exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel' [*Cal. Rules of Ct., Rule 3.400(a)*]." (§ 3.01, p. 3-2.)

The Deskbook then goes on to say that "[a]ntitrust cases often involve the collection, assimilation, and evaluation of vast amounts of evidence regarding numerous transactions and other economic data. . . . Effective management of such cases depends on the adoption of pretrial procedures to facilitate the production and utilization of this material and its efficient presentation at trial. Among the measures that may be useful are the following: [¶] **Limiting scope of discovery.** Early attention to the issues may make feasible establishment of reasonable limits on the scope of discovery. Limits may be fixed with reference to the transactions alleged to be the subject matter of the case, to the relevant **[*50]** products or services, or to geographical areas and time periods. Limits should, however, be subject to modification if a need for broader discovery later appears. For discussion of discovery in complex cases generally, see § 2.50 et seq." (§ 3.03, p. 3-6.)

As noted, the federal manual was a source for the Deskbook, and it covers the subject of case management in antitrust cases in even more detail. Part III of that manual is entitled "Particular Types of Litigation." Chapter 30 deals with antitrust, and describes how antitrust litigation can involve voluminous documentary and testimonial evidence, extensive discovery, complicated legal and factual questions, numerous parties and attorneys, and substantial sums of money, thus calling for application of procedures for the management of complex litigation. The manual elaborates:

"Effective management of antitrust litigation requires identifying, clarifying, and narrowing pivotal factual and legal issues as soon as practicable. [Citation.] Unless the judge and the attorneys give early attention to these issues, substantial time may be wasted on claims subject to summary dismissal, on class action disputes not critical to the class-certification **[*51]** ruling, and on discovery not relevant to the later-refined issues regarding liability of damages. Defining the issues at an early stage may enable the court to structure the litigation so as to limit the scope and volume of discovery, reduce cost and delay, facilitate the prospects of settlement, and improve the trial.

"The procedures for pretrial management of complex litigation discussed in section 11 apply generally to antitrust litigation. . . ." (West's Manual for Complex Litigation (Federal Judicial Center 4th ed. 2004) § 30, pp. 519-520.) And the referenced section 11 counsels that "Discovery control in complex litigation may take a variety of forms, including time limits, restrictions on scope and quantity, and sequencing." It then goes on to list the following examples of discovery "limits that a judge might consider," elaborating on each limit: time limits and schedules; limits on quantity; and phased, sequenced, or targeted discovery. (*Id.* at §11.422, pp. 53-54.)

Those, then, were the well-developed criteria and guidance by which Judge Sabraw was to manage this 20-defendant case. And as is apparent from the above, he did so in exemplary fashion. And without prejudice to plaintiffs **[*52]** who, as is also apparent from the recitation of facts discussed above, had access to full discovery here.

Despite that, plaintiffs contend that there were four categories of discovery they were denied. Specifically:

First, plaintiffs contend that Judge Sabraw "limited document discovery to prices and price setting practices thereby limiting production of documents price fixing [*sic*] of specific drugs and denying discovery of the top level agreement to stabilize prices." In fact, discovery was broader than plaintiffs claim. Judge Sabraw required defendants to produce documents relating to "national policies that affect or have affected the price of identified drugs." But to the extent that any discovery was limited to prices and price setting practices, the case was about defendants' price setting practices, and such limitation was therefore appropriate. Plaintiffs were afforded discovery concerning pricing decisions on the 111 Identified Drugs—drugs, not incidentally, selected in part based on plaintiffs' input—for a ten year period, which we consider a reasonable scope.

Second, plaintiffs complain that Judge Sabraw "refused to require the production of defendants [*sic*] documents showing **[*53]** efforts to restrict re-importation of drugs saying such action was legal." In support of this argument, plaintiffs cite page 3 of an order granting a motion to quash a subpoena to nonparty Johnson & Johnson, in which Judge Sabraw granted the motion as to plaintiffs' request for documents from "Johnson & Johnson to Canadian wholesalers that refer[red] or related to the threats or warnings of termination of sales by J&J for selling and/or distributing pharmaceutical drugs in the United States." Plaintiffs make no attempt to explain how a nonparty's actions would in any way be relevant to the alleged conspiracy.

Third, plaintiffs argue that Judge Sabraw "denied production and allowed redaction of documents arguably subject to the associational privilege. However, such documents are discoverable under footnote 3 to the *Pennington* case to show the purpose and character of non-protected action." The trial court order cited in support of their argument was an "order following in camera review of PhRMA documents to determine whether redactions are proper." For purposes of the in camera review, PhRMA had been permitted to redact privileged information, but not information that it believed to **[*54]** be irrelevant. Judge Sabraw determined that PhRMA took "a narrow view of what constitutes relevant information," explaining, "For example, PhRMA has not produced information concerning the importation of drugs from Canada. Although this information might not be directly relevant to the existence of a conspiracy to use the Canadian price as a floor for drugs in California, it is relevant for purposes of discovery." Judge Sabraw then ordered PhRMA to produce certain documents or excerpts. We fail to understand how an order directing PhRMA to produce documents could support plaintiffs' claim that Judge Sabraw "denied production and allowed redaction of documents arguably subject to the associational privilege."

Finally, plaintiffs object that Judge Sabraw unreasonably limited the depositions of defendants' apex deponents to three and a half hours, while allowing defendants to depose "plaintiffs [*sic*] apex people" for two days. To begin with, plaintiffs did not have "apex people." Judge Sabraw defined apex deponents as "senior officers (CEO, President, Vice President, Chairpersons of the Board, members of the Board of Directors)," while this court in *Liberty Mutual Ins. Co. v. Superior Court, supra, 10 Cal.App.4th 1282, 1289*, **[*55]** the seminal case on apex depositions, referred to "a corporate president or other official at the highest level of corporate management." Plaintiffs here were small businesses whose officers were involved in daily decisions and were produced for depositions as both fact and corporate "most knowledgeable" witnesses. They were clearly differently situated than defendants' apex deponents.

In any case, plaintiffs have failed to establish that the time limit placed on apex depositions was unreasonable. They assert that it was "not sufficient to cover the factual issues in the case," but do not identify any subjects they were unable to cover or any questions that went unanswered. And, of course, plaintiffs made a "strategic decision" not to depose subapex witnesses, a decision that could account for any perceived lapses in the information plaintiffs received through discovery.

Plaintiffs have shown no error, and certainly not any that plaintiffs demonstrate would have made a difference in the outcome here.

C. The Order Denying Plaintiffs' Request for Judge Brick's Disqualification Was Correct, an Order Plaintiffs Cannot Even Challenge Here

On August 26, 2010, we remanded the case to the Alameda **[*56]** County Superior Court, which on September 2 assigned the matter to Judge Brick. As noted, plaintiffs sought to remove him from the case, including with their improper preemptory challenge and their later request to disqualify him for cause, including with two supplemental statements for disqualification. Plaintiffs assert that the refusal to disqualify Judge Brick was error.

The challenge involved here was plaintiffs' September 14, 2010 request to have Judge Brick removed for cause, pursuant to *Code of Civil Procedure section 170.1, subdivisions (a)(5)* and *(a)(6)*. The former provides in pertinent part that a judge shall be disqualified if "[a] lawyer . . . in the proceeding is the spouse, former spouse, child, sibling, or parent of . . . the judge's spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding"; the latter, if "[a] person aware of the facts might reasonably entertain doubt that the judge would be able to be impartial."

To recap, the basis of plaintiffs' challenge was the relationship between Judge Brick and his sister-in-law, a relationship that plaintiffs describe here as follows: "The facts are undisputed. Judge Brick's sister-in-law **[*57]** was a partner in Covington & Burling. [Citation.] For years the Covington firm represented one of the defendants in this case, from complaint, demurrers, discovery, summary judgment on the pass-on defense, the filing of a motion for summary judgment on the merits, appeals, and reversal. It was only when it became apparent that the case would be assigned to Judge Brick that they substituted ou[t] [citation], while continuing to represent most of the defendants in other matters."

The defendant was Boehringer Ingelheim Pharmaceuticals, Inc., and it is true that Covington represented it in this litigation and that Judge Brick's sister-in-law was a member of that firm. It is also true, however, that Covington substituted out as counsel on August 5, 2010,[14] before the case was assigned to Judge Brick.

Following Judge Brick's response to plaintiffs' challenge, it was assigned to Judge D'Opal of the Marin County Superior Court, who issued a detailed order finding that (1) no attorney at Covington was a "lawyer in the proceeding," thus making *Code of Civil Procedure, section 170.1, subdivision (a)(5)* inapplicable; and (2) some relationship between a judge and an attorney at a firm that represents certain defendants on other matters unrelated to the litigation in issue—but not the case before the court—is not a fact upon which a person "might reasonably entertain doubt that the judge would be able to be impartial," making subdivision (a)(6) inapplicable.

Plaintiffs filed a petition for writ of mandate in this court on December 7, 2010, which we denied. Plaintiffs then filed a petition for review in the Supreme Court, which was also denied. That ends the matter—plaintiffs' claim is not properly before us.

Section 170.3, subdivision (d) provides that "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate **[*59]** court of appeal . . . ." (See also *People v. Hull (1991) 1 Cal.4th 266, 276, 2 Cal. Rptr. 2d 526, 820 P.2d 1036* *[section 170.3, subdivision (d)* "prescribes the exclusive means of appellate review of an unsuccessful peremptory challenge motion"]; *D.C. v. Harvard-Westlake School (2009) 176 Cal.App.4th 836, 849-850, 98 Cal. Rptr. 3d 300*; *Sears, Roebuck & Co. v. National Union Fire Ins. Co. (2005) 131 Cal.App.4th 1342, 1348-1349, 32 Cal. Rptr. 3d 717*.)

Faced with this law, plaintiffs' reply argues that the California Supreme Court has countenanced appellate review of such a claim on an appeal from the final judgment when due process issues are raised. They rely on *People v. Brown (1993) 6 Cal.4th 322, 24 Cal. Rptr. 2d 710, 862 P.2d 710* (*Brown*), citing the following passage: "[T]he [United States Supreme Court] has made it clear that a defendant has a due process right to an impartial judge, and that violation of this right is a fatal defect in the trial mechanism. In view of this established federal constitutional authority, to foreclose appellate attack on the fundamental constitutional integrity of the judgment would be a radical and extreme step. It would simultaneously (i) preclude traditional full appellate review of defendant's federal constitutional claim, and (ii) impair what defendant asserts **[*60]** is his state constitutional right of appeal." (*Id. at pp. 333-334*.) *Brown* does not avail plaintiffs.

Brown, a death penalty case, was decided on remand from the United States Supreme Court. The California Supreme Court found no error requiring retrial of the guilt or penalty issues, but reversed the penalty judgment and remanded for reconsideration of the automatic motion for modification of the death verdict. (*Brown, supra, 6 Cal.4th at p. 326*.) Prior to the rehearing, defendant moved pursuant to *Code of Civil Procedure section 170.1, subdivision (a)(6)(C)*, to disqualify the trial judge on the basis of lack of impartiality. Declarations of defense counsel and her investigators indicated that the trial judge had engaged in ex parte communications with them concerning her investigation, which involved contacting jurors. The judge who heard the disqualification motion denied it, and the trial court denied the automatic motion for modification of the death verdict. (*Brown, supra, 6 Cal.4th at pp. 326-327*.)

The Supreme Court went on to hold that Brown's claim could be made on appeal. But not on any basis giving solace to plaintiffs, the court holding as follows: "It is enough to determine **[*61]** that his argument is credible; given the maxim that a statute must be construed, if possible, to avoid constitutional issues, we will not ascribe to the

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[14] Plaintiffs contended below that the "purported substitution" was "defective for three reasons" and that Covington was still counsel of record when the matter was assigned to Judge Brick. Judge D'Opal rejected this contention, concluding that "sufficient evidence supports the basic fact that Covington was not 'a lawyer in the proceeding' when the Presiding Judge assigned this case to Judge Brick **[*58]** for all purposes . . . ." Plaintiffs do not challenge this conclusion on appeal.

Legislature an intent to bar appellate review of defendant's due process claim. [Citations.] [¶] These factors lead us to construe the statute as applied to defendant's claim as follows: *Section 170.3(d)* applies to all *statutory* judicial disqualification claims—even those claims based on statutory provisions that, like *section 170.1, subdivision (a)(6)(C)*, appear to codify due process grounds for relief—but *section 170.3(d)* does not apply to, and hence does not bar, review (on appeal from a final judgment) of *nonstatutory* claims that a final judgment is constitutionally invalid because of judicial bias. [¶] Our conclusion does not alter our construction of *section 170.3(d)* in [*People v.*] *Hull, supra, 1 Cal.4th 266*. Even in a capital case, the denial of a *statutory* judicial disqualification motion is not subject to interlocutory appeal; instead, all litigants who seek to challenge denial of a statutory judicial disqualification motion are relegated to writ review as described in *section 170.3(d)*." (*Brown, supra, 6 Cal.4th at p. 335*.) **[*62]** Here, of course, plaintiffs' challenges were *statutory.*

But even if plaintiffs could make the claim, it would fail. Judge Brick's sister-in-law's firm had substituted out, making *Code of Civil Procedure section 170.1, subdivision (a)(5)* inapplicable. And plaintiffs demonstrate no facts or circumstances by which "[a] person aware of the facts might reasonably entertain a doubt that [Judge Brick] would be able to be impartial" under *section 170.1, subd. (a)(6)*. Plaintiffs cite no authority—and we have found none—that relied upon subdivision (a)(6) to disqualify a judge based merely upon the client of an in-law's law firm. As defendants put it, "The Legislature drew the line in *section 170.1(a)(5)* between family relationships that require recusal and those that do not. There is no reason to believe a broader sweep is required to protect the integrity of the judiciary." We agree.

The few cases cited by plaintiffs are easily distinguishable. *Stitt v. State Bar (1978) 21 Cal.3d 616, 146 Cal. Rptr. 878, 580 P.2d 293*, involved disqualification of a State Bar hearing officer where the officer's law partner was litigating another matter against the parties appearing before the officer. *Tumey v. Ohio (1927) 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236* and *Ward v. Village of Monroeville (1972) 409 U.S. 57, 61, 93 S. Ct. 80, 34 L. Ed. 2d 267*, **[*63]** held that judges were disqualified from cases where they benefitted—either directly (*Tumey*) or indirectly (*Ward*)—from fines they imposed. Judge Brick's relationship to his sister-in-law is a far cry.

D. Judge Brick Did Not Abuse His Discretion In Denying Plaintiffs' Request to Continue the Merits Motions To Allow For Additional Discovery

Plaintiffs next contend, in a brief argument of less than a page, that Judge Brick erred in denying their *Code of Civil Procedure section 437c, subdivision (h)* request for continuance of the summary judgment hearing.[15] Plaintiffs show no error.

Code of Civil Procedure section 437c, subdivision (h) provides that if the party opposing summary judgment shows by declaration that essential evidence "may exist but cannot, for reasons stated, then be presented, the court shall deny the motion" or continue it for a reasonable period. (See *Bahl v. Bank of America (2001) 89 Cal.App.4th 389, 395, 107 Cal. Rptr. 2d 270*.) **[*64]** The reason for the declaration is for the party to '"show that its proposed discovery would have led to "facts essential to justify opposition.""' (*Scott v. CIBA Vision Corp. (1995) 38 Cal.App.4th 307, 325-326, 44 Cal. Rptr. 2d 902*.) This means, as the leading practical treatise describes it, that a party seeking a continuance has to show the following "requirements":

"[10:207.15] **Requirements:** The opposing party's declaration in support of a motion to continue the hearing should show the following:

- *Facts* establishing a *likelihood that controverting evidence may exist* and *why* the information sought is *essential* to opposing the motion;

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[15] It should be recalled that plaintiffs had first sought to continue the motion on November 13, 2006, by a request to Judge Sabraw. Judge Sabraw denied it, a ruling that plaintiffs unsuccessfully challenged by writ petition. Plaintiffs' opposition to the merits motions also contained a 437c(h) request.

• The *specific reasons* why such evidence cannot be presented at the present time;

• An estimate of the *time* necessary to obtain such evidence; and

• The specific steps or procedures the opposing party intends to utilize to obtain such evidence. [See CCP §437c(h); see also *Roth v. Rhodes* (1994) 25 [Cal.App.]4th 530, 548; . . . *Cooksey v. Alexakis* (2004) 123 [Cal.App.]4th 246, 254, . . .; *Combs v. Skyriver Communications, Inc.*[(2008) 159 [Cal.App.4th 1242,] 1270, . . .—declarations did not explain why information sought was essential to opposing motion or why additional time was **[*65]** needed]."

(Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) § 10:207.15, p. 10-83.)

If the declaration(s) do not measure up, the court may deny the request (*Cooksey v. Alexakis, supra, 123 Cal.App.4th 246, 253-254*; *Lerma v. County of Orange (2004) 120 Cal.App.4th 709, 716, 15 Cal. Rptr. 3d 609)*, a denial we review for abuse of discretion. (*Combs v. Skyriver Communications, Inc., supra, 159 Cal.App.4th 1242, 1270*; *Knapp v. Doherty (2004) 123 Cal.App.4th 76, 100, 20 Cal. Rptr. 3d 1*; *FSR Brokerage, Inc. v. Superior Court (1995) 35 Cal.App.4th 69, 72, 41 Cal. Rptr. 2d 404*; *Roth v. Rhodes, supra, 25 Cal.App.4th at pp. 547-548*.) We find no abuse here. And plaintiffs' argument certainly does not demonstrate any.

Plantiffs' entire argument is as follows: "Note that the language of the Legislature is mandatory and requires denial or continuance when essential facts are shown by affidavit. Here plaintiffs' [*sic*] submitted lengthy declarations from their counsel showing what specific evidence existed, how it had been requested early in the litigation but not produced and how it bore specifically on the conspiracy. [Citation.] For example the Canadian internet pharmacy documents, while requested early in the litigation, **[*66]** were not produced until after a long fight and then only partially and after the summary judgment was filed. Clearly discovery was needed to flesh out these documents and provide the story that the documents only suggested. That the lower court called these documents inadmissible hearsay merely reinforces the necessity for discovery." We read the record differently.

The extensive discovery in this case was described in detail above, including two sets each of requests for production of documents, requests for admission, and special interrogatories, as well as three sets of form interrogatories served on each defendant. The original discovery included plaintiffs taking nearly 60 depositions. In addition, between the time that defendants moved for summary judgment and plaintiffs filed their opposition, plaintiffs took some two dozen more depositions, including depositions of all but one of the officers and employees who submitted declarations in support of the motions for summary judgment.

As quoted, plaintiffs' brief argument makes the vague claim that the sought-after discovery would have allowed them to "flesh out" some unidentified documents obtained from some defendant(s) in discovery. **[*67]** Such argument is hardly sufficient. As we said in *Mansell v. Board of Administration (1994) 30 Cal.App.4th 539, 545-546, 35 Cal. Rptr. 2d 574*, we are "'not inclined to act as counsel for . . . [plaintiffs] and furnish a legal argument as to how the trial court's rulings . . . constituted an abuse of discretion.'"

As to plaintiffs' claim below that they might not have deposed the best—or most appropriate—witnesses, Judge Brick aptly observed, "If plaintiffs believe they failed to depose the best witnesses, it is Plaintiffs' own doing."[16]

Beyond all that, plaintiffs do not even attempt to demonstrate why Judge Brick's conclusion— that plaintiffs failed to provide "valid reasons" why essential facts "could not have been obtained through more diligent efforts, and presented with their opposition"—was erroneous. Plaintiffs' request was properly turned **[*68]** down.

E. There Was No Error In Judge Brick's Evidentiary Rulings

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[16] In a similar vein, Judge Sabraw had earlier observed that whatever deficiencies plaintiffs asserted in discovery, it was their own fault. As he put it, "Plaintiffs have had an adequate opportunity to prepare their case and develop evidence to oppose the motions for summary judgment," including "the opportunity to depose the persons responsible for setting prices."

Plaintiffs assert that Judge Brick made "several evidentiary rulings finding documents inadmissible." Rather than "burden" us with "all of these exhibits," plaintiffs focus on three exhibits—numbers 1, 111, and 117.

We begin with the observation that there is no agreement on the standard of review that guides us on the issue here. As we recognized in *Nazir v. United Airlines, Inc. (2009) 178 Cal.App.4th 243, 100 Cal. Rptr. 3d 296* (*Nazir*): "Whether abuse of discretion is the proper standard of review when rulings on evidentiary objections are based on papers alone presents an interesting question, one that is by no means settled. *Carnes* itself recognizes a split of authority. (*Carnes v. Superior Court[(2005) 126 Cal.App.4th 688,] 694, 23 Cal. Rptr. 3d 915*.) And a leading commentary states the rule this way: 'Pursuant to the weight of authority, appellate courts review a trial court's rulings on evidentiary objections in summary judgment proceedings for abuse of discretion. [Citations.]' (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 8:168, p. 8-130 (rev. #1, 2008), italics omitted.)." (*Nazir, supra, 178 Cal.App.4th at p. 255, fn. 4*; **[*69]** see also *Reid v. Google, Inc. (2010) 50 Cal.4th 512, 535, 113 Cal. Rptr. 3d 327, 235 P.3d 988* [recognizing issue].) But whichever the standard, we find no error here, certainly not reversible error.

Exhibit 1 was a declaration of plaintiffs' counsel Eric Unrein, which in turn appended as exhibit A the United States Department of Justice's 292-page file on defendants' business review letter request concerning the CPI Pledge, documents that Unrein described as having been "obtained at my direction and request . . . from the United States Department of Justice ('DOJ'), Antitrust Division, related to the business review letter requested on behalf of" PhRMA concerning the "Pledge."

Defendants objected that the documents were "[n]ot relevant to the conspiracy that survived demurrer here" and that they were "inadmissible hearsay not subject to any exception." Judge Brick sustained the objection on relevancy grounds, citing *Evidence Code sections 210* and *350*.

Plaintiffs argue here that the records were "properly authenticated and from the files of the Government and as such was admissible as an official record. . . . Much of it is also admissible as statements of a co-conspirator made in the course and furtherance of the conspiracy." **[*70]** In making this argument, plaintiffs overlook one significant factor: the ground on which Judge Brick sustained defendants' objection was relevancy. The records concerned only the alleged CPI conspiracy, a conspiracy not pleaded in the third amended complaint.

Exhibit 111 was an exhibit to the Alioto declaration consisting of 56 pages of documents produced by GSK on or about October 5, 2006, documents plaintiffs describe in their opening brief as follows: "Much of the document consists of minutes, agenda, and decision memoranda prepared by PhRMA, or the Canadian association Rx&D, and produced from the files of GSK. These documents are: (1) Decision Memorandum For The Board of Directors On Canada Advocacy 7/9/02 [citation]; Memorandum PhRMA 'Preventing Government Price Controls' 11/4/02 [citation]; 'Rx&D Internet Pharmacy Committee Meeting Minutes' 1/10/03 [citation]; 'Notice to Canada KIT Staff Work Group' 1/23/03 [citation]; Memorandum PhRMA 'Progress In Opposition to Illegal Internet Imports of Medicines' 4/5/03 [citation]; Memorandum PhRMA 'Canada Key Issue Team Task Force Meeting' 5/12/03 [citation]' Fax from Hohner to PhRMA Board of Directors 5/15/03 with materials for May, 22 Board **[*71]** of Directors Meeting, [citation]; Notice to Canada KIT with Memorandum and Agenda for July 2 meeting, 6/27/03 [citation]. [¶] . . . [¶]

"The balance of Exhibit 111 comes from the files of defendant GSK and include not only GSK prepared documents, or in one case by its consultant and in two cases its competitors Wyeth and AstraZeneca. The first of these is a Timeline prepared by GSK in its regular course of business documenting its cut off of the supply to internet pharmacies, [citation]. The second is an email by Wyeths [*sic*] CEO to GSK's CEO expressing 'Nice Job," [citation]. The third is an internal GSK Memorandum discussing internet pharmacies and GSK's actions, [citation]. The fourth document is an internal GSK Memorandum enclosing an unpublished AstraZeneca letter re internet supply, 4/10/03 [citation]; The fifth is an internal GSK Memorandum of an Update on Internet Issue 4/15/03 [citation]. The sixth document is a report from a GSK consultant regarding 'Communications Recommendations' 4/1/603 [citation]."

Defendants objected that they were irrelevant. Further, as to documents Bates stamped GSK-CAL-7000101-102 and 7000179-184, defendants also objected that "to the extent that Plaintiffs **[*72]** offer the documents to prove the truth of the matter asserted therein, the documents are inadmissible hearsay not subject to any exception."

Judge Brick sustained the objection.

Lastly, Exhibit 117 to the Alioto declaration was described by him as "copies of newspaper articles produced by Defendant GSK." The exhibit consisted of four articles: "Health & Technology: Glaxo Warns Canadian Clients Against Drug Sales to the U.S.," *Wall Street Journal,* January 13, 2003; "Glaxo Wants Canada Drug Sales to U.S. to Stop," *Reuters News,* January 13, 2003; "GlaxoSmithKline May Stop Sales to Canada," *AP Online,* January 11, 2003; and "Will Other Companies Follow GlaxoSmithKline's Lead?", *MedAdNews,* May 2003. Defendants objected on hearsay and relevancy grounds, and on lack of foundation as to the fourth article which lacked a Bates stamp number and was not, according to defendants, produced by GSK. Judge Brick sustained the hearsay, lack of foundation, and relevancy objections.

Plaintiffs argue that this "collection of newspaper articles from the files of GSK [is] admissible to show the date of the GSK announcement of restrictions on Internet Pharmacies. These documents are admissible under *Evid. Code, § 645.1* **[*73]** [presumed to be that newspaper regularly issued]. They are also admissible under general evidence law." In claimed support of their position, plaintiffs rely on *Lawlor v. Loewe (2d Cir. 1913) 209 Fed. 721, 726*, citing the following passage: "But in order to show that the dispute between Loewe and the union excited general interest in the community, newspaper articles published in these towns were introduced in evidence, not as proof of the circumstances therein narrated but to show the improbability of the defendants being ignorant of matters which were constantly being made public and were of vital significance to them. . . . It cannot be denied that all this evidence was competent as to those who actually received it or had knowledge of it."

Plaintiffs have not demonstrated that any of the three challenged rulings was error. But even if they had, they would still not prevail, as reversal is warranted only if plaintiffs can show that a more favorable result was reasonably probable if the evidence had been admitted. (See *Evid. Code, § 354*; *Soule v. General Motors Corp. (1994) 8 Cal.4th 548, 574, 34 Cal. Rptr. 2d 607, 882 P.2d 298*.) This, they have failed to do.

F. Judge Sabraw Properly Sustained Defendants' Demurrer to [*74] the Fourth Cause of Action Without Leave to Amend

Plaintiffs argue that Judge Sabraw erred in sustaining the demurrer to the fourth cause of action, one of their unfair business practices claims. The argument is all of 11 lines, and asserts that the ruling was error because "plaintiffs should have been allowed to amend, but even so, the law in this District was that UCL claims involve a balancing of the benefits and harm of the business practice. *Quacchia v. DaimlerChrysler Corp.*[*, supra,*] *122 Cal.App.[4th] 1442, 1453, 19 Cal. Rptr. 3d 508*. Under this test, the complaint stated a UCL claim."

The background for this argument begins with Judge Sabraw's order of April 18, 2005, which again sustained demurrers, this time to plaintiffs' second amended complaint with leave to amend. On May 6, plaintiffs filed their third amended complaint. Again defendants demurred. On July 1 Judge Sabraw filed his "Order (1) Overruling in Part and Sustaining Without Leave to Amend in Part the Demurrer of Defendants to the Third Amended Complaint . . . ." As pertinent here, the order said: "The Third Amended Complaint alleges that Defendants have conspired to inflate the prices of prescription drugs sold to plaintiffs. [Citation.] **[*75]** The Third Amended Complaint alleges the dates [citation], terms [citations], means [citation], and effects [citations] of the alleged conspiracy. The Third Amended Complaint alleges overt acts in furtherance of the conspiracy, including the charging of higher prices in California and (otherwise legal) efforts to restrict the importation of drugs into the United States. The Court finds that the Third Amended Complaint alleges sufficient parallel conduct by the Defendants to raise an inference of collusion and permit the claim to proceed under the heightened standards for pleading a claim under the Cartwright Act."

Turning to the UCL claim, Judge Sabraw noted that the Supreme Court had not enunciated a legal test for unfairness in consumer cases and that the Courts of Appeal have gone in three directions. He then held that unfair "claims must be tethered to specific constitutional, statutory, or regulatory provisions" and denied plaintiffs' request to amend to "state a UCL claim alleging unilateral price discrimination that borrows from or is tethered to the Robinson-Patman Act, *15 U.S.C. § 13* or some other statute." Doing so, Judge Sabraw said that "The Court would normally grant Plaintiffs **[*76]** leave to amend to state a claim against a defendant that is related to a pending claim against that defendant. This is not, however, a normal case—this is a complex case alleging antitrust claims against all the major companies in a large industry."

To begin with, it is not correct to say that the third amended complaint did not state a UCL claim. The fifth cause of action alleged a violation of the "unlawful" prong of the UCL, based on defendants' actions "collectively" and was predicated on alleged price fixing—as was a portion of plaintiffs' claim under the unfair prong.

Beyond that, the third amended complaint attempted to inject a new cause of action never attempted before—a claim of price discrimination by each defendant "individually" under the "unfair" prong of the UCL. This is the claim Judge Sabraw rejected. Doing so, he rejected the definition of unfairness in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 186-187, 83 Cal. Rptr. 2d 548, 973 P.2d 527*, and concluded that "Plaintiffs have not identified any fundamental policy in any constitutional, statutory, or regulatory provision that precludes Defendants from seeking the highest price for their products."

As we understand **[*77]** plaintiffs' claim here, they had properly alleged unfairness under the "balancing of the benefits and harms" test, which they claim is the test in this district. Tellingly, plaintiffs did not cite *Quacchia v. DaimlerChrysler Corp., supra, 122 Cal.App.4th 1442*, below, or make any argument about what is the test in "this district." Despite that, Judge Sabraw independently rejected the balancing test in favor of predictability and consistency with *Cel-Tech* in UCL litigation, noting that courts are "ill suited to regulate prices in a functioning marketplace."

Moreover, the third amended complaint made no mention of the Robinson-Patman Act, *15 United States Code section 13*. However, in the order Judge Sabraw stated that plaintiffs would not be granted leave to amend their unilateral UCL claim to borrow from the Robinson-Patman Act, "find[ing] that a claim that any one defendant engaged in price discrimination is qualitatively different from the central claim that all of the Defendants have conspired to fix prices." That said, Judge Sabraw made it clear that rejection of the unilateral price discrimination claim was without prejudice: "If Plaintiffs seek to pursue collateral claims against **[*78]** any of the Defendants they may do so in separate actions." Plaintiffs chose not to do that. Plaintiffs demonstrate no error, let alone prejudicial error.

With that, we turn to the substantive issue before us—whether Judge Brick properly granted summary judgment for defendants.

G. Judge Brick Properly Granted Summary Judgment For Defendants

1. The Cartwright Act and the General Principles

Enacted in 1907, the Cartwright Act "'generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices.'" (*Pacific Gas & Electric Co. v. County of Stanislaus (1997) 16 Cal.4th 1143, 1147, 69 Cal. Rptr. 2d 329, 947 P.2d 291*; *Bus. & Prof. Code, § 16720, subds. (a)*, *(b)* [prohibiting "combination[s] of capital, skill, or acts by two or more persons" which restrict trade, or limit or reduce the production or increase the price of any commodity].) A conspiracy to fix prices under the act consists of: (1) the formation and operation of the conspiracy, (2) wrongful act or acts done pursuant to it, and (3) damage resulting from such act or acts. (*Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 316-317, 70 Cal. Rptr. 849, 444 P.2d 481* (*Chicago Title*).) Concerted activity is essential to a Cartwright **[*79]** Act claim because the act prohibits "only *contracts, combinations or conspiracies* in restraint of trade." (*Biljac Associates v. First Interstate Bank (1990) 218 Cal.App.3d 1410, 1423, 267 Cal. Rptr. 819*, disapproved on other grounds in *Reid v. Google, Inc., supra, 50 Cal.4th 512, 532, fn. 8*.)

California courts demand a "'high degree of particularity in the pleading of Cartwright Act violations.'" (*G.H.I.I. v. MTS, Inc. (1983) 147 Cal.App.3d 256, 265, 195 Cal. Rptr. 211*.) To state a claim under the Act, it is insufficient to generally allege the elements set forth in the statute. Rather, a plaintiff must allege facts which indicate the existence of a prohibited contract, combination, or conspiracy. (*Chicago Title, supra, 69 Cal.2d at p. 318* ["General allegations of the existence and purpose of the conspiracy are insufficient and appellants must allege specific overt acts in furtherance thereof."]; *Freeman v. San Diego Assn. of Realtors (1999) 77 Cal.App.4th 171, 196, 91 Cal. Rptr. 2d 534* ["An antitrust claim must plead the formation and operation of the conspiracy and the illegal acts done in furtherance of the conspiracy."]; *Cellular Plus, Inc. v. Superior Court (1993) 14 Cal.App.4th 1224, 1236, 18 Cal. Rptr. 2d 308* ["[I]n order to sufficiently state a cause of action, **[*80]** the plaintiff must allege in its complaint certain facts in addition to the elements of the alleged unlawful act so that the defendant can understand the nature of the alleged wrong and discovery is not merely a blind 'fishing expedition' for some unknown wrongful acts."].)

Direct evidence of the conspiratorial agreement is rarely available. (See *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 857, 107 Cal. Rptr. 2d 841, 24 P.3d 493* (*Aguilar*) [plaintiff "must often rely on inference rather than evidence since, usually, unlawful conspiracy is conceived in secrecy and lives its life in the shadows"].) Rather, the conspiracy is usually shown by circumstantial evidence which, in an antitrust case, often takes the form of "conscious parallelism." (*In re Travel Agent Com'n Antitrust Litigation (2009) 583 F.3d 896, 903*.)[17] As described in *Eddins v. Redstone (2005) 134 Cal.App.4th 290, 304-305, 35 Cal. Rptr. 3d 863* (*Eddins*): "Conscious parallelism is a pattern of uniform business conduct, not in itself unlawful. [Citation.] To establish consciously parallel behavior, [plaintiff] 'must show (1) that the defendants' business behavior was parallel, and (2) that the defendants were conscious of each other's conduct and that their awareness was **[*81]** an element in their decisional process.'" (Fn. omitted.)

But, as the *Eddins* court went on to explain, evidence of conscious parallelism alone is not enough. Rather, plaintiff must also establish that ""each defendant engaging in the parallel action acted contrary to its economic self-interest," [citation] or offer[] other "plus factors" tending to establish that the defendants were not engaging merely in oligopolistic price maintenance or price leadership but rather in a collusive agreement to fix prices or otherwise restrain trade.'" (*Eddins, supra, 134 Cal.App.4th at p. 305*; see also *Bell Atlantic Corp. v. Twombly (2007) 550 U.S. 544, 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929* ["The inadequacy of showing parallel conduct . . . without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."]; *In re Flat Glass Antitrust Litigation (3rd Cir. 2004) 385 F.3d 350, 360* **[*82]** ["plaintiffs basing a claim of collusion on inferences from consciously parallel behavior [must] show that certain 'plus factors' also exist."]; *Harlem River Cons. Co-op., Inc. v. Associated Groc. (S.D.N.Y. 1976) 408 F.Supp. 1251, 1277*.) "Existence of these plus factors tends to ensure that courts punish 'concerted action'—an actual agreement—instead of the 'unilateral, independent conduct of competitors.' [Citation.] In other words, the factors serve as proxies for direct evidence of an agreement." (*In re Flat Glass Antitrust Litigation, supra, 385 F.3d at p. 360*.)

2. Summary Judgment and the Standard of Review

Code of Civil Procedure section 437c provides that summary judgment is properly granted "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Code Civ. Proc., § 437c, subd. (c)*.) As we confirmed in *Nazir, supra, 178 Cal.App.4th at p. 253*: "[M]oving defendants can meet their burden by demonstrating that 'a cause of action has no merit,' which they can do by showing that '[o]ne or more elements of the cause of action cannot be separately established . . . .' (*§ 437c, subd.* **[*83]** (*o*)(1); see also *Romano v. Rockwell Internat., Inc. (1996) 14 Cal.4th 479, 486-487, 59 Cal. Rptr. 2d 20, 926 P.2d 1114*.) Once defendants meet this burden, the burden shifts to plaintiff to show the existence of a triable issue of material fact. (*§ 437c, subd. (p)(2)*.)" A plaintiff satisfies his or her burden and creates "a triable issue of material fact if, and only if, the [admissible and properly referenced] evidence would

[17] The Cartwright Act is patterned after the federal Sherman Antitrust Act (*15 U.S.C. § 1 et seq.*), and decisions under the latter are applicable to the former. (*Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 852, 94 Cal. Rptr. 785, 484 P.2d 953*.)

allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra, 25 Cal.4th at p. 850*, fn. omitted.)

Beyond the general rules in *section 437c*, we are further guided by the opinion in *Aguilar,* where the Supreme Court analyzed at length the parties' respective burdens in an antitrust case. As Justice Mosk described, once a defendant sustains its initial burden of production, a plaintiff "who would bear the burden of proof by a preponderance of evidence at trial, must present evidence that would allow a reasonable trier of fact to find in his favor on the unlawful-conspiracy issue by a preponderance of the evidence, that is, to find an unlawful conspiracy more likely than not." (*Aguilar, supra, 25 Cal.4th at p. 852*.) **[*84]** And he went on: "Ambiguous evidence or inferences showing or implying conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy by colluding ones do not allow such a trier of fact so to find. ***Antitrust law***, including the Cartwright Act, compels the result. Otherwise, it might effectively chill procompetitive conduct in the world at large, the very thing that it is designed to protect [citation] by subjecting it to undue costs in the judicial sphere. Therefore, in addition, the plaintiff must present evidence that tends to exclude, although it need not actually exclude, the possibility that the alleged conspirators acted independently rather than collusively. "[18] (*Ibid.*) "[I]f the court determines that any evidence or inference presented or drawn by the plaintiff indeed shows or implies unlawful conspiracy *more likely than* permissible competition, it must then deny the defendants' motion for summary judgment, even in the face of contradictory evidence or inference presented or drawn by the defendants, because a reasonable trier of fact could find for the plaintiff. . . . [¶] But if the court determines that all of the evidence presented **[*85]** by the plaintiff, and all of the inferences drawn therefrom, show and imply unlawful conspiracy *only as likely as* permissible competition *or even less likely,* it must then grant the defendants' motion for summary judgment . . . ." (*Id. at pp. 856-857*.)

Ultimately, *Aguilar* made clear that "while normal summary judgment principles apply in antitrust cases, 'an important distinction exists.' [Citation.] The distinction is that 'certain "inferences may not be drawn from circumstantial evidence in an antitrust case."'" (*Eddins, supra, 134 Cal.App.4th at p. 328*; see also *Matsushita Elec. Industrial Co. v. Zenith Radio, supra, 475 U.S. at p. 588* **[*86]** ["conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy"]; *Aguilar, supra, 25 Cal.4th at p. 852*.) As a result, it has been said that when opposing a motion for summary judgment in the context of an antitrust claim alleging unlawful collusion, plaintiffs face a "demanding standard of proof." (*In re Baby Food Antitrust (3rd Cir. 1999) 166 F.3d 112, 118*.)

On appeal, we review a grant of summary judgment de novo: "'[W]e must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citations.]' (*Intel Corp. v. Hamidi (2003) 30 Cal.4th 1342, 1348, 1 Cal. Rptr. 3d 32, 71 P.3d 296*.) Put another way, we exercise our independent judgment, and decide whether undisputed facts have been established that negate plaintiff's claims." (*Nazir, supra, 178 Cal.App.4th at p. 253*.)

With these guidelines in mind, we turn to the evidence presented below.

3. Defendants Produced Evidence Demonstrating That They Independently Set the Prices of Their Pharmaceuticals

As noted, as the moving parties defendants bore the initial burden of making a prima facie showing of the nonexistence **[*87]** of any triable issue of material fact. (*Aguilar, supra, 25 Cal.4th at p. 850*; *Code Civ. Proc., §*

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[18] The *Aguilar* opinion brought California in line with *Matsushita Elec. Industrial Co. v. Zenith Radio Corp. (1986) 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538*, in which the United States Supreme Court set forth how courts should analyze summary judgment motions involving claims under the Sherman Act, as well as companion cases *Anderson v. Liberty Lobby, Inc. (1986) 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202* and *Celotex Corp. v. Catrett (1986) 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265*. (*Aguilar, supra, 25 Cal.4th at p. 848*.) Doing so, *Aguilar* liberalized the granting of summary judgment in California. (*Ibid.; Nazir, supra, 178 Cal.App.4th at pp. 248, 285*.)

437c, subd. (*o*).) Here, a case alleging horizontal price fixing, this means making "a prima facie showing of the absence of any conspiracy." (*Aguilar, supra, 25 Cal.4th at p. 861*.) Defendants carried this initial burden.

Each defendant submitted sworn testimony from its CEO that it did not participate in a conspiracy to set the prices of its pharmaceuticals above the price for the same drugs in Canada. Such testimony was in a declaration, a deposition, or both. (See *Eddins, supra, 134 Cal.App.4th at p. 303, fn. 8* ["Each executive asserted his or her studio acted independently and at no time conferred or agreed with any other studio about the terms of its deal, and did not agree with Blockbuster or each other to deny comparable terms to the wholesale distributors."].)

In addition, defendants submitted evidence by high-ranking employees with personal knowledge of defendants' price-setting practices. This evidence described the process by which each defendant set, and periodically reevaluated, the wholesale acquisition cost for their pharmaceuticals. Judge Brick summarized the process as described **[*88]** in the evidence this way: "Defendants . . . employed generally similar processes for setting prices. Pricing recommendations (including prices for Identified Drugs) were delegated to specific teams, after the consideration of a variety of factors relevant to market participants' willingness to pay (in a competitive market) for the drug. Some defendants also considered other factors: internal (availability of support resources) and external (public policy and/or public relations issues, inflation, etc.). Most engaged in pricing studies and/or testing their tentative price proposals under different market scenarios. Generally, after completing its analysis, the pricing team's recommendations were presented to a senior committee or executive management charged with review and approval."

It is probably sufficient to leave it at that—a succinct summary of defendants' testimony concerning their price-setting practices—and conclude that it was sufficient to carry their initial burden. (See *Aguilar, supra, 25 Cal.4th at p. 861* ["Through the declarations by their officers and managers and similar employees—and through material from others including third parties—they presented evidence that **[*89]** would require a reasonable jury *not* to find any conspiracy more likely than not."].) Put otherwise, it is not necessary to detail the evidence offered by each and every defendant concerning their price-setting practices.

Nevertheless, we offer the testimony presented on behalf of one randomly-selected defendant—Allergan—as illustrative of the detail defendants provided concerning their independent procedures for arriving at the wholesale acquisition cost for their pharmaceuticals. This detail was shown by the declaration of Julian Gangolli, Allergan's corporate vice president and president, North America, who testified as follows:

"12. Allergan's Product Divisions set the United States prices for their products in a 'bottom-up' manner. Each Product Division has researchers and other employees that collect, organize and review the necessary information to make pricing decisions for the Division's newly launched and existing products. It is an interactive process between the staff and the Marketing VP's and the Marketing VP's take an active role.

"13. The Division staff consider a variety of factors in developing and setting prices for its products in the United States, including: whether **[*90]** the product is a newly launched product or an existing product; whether the product is under the protection of a patent; Allergan's position in the therapeutic market for the given product; the uniqueness of the product in its therapeutic market; the value that patients, physicians and third party payors place on the product; the product's benefit to patients that receive it; the average cost per therapeutic dose; the presence and prices of competitors' products in the therapeutic market and the presence of other existing Allergan products in the relevant therapeutic market; the size of the potential patient pool; the business objectives of the Company and Division; the return on investment for the Division and the Company; and the costs of research, development, production and marketing.

"14. Ultimately, in setting its prices Allergan must focus on those individuals and groups with the power to influence drug purchasing decisions, such as physicians, patients and third party payors. Because competition is so intense, Allergan attempts to distinguish its products from its competitors' products and provide supportive clinical and pharmoeconomic information to physicians, patients and **[*91]** third party payors that Allergan's products address their health needs safely, effectively and better than the competition. In this effort, the Product Division Staff tracks how Allergan's products are perceived by physicians, patients and payors in comparison to its competitors. Allergan does not price its products with groups such as retail pharmacists in mind because these groups do not determine which pharmaceutical products are purchased or prescribed.

"15. The Product Division Staff constantly reviews and refines its pricing process and decisions. Allergan usually adjusts its product prices in the United States one to two times a year, to account for both inflation and the demands of the marketplace.

"16. To monitor the competitive conditions in the United States, the Product Division Staffs consult public sources of information regarding their competitors' actions. Allergan does not, however, receive or solicit information from any pharmaceutical manufacturer about the prices of those companies' pharmaceutical products. Similarly, Allergan does not provide information to any pharmaceutical manufacturer regarding its pricing decisions.

"17. The Product Division Staff provides its **[*92]** United States pricing recommendations and supporting information to the Division's Marketing VP for review. The Marketing VP then provides his pricing recommendations to the President North America who in turn forwards them to the President and ultimately the CEO for approval.

"18. The President will either approve or reject the price recommendations of the Division's Marketing VP and President North America. Once approved, the President then notifies the CEO of the price recommendations. The CEO may ask questions of the Division Marketing VP's, President North American and President to clarify certain issues, but I cannot recall an instance where the CEO has overridden a pricing decision made by them.

"19. The aforementioned discussion describes Allergan's price-setting practices for its products in the United States. The Product Division Staffs and the respective Marketing VP's set the United States product prices independently of pricing decisions for Allergan's products in other countries. They do *not* consider the prices of Allergan's products in other countries, including Canada. In Canada, the prices of Allergan's products are largely dictated by government controls.

"20. Allergan **[*93]** also considers the placement of its products on the 'formularies' of Third Party Payors, such as health-care insurers or managed-care organizations. Third Party Payors create formularies to designate the drugs that are within their healthcare plans. They may also establish tiers within the formulary that set different levels of reimbursement for the drugs in their plans. A patient enrolled in a Third Party Payor plan may select a drug that is not on its formulary, but he will pay more for it than he would for a drug on formulary. Simply, a patient will pay more for a drug that is not on a preferred tier of a formulary.

"21. Because Third Party Payors control access to large pools of potential patients, they demand rebates from Allergan and other pharmaceutical manufacturers in return for placing the manufacturer's products on their formularies. Allergan seeks to negotiate with Third Party Payors so that its products are placed on the most favorable formulary tiers.

"22. Formulary placement is very important to Allergan and has tremendous impact on the amount of Allergan's products that are sold. If a Third Party Payor refuses to place Allergan's products on its formulary or declines **[*94]** to place them in a preferred tier, Allergan could lose substantial numbers of sales because physicians and patients will seek products that are on the formulary and its preferred tiers. As such, Allergan aggressively competes with other manufacturers to ensure that its products are on the formularies of Third Party Payors. The effect of this competition is that Allergan's rebates to Third Party Payors and government agencies ultimately reduce the net price of its products."

Similar declarations were submitted on behalf of other defendants: Patrick Bruen, marketing advisor, U.S. strategic pricing, for Eli Lilly and Company; J. Martin Carroll, president and chief operating officer, and Christine Marsh, executive director of contracts, both of Boehringer; Joaquin Duato, president of Ortho Biotech, Inc.; Pete Feldman, senior director, Strategic Planning and Operation, oncology business unit of Amgen; David Moules, vice president of strategic pricing, contracting and marketing of Smith Kline Beecham Corp. dba. GlaxoSmithKline; Kendall O'Brien, president, chief financial officer and vice president of finance of Ortho-McNeil Pharmaceutical; Kevin O'Leary, vice president of customer planning **[*95]** and contracting of Roche Laboratories Inc. (a wholly-owned subsidiary of Hoffman-La Roche Inc.); Robert Spurr, vice president of the strategic business group of Ortho-McNeil

Janssen Pharmaceutical Services; Raymond Tiedemann, vice president, global pricing, forecasting and contracting at Wyeth Pharmaceuticals, Inc.; Janet Vergis, president of Janssen Pharmaceutical, Inc.; and John R. Freeberry, former head of the pricing strategy group of AstraZeneca Pharmaceuticals LP.[19]

4. Plaintiffs' Burden [*96] of Proof

A. Direct Evidence of a Conspiracy

i. The CPI Theory

With the burden shifted to them, plaintiffs were obligated to present evidence that would permit a reasonable trier of fact to find the existence of a conspiracy more likely than not. This, Judge Brick held, plaintiffs failed to do. Plaintiffs challenge this holding on appeal, relying, as they did below, on what they claim is direct evidence. But not direct evidence of the pleaded Canadian floor theory, but direct evidence that defendants conspired to peg increases in their pharmaceutical prices to the CPI.[20] Plaintiffs' challenge fails, both procedurally and substantively.

As plaintiffs describe it in their opening brief, the price of prescription drugs rose precipitously in the 1980's, such that by the early 1990's there was significant public and political criticism of the increasing drug prices. In order to stave off potential price regulation by the government, PhRMA's board of directors passed a resolution—what plaintiffs called a "Pledge"—described by them as follows. The Pledge directed PhRMA's then-chief to "discuss with President-Elect Clinton, his transition staff, members of his Administration and members of Congress whether these Government officials would have an interest in exploring whether individual pharmaceutical manufacturers should undertake voluntarily and independently to hold for a reasonable period of time—given stable market conditions and government policies supportive of innovation—the increase in the weighted average of changes in the net prices of that company's prescription drug products to an approximate level not greater than **[*98]** one or more externally controlled indices such as the Consumer Price Index, and whether such actions should be confirmed to the Government by a series of reports to document actual results of these undertakings."[21] This resulted in John Ferguson, then counsel for PhRMA, sending a request for a business review letter to the United States Department of Justice, seeking an antitrust exemption permitting pharmaceutical companies to agree to use the annual increase in the CPI as a ceiling on pharmaceutical price increases.[22]

According to plaintiffs, their evidence showed that defendants then adopted this pricing policy which, again according to plaintiffs, constituted a per se violation of California's ***antitrust law***. But whether plaintiffs' evidence

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[19] Plaintiffs argued below that defendants failed to meet their initial burden because their evidence consisted merely of "bald denials" that they engaged in collusive behavior. This, they argued, was insufficient under *Aguilar.* As is seen from the foregoing, plaintiffs' description was myopic. The evidence did more than baldly assert that defendants set their prices independently—it established that prices were independently determined, based upon defendants' individual market analyses which generally utilized public information. In any event, plaintiffs do not reiterate this argument on appeal, which we construe as a concession that defendants' evidence satisfied their initial burden of production.

[20] Plaintiffs variously describe this conspiracy in their opening brief: "to voluntarily restrain their price increases"; "to not increase their prices in excess of the CPI"; "to hold . . . the increase in the weighted average of changes in the net prices . . . to an approximate level not greater than . . . the Consumer Price Index"; "to limit [a company's] price increases, if any, on the entire line of its prescription drug products in any calendar year to an amount not to exceed the increase in the CPI"; "to peg future price increases to the CPI"; to keep **[*97]** "prices in line with the CPI or CPI plus 1 to two-and-a-half percent." And it appears that at some point, plaintiffs' theory morphed into a conspiracy to use the CPI as a floor, rather than a ceiling.

[21] As discussed above, Judge Brick properly sustained defendants' objections to all documents pertaining to the "Pledge." We discuss these documents to provide context for plaintiffs' opposition, not because they have any evidentiary value.

[22] The request was ultimately denied.

concerning the "Pledge" in fact showed what they claimed, it is irrelevant. As Judge Brick properly concluded, such evidence could not defeat summary judgment because plaintiffs **[*99]** never pleaded any conspiracy related to the CPI. The only conspiracy pleaded in the third amended complaint—and the sole focus of discovery—was the Canadian floor conspiracy.

The scope of a motion for summary judgment is determined by the pleadings. (*Rosales v. Battle (2003) 113 Cal.App.4th 1178, 1182, 7 Cal. Rptr. 3d 13)*, a principle plaintiffs conceded in their opposition to the joint motion: "each of Plaintiffs' Cartwright Act claims, as stated in the Third Amended Complaint, controls the present motion." In light of the specificity-in-pleading requirements in an antitrust case (*Freeman v. San Diego Assn. of Realtors (1999) 77 Cal.App.4th 171, 196, 91 Cal. Rptr. 2d 534*; *Chicago Title, supra, 69 Cal. 2d at pp. 317, 326-328)*, Judge Sabraw twice required plaintiffs to amend their complaint to allege their conspiracy claims in greater detail. The result was the third amended complaint, a complaint that can only be read to allege the Canadian floor conspiracy. It cannot be fairly read to incorporate a conspiracy among defendants to tie price increases to the CPI.

Our conclusion finds support throughout the third amended complaint, where plaintiffs made repeated reference to the Canadian floor conspiracy. As quoted above, paragraph **[*100]** five summarized the alleged conspiratorial agreement, as follows:

"5. The Defendants, pursuant to their unlawful combination and agreement, charge more for their drugs sold in the United States, including California, than they charge for the same drugs sold outside of the United States, including Canada. The Defendants agreed to eliminate price competition and fix prices in the United States, including California, by, *inter alia:*

"(a) Using the prices charged in Canada as a floor or minimum price level;

"(b) Acting in concert to restrict reimportation and/or purchase of lower priced foreign drugs;

"(c) Restricting price competition from generics and brand name variations of existing drugs;

"(d) Selling drugs for fixed prices above the prices in Canada (so that the prices charged in the United States, including California, would be higher than the prices for the same drugs sold outside of the United States, including Canada);

"(e) Agreeing that they would not sell their drugs at or below the price at which they sold those same drugs in Canada, and/or other countries outside of the United States; and

"(f) Agreeing and ensuring each other that they would maintain their agreement to charge more **[*101]** in the United States, including California, than they charged outside of the United States, particularly Canada."

And then there was paragraph 6: "The Defendants sell their drugs in the United States, including California, for prices that are 50% to 400% higher than the price those same drugs are sold for in Canada and countries outside of the United States, such as Mexico, Ireland, and the United Kingdom. . . ." And paragraph 8: "The character and nature of the agreement among and between the Defendants are that the Defendants agreed not to charge at or below the prices charged for the same drugs in Canada and elsewhere . . .; that the prices charged in the United States, including California, will be higher than those charged outside of the United States, such as Canada; that the Defendant would continue to abide by the agreement to charge higher prices in the United States, including California, than they charge for the same drugs in Canada and elsewhere . . . ." Many other such examples are peppered throughout the third amended complaint, including in the causes of action and prayer for relief. In short, "Canada" or "Canadian" are mentioned at least 38 times, "Consumer Price Index" **[*102]** or "CPI" not once.[23]

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[23] In their reply brief, plaintiffs attempt to justify this omission: "Plaintiffs do not contend that the 'pledge injured them, as indeed it is hard to see how a maximum price agreement hurt the pharmacists. This in itself explains why the 'pledge' or 'CPI' was not mentioned in the [third amended complaint] . . . ."

Plaintiffs attempt to circumvent this failure by arguing that the third amended complaint alleged one, generic conspiracy—"Defendants agreed to eliminate price competition and fix prices in the United States"—that was broad enough to encompass the CPI theory, as well as the Canadian floor conspiracy. This is what they argue: the third amended complaint "alleges one conspiracy, not several separate conspiracies. Paragraph 5 of the [third amended complaint] alleges: 'The Defendants agreed to eliminate price competition and fix prices in the United States, including California, by, *inter alia:*' [Citation] [¶] The [third amended complaint] goes on to allege a series of overt acts engaged in by the defendants. The so-called 'Canadian Floor Conspiracy,' so named by the defendants and picked up by the lower court to limit plaintiffs' discovery, is contained in **[*103]** only one of the subparagraphs, out of 6 sub-paragraphs, following the '*inter alia.*' The other 5 sub-paragraphs allege acts to limit re-importation, acting to limit price competition from generics and brand name variations, selling drugs at fixed prices higher in the United States than in other countries, not selling drugs in the United States at or lower than the prices charged in other countries, agreeing and ensuring each other that they would maintain their agreement to charge more in the United States." This argument is without merit.

As noted, a claimed antitrust violation must be pleaded with specificity. The conspiracy plaintiffs now claim to assert—that defendants generally conspired to fix pharmaceutical prices—would not have satisfied these specificity-in-pleading requirements. Nor do the pleading requirements permit plaintiffs to rely on the vagaries of "*inter alia*" to bring a new, unpleaded conspiracy into the case. Indeed, this is precisely why Judge Sabraw twice required plaintiffs to amend their complaint.

Our reading of the third amended complaint is confirmed by Judge Sabraw's orders on defendants' demurrers. Each time he sustained the demurrers, he required plaintiffs **[*104]** to provide further facts concerning the precise price-fixing conspiracy at issue. Each time plaintiffs responded by providing greater details about the Canadian floor conspiracy. The following sequence makes the point:

In his April 18, 2005 order sustaining the demurrer to the second amended complaint, Judge Sabraw said that "The Court finds that Plaintiffs' theories are not defined adequately in the [Second] Amended Complaint. The [Second] Amended Complaint alleges generally that Defendants have conspired to inflate the prices of prescription drugs sold in California, but does not allege the substance of the unlawful agreement or how it is implemented.

"At the hearing, Plaintiffs stated that their claim is that all of the Defendants have agreed not to sell any prescription drugs in California for prices that are lower than the price they charge in Canada. The claim is apparently in the nature of horizontal price fixing because the Defendants all allegedly agreed to restrict competition in California by letting the prices charged in Canada operate as a floor or minimum price level. Such a claim would be clear. In addition, this is a recognized antitrust claim. [Citation.] Plaintiffs **[*105]** may file a [Third] Amended Complaint that articulates this (or any other) claim clearly.

"Plaintiffs must support their claims with factual allegations. The factual allegations must be related to the claims. At the hearing the Plaintiffs articulated the terms of an alleged industry-wide agreement, but they must also allege overt acts in furtherance of that industry-wide agreement, the means used to effectuate the industry-wide agreement, and the effects of the conspiracy.

"The [Third] Amended Complaint must allege facts relating to the price fixing conspiracy. Plaintiffs cannot simply allege the existence of an industry-wide conspiracy without reference to specific facts. Allegations might include that the prices of prescription drugs are uniformly higher in California than Canada, prices of specific drugs in the United States rise and fall depending on the prices approved by regulatory authorities in Canada, profit margins are higher in the United States than in Canada, the alleged cartel has 'punished' members of the cartel that have lowered their California prices below the Canada prices, and other matters."[24]

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[24] In a case management order ten days later, Judge Sabraw reiterated that **[*106]** in their third amended complaint "Plaintiffs are encouraged to clarify whether their claim is that Defendants agreed not to sell drugs in California for below the Canada price (but permit independent competition above that floor) or to sell drugs for fixed prices above the Canada price (so the price in

Likewise, Judge Sabraw's July 1, 2005 order sustaining defendants' demurrer to plaintiffs' fourth cause of action described the case as "a complex case alleging antitrust claims against all the major companies in a large industry," and concluded that it was "appropriate to focus the claims in this case on the central allegation that all Defendants have unlawfully conspired or colluded to sell their drugs in California for prices that are higher than the prices charged in Canada."

Beyond the language of the third amended complaint, we find support for our conclusion elsewhere in the record. For example, in his April 18, 2005 case management order, Judge Sabraw stated, "This lawsuit appears to allege that the Defendants **[*107]** have conspired not to sell prescription drugs in California for prices that are below or equal to the prices in Canada. The trial will be focused on the claims asserted and the discovery should be focused on obtaining evidence to prove or disprove those claims. This is not a general administrative investigation into the business practices of the pharmaceutical industry."

Additionally, the Identified Drugs that were the focal point of discovery were selected in part because they were sold in both the United States and Canada. In his April 28, 2005 order recommending limitations for discovery, Judge Sabraw suggested that the "average disparity from Canada price" would be a factor in selecting the Identified Drugs. And in his July 11, 2005 order listing the Identified Drugs, he represented that they were selected in part based on defendants' representations that their lists identified drugs that were marketed in the United States and Canada.

In a June 2006 order concerning plaintiffs' claims that defendants improperly redacted documents relating to PhRMA, Judge Sabraw ordered plaintiffs to identify the 3,000 documents they claimed were wrongly redacted and PhRMA to then produce unredacted **[*108]** copies of the documents for in camera review. Then, after reviewing the documents, Judge Sabraw observed, "PhRMA has taken a narrow view of what constitutes relevant information. For example, PhRMA has not produced information concerning the importation of drugs from Canada. Although this information might not be directly relevant to the existence of a conspiracy to use the Canadian price as a floor for drugs in California, it is relevant for purposes of discovery. The Court could identify, and has identified, information that is related to collaboration among the Manufacturer Defendants, to the prices of drugs in Canada, to the antitrust concerns of PhRMA, and to other matters that are relevant as the Court has defined the scope of relevance in prior orders."

In these and many other instances, Judge Sabraw conveyed his understanding that the case was about the Canadian floor conspiracy. Not once did plaintiffs attempt to correct this understanding. Not once did they suggest that any CPI conspiracy was in play. And not once did they attempt to file an amended complaint seeking to allege the CPI conspiracy.

Defendants evidenced a similar understanding. In their moving papers in support **[*109]** of the joint motion, they summarized plaintiffs' allegations as follows: "Plaintiffs claim that Manufacturer Defendants' CEOs orchestrated a price-fixing conspiracy pursuant to which each Defendant agreed to price its drugs in the United States higher than the prices charged for similar drugs in Canada. As the Court ruled in its Order on Defendants' Demurrer to Plaintiffs' Third Amended Complaint: '[I]t is appropriate to focus the claims in this case on the central allegation that all Defendants have unlawfully conspired or colluded to sell their drugs in California for prices that are higher than the prices charged in Canada.' "

JJHCS's moving papers were similar, providing this detailed summary in its statement of facts: "This Court has repeatedly stated that 'the claims in this case concern an alleged multilateral conspiracy among the defendants to not sell drugs in California below the Canada price. Order of Aug. 28, 2006 . . .; see also Order of Apr. 18, 2005 . . . ('At the hearing, Plaintiffs stated that their claim is that all of the Defendants have agreed not to sell any prescription drugs in California for prices that are lower than the price they charge in Canada.'); Hr'g **[*110]** Tr. . . . dated June 30, 2005 . . . ('And indeed when you look at the contentions here [in the Third Amended Complaint], it's just simply that there's this floor, for lack of a better description, that is alleged to be agreed to by the manufacturers, the

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California would fluctuate in tandem with the Canada price) or to sell drugs for fixed prices (that happen to be above the Canada price) or some combination of these theories."

defendants in this instance.'); Order of July 1, 2005 . . . (stating that the focus of this case is on 'the central allegation that all Defendants have unlawfully conspired or colluded to sell their drugs in California for prices that are higher than the prices charged in Canada').

"Plaintiffs have also consistently represented that their claim centers on an alleged agreement among Defendants to maintain prices in California that are higher than those charged for the same pharmaceutical products in Canada. In describing their claim at the hearing on Defendants' demurrer to the Second Amended Complaint, Plaintiffs stated: [¶] 'What we've charged here is—and it's very rudimentary and elementary and the defendants have acknowledged it—that each of these defendants that we have named have conspired to charge higher prices in the United States than they do in other countries, including Canada. So the charge is here. They either fix the price **[*111]** here, they either had an agreement to charge higher prices here or they did not.' [¶] Hr'g Tr. . . . dated Apr. 8, 2005 . . . . Plaintiffs have repeatedly characterized their claim in this manner throughout the case. See, e.g., [Third Amended Complaint ¶¶ 5-6; Apr. 8, 2005 Tr. . . . ('In our case, we have said over and over again the agreement is and is [*sic*] specific about this, the agreement is don't charge—you must charge higher than you are charging in Canada. That's the whole point of it.'); June 30, 2005 Tr. . . . . ('The parallel conduct, I would respectfully submit and as we've alleged in the complaint, is obvious. The obvious nature of the parallel conduct is that all these people are charging more in the United States and Canada than they are charging in Canada.')."

But Judge Sabraw and defendants were not alone in operating under the understanding that the conspiracy at issue was the Canadian floor conspiracy. So, too, were plaintiffs themselves. As late as November 13, 2006, a mere 17 days before their oppositions to the merits motions were due, plaintiffs' request for a continuance of the merits motions was in part premised on November 10, 2006 deposition testimony of Bristol **[*112]** Myers Squibb CEO Peter Dolan which, plaintiffs argued, consisted of newly discovered evidence because "[c]ontrary to prior testimony of PMK witnesses and CEOs of Defendants, Mr. Dolan testified that prices and price-setting practices regarding the United States and Canada were discussed at the meetings conduct at PhRMA."[25] Plaintiffs' request made no mention of the CPI theory.

Plaintiffs took a similar position on December 4, 2006, one day before Amgen's merits motion was set to be heard. On that day, just **[*113]** after Judge Sabraw issued his tentative ruling granting summary judgment based on the pass-on defense, plaintiffs filed their unsuccessful request to disqualify him. In it, they explained, "This private antitrust suit is the only case existing in the U.S. challenging the pricing practices of defendants who are the largest industrial companies in the world in terms of net profits. For many years defendants have established a substantial pricing differential between the US, including California and other foreign countries, particularly Canada. These substantial price differentials have not and could not be explained by usual economic standards, but are inflated artificially. . . ." Plaintiffs then went on to quote paragraph 5 of the third amended complaint, which detailed the Canadian floor conspiracy.

Indeed, plaintiffs continued to describe the conspiracy as that involving Canadian prices even *after* the matter was remanded and assigned to Judge Brick. In their September 14, 2010 statement seeking Judge Brick's disqualification, plaintiffs reiterated their claim that the lawsuit was "the only case existing in the U.S. challenging the pricing practices of defendants who are the largest **[*114]** industrial companies in the world in terms of net profits. For many years defendants have established a substantial pricing differential between the U.S. including California and other foreign countries, particularly Canada."

In sum, as plaintiffs themselves repeatedly confirmed, this case was about one conspiracy, and one conspiracy only—the Canadian floor conspiracy. This was the conspiracy pleaded. The CPI conspiracy was not. It could not defeat summary judgment. (See, e.g., *Laabs v. Victorville (2008) 163 Cal.App.4th 1242, 1258, 78 Cal. Rptr. 3d 372*

[25] Plaintiffs had previously sought to reopen Dolan's apex deposition on other grounds. In an August 28, 2006 order denying that request, Judge Sabraw observed, "The Court will presume for this motion that the allegedly collusive and illegal settlement between Bristol Myers Squibb and Apotex is relevant to the claims in this case. The Court notes, however, that the claims in this case concern an alleged multilateral conspiracy among the defendants to not sell drugs in California below the Canada price. The claims in this case do not encompass every potentially unlawful action that any of the defendants may have engaged in for the purpose of obtaining higher prices for their products."

[in opposition to city's motion for summary judgment, plaintiff could not raise theory that city's placement of street lighting constituted dangerous condition, as theory was not mentioned in, or encompassed by, either original or amended complaint]; *Nein v. HostPro, Inc. (2009) 174 Cal.App.4th 833, 851, 95 Cal. Rptr. 3d 34* [plaintiff could not raise issue of oral contract in opposition to motion for summary judgment where operative complaint did not allege that terms of employment relationship were by oral agreement]; *Bosetti v. United States Life Ins. Co. in City of New York (2009) 175 Cal.App.4th 1208, 1225, 96 Cal. Rptr. 3d 744* [plaintiff could not defeat motion for summary judgment by raising **[*115]** at hearing theory of liability not alleged in complaint].)

Like plaintiffs here, plaintiff in *Aguilar* made a similar attempt to change theories late in the game. The Court of Appeal and Supreme Court rejected the attempt, the Supreme Court noting as follows: "In alleging facts for her Cartwright Act cause of action, Aguilar proceeded on a theory, which was legally sound [citation], that the assertedly unlawful conspiracy consisted of an agreement among the petroleum companies as competitors to restrict the output of CARB gasoline and to raise its price, and was unlawful per se without regard to any of its effects. In granting the petroleum companies summary judgment, the superior court did so on that theory. On appeal, Aguilar apparently attempts to introduce an alternative theory, which was also legally sound [citation], that the assertedly unlawful conspiracy consisted of the various exchange agreements entered into by the various petroleum companies, and was unlawful because of its effects. The Court of Appeal rejected any such attempt as too late. To the extent that Aguilar makes the same attempt on review, we reject it for the same reason." (*Aguilar, supra, 25 Cal.4th at p. 866, fn. 35*.) **[*116]** The same applies here.

ii. Defendants Would Be Unduly Prejudiced By An Amendment Asserting The CPI Theory

When questioned by Judge Brick at the hearing on the motions about where in the third amended complaint the CPI theory was alleged, plaintiffs' counsel responded that plaintiffs would ordinarily be permitted leave to amend their complaint up until the close of trial. We construe this, as did Judge Brick, as a suggestion that they should be permitted to amend the third amended complaint to allege the CPI theory. This suggestion is wrong.

Code of Civil Procedure section 473 authorizes the trial court, in its discretion, to allow amendments to pleadings "in furtherance of justice"; *section 576* permits amendment during trial to conform to proof. And, of course, trial courts are to show "great liberality" in permitting amendments. (*Barba v. Superior Court (1966) 239 Cal.App.2d 572, 577, 49 Cal. Rptr. 60*; *Desny v. Wilder (1956) 46 Cal.2d 715, 751, 299 P.2d 257*.) However, where the rights of the adverse party would be prejudiced by the amendment, granting leave to amend constitutes an abuse of discretion. (*Garcia v. Roberts (2009) 173 Cal.App.4th 900, 909, 93 Cal. Rptr. 3d 286*; *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 CalApp.4th 338, **[*117]** 354-355 [no error in denying leave to amend]; *Melican v. Regents of University of California (2007) 151 Cal.App.4th 168, 175, 59 Cal. Rptr. 3d 672* [same].)

Passing over the glaring fact that plaintiffs never moved for leave to amend to allege the CPI theory,[26] any such amendment would have subjected defendants to extreme prejudice. We cannot state it better than did Judge Brick: plaintiffs' argument that they would have been granted leave to amend up until the close of trial "ignores the procedural posture of this case, including this Court's careful efforts to require a clear statement of Plaintiffs' claims and to manage discovery with respect to those claims for a period of two years. The prejudice to Defendants of starting over now is apparent."

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[26] Plaintiffs apparently had at least two warnings that there appeared to be a disconnect between the conspiracy alleged in the third amended complaint and the conspiracy argued in their opposition to the merits motions. As Judge Brick explained in his order granting the merits motions: "[O]ne of the court's last orders before the summary judgment motions were originally set to be heard in December 2006 expressly declined to resolve 'whether or in what circumstances **[*118]** Plaintiffs might be required to amend their Complaint if the evidence supports claims that are different from the ones asserts in the Third amended Complaint.' [Citation.] Then, before the February 11 hearings, this Court's tentative ruling asked Plaintiffs to explain where the CPI theory is pleaded." Despite this, plaintiffs never requested leave to amend, electing instead to hang their hats on their insistence that the third amended complaint encompassed the CPI theory.

Three times plaintiffs amended their complaint to clarify the alleged conspiracy at issue, finally succeeding. Following this, plaintiffs engaged in extensive discovery for almost two years. Plaintiffs appeared at almost monthly case management conferences before Judge Sabraw, who managed discovery based on the allegations in the third amended complaint. This included seemingly endless discovery disputes, which resulted in more than 37 formal motions before Judge Sabraw, not to mention countless disputes resolved informally. Defendants responded to voluminous written discovery requests, producing, in defendants' estimation, over one million pages of documents.[27] Deposition discovery included plaintiffs deposing some **[*119]** 60 witnesses, including 19 apex deponents, not to mention the numerous depositions following the motions, including depositions of all but one of the officers and employees who submitted declarations in support of the motions. And none of it pertained to the CPI theory.

Defendants prepared multiple summary judgment motions based on the conspiracy alleged in the third amended complaint. Permitting plaintiffs to change course at this late date, abruptly drop the Canadian floor conspiracy, and start over again with a new conspiracy theory would essentially nullify everything the parties did for two years. Simply put, leave to amend under these circumstances would be unduly prejudicial.[28]

iii. Other Direct Evidence: Testimony of Peter Rost

Facing a failure of their unpleaded CPI theory, plaintiffs contend that they in fact produced other direct evidence, this bearing on the Canadian floor conspiracy.[29] This evidence was the entire, 255-page transcript from the deposition of Peter Rost, a former Wyeth vice president, which plaintiffs claim demonstrates an industry-wide agreement to never cut pharmaceutical drug prices. As plaintiffs describe it: "Dr. Rost spent his life in the pharmaceutical industry and has worked for several pharmaceutical manufacturers. While with Wyeth, he was

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[27] Again, plaintiffs do not dispute defendants' representation.

[28] It is perhaps the case that any attempt to amend would fail because the proposed claim would be subject to demurrer as being barred by collateral estopped. (*Yee v. MobileHome Park Rental Review Bd. (1998) 62 Cal.App.4th 1409, 1429, 73 Cal. Rptr. 2d 227*; see generally *Foxborough v. Van Atta (1994) 26 Cal.App.4th 217, 230, 31 Cal. Rptr. 2d 525* [proposed amendment barred by statute of limitations and no basis for "relation back"].) Specifically:

In re Brand Name Prescription Drugs Antitrust Litig., supra, 2000 U.S. Dist. LEXIS 1735, 2000 WL 204064 **[*120]** (*In re Brand Name*) was a suit by a nationwide class of retail pharmacies against wholesalers and manufacturers of brand name prescription drugs alleging violations of the Sherman Act, *15 United States Code section 1 et seq.* As described by the district court: "Class Plaintiffs claim that Defendants entered into a conspiracy to deny them discounts and to peg any future price increases to gains in the Consumer Price Index ('CPI')." (*In re Brand Name, supra, 2000 U.S. Dist. LEXIS 1735, [WL] at *1*.) Describing plaintiffs' proposed methodology as "ill-defined and vague" and "neither capable of evaluation nor meaningful analysis" (*2000 U.S. Dist. LEXIS 1735, [WL] at *4*), the district court concluded that plaintiffs presented no evidence that they were injured by the CPI conspiracy or that would support a jury's award of damages to compensate for any injury (*2000 U.S. Dist. LEXIS 1735, [WL] at *5*) and that plaintiffs demonstrated no basis for the entry of an injunction.

Defendants claimed below that the issue litigated in *In re Brand Name* and the CPI theory belatedly asserted by plaintiffs are identical, and that the CPI issue was decided unfavorably to plaintiffs there. At the hearing on the merits motions, defendants represented, and plaintiffs did not dispute—and indeed, at oral **[*121]** argument here conceded—that plaintiffs here were all class members in the *In re Brand Name* case, and that one of the plaintiffs here was also a named plaintiff there. Thus, defendants argue that collateral estoppel would apply. (See *Pacific Lumber Co. v. State Water Resources Control Bd. (2006) 37 Cal.4th 921, 943, 38 Cal. Rptr. 3d 220, 126 P.3d 1040*.) This issue was not fully developed or briefed below, and is not necessary to our decision. We thus do not decide it here.

[29] Defendants contend that plaintiffs have abandoned this theory in favor of the CPI theory. They cite plaintiffs' lead counsel's statement at the hearing on the pass-on motions **[*123]** that "There is an outstanding agreement to fix prices. . . . By the way, it looks like the floor is CPI, not Canada. CPI long left Canada. But now it's CPI." This contention is contrary to plaintiffs' representation at the hearing on the merits motions, as well as in their briefs on appeal, that they are still pursing the Canadian floor conspiracy.

assigned to the Nordic region and in that capacity had pricing authority. When he cut list prices for Wyeth in that region he was immediately confronted by representatives **[*122]** of the pharmaceutical manufacturers. As he testified, first he was contacted by email from the president of the local pharmaceutical manufacturers association, Horken Mondel, and told to 'tone down his marketing efforts.' [Citation.] He was then asked by Mr. Mondel to meet with him over lunch. In this meeting, at a private club, 'he basically asked me to compete less aggressively.' [Citation.] When this was ineffective, the General Manager for AstraZeneca, Steiner Hoeg, contacted Dr. Rost's superior, Rume Bremburg, and 'asked to meet with us privately regarding our marketing and pricing of Lanzo.'" At the meeting, Mr. Hoeg "was very upset that we have started competing on price and that we were applying this strategy. And he told us that we are all going to lose out because of this . . . [¶] . . . [¶] because it was going to hurt the industry in general and . . . basically I had broken ranks with the industry. It is like swearing in church. You are lowering prices? You are a branded company? You don't do that.' "

Plaintiffs submit that Rost's testimony constituted "[d]irect evidence, taken in the context of all of plaintiffs' evidence, requir[ing] a trial and denial of summary judgment."[30] We disagree, as any fair reading of Rost's testimony in context makes clear that the conversations he described involved a Swedish trade association and a Swedish competitor (AztraZeneca) who were pressuring him to modify his aggressive pricing of a single product (Lanzo)—in Sweden, in 2000.

v. Other Direct Evidence: Suppression of Illegal Imports [*124] of Prescription Drugs

Plaintiffs also contend that evidence of defendants' efforts to prevent re-importation of their drugs from Canada satisfied their burden of proof. As they put it in their opening brief: "As the PhRMA documents demonstrate, the industry was concerned about the U.S.-foreign price differentials and the re-importation of drugs because it put downward pressure on the U.S. prices and brought the threat of price controls. One remedy was to curb the supply of drugs to internet pharmacies. The evidence shows that GSK led the way, but they made sure that the other industry members followed suit in order to avoid retaliation against GSK. The evidence further shows that Pfizer followed suit even though the GSK action was not yet public and that most of the defendants met at this time to discuss the re-importation issue and responses to it. Eventually, all but two of the defendant manufactures [*sic*] took action to curb re-importation." This argument is problematic for multiple reasons.

First, in claimed support of this argument, plaintiffs rely on Exhibits 111 and 117. As discussed in section E, above, Judge Brick properly sustained defendants' objections to both exhibits. But **[*125]** even if that evidence were before us, the argument would still fail, because evidence of defendants' attempts to block Canadian imports is not evidence of an agreement to fix prices. At best, such evidence might demonstrate a "plus factor," an issue we need not reach given the absence of evidence of parallel pricing, discussed below.

B. Plaintiffs Failed to Present Indirect Evidence Creating a Triable Issue of Fact Concerning the Existence of the Canadian Floor Conspiracy

Given the absence of *direct* evidence supporting the Canadian floor conspiracy, we lastly turn to whether plaintiffs presented any *indirect* evidence of it. As detailed above, in an antitrust case such as this, circumstantial evidence often takes the form of "conscious parallelism," or "a pattern of uniform business conduct . . . ." (*Eddins, supra, 134 Cal.App.4th at pp. 304-305*.) Although plaintiffs need not establish "exact uniformity of detail . . . more than a general similarity of action is required for a finding of consciously parallel behavior." (*Harlem River Cons. Co-op. v. Associated Groc., supra, 408 F.Supp. 1251, 1277*.)

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[30] While plaintiffs claim on appeal that Rost's testimony is so significant that it defeats summary judgment, they did not even mention him in their opposition below, nor cite his testimony in their separate statement of facts. This failure alone is reason enough for us to disregard it. (*Code Civ. Proc., § 437c, subd. (b)(3)*.)

The starting point for plaintiffs was a showing that defendants engaged in parallel conduct, **[*126]** or that they consistently priced the pharmaceuticals they sell in the United States higher than those sold in Canada. Despite the extensive discovery on defendants' price setting practices for the 111 "Identified Drugs," plaintiffs failed to produce evidence showing parallel conduct on price-setting. Simply, the record contains no competent evidence that defendants set their prices on their Identified Drugs in the United States higher than the prices for those same drugs in Canada.

Plaintiffs' additional fact no. 3 asserted that "Defendants' drug prices are higher in [the United States] than they are for the same drugs sold in the [Canada]." The claimed supporting evidence was (1) a 2004 Congressional Research Service report concluding that, on average, brand name drugs were priced 70% higher in the United States than in Canada; and (2) a 1992 General Accounting Office report entitled "Prescription Drugs: Companies Typically Charge More in the United States Than in Canada." Neither is availing.

As to the Congressional Research Service Report—Exhibit 7 to the Alioto declaration—Judge Brick sustained defendants' objection on hearsay grounds. Plaintiffs do not challenge that ruling, and **[*127]** the report is not before us.

As to the General Accounting Office report—Exhibit 4 to the Alioto declaration—not only does it predate the filing of this lawsuit by 12 years, but it does not constitute competent evidence that defendants priced their drugs higher in the United States than in Canada. The study was based on pharmaceutical prices as of May 1, 1991, a time frame hardly relevant to a lawsuit filed in August 2004. And it was based on 121 pharmaceuticals, only an estimated 33 of which appear, as best as we can determine, to have been manufactured by defendants. Those drugs do not represent all defendants, and some of the studied drugs were less expensive in the United States than in Canada.

To be sure, plaintiffs submitted voluminous opposition to the merits motions—over 2,000 pages in 77 separate exhibits attached to the Alioto declaration. Defendants lodged 45 objections to plaintiffs' evidence, and Judge Brick sustained 32 of them, rendering a significant portion of plaintiffs' evidence inadmissible.[31] Still, they were left with numerous exhibits, comprising hundreds of pages. But nothing in this evidence demonstrated that the prices on defendants' Canadian pharmaceuticals **[*128]** were consistently below the prices on their American counterparts.

In light of plaintiffs' failure to introduce either direct evidence concerning the Canadian floor theory or evidence of parallel pricing, they failed to satisfy their burden of producing evidence showing the alleged conspiracy was more likely than not. Plaintiffs demonstrated no triable issue of material fact, and their antitrust case was properly disposed of by summary judgment. (See *Aguilar, supra, 25 Cal.4th 826*; *Filco v. Amana Refrigeration, Inc. (9th cir. 1983) 709 F.2d 1257, 1266-1267* [affirming summary judgment for defendants where plaintiffs failed to provide evidence that defendants priced at a fixed level; no evidence of parallel conduct]; *Zoslaw v. MCA Distributing Corp. (9th Cir. 1982) 693 F.2d 870, 884* [finding of parallel conduct lacking where evidence demonstrated significant variation in defendants' practices and pricing].)[32]

DISPOSITION

The judgment **[*129]** for defendants is affirmed.

Richman, J.

We concur:

Kline, P.J.

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[31] As discussed *ante,* plaintiffs challenge Judge Brick's evidentiary rulings only as to three specific exhibits—1, 111, 117—a challenge we concluded was without merit.

[32] We need not consider whether Amgen, PhRMA, and JJHCS were entitled to separate summary judgments.

Haerle, J.

In re Blood Reagents Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

August 22, 2012, Decided; August 22, 2012, Filed

MDL No. 09-2081 ALL CASES

Reporter

283 F.R.D. 222 *; 2012 U.S. Dist. LEXIS 118727 **; 2012 WL 3590269

IN RE: BLOOD REAGENTS ANTITRUST LITIGATION

Subsequent History: Vacated by, Remanded by *In re Blood Reagents Antitrust Litig., 2015 U.S. App. LEXIS 5630 (3d Cir. Pa., Apr. 8, 2015)*

Prior History: *In re Blood Reagents Antitrust Litig., 756 F. Supp. 2d 637, 2010 U.S. Dist. LEXIS 134261 (E.D. Pa., 2010)*

Core Terms

prices, customers, damages, increased price, plaintiffs', blood, predominance, antitrust, conspiracy, products, price-fixing, reagents, class certification, purchasers, calculating, models, class period, estimate, but-for, duopoly, certification, defendants', benchmark, class member, merits, cases, fraudulent concealment, yardstick, parties, methodology

LexisNexis® Headnotes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN1[] **Prerequisites for Class Action, Adequacy of Representation**

Fed. R. Civ. P. 23(a) of sets out four prerequisites for a class action. The *Rule 23(a)* requirements are known as numerosity, commonality, typicality, and adequacy. Subsection (b) provides additional requirements for each type of class action. To obtain certification under *Rule 23(b)(3)*, the moving party must show that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *Fed. R. Civ. P. 23(b)(3)*. These requirements are known, respectively, as predominance and superiority.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN2[] **Class Actions, Certification of Classes**

The United States Court of Appeals for the Third Circuit has emphasized that a district court must conduct a rigorous analysis in deciding whether to certify a class. The decision to certify a class calls for findings by the court, not merely a threshold showing by a party, that each requirement of *Fed. R. Civ. P. 23* is met. Factual determinations supporting *Rule 23* findings must be made by a preponderance of the evidence. Moreover, the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action. However, there is no "claims" or "merits" litmus test incorporated into the predominance inquiry beyond what is necessary to determine preliminarily whether certain elements will necessitate individual or common proof. A district court may inquire into the merits of the claims presented in order to determine whether the requirements of *Rule 23* are met, but not in order to determine whether the individual elements of each claim are satisfied.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN3[] **Class Actions, Certification of Classes**

On a class certification analysis, the court's obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it. The court must examine critically expert testimony on both sides and may be persuaded by either side as to whether a certification requirement has been met. Performing a rigorous analysis may require the district court to weigh conflicting expert testimony at the certification stage and determine whether an expert's opinion is persuasive or unpersuasive.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN4[] **Prerequisites for Class Action, Numerosity**

Fed. R. Civ. P. 23(a)(1) requires that the class be so numerous that joinder of all members is impracticable. Satisfaction of this standard does not require evidence of the exact number or identification of the members of the proposed class. Generally, if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the numerosity requirement of *Rule 23(a)* has been met.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN5[] **Prerequisites for Class Action, Commonality**

To satisfy *Fed. R. Civ. P. 23(a)(2)*, there must be questions of law or fact common to the class. Satisfaction of the commonality requirement requires that plaintiffs demonstrate that their claims depend upon a common contention, the resolution of which will resolve an issue that is central to the validity of each one of the claims in one stroke. Commonality does not require an identity of claims or facts among class members; instead, the commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN6[] Prerequisites for Class Action, Commonality

Courts interpreting the commonality requirement for a class action in the antitrust area have held that allegations concerning the existence, scope and efficacy of an alleged conspiracy present questions adequately common to class members to satisfy the commonality requirement.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN7[] Prerequisites for Class Action, Typicality

Fed. R. Civ. P. 23(a)(3) requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class. *Fed. R. Civ. P. 23(a)(3)*. To conduct the typicality inquiry, the court must examine whether the named plaintiffs' claims are typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class. The typicality requirement is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees. If a plaintiff's claim arises from the same event, practice or course of conduct that gives rise to the claims of the class members, factual differences will not render that claim atypical if it is based on the same legal theory as the claims of the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN8[] Prerequisites for Class Action, Adequacy of Representation

Fed. R. Civ. P. 23(a)(4) requires plaintiffs to show that the representative parties will fairly and adequately protect the interests of the class. Whether adequacy has been satisfied depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class. The second factor seeks to uncover conflicts of interest between named parties and the class they seek to represent.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN9[] Prerequisites for Class Action, Predominance

To obtain class certification under *Fed. R. Civ. P. 23(b)(3)*, plaintiffs must also demonstrate predominance and superiority by a preponderance of the evidence.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN10[] Prerequisites for Class Action, Predominance

Fed. R. Civ. P. 23(b)(3) requires that the questions of law or fact common to class members predominate over any questions affecting only individual members. Predominance tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. It is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws, but a court may not relax its certification analysis as to each element of *Rule 23*.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN11[] **Antitrust & Trade Law, Sherman Act**

Class certification is only appropriate in antitrust cases where plaintiffs can show, by a preponderance of the evidence, that proof of the essential elements of the cause of action, including antitrust injury, do not require individual treatment A key question in a litigation class action is manageability—how the case will or can be tried, and whether there are questions of fact or law that are capable of common proof. Thus, to obtain certification, antitrust plaintiffs must establish by a preponderance of the evidence that common proof will predominate at trial with respect to each of the essential elements of their antitrust claim: (1) that defendants violated *15 U.S.C.S. § 1* of the Sherman Act, (2) the fact of damages arising from the unlawful activity (antitrust impact), and (3) the amount of damages sustained because of the unlawful activity.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN12[] **Cartels & Horizontal Restraints, Price Fixing**

In horizontal price-fixing cases, courts routinely hold that common proof predominates in determining whether an unlawful conspiracy existed.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

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

HN13[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Antitrust impact is the fact of damage resulting from a violation of the antitrust laws. In antitrust cases, impact often is critically important for the purpose of evaluating *Fed. R. Civ. P. 23(b)(3)*'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof. Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, at the certification stage, plaintiffs must show that their theory of impact is plausible in theory and susceptible to proof at trial through available evidence common to the class.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN14[] Sherman Act, Scope

A theory of impact that is plausible in theory and susceptible to proof through common evidence is sufficient to meet the predominance requirement at the class-certification stage.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN15[] Cartels & Horizontal Restraints, Price Fixing

Under certain circumstances, a court considering a class certification motion in a horizontal price-fixing case may presume antitrust impact. Specifically, if a nationwide conspiracy is proven, the result of which was to increase prices to a class of plaintiffs beyond the prices which would obtain in a competitive regime, an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price. If the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage. Courts often apply this presumption in horizontal price-fixing cases.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN16[] Sherman Act, Scope

A court must rigorously analyze the evidence to determine whether Bogosian applies to a particular case. Moreover, Bogosian alone does not suffice to satisfy the predominance requirement; plaintiffs must present additional evidence that they can prove impact using common proof.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN17[] Sherman Act, Scope

Courts have applied Bogosian even in cases involving multiple varieties of products.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN18[] **Sherman Act, Scope**

Many courts have accepted market-structure analyses in finding predominance with respect to antitrust impact. However, before accepting such an analysis, the court must be persuaded that the market-structure factors identified by the plaintiffs' expert do, in fact, exist.

Antitrust & Trade Law > Sherman Act > Defenses

HN19[] **Sherman Act, Defenses**

The decision of some purchasers to switch from one seller to another when faced with enormous price increases does not establish elastic demand for the higher cost seller. Even where demand is highly inelastic, customers will eventually stop purchasing a product if there is a sufficiently large price increase.

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

HN20[] **Sherman Act, Scope**

A barrier to market entry need not prevent competitors from ever entering the market.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN21[] **Sherman Act, Scope**

Clearly, the fact that prices rise does not, in and of itself, demonstrate antitrust impact— at trial, plaintiffs will need to show that they experienced price increases that resulted from anticompetitive conduct. However, a showing that prices behaved similarly across groups of customers contributes to a finding of predominance at the class certification stage.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN22[] **Sherman Act, Scope**

In an antitrust case, variation in the prices paid by individual customers does not preclude a finding of predominance. However, plaintiffs must be able to account for such variation using common proof.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN23[] **Sherman Act, Scope**

Mergers frequently produce pro-competitive efficiencies that outweigh their anti-competitive harm, and courts routinely weigh these countervailing effects as an integral component of merger analysis. It is far less plausible, on the other hand, that a price-fixing conspiracy would have offsetting benefits to consumers. Some categories of restraints, such as horizontal price-fixing , because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN24[] **Class Actions, Certification of Classes**

At the class certification stage, plaintiffs must establish by a preponderance of the evidence that they will be able to measure damages on a class-wide basis using common proof. The court must address only whether plaintiffs have provided a method to measure and quantify damages on a class-wide basis. The court must find that the model could evolve to become admissible evidence, but the model need not be perfect.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN25[] **Sherman Act, Scope**

Even at the merits stage of an antitrust class action, plaintiffs need not measure damages with complete certainty, because courts recognize the inherent difficulty of identifying a "but-for world." At the merits stage, plaintiffs must demonstrate damages only as a matter of just and reasonable inference.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN26[] **Class Actions, Certification of Classes**

At the class certification stage, courts are precluded from addressing any merits inquiry unnecessary to making a *Fed. R. Civ. P. 23* determination. This is consistent with Hydrogen Peroxide's interpretation of Eisen as precluding a merits inquiry that is not necessary to determine a *Rule 23* requirement.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

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

HN27[] **Sherman Act, Claims**

The benchmark methodology is widely accepted for calculating overcharges in antitrust cases. Estimating but-for prices is particularly difficult where the defendants' duopoly was created only a short time before they allegedly conspired to fix prices. Market consolidation tends to increase prices, even in the absence of coordinated conduct.

Evidence > Weight & Sufficiency

HN28[] **Evidence, Weight & Sufficiency**

It is important not to let a quest for perfect evidence become the enemy of good evidence.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN29[] **Class Actions, Certification of Classes**

A district court has limited authority to examine the merits when conducting a class certification inquiry; the ability of the named plaintiff to succeed on his or her individual claims has never been a prerequisite to certification of the class.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN30[] **Sherman Act, Claims**

To succeed at the merits stage of a horizontal price-fixing claim, the yardstick business or product must be as nearly identical to the plaintiff's as possible. Exact correlation is not necessary, however; the products need only be fair congeners. Few cases discuss the showing of similarity that is required at the class certification stage, but courts have rejected proposed yardsticks on certification where the party proffering them failed to perform a substantive analysis of the products' similarity.

Antitrust & Trade Law > Sherman Act > Claims

HN31[] **Sherman Act, Claims**

To avoid the four-year statute of limitations on civil antitrust actions under *15 U.S.C.S. § 15b*, plaintiffs must show (1) fraudulent concealment; (2) failure on the part of the plaintiff to discover his cause of action notwithstanding such concealment; and (3) that such failure to discover occurred notwithstanding the exercise of due care on the part of the plaintiff.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Defenses

HN32[] **Sherman Act, Claims**

An antitrust action implicating fraudulent concealment raises some individual issues, including whether an individual plaintiff knew of the alleged violation and whether he exercised due diligence. However, the United States Court of Appeals for the Third Circuit has held that, in general, it is the fact of concealment that is the polestar in an analysis of fraudulent concealment. The weight of authority is in accord with that holding. Nonetheless, there is no per se rule that individual issues regarding fraudulent concealment can never defeat a finding of predominance. If a case presented particularly complex or important individual issues, it might be appropriate to deny class certification.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN33[] **Prerequisites for Class Action, Superiority**

With respect to superiority, *Fed. R. Civ. P. 23(b)(3)* requires that a class action be superior to other available methods for the fair and efficient adjudication of the controversy. To determine whether the requirement is satisfied, a court must balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication. Similar to the predominance requirement, the requirement of superiority ensures that resolution by class action will achieve economies of time, effort, and expense, and promote uniformity of decision without sacrificing procedural fairness or bringing about other undesirable results.

Judges: [1]** Hon. JAN E. DUBOIS, J.

Opinion by: JAN E. DUBOIS

Opinion

[*226] MEMORANDUM

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I. INTRODUCTION

In these consolidated antitrust actions, plaintiffs allege that the two leading producers of blood reagents—Immucor, Inc. ("Immucor") and Ortho Clinical Diagnostics, Inc. ("Ortho")— conspired to unreasonably **[**2]** restrain trade and commerce in violation of § 1 of the Sherman Antitrust Act, *15 U.S.C. § 1*. Presently before the Court is Plaintiffs' Motion for Class Certification. On July 26, 2012, the Court received evidence, including **[*227]** testimony from Ortho's economic expert, and held oral argument on the motion. Plaintiffs' economic expert provided rebuttal testimony on August 6, 2012. [1] For the reasons set forth below, Plaintiffs' Motion for Class Certification is granted.

II. BACKGROUND

Between 2000 and 2009, defendants drastically increased the prices of their blood reagent products. Many products' prices rose by more than 2000% during that period. (See Beyer Report, Pls.' Mot. Ex. 1, at 13, 14.) The parties agree that some part of this increase resulted from the creation of a duopoly in the blood reagents industry in 1999 as a result of the acquisition of numerous manufacturers of blood reagents by defendants over a period of several years. However, plaintiffs allege that an unlawful **[**3]** horizontal price-fixing agreement that began in November 2000 accounts for much of the increase. Ortho argues primarily that even if there were such an agreement, the class should not be certified because plaintiffs have failed to offer a reliable methodology to distinguish between lawful and unlawful price increases.

A. Background on Blood Reagents

[1] There were no objections to the documentary evidence received, and no Daubert motions were filed. Reliability objections to the testimony of plaintiff's economic expert are addressed and rejected in this Memorandum.

Blood reagents are used to identify properties of human blood. Most large purchasers of blood reagents are blood donor centers and hospitals, which use them to test whether the blood of a potential donor is compatible with the blood of a potential recipient. (See Report of Teresa Harris ("Harris Report"), Pls.' Mot. Ex. 2, at 3.) Under applicable FDA regulations, Blood Bank and Transfusion Standards promulgated by the American Association of Blood Banks ("AABB"), and other rules, a blood donor center must test a donor's ABO group and Rh type and perform an antibody screen each time he or she donates. (Id. at 9.) A hospital must conduct similar tests on a recipient before providing a blood transfusion. (Id.)

There are two basic categories of blood reagents: traditional and automated. Although both Ortho and Immucor sold products in both categories **[**4]** throughout the class period, the putative class in this case includes only purchasers of traditional blood reagents ("TBR"). When using TBR, laboratory technicians test blood manually in test tubes and interpret the results. (Id. at 6.) "Automated" or "proprietary" blood reagents ("ABR"), on the other hand, are often used with specialized equipment. (Id.) They allow quicker testing while requiring less skill and decreasing the risk of technician error. (See, e.g., Pls.' Mot. Ex. 22, at 13 (citing the benefits of ABR as "[s]ignificant labor reduction," "[i]ncreased productivity/efficiency," and "[i]ncreased patient safety").) ABR tend to be more expensive than TBR. (See, e.g., Weiss Decl., Pls.' Reply Ex. 149, ¶ 14.) The parties dispute the extent to which defendants' customers were able to use TBR and ABR interchangeably.

During the class period, Ortho and Immucor each sold more than forty different TBR products. (See, e.g., Harris Report Ex. C.) A list provided by plaintiffs' industry expert, Teresa Harris, shows that most Ortho TBR products had an equivalent Immucor TBR product, and vice versa. (See id.; see also, e.g., Poynter Decl. ¶ 29.) Ms. Harris testified in her deposition that **[**5]** a few of the products that she paired in the list are not identical. (See Harris Dep., Def.'s Opp. Ex. B, at 64-65, 143-44.) However, she opines that those nonidentical pairs "perform exactly the same function." (Harris Reply Report, Pls.' Reply Ex. B, at ¶ 3.)

The blood-reagents market features significant barriers to entry. Most importantly, a prospective entrant must obtain FDA approval before beginning to market and sell blood reagents. This process takes several years. (See, e.g., Pls.' Mot. Ex. 9, at 4 (2003 interview in which Immucor CEO Edward Gallup stated, "[T]he FDA is very often our friend . . . . [S]ix years is a long time—but, even if it were half that, it's still a huge barrier to entry."); Pls.' Mot. Ex. 62, at 1 (Immucor strategy document stating that "[t]here are high barriers to entry. To enter **[*228]** the market, a company must meet FDA Regulations, which takes approximately five to six years to gain approval.").) Toward the end of the class period, in or around 2008, two new TBR producers entered the market. (See, e.g., Def.'s Opp. 18-19.)

B. Creation of Duopoly by Ortho and Immucor

In the 1980s and 1990s, the TBR market was highly competitive, with more than a dozen competitors. **[**6]** (Pls.' Mot. Ex. 9, at 2.) During that period, there was intense price competition, (see, e.g., id.; Pls.' Mot. Ex. 10, at 1), and TBR prices and profitability were low, (see, e.g., Pls.' Mot. Ex. 5, at 4 (showing Immucor's gross profits declining steadily between 1995 and 2000)). As a result, Immucor approached bankruptcy, (see, e.g., Pls.' Mot. Ex. 7), and Ortho considered exiting the TBR industry, (see, e.g., Pls.' Mot. Ex. 12, at 12), in those years.

In the 1990s, Immucor began to acquire competing TBR producers. (See, e.g., Pls.' Mot. Ex. 9, at 3; Pls.' Mot. Ex. 19, at 1.) After Immucor acquired Gamma Biological in 1998 and the Biological Corporation of America in 1999, Immucor and Ortho had a duopoly in the United States TBR market. (See, e.g., Pls.' Mot. Ex. 10, at 1; Pls.' Mot. Exs. 22-24.) Defendants anticipated that this market consolidation would allow them to raise prices and increase their profitability. (See, e.g., Pls.' Mot. Ex. 19 (statement of Immucor CEO that "by buying up its competition and consolidating the marketplace into two key players, Immucor can raise its prices"); cf. Pls.' Mot. Ex. 21.) Immucor's market share in North America was slightly larger than Ortho's **[**7]** throughout the class period. (See, e.g., Pls.' Mot. Exs. 22-24 (showing Immucor with a market share of approximately 55% and Ortho with a market share of approximately 45% in 1999 and 2007).)

C. Post-Duopoly Price Increases

1. Operation Create Value

Shortly after Ortho and Immucor created their duopoly, Ortho developed a pricing strategy it called "Operation Create Value" ("OCV"). (See, e.g., Pls.' Mot. Ex. 43, at 1.) Ortho began work on OCV at least as early as October 1999. (Id.) With the assistance of a consulting firm, Ortho decided to increase the prices it charged all TBR customers by 25% in 2000 and by an additional 25% in 2001. (Pls.' Mot. Ex. 45, at 1; see also Pls.' Mot. Ex. 47, at 13.) Ortho anticipated that it would impose additional "increases yearly thereafter until profitability achieved." (Pls.' Mot. Ex. 45, at 1; see also Pls.' Mot. Ex. 54, at 10 (describing OCV as consisting of "5+ years of annual 25% price increases").) In developing the strategy, Ortho focused heavily on whether Immucor would follow its price increases and, if so, when the Immucor price increases would take place. (See, e.g., **[**8]** Pls.' Mot. Ex. 47, at 20-22, 39.) Ortho rejected larger proposed price increases—as large as 100% per year—because of the risk of customer loss. (See, e.g., Def.'s Opp. Ex. 46.)

Ortho implemented the first 25% price increase under OCV in April 2000. (Pls.' Mot. Ex. 49, at 1; Pls.' Reply Ex. 156.) Many customers did not actually experience a price increase at that time, however, because Ortho could not increase customers' prices until their existing contracts expired. (See Beyer Reply Report, Pls.' Reply Ex. A, at ¶ 73; 7/26/12 Hr'g Tr. 97; Poynter Decl., Pls.' Reply Ex. 150, at ¶ 31.) As a result, Ortho's average TBR prices increased by less than 25% in 2000. (See, e.g., 7/26/12 Hr'g Tr. 188-91 (testimony of Dr. Bronsteen that average prices of particular TBR products increased by about 10% between 1999 and 2000).)

Immucor implemented similar price increases around the same time. For example, in an October 2000 email, Immucor's CEO, Edward Gallup, told a shareholder that Immucor had begun to increase customers' prices in June 2000 as their existing contracts ended. (Pls.' Mot. Ex. 50, at 1; see also Poynter Decl. ¶ 4 (stating that "Immucor implemented an approximately 20% price increase **[**9]** on traditional blood reagents in June 2000").) Gallup wrote that it was Immucor's goal "to affect [sic] a 10-20% price increase over the next 12 months to all domestic customers." (Id.; see also Pls.' Mot. Exs. 51-52; Poynter Decl. ¶ 5 ("Immucor wanted to target 20% price increases on blood reagents over the next 12 months.").) Gallup further explained, "While there is always **[*229]** some risk of losing customers, early indications are that our only competitor in the U.S. (Ortho Clinical Diagnostics division of [Johnson & Johnson]) is doing the same." (Pls.' Mot. Ex. 50, at 1-2.)

2. Blood Bank Leadership Program

In the fall of 2000, Ortho considered a different, more aggressive pricing strategy that came to be known as the Blood Bank Leadership Program ("BBLP"). An internal Ortho document dated September 15, 2000, enumerated three options: (1) "stay the course" by continuing the 25% annual price increases planned under OCV, (2) exit the TBR market altogether, or (3) enact the BBLP. (Pls.' Mot. Ex. 54, at 2.) Ortho hoped that the larger price increases under the BBLP would increase gross profit margins on all of its TBR products to at least 40%. (Id. at 4.) In considering whether to implement **[**10]** the BBLP, as with OCV, Ortho focused on the risk that Immucor might not "follow aggressively." (Id. at 11.) As early as October 30, 2000, Ortho developed price lists under the BBLP and prepared to inform its customers of the price increases. [2] (Pls.' Mot. Ex. 56.) The BBLP price increases varied by

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[2] As detailed in Section II.D, infra, plaintiffs presented evidence that Ortho did not charge the BBLP prices to any customer until after it allegedly engaged in unlawful price-related conversations with Immucor. At the class certification hearing, the parties disputed the probative value of a slide contained in an October 30, 2000, Ortho presentation regarding the BBLP. The slide is labeled "Communication with Customers," and it lists the names of seven major customers alongside dates ranging from September 27, 2000, to October 20, 2000. (Pls.' Mot. Ex. 56, at 5.) The record contains no evidence regarding the nature of any communications between Ortho and those customers. Ortho contends that the slide establishes that it had already **[**11]** implemented the BBLP prior to the alleged price-fixing conspiracy, which plaintiffs contend began in November 2000. Plaintiffs argue that, even if Ortho engaged in some kind of discussion with select customers in September and October of 2000, Ortho did not finalize the BBLP until after its allegedly unlawful communications with Immucor. On the present state of the

TBR product but resulted in an overall increase of 200 to 300 percent in TBR prices between 2000 and 2002. (Pls.' Mot. Ex. 11, at 3; see also Pls.' Mot. Ex. 56.)

D. The Alleged Price-Fixing Conspiracy

Plaintiffs allege that defendants began to engage in unlawful pricing-related communications at an annual meeting of the American Association of Blood Banks ("AABB"). The meeting took place in Washington, D.C., between November 4, 2000, and November 8, 2000, and Ortho and Immucor executives were in attendance. (See, e.g., Pls.' Mot. Ex. 59, at 1.)

At the AABB meeting, Immucor executives watched a presentation in which Ortho announced the BBLP price increases. [3] (See, e.g., Thorne Dep., Pls.' Mot. Ex. 60, at 206; DeMezzo Dep., Pls.' Mot. Ex. 153, at 88.) Ortho's president, Catherine Burzik, also stopped by the Immucor booth and introduced herself **[**12]** to Mike Poynter, an Immucor executive. (Poynter Decl. ¶ 7.) She asked Poynter to "pass [her business card] along to Ed Gallup, [Immucor's CEO,] because she wanted to speak with him." (Id.) "Ms. Burzik told [Poynter] that she had recently joined Ortho, that Ortho's margins on traditional blood reagents were terrible, and that she wanted to understand the margin situation regarding traditional blood reagents. She also asked if [Poynter] had seen Ortho's presentation and invited [him] to come to the Ortho booth to see it." (Id.)

In mid-November 2000, shortly after the AABB meeting, Gallup, Immucor's CEO, asked Judy Thorne, Immucor's Director of Marketing, to meet with an Ortho employee to "find **[**13]** out a range of where Ortho may be considering putting the pricing." (Thorne Dep. 206.) Shortly after Gallup made that request, Thorne had lunch with David Gendusa, **[*230]** a Regional Vice President for Ortho. (Id. at 206, 208.) At the lunch meeting, Gendusa "showed [Thorne] the range that [Ortho was] considering" for about twenty-five TBR products but did not give her a copy of the price list. (Id.) Thorne wrote down the prices for several categories of products, returned to the office, and gave the information to Gallup. (Id. at 207-09.) Gallup instructed Thorne to "expense the lunch as if he was the person [she] had lunch with," presumably to conceal her communications with Gendusa. (Cangiamilla Dep., Pls.' Reply Ex. 152, at 45-46.)

Immucor changed its pricing strategy drastically after learning of Ortho's plans. On November 17, 2000, Immucor's Vice-President of Sales sent an email stating, "We are going to increase prices around the first of the year so look out. We are going to piss off a lot of people, but Ortho is going to do the same!!! So maybe we will start getting profitable!" (Pls.' Mot. Ex. 64, at 1.) Ortho sent its customers a letter with the BBLP price list on November 21, 2000. **[**14]** (Def.'s Opp. Ex. 27, at ORTHOCD-0834002.) Immucor received a copy of the price list from a customer on December 1, 2000. (Def.'s Opp. Ex. 39.) In 2001 and 2002, Immucor raised prices on its TBR products by between 247% and 400%. (See, e.g., Pls.' Mot. Ex. 62, at 1.) Ortho raised prices on its TBR products by between 200% and 300% during the same period. (See, e.g., Pls.' Mot. Ex. 11, at 3, 5.) The price increases became effective for different customers at different times, depending on when their existing contracts expired. (See, e.g., Def.'s Opp. 27-28, 30-31.)

E. 2005 Price Increases

Plaintiffs allege that the November 2000 communications initiated a lengthy conspiracy through which defendants colluded to impose substantial price increases throughout the class period. While prices rose somewhat between 2002 and 2004, (see, e.g., Beyer Report figs.1-4), the next "major price increase initiative[]" was implemented in 2005, (id. ¶ 29).

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record, the Court finds that the slide does not establish that Ortho implemented the BBLP before the AABB meeting, which began on November 4, 2000.

[3] At the class certification hearing, Ortho provided the Court with the Supplemental Declarations of Mike Poynter and Bill Weiss, two Immucor executives. In those declarations, Poynter and Weiss aver that they do not "remember anything being said during [Ortho's] presentation about a 2001 price increases or anything about Ortho's future pricing plans." (Supp. Poynter Decl. ¶ 8; see also Supp. Weiss Decl. ¶ 5.) However, other Immucor employees who attended the AABB meeting testified to the contrary.

Both firms increased the prices of their TBR products significantly in 2005. (See, e.g., Pls.' Mot. Ex. 67 (12/20/04 email from Immucor sales representative stating that "Blood Bank reagents went up approximately 300% in 2001 and now they are rising another **[**15]** 125%"); Pls.' Mot. Ex. 88 (4/12/06 internal Ortho email referring to Ortho's 125% price increase in 2005 and "the fact that Immucor also followed"); Beyer Report tbl.7 (showing that the 2005 increase raised the prices of Immucor's top ten TBR products by 115% to 316%).) Plaintiffs have presented evidence that each defendant was confident that the other would not deviate from this strategy. (See, e.g., Pls.' Mot. Ex. 91.)

Plaintiffs also note that both defendants cancelled contracts with important group purchasing organizations ("GPOs") in order to implement the price increase. (See, e.g., Pls.' Mot. Ex. 94, at 2.) According to plaintiffs, the GPOs comprised a large share of sales for Immucor and Ortho, which would have made those cancellations highly risky absent collusion. (Pls.' Mot. 21-22; Beyer Report ¶ 36.) The cancellations were nearly simultaneous: for example, both Ortho and Immucor decided to terminate their contracts with one GPO, Premier, during the fall of 2004. (Pls.' Mot. Ex. 94, at 2.) The cancellations of the Premier contract by Ortho and Immucor became effective on December 31, 2004, and January 26, 2004, respectively. (Pls.' Mot. Ex. 96.) Both defendants also cancelled **[**16]** their contracts with another GPO, Novation, around the same time. (Id.)

With its 2005 price increases, Immucor introduced two new TBR pricing programs. First, in October 2004, Immucor informed its remaining GPO customers that they could obtain "price protection," freezing their TBR prices at 2004 levels for five years, if they purchased Immucor's ABR instrument. (Def.'s Opp. Ex. 70.) Second, Immucor introduced a "Customer Loyalty Program" that separated customers into three pricing tiers depending on their "commitment" to purchasing Immucor's TBR. (See Def.'s Opp. Ex. 71.) Customers that promised to purchase 90% of their TBR from Immucor received "Level II" prices. (Id.) Customers that promised to purchase 70% of their TBR from Immucor received "Level I" prices. (Id.) Customers that did not make such a commitment received "Base" prices. (Id.) In **[*231]** 2005, Base, Level I, and Level II prices increased by 95%, 70%, and 58%, respectively. (Def.'s Opp. Ex. 72.)

F. 2008 Price Increases

In March 2008, Ortho implemented a final significant price increase, raising TBR prices by an average of 100%. (Def.'s Opp. Ex. 80, at 2.) Ortho notified customers of the increase in December 2007 and January 2008. **[**17]** (Def.'s Opp. Ex. 81, at 7.) In July 2008, Immucor implemented its own price increase. Having reconfigured its pricing tiers since 2004, Immucor increased prices by 20% for customers in its "Automation" tier and by 50% for customers in its "Base" tier. (Def.'s Opp. Ex. 99.) The price increase did not apply to GPOs. (Id.)

G. Procedural History

Plaintiffs began to file civil lawsuits against Ortho and Immucor in 2009, shortly after the Antitrust Division of the Department of Justice opened a criminal grand jury investigation into blood reagents pricing. By Orders dated August 17, 2009, and August 19, 2009, the Judicial Panel on Multidistrict Litigation transferred twenty-three of those cases to this Court for coordinated pretrial proceedings pursuant to *28 U.S.C. § 1407*. Another ten cases were originally filed in this Court. By Order dated December 23, 2009, this Court consolidated these thirty-three cases pursuant to *Federal Rule of Civil Procedure 42(a)*.

Plaintiffs filed a Consolidated Amended Class Action Complaint on February 15, 2010. On August 23, 2010, the Court denied Ortho and Immucor's motion to dismiss the Amended Class Action Complaint. [4] See *In re Blood Reagents Antitrust Litig., 756 F. Supp. 2d 623 (E.D. Pa. 2010)*. **[**18]** The Court denied their motion for reconsideration of that ruling on December 14, 2010. See *In re Blood Reagents Antitrust Litig., 756 F. Supp. 2d 637 (E.D. Pa. 2010)*.

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[4] The Court dismissed plaintiffs' claims against Ortho's parent company, Johnson & Johnson Health Care Systems. See *In re Blood Reagents Antitrust Litig., 756 F. Supp. 2d 623, 633 (E.D. Pa. 2010)*.

On March 5, 2012, the Court granted preliminary approval of a proposed settlement between Immucor and plaintiffs. Plaintiffs filed a motion for final approval of the settlement on May 23, 2012, and a fairness hearing was held on June 15, 2012. Although the Court has not yet ruled on the motion for final approval of the Immucor settlement, the response and surreply to Plaintiffs' Motion for Class Certification were filed in Ortho's name only.

The Court held a hearing on Plaintiffs' Motion for Class Certification on July 26, 2012. Counsel for plaintiffs and for Ortho presented argument at the hearing. Ortho's economic expert, Dr. Peter Bronsteen, testified, and plaintiffs' counsel cross-examined him. Plaintiffs' economic expert, Dr. John C. Beyer, was unable to attend the July 26, 2012, hearing due to health issues. However, plaintiffs **[**19]** presented Dr. Beyer's rebuttal testimony to the Court by video, which was recorded on August 6, 2012. Counsel for Ortho also cross-examined Dr. Beyer during the August 6, 2012, proceedings.

III. LEGAL STANDARD

HN1[] *Subsection (a) of Federal Rule of Civil Procedure 23* sets out four prerequisites for a class action. The *Rule 23(a)* requirements are known as numerosity, commonality, typicality, and adequacy. *Subsection (b)* provides additional requirements for each type of class action. To obtain certification under *Rule 23(b)(3)*, as plaintiffs seek to do in this case, the moving party must show "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. These requirements are known, respectively, as predominance and superiority.

HN2[] The Third Circuit recently emphasized that a district court must conduct a "rigorous analysis" in deciding whether to certify a class. See, e.g., *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 306 (3d Cir. 2008)*. "[T]he decision to certify a class calls **[**20]** for findings by the court, not **[*232]** merely a 'threshold showing' by a party, that each requirement of *Rule 23* is met." *Id. at 307*. "Factual determinations supporting *Rule 23* findings must be made by a preponderance of the evidence." Id.

Moreover, "the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action." *Id. at 307*. However, "there is no 'claims' or 'merits' litmus test incorporated into the predominance inquiry beyond what is necessary to determine preliminarily whether certain elements will necessitate individual or common proof." *Sullivan v. DB Invs., Inc., 667 F.3d 273, 305 (3d Cir. 2011)*. "[A] district court may inquire into the merits of the claims presented in order to determine whether the requirements of *Rule 23* are met, but not in order to determine whether the individual elements of each claim are satisfied." Id.

"Finally, ***HN3***[] the court's obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it." *Hydrogen Peroxide, 552 F.3d at 307*. "The court must **[**21]** . . . examine critically expert testimony on both sides and may be persuaded by either side as to whether a certification requirement has been met." *Behrend v. Comcast Corp., 655 F.3d 182, 190 (3d Cir. 2011)*. [5] "Performing a rigorous analysis may require the district court to weigh conflicting expert testimony at the certification stage and determine whether an expert's opinion is persuasive or unpersuasive." *Behrend v. Comcast Corp., 264 F.R.D. 150, 155 (E.D. Pa. 2010)* (citing *Hydrogen Peroxide, 552 F.3d at 323-24*).

IV. DISCUSSION

Ortho does not dispute that the *Rule 23(a)* requirements and the *Rule 23(b)(3)* superiority requirement are satisfied in this case. The Court thus addresses those issues only briefly and focuses its analysis on the *Rule 23(b)(3)*

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[5] The Supreme Court granted certiorari in Behrend on June 25, 2012. See ***133 S. Ct. 24, 183 L. Ed. 2d 673, 2012 U.S. LEXIS 4754, 80 U.S.L.W. 3707 (U.S. June 25, 2012) (No. 11-864)***.

predominance requirement, which is hotly contested. After a rigorous analysis of the evidence and argument offered by both parties, the Court finds that plaintiffs have established the *Rule 23(a)* and *Rule 23(b)(3)* requirements by a preponderance of the evidence.

A. *Rule 23(a)* Requirements

1. Numerosity

HN4[] *Rule 23(a)(1)* **[**22]** requires that the class be "so numerous that joinder of all members is impracticable." Satisfaction of this standard "does not require evidence of the exact number or identification of the members of the proposed class." *In re Linerboard Antitrust Litig., 203 F.R.D. 197, 205 (E.D. Pa. 2001)*. "'Generally, if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the numerosity requirement of *Rule 23(a)* has been met.'" *In re OSB Antitrust Litig., No. 06-826, 2007 U.S. Dist. LEXIS 56584, 2007 WL 2253418, at *2 (E.D. Pa. Aug. 3, 2007)* (quoting *Ketchum v. Sunoco, Inc., 217 F.R.D. 354, 357 (E.D. Pa. 2003))*.

In this case, transactional data produced by defendants shows that thousands of customers purchased TBR directly from defendants during the class period. (See, e.g., Beyer Reply 54-55.) This renders joinder highly impracticable and satisfies the numerosity requirement.

2. Commonality

HN5[] To satisfy *Rule 23(a)(2)*, there must be "questions of law or fact common to the class." Satisfaction of the commonality requirement requires that plaintiffs demonstrate that their claims "depend upon a common contention," the resolution of which "will resolve an issue that is central to the validity of each **[**23]** one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)*. "Commonality does not require an identity of claims or facts among class members; instead, [t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178, 184* ***[*233]*** *(3d Cir. 2011)* (internal quotation marks omitted); see also *Marcus v. BMW of N. Am., LLC, Nos. 11-1193, 11-1192, 687 F.3d 583, 2012 U.S. App. LEXIS 16369, 2012 WL 3171560, at *10 (3d Cir. Aug. 7, 2012)*.

HN6[] "Courts interpreting the commonality requirement in the antitrust area have held that allegations concerning the existence, scope and efficacy of an alleged conspiracy present questions adequately common to class members to satisfy the commonality requirement." *Linerboard, 203 F.R.D. at 205* (internal quotation marks omitted); see also, e.g., *In re Bulk (Extruded) Graphite Prods. Antitrust Litig., No. 02-6030, 2006 U.S. Dist. LEXIS 16619, 2006 WL 891362, at *5 (D.N.J. Apr. 4, 2006)*. In this case, plaintiffs' allegations include a number of common issues, including (1) whether defendants conspired to raise, fix, maintain and/or stabilize the price of blood reagents **[**24]** in the United States, (2) the duration of the conspiracy, and (3) the nature and character of the acts performed by defendants in furtherance of the conspiracy. "Resolving the allegations surrounding" defendants' alleged conduct in conspiring to fix TBR prices "will resolve issues that are 'central to the validity of each one of the claims in one stroke.'" *In re Flonase Antitrust Litig., No. 08-3301, 284 F.R.D. 207, 2012 U.S. Dist. LEXIS 83950, 2012 WL 2277840, at *8 (E.D. Pa. June 18, 2012)*. This suffices to satisfy the commonality requirement.

3. Typicality

HN7[] *Rule 23(a)(3)* requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Fed. R. Civ. P. 23(a)(3)*. To conduct the typicality inquiry, the court must examine "whether the named plaintiffs' claims are typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class." *Beck v. Maximus, Inc., 457 F.3d 291, 295-96 (3d Cir. 2006)*. "The typicality requirement is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees." *Georgine v. Amchem Prods., Inc., 83 F.3d 610, 631 (3d Cir. 1996)*. **[**25]** "If a plaintiff's claim arises from the same event, practice or course of conduct that gives rise to the claims of the class members, factual differences will not render that claim atypical if it is based on the same legal theory as the claims of the class." *Marcus, 687 F.3d 583, 2012 U.S. App. LEXIS 16369, 2012 WL 3171560, at *11*.

In this case, plaintiffs allege that the same unlawful conduct injured the class representatives and the absent class members. All members of the putative class are direct purchasers of TBR and allege that they made their purchases at supracompetitive prices. This is sufficient to satisfy the typicality requirement. See, e.g., *In re Flat Glass Antitrust Litig., 191 F.R.D. 472, 480 (W.D. Pa. 1999)* ("[T]he named class members' claims, as well as the claims of the proposed classes, arise from the alleged price-fixing scheme perpetrated by defendants[,] [which is] the linchpin of plaintiffs' amended complaint, regardless of the product purchased, the market involved or the price ultimately paid.").

4. Adequacy of Representation

HN8[] *Rule 23(a)(4)* requires plaintiffs to show that "the representative parties will fairly and adequately protect the interests of the class." "Whether adequacy has been satisfied 'depends **[**26]** on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.'" *McDonough v. Toys R Us, Inc., 638 F. Supp. 2d 461, 477 (E.D. Pa. 2009)* (quoting *New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 313 (3d Cir. 2007))*. "The second factor 'seeks to uncover conflicts of interest between named parties and the class they seek to represent.'" Id. (quoting *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 532 (3d Cir. 2004))*.

The first element—the qualification of plaintiffs' attorneys—is satisfied. Plaintiffs' lead counsel has extensive experience in complex antitrust class actions and has ably performed his duties as interim class counsel. The Court concludes that plaintiffs' counsel are "qualified, experienced, and generally able to conduct the proposed litigation." *New Directions, 490 F.3d at 313*.

[*234] As to the second element, there is no evidence of any conflict of interest between the named plaintiffs and the absent members of the putative class. Each class member allegedly purchased TBR directly from Ortho or Immucor during **[**27]** the class period at a supracompetitive price. "Each class member holds a strong common interest in establishing [defendants'] liability for these alleged overcharges." *Flonase, 284 F.R.D. 207, 2012 U.S. Dist. LEXIS 83950, 2012 WL 2277840, at *9*.

The Court thus finds that the adequacy requirement is satisfied.

B. *Rule 23(b)(3)* Requirements

HN9[] To obtain class certification under *Rule 23(b)(3)*, plaintiffs must also demonstrate predominance and superiority by a preponderance of the evidence.

1. Predominance

Predominance is the only certification requirement contested by the parties. Ortho argues that plaintiffs have failed to present a reliable method of proving two elements of their claim— antitrust impact and the amount of damages— using predominantly common proof. Ortho also contends that the individual issues involved in evaluating whether individual plaintiffs are entitled to tolling of the statute of limitations based on fraudulent concealment preclude a finding of predominance.

HN10[] *Rule 23(b)(3)* requires that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." **[**28]** *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. "It 'is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws,' but a court may not relax its certification analysis as to each element of *Rule 23*." *Behrend, 655 F.3d at 191* (quoting *Amchem, 521 U.S. at 625*); see also *Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 815 (7th Cir. 2012)* ("[C]areful application of *Rule 23* is necessary in antitrust cases, as in all cases, and . . . in antitrust cases, *Rule 23*, when applied rigorously, will frequently lead to certification." (internal quotation marks omitted)).

HN11[] Certification is "only appropriate in antitrust cases where plaintiffs can show, by a preponderance of the evidence, that proof of the essential elements of the cause of action, including antitrust injury, do not require individual treatment." *In re K-Dur Antitrust Litig., 686 F.3d 197, 2012 WL 2877662, at *17 (3d Cir. 2012)*; see also *In re Am. Int'l Grp., Inc. Sec. Litig., No. 10-4401, 689 F.3d 229, 2012 U.S. App. LEXIS 16911, 2012 WL 3264048, at *6 (2d Cir. Aug. 13, 2012)* ("'A key question in a litigation class action is manageability—how the case will or can be tried, **[**29]** and whether there are questions of fact or law that are capable of common proof.'" (quoting *Sullivan, 667 F.3d at 335*)). Thus, to obtain certification, plaintiffs must establish by a preponderance of the evidence that common proof will predominate at trial with respect to each of the essential elements of their antitrust claim: (1) that defendants violated *§ 1* of the Sherman Act, (2) the fact of damages arising from the unlawful activity ("antitrust impact"), and (3) the amount of damages sustained because of the unlawful activity. See, e.g., *Linerboard, 203 F.R.D. at 214*. The Court analyzes each of these essential elements and then addresses Ortho's defense of statute of limitations and the issue of fraudulent concealment.

a. Violation of § 1 of the Sherman Act

HN12[] In horizontal price-fixing cases, courts routinely hold that common proof predominates in determining whether an unlawful conspiracy existed. See, e.g., *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 105 (2d Cir. 2007)*; *McDonough, 638 F. Supp. 2d at 479-80*; *Lumco Indus., Inc. v. Jeld-Wen, Inc., 171 F.R.D. 168, 172 (E.D. Pa. 1997)*. Ortho does not argue that evaluation of the particular allegations of **[**30]** concerted action in this case might require individual proof. The Court thus concludes that the predominance requirement is satisfied with respect to proof of an antitrust violation.

b. Antitrust Impact

HN13[] Antitrust impact is the "fact of damage" resulting from a violation of the antitrust **[*235]** laws. *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454 (3d Cir. 1977)*. "In antitrust cases, impact often is critically important for the purpose of evaluating *Rule 23(b)(3)*'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof." *Hydrogen Peroxide, 552 F.3d at 311*. "Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so." *Id. at 311-12*; see also *Behrend, 655 F.3d at 197* (holding that, at the certification stage, a court need not "reach into the record and determine whether [p]laintiffs actually have proven antitrust impact" but must determine whether plaintiffs "demonstrated by a preponderance of the evidence that they could prove antitrust impact through common evidence at trial"). Instead, at the certification stage, plaintiffs **[**31]** must show that their theory of impact is "plausible in theory" and "susceptible to proof at trial through available evidence common to the class." *Behrend, 655 F.3d at 198*.

In this case, plaintiffs assert that they will prove antitrust impact using five elements of common proof: (1) application of the so-called "Bogosian shortcut," (2) Dr. Beyer's analysis of the structure of the TBR market, (3) Dr. Beyer's empirical analysis of TBR prices during the class period, (4) documents produced by defendants, and (5) Dr. Beyer's proposed methods of calculating the amount of damage each class member suffered. Ortho heavily criticizes these alleged elements of common proof. The Court concludes, however, that plaintiffs have presented ***HN14***[] a theory of impact that is "plausible in theory" and susceptible to proof through common evidence, which is sufficient at the class-certification stage. Id.

1. Bogosian Shortcut

In *Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977)*, the Third Circuit recognized that ***HN15***[] under certain circumstances, a court considering a class certification motion may presume antitrust impact. Specifically, the Bogosian court held as follows:

> If . . . a nationwide conspiracy is proven, **[**32]** the result of which was to increase prices to a class of plaintiffs beyond the prices which would obtain in a competitive regime, an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price. If the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage.

Id. at 455.

Courts often apply this presumption in horizontal price-fixing cases. See, e.g., *OSB, 2007 U.S. Dist. LEXIS 56584, 2007 WL 2253418, at *4-5*; *In re Bulk (Extruded) Graphite Prods. Antitrust Litig., No. 02-6030, 2006 U.S. Dist. LEXIS 16619, 2006 WL 891362, at *11-13 (D.N.J. Apr. 4, 2006)*. However, ***HN16***[] a court must rigorously analyze the evidence to determine whether Bogosian applies to a particular case. See *Hydrogen Peroxide, 552 F.3d at 326* (expressing doubt **[**33]** about whether Bogosian applied where prices were "lower, not higher, at the end of the class period than at the beginning," production increased during the class period, and defendants presented evidence of "substantial price disparities among similarly situated customers"). Moreover, Bogosian alone does not suffice to satisfy the predominance requirement; plaintiffs must present additional evidence that they can prove impact using common proof. Id.; see also *Am. Seed Co., Inc. v. Monsanto Co., 271 F. App'x 138, 141 (3d Cir. 2008)* ("[I]t is important that a putative class's presumption of impact under Bogosian be supported by some additional amount of empirical evidence.").

In many ways, this is a straightforward horizontal price-fixing case brought by direct purchasers of TBR. The anticompetitive effects of horizontal price-fixing are obvious. **[*236]** See, e.g., *Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830 (3d Cir. 2010)*. Many cases in which courts reject application of Bogosian involve alleged conduct whose anticompetitive effect is less straightforward. See, e.g., *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, No. 04-5898, 2010 U.S. Dist. LEXIS 105646, 2010 WL 3855552, at *21-22 (E.D. Pa. Sept. 30, 2010)* **[**34]** (refusing to apply Bogosian to the claims of indirect purchasers).

Ortho argues, however, that Bogosian is inapplicable for two reasons. First, it relies on the fact that "the alleged conspiracy . . . coincided with a substantial reduction in the number of competitors and the formation of a duopoly market." (Def.'s Opp. 58.) Therefore, while there were substantial price increases during the class period, those increases cannot be presumed to have resulted solely from collusion. However, defendants' creation of a duopoly by the acquisition of a number of competitors shortly before the alleged conspiracy began does not mitigate the fact that prices on many TBR products rose by more than 2000% during the class period, that those huge increases occurred very shortly after the alleged collusion began, and that those huge price increases applied to all customers. Unlike in *Hydrogen Peroxide*, there is no evidence that prices decreased at any time during the class period. Moreover, the benchmark methodology detailed in Dr. Beyer's reports, see infra Section IV.B.1.c.2, estimates the but-for prices that would have been charged in a lawful duopoly market and calculates those additional price **[**35]** increases that resulted from the alleged anticompetitive activity.

Second, Ortho argues that the conspiracy in alleged in this case "encompass[es] dozens of different products, each with different demand and cost factors." (Def.'s Opp. 58-59.) However, ***HN17***[] courts have applied Bogosian even in cases involving multiple varieties of products. See, e.g., *Bulk (Extruded) Graphite, 2006 U.S. Dist. LEXIS 16619, 2006 WL 891362, at *11*. In this case, where Ortho manufactured an analogue of most TBR products manufactured by Immucor, and vice versa, it is logical that a horizontal price-fixing conspiracy encompassing all of those products would impact all purchasers.

There is thus a strong argument that Bogosian applies to the facts of this case. Nevertheless, as set forth below, the Court concludes that other elements of common proof offered by plaintiffs—most importantly, Dr. Beyer's market structure analysis and his damages models—suffice to establish that plaintiffs can prove impact using common evidence regardless of whether Bogosian applies.

2. Market Structure Analysis

Plaintiffs' second element of proof of impact is Dr. Beyer's analysis of the structure of the TBR market. Based on his review of relevant documents and deposition **[**36]** testimony in this case, Dr. Beyer concludes that several features of the blood reagents industry gave "defendants . . . the incentive to form the alleged conspiracy" and made it impossible for individual purchasers to "avoid[] impact from a conspiracy." (Beyer Report 26.) In particular, Dr. Beyer cites (1) the consolidated market, (2) high barriers to entry, (3) inelastic demand for TBR, (4) the interchangeability of defendants' TBR products, (5) defendants' ability to monitor each other's pricing behavior by obtaining price lists from customers, and (6) defendants' unwillingness to deviate from their pricing policies for particular customers. (Id. at 26-35.) Many of these conclusions are reinforced by the reports of Ms. Harris, plaintiffs' industry expert. (See Harris Report ¶¶ 16, 20, 33.)

In its brief, Ortho disputes some of Dr. Beyer's conclusions regarding market structure, arguing that (1) TBR are not interchangeable and, as such, are not commodity products, (2) demand for TBR is not inelastic because TBR and ABR are interchangeable, and (3) recent market entry shows that plaintiffs overstate their claims regarding barriers to entry. However, the report of Ortho's expert, Dr. **[**37]** Bronsteen, does not dispute that the TBR market possessed the structural features Dr. Beyer identifies. Instead, Dr. Bronsteen argues that those structural features are just as consistent with tacit coordination as with unlawful collusion. (Bronsteen Report 34.) He opines that such a market structure "generally make[s] it easier for firms to refrain from aggressive competition and to coordinate their pricing either **[*237]** from an explicit cartel agreement or from tacit coordination." (Id. at 35.) Dr. Bronsteen then concludes that firms often prefer to engage in tacit coordination because, unlike explicit collusion, it is not unlawful. (Id. at 35-36.)

HN18[] Many courts have accepted market-structure analyses in finding predominance with respect to antitrust impact. See, e.g., *Linerboard, 305 F.3d at 153-55*; *Behrend, 264 F.R.D. at 160-61*; *OSB, 2007 U.S. Dist. LEXIS 56584, 2007 WL 2253418, at *4-7*. However, before accepting such an analysis, the Court must be persuaded that the market-structure factors identified by the plaintiffs' expert do, in fact, exist. See, e.g., *In re Plastics Additives Antitrust Litig., No. 03-2038, 2006 U.S. Dist. LEXIS 69105, 2010 WL 3431837, at *7 (E.D. Pa. Aug. 31, 2010)* ("While a market with the characteristics described by [the **[**38]** expert] may in theory be vulnerable to a price-fixing conspiracy, we find that the markets at issue in this case do not actually possess those characteristics."). In this case, after weighing the evidence presented by both parties, the Court is persuaded by Dr. Beyer's conclusions regarding the structure of the TBR market.

First, Ortho does not dispute many of the market characteristics Dr. Beyer identified. Dr. Bronsteen disputes even fewer; his primary argument is that the characteristics are consistent with lawful conduct as well as unlawful conduct. However, the question for the Court at this stage is not whether defendants actually engaged in a price-fixing conspiracy but whether, if plaintiffs establish such a conspiracy, they will also be able to prove impact through predominantly common proof. Dr. Bronsteen's testimony thus does not discredit Dr. Beyer's market-structure analysis at this stage of the litigation.

Second, the Court is persuaded that most customers viewed TBR as commodity products during the class period. (See, e.g., Gallup Dep., Pls.' Reply Ex. 151, at 59-60 (stating that most customers "believed that [TBR] [were] like plain white bread: all the products were the **[**39]** same"); Weiss Decl., Pls.' Reply Ex. 149, ¶¶ 11-12 (stating that customers can use TBR "interchangeably" as long as they have FDA approval and that TBR "are almost identical 'commodity' products").) Ortho presented anecdotal evidence that a few purchasers preferred one defendant's TBR for nonprice reasons. (See, e.g., Carbaugh Dep., Def.'s Opp. Ex. C, at 36; Fennema Dep., Defs.' Opp. Ex. D, at 57-

59.) The Court finds that isolated testimony less persuasive than the expert report and evidence that plaintiffs offered to the contrary. [6]

Third, Ortho disputes Dr. Beyer's conclusions regarding the inelasticity of TBR demand because ABR constituted a "potential substitute product[]" for TBR. (Def.'s Opp. 13.) Ortho explains that, although ABR are more expensive than TBR, they are more efficient and more accurate, which gave customers an incentive to switch despite the increased expense. (Id. at 15-16.) Moreover, Ortho presents evidence that some class members did switch from TBR to ABR during the class period. (Id. at 14-15.) However, as plaintiffs' counsel argued persuasively at the certification hearing, *HN19*[] the decision of some purchasers to switch from TBR to ABR when faced with enormous price increases does not establish elastic demand for TBR. (See 7/26/12 Hr'g Tr. 30-31.) Even where demand is highly inelastic, customers will eventually stop purchasing a product if there is a sufficiently large price increase. See generally IIA Phillip E. Areeda et al., ***Antitrust Law*** ¶ 507 (3d ed. 2007). The Court also credits Dr. Beyer's conclusion that, **[**41]** because Ortho and Immucor dominated both the TBR and ABR markets, the possibility **[*238]** that customers would switch from TBR to ABR did not threaten the success of the alleged conspiracy. (See Beyer Report ¶ 63.)

Finally, the entry of two new TBR manufacturers in 2008—eight years after the alleged price-fixing conspiracy began—does not discredit Dr. Beyer's conclusion that the TBR market features high barriers to entry. *HN20*[] A barrier to entry need not prevent competitors from ever entering the market. See generally IIB Areeda et al., supra, at ¶ 420. Dr. Bronsteen agrees with Dr. Beyer that FDA regulation delays entry to the TBR market. (Bronsteen Dep., Pls.' Reply Ex. 148, at 56, 242-23.) It is undisputed that it takes several years for a new competitor to obtain FDA approval and begin to sell TBR. This is a substantial delay, sufficient to render the TBR market conducive to collusion that would impact all customers.

The Court thus accepts Dr. Beyer's analysis of the structure of the TBR market as persuasive evidence supporting a finding of predominance with respect to impact.

3. Empirical Pricing Analysis

Third, plaintiffs rely on Dr. Beyer's empirical analysis of pricing patterns in the TBR industry **[**42]** during the class period. There are two parts to this analysis. First, Dr. Beyer observes that TBR prices "skyrocketed" during the class period. (Beyer Report ¶ 29 & tbls. 3-4.) Second, he analyzes the prices defendants charged to individual customers and concludes that prices rose somewhat uniformly. Most Ortho customers paid "identical or nearly identical" prices throughout the class period. (Id. ¶ 77, figs. 5-6.) Because of Immucor's pricing tiers, Immucor prices exhibit more dispersion. Moreover, some Immucor customers were able to obtain price protection, which locked their 2004 prices in place for five years. Nonetheless, Dr. Beyer states that the prices for Immucor's TBR "tended to cluster at a handful of pricing points." (Id. ¶ 76.) Further, in his Reply Report, he demonstrates that customers in each of Immucor's pricing tiers and even its price-protected customers paid more than but-for prices. (Beyer Reply Report ¶¶ 77-88.)

HN21[] Clearly, the fact that prices rose does not, in and of itself, demonstrate antitrust impact— at trial, plaintiffs will need to show that they experienced price increases that resulted from anticompetitive conduct. However, a showing that prices behaved similarly **[**43]** across groups of customers contributes to a finding of predominance at the certification stage. [7] Because Ortho's prices were more uniform than Immucor's, this element of proof is more

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[6] At the class certification hearing, Dr. Bronsteen testified that the evidence regarding whether TBR are commodities is "mixed." (7/26/12 Hr'g Tr. 182.) He argued that differences in the prices of Ortho's and Immucor's TBR during the class period show that some customers preferred one defendant's TBR to the other. (Id. at 182-83.) However, Dr. Beyer's analysis shows that, even if Ortho and Immucor prices were not identical for all products, they were similar. (See, e.g., Beyer Reply fig.1.) Moreover, Dr. Bronsteen compares average prices charged by Immucor and Ortho. Those average prices are very similar through 2004. (See Bronsteen Report Exs. 9A-9D.) **[**40]** The Court concludes that divergence in prices after 2004 is explained, at least in part, by the discounts Immucor gave some of its customers through price protection and pricing tiers.

persuasive with respect to Ortho sales than Immucor sales. (Compare Beyer Report fig.5, with id. figs.10-11.) As described below, however, Dr. Beyer has showed that, despite price variation, he can demonstrate impact to Immucor purchasers using common proof. Therefore, while the Court does not find Dr. Beyer's empirical pricing analysis as persuasive as his market analysis or the results of his damages models, the analysis provides additional support for his assertion that plaintiffs will be able to prove impact using common proof.

4. Defendants' Documents

Fourth, plaintiffs rely on defendants' internal documents for the proposition that the **[**44]** price increases affected all customers. Most importantly, the documents support plaintiffs' contention that defendants were generally unwilling to negotiate prices with their customers. (See, e.g., Pls.' Mot. Ex. 138, at 4 (email from an Immucor sales representative stating that "[u]nfortunately, the pricing change is firm. It was an increase that was shared with our entire customer base and at this time, there aren't any exceptions being made"); Pls.' Mot. Ex. 139 (email from an Ortho executive stating that "everyone pays the same" for TBR).) Moreover, the documents provide evidence that even where defendants provided discounts from list prices, the discounts remained related to the list prices. (See, e.g., Pls.' Reply Ex. 143 (Ortho document stating that "[a]s list price increases all customer prices change in lock step"); Heflin Decl. ¶ 16 (stating that Immucor's list **[*239]** prices and tiered pricing were set based on Ortho's list prices).) This gives rise to an inference that anticompetitive increases in list prices would also impact customers who were purchasing TBR at a discount. See, e.g., *McDonough, 638 F. Supp. 2d at 486* ("[W]hen list prices have been artificially inflated, fixed **[**45]** or proportional discounts from them are equally inflated.").

While these documents would not suffice to prove impact on their own, they lend support to a finding of predominance.

5. Damages Calculation

Plaintiffs offer an additional element of common proof of impact: Dr. Beyer's proposed methodologies for calculating the damages incurred by individual plaintiffs. Those methodologies, which are explained in more detail below, see infra Section IV.B.1.c.2, distinguish between price increases resulting from the creation of a duopoly and price increases resulting from the alleged price-fixing conspiracy. Specifically, Dr. Beyer utilizes a benchmark model to estimate the pricing that would have occurred in a lawful duopoly. He concludes that any differences between those estimated prices and the actual prices charged by defendants resulted from the alleged price-fixing conspiracy. The important point for purposes of the impact analysis is that, by applying one variation of this benchmark model to transactional data produced by defendants, Dr. Beyer has demonstrated that "virtually all customers paid more for traditional reagents than they would have paid in the absence of the alleged anticompetitive **[**46]** conduct." (Beyer Reply Report ¶ 102.) Dr. Beyer's calculations show that virtually all of defendants' customers purchased at least one TBR product for more than the but-for price during the class period. (Id. ¶¶ 105-106 & tbls. 18-19.) The calculations are persuasive evidence that antitrust impact is "susceptible to proof at trial through available evidence common to the class." *Behrend, 655 F.3d at 198*.

As is explained in more detail below, Ortho focuses its argument on the assertion that Dr. Beyer's damages methodologies are speculative and unreliable. For reasons that will be discussed infra Section IV.B.1.c, the Court concludes that these arguments do not defeat plaintiffs' case at the class certification stage.

In addition to its arguments regarding the merits of plaintiffs' damages formula, Ortho argues that Dr. Beyer's conclusions are based on a faulty understanding of antitrust impact. Ortho asserts that it is not enough for plaintiffs

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[7] ***HN22***[] Variation in the prices paid by individual customers does not preclude a finding of predominance. See, e.g., *K-Dur, 686 F.3d 197, 2012 WL 2877662, at *19-20*; *McDonough, 638 F. Supp. 2d at 486*. However, plaintiffs must be able to account for such variation using common proof— which they have persuaded the Court that they will be able to do in this case. See infra Part IV.B.1.c.3.i.

to show that a customer paid more than the but-for price for at least one item in at least one transaction. Instead, according to Ortho, plaintiffs must analyze "whether the net effect of the alleged antitrust violation is positive or negative." **[**47]** (Def.'s Surreply 16 (emphasis added).) They must offset class members' losses from the alleged conspiracy against any benefits they received from it. (Id. at 17.) For example, Ortho contends that Dr. Beyer wrongly "overlooks the prospect that higher prices for traditional reagents led to lower prices or lower price increases for proprietary reagents and equipment." (Id.)

The Court rejects this argument. The case on which Ortho relies involved a merger, not a horizontal price-fixing conspiracy. See *Kottaras v. Whole Foods Market, Inc., 281 F.R.D. 16 (D.D.C. 2012)*. ***HN23***[] Mergers frequently produce pro-competitive efficiencies that outweigh their anti-competitive harm, and courts routinely weigh these countervailing effects as an integral component of merger analysis. See, e.g., *id. at 24*; see also U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (issued Aug. 19, 2010). It is far less plausible, on the other hand, that a price-fixing conspiracy would have offsetting benefits to consumers. See *Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830 (3d Cir. 2010)* ("Some categories of restraints, such as horizontal price-fixing . . . , 'because of their pernicious **[**48]** effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable.'" (emphasis added) (quoting *United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993)))*. Ortho cites no case in which a court required plaintiffs to account for potential decreases in the price of some products as the result of an alleged horizontal price-fixing conspiracy.

[*240] At the class certification hearing, Dr. Bronsteen stated that the alleged conspiracy might have caused the prices of some TBR or ABR products to decrease because it gave defendants an incentive to "cheat" on the cartel by cutting prices on products not subject to the conspiracy. (7/26 Hr'g Tr. 218-19.) He presented evidence that, while TBR prices were increasing sharply, the prices of some of defendants' leading ABR products were "essentially flat." (Id. at 220.) Moreover, he argued that defendants hoped that increases in the prices of TBR would induce customers to switch from TBR to ABR. (Id.)

The argument that defendants were cheating on the cartel is speculative, at best. Ortho has not persuaded the Court that the "essential flatness" of ABR prices resulted from its alleged conspiracy to fix TBR prices; Ortho **[**49]** has merely suggested that that is a possibility. Second, as a practical matter, Ortho's theory—which could be raised in every price-fixing case—would be very difficult to model. Without stronger evidence that a price-fixing conspiracy did, indeed, have offsetting benefits to consumers, plaintiffs in this type of case should not be saddled with analyzing whether a price-fixing conspiracy might possibly have had any negative effect on the price of any product sold by the defendants. Ortho has not cited any nonmerger cases in which courts imposed such a requirement, and this Court will not do so in this case. The Court thus accepts the results of the damages models as persuasive evidence of impact.

In summary, after a rigorous analysis of the evidence offered by both parties, the Court concludes that plaintiffs have shown by a preponderance of the evidence that they will be able to demonstrate antitrust impact using predominantly common proof.

c. Damages

1. Legal Standard

HN24[] Plaintiffs must also establish by a preponderance of the evidence that they "will be able to measure damages on a class-wide basis using common proof." *Behrend, 655 F.3d at 204*. At the class certification stage, the court **[**50]** must "address only whether [p]laintiffs have provided a method to measure and quantify damages on a class-wide basis." *Id. at 206*. The Court has not "reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculative." Id. The Court must find that the model "could evolve to become admissible evidence," but the model need not be "perfect." [8] Id. at 204 n.13; see also, e.g., McDonough, 638 F. Supp. 2d at 490 ("[P]redominance requires only a viable method whereby damages can be reasonably estimated based on common evidence."); In re Neurontin Antitrust Litig. No. 02-1390, 2011 U.S. Dist. LEXIS 7453, 2011 WL 286118, at *25 (D.N.J. Jan. 25, 2011).

In Behrend, the Third Circuit rejected the defendant's criticisms of the reliability of the damages model proposed by the **[**51]** plaintiffs' expert. The Court held that those criticisms constituted "attacks on the merits of the methodology that have no place in the class certification inquiry." Behrend, 655 F.3d at 206-07. Behrend makes this point repeatedly, stating, for example, that **HN26**[] "at the class certification stage, [courts] are precluded from addressing any merits inquiry unnecessary to making a Rule 23 determination." Id. at 190. This is consistent with Hydrogen Peroxide's interpretation of Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), as "preclud[ing] . . . a merits inquiry that is not necessary to determine a Rule 23 requirement." Hydrogen Peroxide, 552 F.3d at 317.

As explained below, Ortho devotes little energy to arguing that individual proof will predominate in calculating damages. Virtually all of Ortho's arguments go to the merits of the models Dr. Beyer has constructed: the question whether the models give rise to "a just and reasonable inference or [are] speculative." Behrend, 655 F.3d at 206. These merits arguments have some **[*241]** force, and they may prove persuasive at the summary judgment stage. However, they do not overlap with the Rule 23 requirements, because they neither implicate **[**52]** a need for individual proof nor convince the Court that Dr. Beyer's models could not "evolve to become admissible evidence." Id. at 204 n.13. Thus, applying Behrend, Hydrogen Peroxide, and Eisen, the Court concludes that it must defer analysis beyond that offered in this Memorandum until it addresses the issues at the summary judgment stage. See In re Online DVD Rental Antitrust Litig., No. 09-2029, 2010 U.S. Dist. LEXIS 138558, 2010 WL 5396064, at *10 (N.D. Cal. Dec. 23, 2010) (rejecting arguments that plaintiffs failed "to discuss or explain the importance of certain competitive variables in the but for world" because those arguments "are ultimately directed to the merits of plaintiffs' ability to prove impact"; they "do not . . . establish that plaintiffs' methodology for proving impact will necessarily require individualized evidence").

2. Damages Models Offered by Dr. Beyer

To calculate damages, each plaintiff must estimate the overcharge that it paid as a result of the alleged conspiracy: that is, the difference between the prices it actually paid for TBR and the prices it would have paid in the absence of a price-fixing conspiracy ("but-for prices"). In this case, plaintiffs' damages model must distinguish **[**53]** between price increases resulting from defendants' creation of a duopoly and price increases resulting from the anticompetitive conduct in which defendants are alleged to have engaged. In his Reply Report, Dr. Beyer formulates and applies several variations on a benchmark model to estimate the but-for prices that would have resulted from creation of a lawful duopoly in the absence of anticompetitive conduct. He then measures the amount by which actual prices exceeded but-for prices, which he concludes is attributable to the anticompetitive conduct alleged by plaintiffs.

As a general matter, **HN27**[] the benchmark methodology is widely accepted for calculating overcharges in antitrust cases. See, e.g., Linerboard, 305 F.3d at 153-55; McDonough, 638 F. Supp. 2d at 490 & n.19; IIB Areeda et al., supra, at § 392d. Estimating but-for prices is particularly difficult in this case, however, because defendants' duopoly was created only a short time before they allegedly conspired to fix prices. Market consolidation tends to increase prices, even in the absence of coordinated conduct. See, e.g., Horizontal Merger Guidelines, supra, at § 6. The parties agree that this would make it very difficult to make **[**54]** reliable use of empirical data regarding pre-

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[8] **HN25**[] Even at the merits stage, plaintiffs need not measure damages with complete certainty, because courts recognize the "inherent difficulty of identifying a 'but-for world.'" Behrend, 655 F.3d at 203. At the merits stage, plaintiffs must demonstrate damages only "as 'a matter of just and reasonable inference.'" Id. (quoting Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 51 S. Ct. 248, 75 L. Ed. 544 (1931)).

conspiracy prices to estimate but-for prices. [9] (See Beyer Report ¶ 93; 7/26/12 Hr'g Tr. 165-67.) Moreover, because the damages period extends to the present, there is no "after" period that can serve as a benchmark. (Beyer Report ¶ 92.) Dr. Beyer thus cannot use the familiar "before-and-after" benchmark that courts have approved in many cases. See, e.g., *Linerboard, 305 F.3d at 153-55*; *In re Wellbutrin XL Antitrust Litig., No. 08-2431, 2011 U.S. Dist. LEXIS 90075, 2011 WL 3563385, at *14-16 (E.D. Pa. Aug. 11, 2011)*.

As an alternative, Dr. Beyer bases his benchmark on the price increases defendants planned and partially implemented after the duopoly was created but before they allegedly formed their price-fixing conspiracy. Dr. Beyer asserts that defendants' planned price increases provide a good estimate of but-for prices because (1) they account for the market's consolidation to duopoly, (2) they are "based on Immucor's and **[**55]** Ortho's own projection of the but-for prices of [TBR]," and (3) "the basis for the increase does not appear to include cooperative behavior between the two defendants." (Beyer Report ¶ 97.)

For the period between 2001 and 2005, Dr. Beyer assumes that both defendants' TBR prices would have increased by 25% per year, as Ortho had planned under OCV. [10] Plaintiffs **[*242]** assert that 25% is a reasonable figure for both defendants because it reflects Ortho's carefully considered OCV strategy and because Immucor (1) implemented a 20% increase around the same time and (2) consistently followed Ortho's pricing strategies. Plaintiffs further contend that, based on Ortho strategy documents, it is reasonable to estimate that the increases would have lasted for five years. (See, e.g., Pls.' Mot. Ex. 54, at 10 (Ortho planning document stating that the OCV plan would include "5+ years of annual 25% price increases").) Moreover, Dr. Beyer points out that after five years of 25% increases, Ortho would have more than achieved the level of gross profitability that its president, Catherine Burzik, set as a goal after defendants obtained their duopoly. [11] (8/6/12 Tr. at 336.)

For the period between 2006 and the end of the damages period, Dr. Beyer proposes two alternative methods of estimating but-for prices. The first option is to assume that TBR prices would have risen at the same rate that Immucor's standard costs rose. [12] The second option makes use of a proposed non-TBR "yardstick" product, RhoGAM. RhoGAM is Ortho's brand of Rho(D), a prescription pharmaceutical that is administered to pregnant women. Dr. Beyer asserts that Rho(D) is a good yardstick for TBR because of the following similarities: (1) the Rho(D) market is a "highly concentrated oligopoly," (2) demand for Rho(D) is inelastic, (3) the Rho(D) market features high barriers to entry due to FDA regulation, (4) RhoGAM is interchangeable with other Rho(D) products, (5) the same hospitals that were the largest TBR customers also purchased Rho(D), (6) demand for Rho(D) was

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[9] For the same reason, the parties agree that it would be difficult to apply multiple regression analysis, another technique often used to isolate anticompetitive effects, reliably in this case. (See Beyer Reply ¶ 52-53; 7/26/12 Hr'g Tr. 164-66.)

[10] Dr. Beyer also presents a variation **[**56]** on this methodology in which he adjusts the size of the but-for price increases of individual TBR products to reflect the distribution of actual price increases on different TBR products. (Beyer Reply ¶ 74.) The weighted average price increase, however, remains 25%. (Id.)

[11] At the class certification hearing, Dr. Bronsteen testified that it did not make sense for the 25% price increases to stop after five years. In his opinion, defendants would have continued raising prices in the but-for world "until they reach[ed] the level of [the prices actually charged]." (7/26/12 Hr'g Tr. 194.) Dr. Bronsteen oversimplifies this point. There are a number of reasons that the price obtained by noncolluding duopolists might be lower than that obtained by a cartel. See, e.g., IIB Areeda et al., supra, at ¶ 405c ("[W]ith any market of given structural and other characteristics, the probability of effective cooperation in raising price and restricting output is much greater with express collusion than with mere reliance on recognized interdependence."); *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 656 (7th Cir. 2002)* (Posner, J.) ("[S]ellers would not bother to fix list prices if they **[**57]** thought there would be no effect on transaction prices.").

[12] Dr. Beyer uses Immucor's standard costs for both defendants because **[**58]** Ortho has represented that its cost data is unreliable. Because both defendants manufactured the same products from similar raw materials and were subject to the same regulations, Immucor's costs are a reasonable proxy for Ortho's costs. (Beyer Reply ¶ 56.) At the very least, using Immucor's standard costs is sufficient to "give 'a reasonable estimate' of damages. And nothing more is required." *McDonough, 638 F. Supp. 2d at 491* (quoting *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 484 (3d Cir. 1998))*.

relatively stable throughout the damages period, and (7) prices for Rho(D) were set based on "the level of competitiveness in the market rather than on cost or demand factors." (Beyer Reply ¶¶ 61-67.)

In sum, in all variations of his proposed damages models, Dr. Beyer uses a benchmark methodology to estimate the but-for prices that defendants would have charged in a lawful duopoly, in the absence of collusion. Dr. Beyer then calculates the differences between those estimated but-for prices and the actual prices charged to plaintiffs, which he concludes are attributable to the alleged price-fixing conspiracy.

3. Ortho's Criticisms of Dr. Beyer's Damages Models

Ortho criticizes Dr. Beyer's proposed damages models on a number of grounds. As stated above, most of these criticisms go to the reliability of the models—their alleged failure to account for important competitive variables—rather **[**59]** than whether their application will require the use of individualized proof at trial.

i. Common Proof Versus Individualized Proof

A few of Ortho's arguments go to the heart of the predominance inquiry—whether plaintiffs will rely on individual evidence to prove their case. First, Ortho asserts that **[*243]** Dr. Beyer's damages model is insufficient because (1) it assumes that there would have been one but-for price for each TBR product in each year and (2) in reality, different customers paid different prices, and a model that accounted for that would require extensive use of individualized proof. The Court rejects that argument. Ortho may be correct that, if feasible, it would be more accurate to estimate but-for prices for each individual transaction separately. However, estimating a single but-for price for each product in each year is sufficient to estimate damages "'as a matter of just and reasonable inference.'" *Behrend, 655 F.3d at 203* (quoting *Story Parchment, 282 U.S. at 563*). What Ortho proposes would exponentially complicate the calculation of damages in this type of case. As Dr. Beyer testified, it would require plaintiffs to estimate "almost a million" different but-for prices. (8/6/12 **[**60]** Tr. at 351.) Ortho has cited no case—and the Court has found none—in which plaintiffs were required to do this. In contrast, the Court has found cases that featured variable pricing in the real world but in which courts accepted the calculation of only one price for all customers in the but-for world. See, e.g., *McDonough, 638 F. Supp. 2d at 490-91*.***HN28***[] "[I]t is important not to let a quest for perfect evidence become the enemy of good evidence." *Flonase, 284 F.R.D. 207, 2012 U.S. Dist. LEXIS 83950, 2012 WL 2277840, at *24* (quoting *Messner, 669 F.3d at 808*).

Plaintiffs have also rebutted Ortho's contention that Immucor's variable pricing will necessitate the use of individualized evidence to calculate damages. It is well established that "variation of damages among class members does not defeat certification" so long as that variation does not raise "[c]omplex and individual questions." *Id. at 204*; see also 7AA Charles Alan Wright et al., Federal Practice & Procedure § 1781 (3d ed. 2005). In his Reply Report, Dr. Beyer shows that the prices paid by most Immucor customers after 2005 corresponded to one of the standard pricing tiers, and it is straightforward to calculate an overcharge percentage for each pricing tier. (See Beyer Reply **[**61]** ¶¶ 77-84.) Moreover, Dr. Beyer calculates damages for a random sample of Immucor and Ortho customers using data regarding their actual transactions. (Id. ¶¶ 90-93.) Despite variation in the prices the customers may have paid, the damages model produces results—and shows antitrust impact—for all of them. (Id.) It would be straightforward to perform a similar calculation for the rest of the class. Dr. Beyer has thus shown that, despite variation in the actual prices paid by purchasers, his damages formula is "able to measure damages on a class-wide basis using common proof." *Behrend, 655 F.3d at 204*.

ii. General Reliability Arguments

At the present stage of the litigation, the Court also rejects Ortho's arguments regarding the reliability of plaintiffs' damages models. Even if Dr. Beyer's models have some deficiencies, the Court concludes that those deficiencies are remediable; Ortho has not established that the models could not "evolve to become admissible evidence." *Behrend, 655 F.3d at 204 n.13*.

First, Ortho argues strenuously that the 25% price increase envisioned under OCV is not a reliable benchmark for prices between 2001 and 2005. Ortho contends that it implemented the BBLP before **[**62]** the alleged price-fixing conspiracy began. As a result, according to Ortho, neither OCV nor the BBLP is a product of the price-fixing conspiracy alleged in this case, rendering it wholly arbitrary for Dr. Beyer to select OCV prices, instead of BBLP prices, as a benchmark. The Court rejects this argument. Plaintiffs' theory—that Ortho began to consider the BBLP before the AABB meetings but would not have executed the plan without explicit assurance that Immucor would follow—is highly plausible and is consistent with documents showing that the BBLP only became fully operational after the meetings. Moreover, even if Dr. Beyer used BBLP prices, rather than OCV prices, as a benchmark, the damages methodology would still utilize common proof. See *Behrend, 655 F.3d at 206-07* (explaining that if the defendant's criticisms were taken into account, "only the final amount of estimated damages would change"; the criticisms thus "do not impeach the . . . ultimate holding that damages are capable of common proof on a class-wide basis"). This is a mer **[*244]** its argument that does not overlap with a *Rule 23* requirement.

Ortho's more persuasive argument is that the OCV benchmark is unreliable because it fails **[**63]** to take crucial competitive variables into account: it does not adequately control for changes in standard costs, demand, or market structure. Dr. Bronsteen presented persuasive testimony on this point at the class certification hearing. First, however, Ortho did not present any evidence that plaintiffs would need to rely on individualized proof to account for these competitive variables. Dr. Bronsteen's testimony did not rebut the fundamental point that standard costs, demand, and market structure are all common variables that Ortho asserts plaintiffs should have included in their common damages formula.

Second, Dr. Bronsteen did not persuade the Court that plaintiffs' damages models could not evolve to become admissible at trial. Dr. Bronsteen argued persuasively that Dr. Beyer's models would be more accurate if, for example, he added annual percentage increases in standard costs to his benchmark to account for the likelihood that defendants would have passed increased costs on to purchasers. (See 7/26/12 Hr'g Tr. 196-97.) He also opined that Dr. Beyer should adjust the benchmark annually to account for changes in aggregate demand. The parties have presented data regarding both costs **[**64]** and aggregate demand, so, if deemed necessary by Dr. Beyer, both of these criticisms can be addressed and rectified before the merits stage of the litigation. [13]

In addition, contrary to Dr. Bronsteen's report and testimony, the damages models account for market structure. The 25% OCV-based benchmark reflects plans defendants formed after their duopoly was created, thus reflecting their estimate of the prices they would be able to impose given the change in market structure. (Beyer Report ¶ 95.) Likewise, both of the alternative benchmarks Dr. Beyer proposes **[**65]** for the post-2005 period take market structure into account. His assumption that "the full amount of variable costs of manufacturing blood reagents would be passed on to purchasers" reflects defendants' market power as duopolists. (Id. ¶ 101.) Likewise, he selected RhoGAM as a yardstick because, like the TBR market, the RhoGAM market was a highly concentrated oligopoly in which Ortho had a large market share. (Beyer Reply ¶ 61.) Ortho argues that, even if Dr. Beyer's damages formulas attempt to account for market share in this way, they are fatally speculative and unreliable. However, as stated above, the models present a viable method of calculating damages using common proof, and "[w]e have not reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculative." [14] *Behrend, 655 F.3d at 206*.

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[13] Dr. Bronsteen also testified at the certification hearing that he "suspect[ed]" that if Dr. Beyer made this type of adjustment, but-for prices would fall below average prices and plaintiffs would be unable to prevail on the merits. (7/26/12 Hr'g Tr. 197.) The Court notes that Dr. Bronsteen did not perform any analysis to support his suspicion. More fundamentally, ***HN29***[] "a district court has limited authority to examine the merits when conducting the certification inquiry"; the "ability of the named plaintiff to succeed on his or her individual claims has never been a prerequisite to certification of the class." *Sullivan, 667 F.3d at 305*.

[14] In his original Report, Dr. Beyer stated that the first increase in but-for prices would occur in 2000. (Beyer Report ¶ 95.) His Reply Report shifts the first increase to 2001. (Beyer Reply ¶ 73.) Ortho contends that this change makes Dr. Beyer's methodology "even more ad hoc and speculative." (Def.'s Surreply 11.) However, Dr. Beyer provides **[**66]** a persuasive explanation for the change. He explains that he shifted the first but-for price increase because the alleged price-fixing conspiracy did not begin to impact customers until 2001; neither defendant imposed its substantial price increases until early 2001. (Beyer

iii. The RhoGAM Yardstick

Finally, Ortho argues that RhoGAM is too different from TBR to serve as a yardstick for the post-2005 period. In particular, according to Ortho, the RhoGAM and TBR markets feature different demand and cost factors and different competition levels. **[*245]** (See, e.g., Def.'s Surreply 11-13; see also Bronsteen Report 19-22.) Moreover, prices for RhoGAM and TBR moved very differently prior to the alleged price-fixing conspiracy. (Id.) Plaintiffs respond that the markets are comparable because they both feature, inter alia, Ortho as a major competitor, inelastic demand, barriers to entry created by FDA requirements, homogeneous products, and relatively **[**67]** stable demand. (See, e.g., Beyer Reply ¶¶ 61-67.) Pre-conspiracy prices of TBR and RhoGAM are different because, for most of that period, the TBR market was competitive, while the RhoGAM market was a duopoly. (Id. ¶ 68.)

HN30[] To succeed at the merits stage, the yardstick business or product "'must be as nearly identical to the plaintiff's as possible.'" *Loeffel Steel Prods. v. Delta Brands, Inc., 387 F. Supp. 2d 794, 812 (N.D. Ill. 2005)*. "[E]xact correlation is not necessary," however; the products need only be "fair congeners." Id.; see also *Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, 213 F.3d 198, 208 (5th Cir. 2000)* ("An antitrust plaintiff who uses a yardstick method of determining lost profit bears the burden to demonstrate the reasonable similarity of the business whose earning experience he would borrow." (emphasis added)). Few cases discuss the showing of similarity that is required at the class certification stage, but courts have rejected proposed yardsticks on certification where the party proffering them failed to perform a substantive analysis of the products' similarity. See *In re Live Concert Antitrust Litig., No. 06-1745, 863 F. Supp. 2d 966, 2012 U.S. Dist. LEXIS 47768, 2012 WL 1021081, at *7-9 (C.D. Cal. Mar. 23, 2012)*; **[**68]** *Weiner v. Snapple Beverage Corp., No. 07-8742, 2010 U.S. Dist. LEXIS 79647, 2010 WL 3119452, at *7-10 (S.D.N.Y. Aug. 5, 2010)*.

Under these standards, as well as the more general standards set forth in *Behrend*, the Court concludes that the proposed RhoGAM yardstick supports a finding that plaintiffs will be able to prove the amount of damages using common evidence. Ortho points out important differences between the TBR and RhoGAM markets—most persuasively, the fact that the RhoGAM market featured three competitors, rather than two, during the period for which Dr. Beyer proposes to use it. However, these arguments do not persuade the Court that individualized evidence will be necessary to RhoGAM's use as a yardstick or that a damages model incorporating a RhoGAM yardstick could not evolve to become admissible at trial. [15] Although RhoGAM and TBR are not identical, they appear, on the present state of the record, to be "fair congeners." *Loeffel, 387 F. Supp. 2d at 812*. Moreover, even if the Court rejects the RhoGAM yardstick at the merits stage, the yardstick is merely one proposed method for calculating post-2005 damages; Dr. Beyer has proposed the use of Immucor's standard costs as an alternative.

In conclusion, under the standards set forth in *Behrend* and *Hydrogen Peroxide*, plaintiffs have satisfied the predominance requirement with respect to the amount of damages. Dr. Bronsteen's criticisms of Dr. Beyer's models are not so fundamental that the models could not "evolve to become admissible evidence." Plaintiffs have presented and applied viable methodologies to calculate damages using common proof.

d. Fraudulent Concealment

Finally, Ortho argues that individual issues related to fraudulent concealment will predominate at trial. ***HN31***[] To avoid the four-year statute of limitations on civil antitrust actions under *15 U.S.C. § 15b*, plaintiffs must show "(1) fraudulent concealment; (2) failure on the part of the plaintiff to discover his cause of action notwithstanding such concealment; and (3) that such failure to discover occurred [notwithstanding] the exercise of due care on the part of the plaintiff." *Linerboard, 305 F.3d at 160* **[**70]** (alteration in original) (internal quotation marks omitted). The first

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Reply ¶ 73.) Thus, since plaintiffs do not allege that prices increased in 2000 due to unlawful collusion, "it is more accurate for but-for prices to equal actual prices in 2000 and to have but-for prices only start diverging from actual prices in 2001." (Id.)

[15] On the present **[**69]** state of the record, the Court is not entirely persuaded by Dr. Beyer's explanation for why he uses RhoGAM as a yardstick only when the RhoGAM market had three competitors. However, that issue does not require the Court to reject the RhoGAM yardstick at the certification stage.

of plaintiffs' class action complaints was filed on May 18, 2009. Thus, claims for damages based on pre-May 18, 2005 purchases of TBR are time-barred unless the purchaser can establish fraudulent concealment. Ortho argues that a finding of predominance is barred by the myriad individual issues that will be involved **[*246]** in analyzing all three elements of fraudulent concealment.

The Court rejects this argument. It is true that ***HN32***[] an action implicating fraudulent concealment raises some individual issues, including whether an individual plaintiff knew of the alleged violation and whether he exercised due diligence. However, in Linerboard, the Third Circuit held that, in general, "[i]t is the fact of concealment that is the polestar in an analysis of fraudulent concealment." *Linerboard, 305 F.3d at 163*. The weight of authority is in accord with that holding. See, e.g., *In re Pressure Sensitive Labelstock Antitrust Litig., No. 03-1556, 2007 U.S. Dist. LEXIS 85466, 2007 WL 4150666, at *21-22 (M.D. Pa. Nov. 19, 2007)*; *In re Flat Glass Antitrust Litig., 191 F.R.D. 472, 488 (W.D. Pa. 1999)*; see also Newberg on Class Actions § 4:26 (4th ed. 2002) ("Challenges **[**71]** based on the statute of limitations, fraudulent concealment, releases, causation, or reliance often are rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability.").

Nonetheless, there is no per se rule that individual issues regarding fraudulent concealment can never defeat a finding of predominance. If a case presented particularly complex or important individual issues, it might be appropriate to deny class certification. However, this is not such a case. Ortho has not persuaded the Court that here, unlike the typical price-fixing case, individualized issues are the "polestar" of the fraudulent-concealment inquiry. In this case, the fraudulent-concealment issue involves the same mix of individualized and common proof that was present in Linerboard and other cases. There is substantial common evidence that defendants took affirmative acts to conceal their alleged conspiracy—for example, the acts of concealment that surrounded the Thorne/Gendusa lunch in November 2000. Ortho cites evidence regarding individual plaintiffs' suspicions and due diligence. However, **[**72]** that evidence is highly similar to, and no more complex than, the individual evidence that failed to preclude certification in Linerboard. See *Linerboard, 305 F.3d 161-62 & n.13*. In this case, as in many others, individual issues relating to fraudulent concealment "can be resolved at a later damages phase" if necessary. *Linerboard, 305 F.3d at 163*. They do not defeat a finding of predominance. [16]

Thus, for the reasons stated above, the Court concludes that plaintiffs have satisfied the *Rule 23(b)(3)* predominance requirement with respect to fraudulent concealment.

2. Superiority

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[16] Ortho argues in its surreply brief that requiring it to litigate individual plaintiffs' fraudulent concealment defenses in separate damages proceedings would "infringe Ortho's substantive rights and thereby violate the Rules Enabling Act." (Def.'s Surreply 22-23.) Ortho cites two cases for this proposition: *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*, and *Hohider v. United Parcel Service, Inc., 574 F.3d 169 (3d Cir. 2009)*. Neither case supports Ortho's argument.

In Dukes, the Supreme Court held that it would violate the Rules Enabling Act to calculate individual plaintiffs' damages by applying a formula, without conducting any "individualized proceedings." *131 S. Ct. at 2561*. That is very different from the procedure envisioned in this case, in which each individual plaintiff would **[**73]** be required to show that it was entitled to tolling of the statute of limitations.

In Hohider, the district court erroneously concluded that it did not need to determine whether individual employment-discrimination plaintiffs were qualified for their jobs in order to determine whether they were entitled to relief. *574 F.3d at 198*. Based on that conclusion, the court certified a class under *Rule 23(b)(2)*. The Third Circuit reversed, holding that an individualized analysis of each plaintiff's qualifications was, in fact, necessary to the adjudication of their claims and was fundamentally "incompatible with the requirements of *Rule 23*." *Id. at 196*. In this case, in contrast, there is no question that the essential elements of plaintiffs' claims and each plaintiff's entitlement to tolling of the statute of limitations will be adjudicated on the merits. Moreover, unlike in Hohider, analysis of those issues in a class action is compatible with the requirements of *Rule 23*. See, e.g., *Linerboard, 305 F.3d at 163*.

HN33[] With [**74] respect to superiority, Rule 23(b)(3) requires that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy." To determine whether the requirement is satisfied, a court must "balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication." Amchem, 83 F.3d at 632. "[S]imilar to the predominance requirement, [*247] the requirement of superiority ensures that resolution by class action will 'achieve economies of time, effort, and expense, and promote . . . uniformity of decision without sacrificing procedural fairness or bringing about other undesirable results.'" Flonase, 284 F.R.D. 207, 2012 U.S. Dist. LEXIS 83950, 2012 WL 2277840, at *25 (quoting Amchem, 521 U.S. at 615).

The superiority requirement is satisfied in this case, and Ortho does not dispute that point. Certification of the class will promote fairness and efficiency. If the class were not certified, "the numerous individual class members would be forced to file suit individually, producing numerous identical issues in each case that would waste judicial resources and leave all parties vulnerable to unfair inconsistencies." 2012 U.S. Dist. LEXIS 83950, [WL] at *26. Many [**75] courts have recognized that the cost of maintaining individual actions is frequently prohibitive in this type of antitrust litigation. See, e.g., Wellbutrin, 282 F.R.D. 126, 2011 U.S. Dist. LEXIS 90697, 2011 WL 3563835, at *17; Linerboard, 203 F.R.D. at 223. Due to the many common questions of law and fact involved in the class members' claims, class treatment will promote efficiency. For these reasons, plaintiffs have satisfied the superiority requirement under Rule 23(b)(3).

V. CONCLUSION

For the reasons set forth above, Plaintiffs' Motion for Class Certification is granted. An appropriate Order follows.

ORDER

AND NOW, this 22nd day of August, 2012, upon consideration of Plaintiffs' Motion for Class Certification (Document No. 140, filed September 16, 2011), Defendant Ortho-Clinical Diagnostics, Inc.'s Memorandum in Opposition to Plaintiffs' Motion for Class Certification (Document No. 165, filed March 2, 2012), the Reply in Support of Plaintiffs' Motion for Class Certification (Document No. 180, filed May 24, 2012), and Defendant Ortho-Clinical Diagnostics, Inc.'s Surreply Memorandum in Opposition to Plaintiffs' Motion for Class Certification (Document No. 184, filed July 2, 2012), after a hearing on July 26, 2012, and additional [**76] testimony on August 6, 2012, for the reasons set forth in the Memorandum dated August 22, 2012, **IT IS ORDERED** that Plaintiffs' Motion for Class Certification is **GRANTED.**

IT IS FURTHER ORDERED as follows:

1. The following litigation class is hereby certified pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(3): "All individuals and entities who purchased traditional blood reagents in the United States directly from Defendants Immucor, Inc., and Ortho-Clinical Diagnostics, Inc. at any time from January 1, 2000 through the present. Excluded from the Class are Defendants, and their respective parents, subsidiaries and affiliates, as well as any federal government entities."

2. Class claims, issues, and defenses are those detailed in the Memorandum of August 22, 2012, and the affirmative defenses raised in the answer of Ortho-Clinical Diagnostics, Inc.

3. The law firm of Spector Roseman Kodroff & Willis, P.C., is hereby appointed as counsel to the class.

4. Within 30 days of the date of this Order, the parties shall submit an agreed-upon proposed notice program and forms of notice to class members. If the parties are unable to agree as to the proposed notice program and/or forms of [**77] notice, they shall submit separate proposals.

BY THE COURT:

/s/ Hon. Jan E. DuBois

JAN E. DUBOIS, J.

Prof. JosÉ M. Font De SantiÁgo v. Burset

United States District Court for the District of Puerto Rico

August 22, 2012, Decided; August 22, 2012, Filed

Civil No. 11-2158 (FAB/BJM)

Reporter

2012 U.S. Dist. LEXIS 204000 *

PROF. DR. JOSÉ M. FONT DE SANTIÁGO, Plaintiff, v. HON. LUIS FORTUÑO BURSET, Governor of Puerto Rico, in his official and individual capacity, et al., Defendants.

Core Terms

immunity, damages, sovereign immunity, allegations, diversity, rights, qualified immunity, recommendation, Disabilities, Treaty, factual allegations, international law, cause of action, territory, license, suits, legislative immunity, declaration, references, parties, waived

Counsel: **[*1]** Jose M. Font-De Santiago, Plaintiff, Pro se, Hato Rey, PR.

For Luis Fortuno-Burset, in his official and individual capacity, Commonwealth of Puerto Rico, through its Secretary of Justice Guillermo Somoza, Guillermo Somoza, in his official and individual capacity, Department of Health of PR, though its Secretary Dr. Lorenzo Gonzalez, Lorenzo Gonzalez, in his official and individual capacity, Defendants: Eliezer Alberto Aldarondo-Lopez, LEAD ATTORNEY, Aldarondo & Lopez Bras, PSC, Guaynabo, PR.

For U.S. Bankruptcy Court, Puerto Rico District, through Judge Brian Tester, Defendant: Agnes I. Cordero, United States Attorneys Office, District of Puerto Rico, San Juan, PR.

For MAPFRE Insurance through its Chairman, Defendant: Jose E. Otero-Matos, Jose E. Otero Law Offices, San Juan, PR.

For ACE Insurance through its Chariman, Defendant: Francisco J. Colon-Pagan, Colon & Colon PSC, San Juan, PR.

For University of Puerto Rico through its President, Defendant: Alondra M. Fraga-Melendez, LEAD ATTORNEY, Alondra Fraga Melendez Law Offices, San Juan, PR.

For American International Insurance through its Chariman, Defendant: Vivian Patricia Ramos-Santiago, De Corral & De Mier, San Juan, PR.

Judges: BRUCE J. McGIVERIN, **[*2]** United States Magistrate Judge.

Opinion by: BRUCE J. McGIVERIN

Opinion

REPORT AND RECOMMENDATION

In a 53-page complaint, Prof. Dr. José M. Font De Santiágo ("Font"), *pro se*, sued the United States and Puerto Rico governments, several of their officers and agencies, and various private parties, seeking equitable relief and the payment of "$1,242,408,890.41 BILLIONS" in damages on a dizzying array of legal theories. (Docket No. 2, hereinafter "Compl.").

Before the court are motions to dismiss brought by the following defendants: Hospital Menonita ("Mennonite") (Docket No. 71); the Commonwealth of Puerto Rico, the Department of Health, Governor Luis Fortuño Burset, President of the Senate of Puerto Rico Thomas Rivera Schatz ("Rivera"), Attorney General Guillermo Somoza ("Somoza"), and Secretary of Health Lorenzo González ("Secretary González") (collectively, "Commonwealth defendants") (Docket No. 87); Speaker of the Puerto Rico House of Representatives Jennifer González ("Speaker González") (Docket No. 90); the University of Puerto Rico ("UPR") (Docket No. 91); American International Insurance Company ("American") (Docket No. 92); the United States of America, the U.S. Bankruptcy Court, and U.S. Bankruptcy Judge **[*3]** Brian Tester (collectively, "federal defendants") (Docket No. 94); and MAPFRE PRAICO Insurance Co. ("MAPFRE") (Docket No. 100). ACE Insurance Company ("ACE") moved to join American's motion. (Docket No. 104). The only captioned defendants not moving for dismissal are the Puerto Rico Board of Medical Examiners, the Puerto Rico Board of Licensure and Discipline, Engineering Builder Construction Group, S.E. ("EBCG"), and Jose Garcia, Inc.

Font has opposed the motions in a series of filings, most of which are written in a near-even mix of English and Spanish and seem to repeat portions of the complaint, coupled with demands for a jury trial and requests for my recusal.[1] (Docket Nos. 101, 102, 103, 110, 112, 115, 116). Several defendants moved to strike the material under Rule 12(f) as "scandalous." (Docket Nos. 105, 106, 107, 108).

The case was referred to me by the presiding district judge. (Docket No. 10). All parties appear to have consented to magistrate judge jurisdiction, but two reserved consent on "trial, the entry of a final judgment[,] and post-trial proceedings." (Docket Nos. 81, 82). Out of an abundance of caution, I therefore present my analysis of these motions as a report **[*4]** and recommendation to the presiding district judge. For the reasons that follow, I recommend that Font's complaint be **dismissed**.

SUFFICIENCY OF THE PLEADINGS

A complaint "must contain . . . a short and plain statement of the grounds for the court's jurisdiction . . . a short and plain statement of the claim showing that the pleader is entitled to relief; and a demand for the relief sought . . . ." *Fed. R. Civ. P. 8(a)*. *Pro se* complaints must be construed liberally, such that if the plaintiff "present[s] sufficient

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[1] Font alleges that I have violated the Constitution and am partial to defendants' attorneys and requests my recusal. (See Docket No. 110; Docket No. 112, p. 2; Docket No. 113, p. 3; Docket No. 116, p. 2). "Any . . . magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," or "[w]here he has a personal bias or prejudice concerning a party . . . ." *28 U.S.C. §§ 455(a)*, *455(b)(1)*. Under *§ 455(a)*, recusal is required "only if the charge against [the judge] is supported by a factual foundation and the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality." *In re United States (Franco), 158 F.3d 26, 30 (1st Cir. 1998)* (internal quotation marks and citation omitted). The words "bias or prejudice" in *§ 455(b)(1)* "connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate . . . ." *Liteky v. United States, 510 U.S. 540, 550 (1994)*. Importantly, "[t]he trial judge has a duty not to recuse himself or herself if there is no objective basis for recusal." *In re United States (Vásquez-Botet), 441 F.3d 44, 67 (1st Cir. 2006)*. Moreover, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion . . . ." *Liteky, 510 U.S. at 555-56*.

Judge Besosa already denied Font's first request for my recusal (Docket No. 111), but since *§ 455* calls for self-disqualification, I will nonetheless briefly consider the other motions. Font does not plainly state the reason he believes I am partial to the defense attorneys, making it difficult to assess his position. As each motion is accompanied by requests to deny the pending motions to dismiss and set the case for trial, the best inference I can draw is that Font is relying on the mere fact that his requests have not been granted. However, that fact is in the nature of ordinary case management and judicial determination, and does not on its own suggest any "wrongful or inappropriate" predisposition. See *Liteky, 510 U.S. at 555-56*. Because Font has not alleged anything that would establish even the objective appearance of partiality, his pending requests for my recusal are **denied**.

facts, the court may intuit the correct cause of action, even if it was imperfectly pled." *Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997)*.

Notwithstanding the leniency in construction afforded *pro se* litigants, Font's complaint may be dismissed for failure to inform the defendants of the basis for his claims. "[C]onsidering the length of plaintiff's complaint, the constant repetitions, and the overall confusing nature of the complaint, it would be challenging, at best, for the defendants to be properly put on notice of plaintiff's claims. Indeed, the complaint does not permit the defendants to answer and prepare for trial." Cf. Laurence v. Wall, No. CA 07-066 ML, 2007 WL 1875795, at *1 (D.R.I. June 27, 2007). Moreover, Font has been a *pro se* litigant before this court for over 20 **[*5]** years, having filed complaints here at least nine times since 1990.[2] In observing this, I "[do] not intend to punish [him] for excessive litigiousness, but rather merely to charge him with the responsibilities accompanying his manifest experience with civil litigation." See *Sledge v. Kooi, 564 F.3d 105, 109 (2d Cir. 2009)*; Carey v. Ward, No. 06-CV-293-SM, 2007 WL 2682259, at *1 (D.N.H. Sept. 7, 2007) (*Pro se* plaintiff had been "a frequent litigant in this court and, given his substantial litigation experience, is presumed to fully understand that more is necessary to overcome a properly supported motion for summary judgment").

In short, none of the defendants can be expected to make heads or tails of what Font has accused them of, and any attempt to impose structure on his manifesto gives him far more credit than is due. Nonetheless, construing the pleadings "so as to do justice," *Fed. R. Civ. P. 8(e)*, I will proceed to an alternative analysis of why the complaint, no matter how generously construed, nonetheless fails to state a claim that is cognizable before this court.

STANDARDS FOR MOTIONS TO DISMISS

Several of the **[*6]** moving defendants challenge the court's subject matter jurisdiction. "[F]ederal jurisdiction is never presumed." *Viqueira v. First Bank, 140 F.3d 12, 16 (1st Cir. 1998)*. Rather, "the party invoking the jurisdiction of a federal court carries the burden of proving its existence." *P.R. Tel. Co. v. Telecomm's Reg. Bd. of P.R., 189 F.3d 1, 7 (1st Cir. 1999)*. There are two general rubrics for evaluating subject matter jurisdiction. First, a defendant may challenge the legal sufficiency of the facts offered by the plaintiff, while assuming their accuracy; the court then credits the plaintiff's factual allegations and draws reasonable inferences in its favor. *Valentín v. Hospital Bella Vista, 254 F.3d 358, 363 (1st Cir. 2001)*. Alternatively, the movant may challenge the truth of the plaintiff's facts and offer contrary evidence; the court then weighs the evidence. Id. Here, all of the challenges to subject matter jurisdiction go to the legal sufficiency of Font's allegations; thus, his allegations are taken as true for the jurisdictional analysis.

With the exception of a *res judicata* argument that I do not reach, the non-jurisdictional challenges likewise do not require the weighing of evidence, and are properly treated as motions to dismiss for failure to state a claim. To survive a motion to dismiss at the pleading stage, "an adequate complaint must provide fair notice to the defendants **[*7]** and state a facially plausible legal claim." *Ocasio-Hernández v. Fortuño-Burset, 640 F.3d 1, 12 (1st*

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[2] See Font-Santiago v. Doe, Civil. No 05-2237 (JAG) (D.P.R. Jan. 9, 2006); Font v. Travel Networks, Civil No. 99-2130 (PG) (D.P.R. Oct. 26, 2000); Font v. Sana Investment, Inc., Civil No. 00-1408 (RLA) (D.P.R. Feb. 2, 2000), *aff'd*, *6 Fed. Appx. 31 (1st Cir. 2001)*; Font v. González-Torrents, Civil No. 99-2128 (GG) (D.P.R. Oct. 19, 1999); Font v. United States, Civil No. 98-2440 (RLA) (D.P.R. Aug. 2, 1999); Font v. U.S. Trustee, Civil No. 97-1666 (DRD) (D.P.R. May 15, 1997); Font v. United States, Civil No. 91-2162 (JAF) (D.P.R. Feb. 11, 1992); *Font v. Dapena Yordan, 763 F. Supp. 680, 681 (D.P.R.)*, *aff'd*, ***946 F.2d 880, 1991 U.S. App. LEXIS 21169 (1st Cir. 1991)*** (unpublished). See also ***Font v. Albandoz, 946 F.2d 881, 1991 U.S. App. LEXIS 27438 (1st Cir. Sept. 11, 1991)*** (unpublished).

In 1999, Font also pursued several appeals before the D.C. Circuit. See *In re Font, No. 99-5016, 1999 U.S. App. LEXIS 4067 (D.C. Cir. Feb. 26, 1999)*; *Font. v. Clinton, No. 00-5039, 2000 WL 1279292 (D.C. Cir. Aug. 25, 2000)*; ***Font v. Torres, 221 F.3d 195, 2000 U.S. App. LEXIS 10891 (D.C. Cir. May 9, 2000)*** (unpublished); ***Font v. United States, 221 F.3d 196, 2000 U.S. App. LEXIS 10663 (D.C. Cir. Apr. 21, 2000)*** (unpublished); *Font v. U.S. ex rel. Reno, No. 99-5432, 2000 WL 621411 (D.C. Cir. Apr. 12, 2000)*.

Cir. 2011). A court parses the allegations of the complaint in two steps. First, "'legal conclusions couched as fact' or 'threadbare recitals of the elements of a cause of action'" are identified and completely disregarded. Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009)) (alteration marks omitted). The remaining "[n]on-conclusory factual allegations" are then "treated as true, even if seemingly incredible." Id. The overall standard is only satisfied if those facts "state a plausible, not a merely conceivable, case for relief"; however, a court must not "attempt to forecast a plaintiff's likelihood of success on the merits." Id.

FACTUAL ALLEGATIONS OF THE COMPLAINT

Font's complaint alleges the following facts, which are taken as true for this analysis.

Font graduated from medical school in the Dominican Republic, studied ophthalmology in Uruguay, was a professor at the Interamerican University in San Juan, and holds an honorary doctorate in constitutional and international law. (Id., p. 5). Font is not currently licensed to practice medicine in Puerto Rico, though it is unclear whether he once held such a license. (See id., p. 7). Font suggests that he once "had the opportunity to take the exam" in the **[*8]** United States—where, precisely, is unclear—but that he refused to do so. (Id., p. 14). Font's ancestors lived in Catalonia for over 1,200 years. (Id., p. 6). Font intends to return there one day to practice ophthalmologic surgery. (Id.).

Sometime in 2009, and again in 2011, Font attempted to purchase the Caguas Regional Hospital. (Id., p. 2). Font planned to establish a private medical school, renovate the hospital, and reopen it as a world-class institution called "Christ Miracle General & Specialties Hospital," annexed to the "Prof. Dr. José M. Font De Santiago School of Medicine." (Id., p. 4). Mennonite won the auction of the hospital. (Id., p. 9). The institution is currently closed, however. (Id., p. 10). A "small splinter group of vested interests," including First Medical and Hospital Pavia (neither of which are named as defendants), controls health services in Puerto Rico. (Id., p. 10). It may be inferred that some combination of proceedings before the Department of Health and/or the Bankruptcy Court resulted in Mennonite's acquisition of the hospital.

On August 26, 2002, at around 2:30 p.m., Font slipped and fell near a construction site on the UPR-Río Piedras campus, due to a buildup of sand and gravel. Font was one of five people to slip **[*9]** and fall in the same location that day. He suffered various fractures, became totally disabled in his right wrist, and lost 14 teeth. UPR and EBCG exercised control over the premises. (Id., p. 5).

Font mailed a set of exhibits to the Clerk of Court. (Docket No. 5). Excluding the untranslated documents, see Local Rule 5(g), the complaint incorporates the following:

- Font's expired passport. (Docket No. 5-1, p. 3).
- Font's doctoral degree, issued by the Eugenio María de Hostos International University in Santo Domingo, Dominican Republic. (Docket No. 5-1, p. 28).
- A certification that Font completed a postgraduate course in Ophthalmology at the University of the Republic, Montevideo, Uruguay. (Docket No. 5-1, p. 32).
- A diagram prepared by Font, illustrating the legal framework presumably governing, *inter alia*, his instant claims. (Docket No. 5-1, p. 43).
- Font's honorary degree in constitutional and international law, also issued by the Eugenio María de Hostos International University. (Docket No. 5-1, p. 45).
- Font's proposals for purchasing the Caguas Regional Hospital. (Docket No. 5-2, p. 5-34, 36-51, 55-58, 60, 66-77).

DISCUSSION

The complaint should be dismissed in its entirety. Font states no federal claims, **[*10]** complete diversity is lacking, and the court should decline supplemental jurisdiction over claims arising under Commonwealth law.

Read generously, the complaint challenges the lawfulness of any Puerto Rico law or regulation requiring examinations as a condition for issuing a medical license. This claim appears directed to several of the moving Commonwealth defendants — Puerto Rico itself, the Secretary of Justice, the Department of Health, the Board of Medical Examiners, and the Board of Licensure. (See Compl., p. 7). Font seems to seek monetary relief, an injunction granting him a medical license, and a declaration that the licensing exam is unconstitutional. The Commonwealth defendants argue generally that (1) claims for damages against the state are barred by the *Eleventh Amendment*, (2) that the individual defendants are entitled to qualified immunity, and (3) that Font has failed to plead any constitutional violations whatsoever, requiring dismissal of the complaint. (Docket No. 87). By like token, the complaint attacks the refusal (by whom is unclear) to grant Font ownership of the Caguas Regional Hospital. This grievance appears to implicate the Governor, the Secretary of Health, Speaker González, **[*11]** Senate President Rivera, Judge Tester, the Bankruptcy Court, and Mennonite. Font seems to seek monetary relief, orders "revoking" Mennonite's purchase of the hospital and immediately "giving" the hospital to himself, and the imprisonment of the individual defendants. In addition to the Commonwealth defendants' arguments, Speaker González highlights the doctrine of absolute legislative immunity, and the federal defendants point to the sovereign immunity of the United States and the absolute immunity for Judge Tester's judicial acts. Finally, the complaint seeks damages from UPR, EBCG, Jose Garcia, Inc., and insurance companies ACE, American, and MAPFRE, stemming from Font's 2002 accident on the UPR-Río Piedras campus. UPR invokes *Eleventh Amendment* immunity, while the insurers argue that the *res judicata* effect of a prior Commonwealth judgment precludes the instant suit.

To simplify the consideration of the defendants' arguments, I begin by reviewing a challenge to the service of process, and then consider whether diversity jurisdiction obtains, followed by the various sovereign and personal immunity doctrines limiting the scope of Font's suit. I then evaluate whether Font states a federal question under **[*12]** any of the remaining claims; finding none, I review the criteria for exercising supplemental jurisdiction over the claims under Commonwealth law. Finally, I address Font's requests for a jury trial.

I. Service of Process

The federal defendants complain that they have not been properly served. Under *Federal Rule of Civil Procedure 4(i)(2)-(3)*, the *sine qua non* of effective service on a U.S. agency, corporation, officer, or employee, including individual-capacity suits "for an act or omission occurring in connection with duties performed on the United States' behalf," is service on the United States itself. No proof of such service is evident in the record, but in light of the requirement that courts extend a "reasonable time to cure" this type of failure, see *Fed. R. Civ. P. 4(i)(4)(B)*, it is not clear that dismissal lies here. Moreover, the substantive infirmity of Font's complaint counsels an ultimate determination of whether the federal defendants are entitled to *Rule 12(b)* dismissal.

II. Diversity Jurisdiction

As a threshold matter, Font's invocation of diversity jurisdiction is plainly deficient. A district court has original jurisdiction of a civil action where the amount in controversy is at least $75,000 and the parties are citizens of different states. *28 U.S.C. § 1332(a)*. **[*13]** This diversity of citizenship "must be complete"; that is, no two parties on opposite sides of the case may hail from the same state. *DCC Operating, Inc. v. Rivera Siaca (In re Olympic Mills Corp.), 477 F.3d 1, 6 (1st Cir. 2007)*. A natural person is a citizen of the state where he is domiciled; that is, where he is physically present, with the intent to make that place his home. *Rodríguez-Díaz v. Sierra-Martínez, 853 F.2d 1027, 1029 (1st Cir. 1988)*. A corporation is a citizen of "any State by which it has been incorporated and of the State where it has its principal place of business . . . ." *§ 1332(c)(1)*. When diversity is challenged, a plaintiff bears the burden of establishing jurisdiction. *Media Duplication Servs., Ltd. v. HDG Software, Inc., 928 F.2d 1228, 1236 (1st Cir. 1991)*. And importantly, "pro se status does not insulate a party from complying with procedural and substantive law." *Ahmed, 118 F.3d at 890*.

Here, Font alleges that he is a citizen of Puerto Rico. (Compl., p. 1-2). Mennonite asserts that because it is a Puerto Rico corporation, it is a Puerto Rico citizen, destroying complete diversity. (Docket No. 71, p. 7-8). In less clear terms, the Commonwealth defendants also imply that they are Puerto Rico citizens. (Docket No. 87, p. 5). Font offers no evidence refuting these contentions, and therefore has failed to carry the burden of establishing complete diversity. Thus, to vest this court with original jurisdiction, Font must state causes of action **[*14]** arising under federal law. See *28 U.S.C. § 1331(a)*.

III. Immunities From Suit

Font's complaint names a variety of governmental entities and officers, each of which are immune from being sued for damages. I consider (1) the federal government's sovereign immunity; (2) Puerto Rico's immunity under the *Eleventh Amendment*; (3) absolute legislative immunity; (4) absolute judicial immunity; and (5) qualified immunity for state and federal officers.

A. The Federal Government's Sovereign Immunity

Congress may waive sovereign immunity by creating specialized causes of action, such as the Federal Tort Claims Act, or by waiving immunity in an agency's organic statute. See *FDIC v. Meyer, 510 U.S. 471, 475-83 (1994)* (analyzing whether Federal Savings and Loan Insurance Corporation lacked sovereign immunity). But "[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit. . . . Sovereign immunity is jurisdictional in nature. Indeed, the 'terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Id. at 475* (quoting *United States v. Sherwood, 312 U.S. 584, 586 (1941))* (alterations in original, other citations omitted).

This is so even considering the complaint's recurrent mantra that "the 'sovereign immunity' cannot be invoked to avoid the payment **[*15]** of damages under the subterfuge of financial ruin of the state." (Compl., p. 2, 21, 38, 49) (citing *Riss v. City of New York, 22 N.Y.2d 579 (1968))*. In that case, the highest court of New York held that city police had no tort duty to provide personal protection to individual citizens upon request. The dissenting justice likened the decision to an opening-the-floodgates argument once raised against legislation waiving sovereign immunity. It is enough to say that even if the dissenting justice's indictment of common-law sovereign immunity were persuasive, the Supreme Court has repeatedly upheld the doctrine in the modern era, and this court is bound to follow those decisions. Because the complaint does not present any facts tending to show that the federal government has waived its sovereign immunity, Font's claims for damages against the United States government are barred.

B. Puerto Rico's *Eleventh Amendment* Immunity

The *Eleventh Amendment* bars suits against state governments, with the exception of suits for prospective injunctive or declaratory relief. *Vaquería Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464, 477-78 (1st Cir. 2009)*. *Eleventh Amendment* immunity extends to the Commonwealth of Puerto Rico as it would to one of the fifty states. *Torres v. P.R. Tourism Co., 175 F.3d 1, 3 (1st Cir. 1999)*. That immunity may sometimes be abrogated by Congress, see *Torres-Alamo v. Puerto Rico, 502 F.3d 20, 24 (1st Cir. 2007)*, and may sometimes be waived by the Commonwealth, see *Arecibo Cmty. Health Care, Inc. v. Puerto Rico, 270 F.3d 17, 24-25 (1st Cir. 2001)*. But **[*16]** generally, suits for the direct payment of money from the state treasury—*e.g.*, for money damages or equitable restitution—must be dismissed. *Tres Monjitas, 587 F.3d at 478* (citing *Edelman v. Jordan, 415 U.S. 651, 664-65 (1974))*.

Here, the complaint's factual allegations suggest no basis for abrogation or waiver of this immunity, so Font's damages and restitution claims against the Commonwealth and its agencies, including UPR, should be dismissed.

C. Legislative Immunity

Speaker González invokes the doctrine of absolute legislative immunity. Individuals performing "'legislative functions'" in Puerto Rico, as in the fifty states, are entitled to absolute immunity from federal civil suit based on those legislative acts. *Torres Rivera v. Calderón Serra, 412 F.3d 205, 212 (1st Cir. 2005)* (quoting *Bogan v. Scott-Harris, 523 U.S. 44, 55 (1998))*. It is the function being performed, rather than the individual's title, that creates legislative immunity; thus, for example, a governor is immune from liability for signing a bill into law. See *id. at 212-13* (collecting cases). Legislative acts are those that are (1) driven by "'generalizations concerning a policy or state of affairs,'" rather than "specific facts relating to particular individuals or situations," and (2) which "'involve[] establishment of a general policy'" rather than "'singl[ing] out specifiable individuals and affect[ing] them **[*17]** differently from others.'" *Acevedo-García v. Vera-Monroig, 204 F.3d 1, 9 (1st Cir. 2000)* (quoting *Cutting v. Muzzey, 724 F.2d 259, 261 (1st Cir. 1984))*.

To the extent Font seeks damages from any of the defendants based on the act of enacting any law, such as the medical license requirement or ownership restrictions on hospitals, those defendants are shielded by absolute immunity. However, only qualified immunity shields them from liability for following the mandates of that legislation. See *Torres Rivera, 412 F.3d at 214*.

D. Judicial Immunity

The United States argues that absolute judicial immunity also bars some of Font's claims. It is foundational that "judges . . . are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1871)*. Two factors determine whether an act is judicial: (1) "whether it is a function normally performed by a judge," and (2) whether the parties "dealt with the judge in his judicial capacity." *Stump v. Sparkman, 435 U.S. 349, 362 (1978)*. This immunity is absolute unless the judge "has acted in the 'clear absence of all jurisdiction.'" *Id. at 356* (quoting *Bradley, 80 U.S. (13 Wall.) at 351*). To the extent Font is attempting to sue Judge Tester for his judicial actions in the Bankruptcy Court, the action for damages is barred by his absolute immunity.

E. Qualified Immunity

As the Commonwealth **[*18]** defendants observe, they are entitled to qualified immunity because Font has not alleged that any of the named individuals personally deprived him of any rights. The qualified immunity doctrine provides "an immunity from suit and not a mere defense to liability," weeding out "insubstantial claims" even before discovery has occurred. *Maldonado v. Fontanes, 568 F.3d 263, 268 (1st Cir. 2009)*. An individual is entitled to immunity from suits for damages where either (1) the plaintiff fails to state a violation of a constitutional right, or (2) any such right was not "clearly established" when the alleged violation occurred. *Id. at 269*. "Although this case involves suits under both § 1983 [i.e., against Puerto Rico officers] and *Bivens* [i.e., against federal officers], the qualified immunity analysis is identical under either cause of action." See *Wilson v. Layne, 526 U.S. 603, 609 (1999)*. Importantly, an individual's office, standing alone, is insufficient to hold him or her liable for the government's conduct. *Ayala-Rodríguez v. Rullán, 511 F.3d 232, 236 (1st Cir. 2007)* (section 1983); *Ruiz Rivera v. Riley, 209 F.3d 24, 28 (1st Cir. 2000)* (*Bivens*). Rather, a plaintiff must "establish that her constitutional injury resulted from the direct acts or omissions of the official, or from indirect conduct that amounts to condonation or tacit authorization." *Rodríguez-García v. Miranda-Marín, 610 F.3d 756, 768 (1st Cir. 2010)*.

Here, the glaring absence of any answer to the questions of who did **[*19]** what, where, when, and how, is dispositive. The complaint does not allege or imply the personal involvement of any particular government officer. Such allegations are a *sine qua non* for personal-capacity liability; their absence means that regardless of the theory of recovery, the individuals are entitled to qualified immunity.

IV. Claims Arising Under Federal Law

Although this panoply of immunities cuts out the bulk of Font's claims for damages, it is still necessary to consider whether his allegations have established any other viable federal-question claims. I first turn to Font's constitutional claims, followed by his references to the Sherman Act, the Americans with Disabilities Act, and international law.

A. Constitutional Claims

Font's "Constitutional Exposition" (Compl., p. 12-50) name-checks the prohibitions on bills of attainder, cruel and unusual punishment, ex post facto laws, slavery, the impairment of contracts, deprivations of life, liberty, and property without due process, denial of equal protection, and takings for public use without just compensation. Given the complaint's lack of factual detail, a superficial review of these principles demonstrates their clear inapplicability. **[*20]**

Font does not allege that he has suffered any criminal punishment, rendering his references to the Ex Post Facto Clause and *Cruel and Unusual Punishment Clause* inapposite. See *Collins v. Youngblood, 497 U.S. 37, 41 (1990)* ("[I]t has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them."); *Ingraham v. Wright, 430 U.S. 651, 664* (*Eighth Amendment* "was designed to protect those convicted of crimes."). He does not allege that any law applied to him "is pervaded with the key features of a bill of attainder: a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." See *Nixon v. Administrator of General Servs., 433 U.S. 425, 468 (1977)*. And Font alleges neither the use nor the threat of physical restraint, physical injury, or legal coercion forcing him to work for anyone in violation of the *Thirteenth Amendment*. See *United States v. Kozminski, 487 U.S. 931, 952 (1988)* (construing amendment as applied by criminal statutes forbidding involuntary servitude). He does not allege the existence of any contract between himself and another party, let alone a contract that has been impaired. See also *U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 17 (1977)* ("[A]s a preliminary matter, appellant's claim requires a determination that the [legislative act] has the effect of impairing a contractual obligation."). He does not relate **[*21]** any facts describing the means by which he was deprived of any liberty or property interest, making it impossible to ascertain that any such deprivation occurred "without constitutionally adequate process." *González-Droz v. González-Colón, 660 F.3d 1, 13 (1st Cir. 2011)*. Likewise, he has not alleged an equal protection violation, since the complaint sheds no light on how he "was treated differently from others similarly situated . . . based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Clark v. Boscher, 514 F.3d 107, 114 (1st Cir. 2008)* (citation and internal quotation marks omitted). And the *Takings Clause* does not require compensation for property "already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." See *Bennis v. Michigan, 516 U.S. 442, 452 (1996)* (civil forfeiture).

In short, regardless of what acts Font's constitutional complaints are directed towards, he has failed to plead the predicate facts to support any of the diverse theories he suggests.

B. The Sherman Act

Font also refers to violations of ***antitrust law*** and antimonopoly law, presumably pegged to his allegations about the hospital market in Puerto Rico. Under *section 1* of the Sherman Act, "[e]very contract, combination **[*22]** . . . or conspiracy, in restraint of trade or commerce among the several States" is unlawful. *15 U.S.C. § 1*. The elements of a *section 1* claim are (1) concerted action, and (2) an illegal restraint of trade. *Euromodas, Inc. v. Zanella, Ltd., 368 F.3d 11, 16 (1st Cir. 2004)*. Importantly, "when allegations of parallel conduct are set out in order to make a *§ 1* claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007)*.

Section 2 makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person . . . to monopolize any part of the trade or commerce among the several States." *15 U.S.C. § 2*. Monopolization occurs when a person (1) has monopoly power, and (2) "has engaged in impermissible 'exclusionary' practices with the design or effect of protecting or enhancing its monopoly position." *Coastal Fuels of P.R., Inc. v. Caribbean Petrol. Corp., 79 F.3d 182, 195 (1st Cir. 1996)* (quoting Herbert Hovenkamp, Federal Antitrust Policy § 6.4a (1994)). Monopoly power, or the potential for monopoly power, is evaluated in light of the "relevant market" and "the defendant's ability to lessen or destroy competition in that market." *Coastal Fuels, 79 F.3d at 196* (quoting *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993))*.

Beyond affixing conclusory labels, Font does not specify what unlawful agreements or exclusionary monopolistic practices **[*23]** have allegedly taken place. The bare fact of Mennonite's acquisition of the hospital Font set his eyes on cannot, without more, show either parallel conduct or a capacity to injure competition in the marketplace.

C. Americans with Disabilities Act

Font also makes scattered references to the Americans with Disabilities Act of 1990, as amended, as an anchor for federal jurisdiction. But even granting, *arguendo*, that Font may have some disability as defined under the Act, the facts he has narrated fail to state a violation of its operative provisions. He does not allege that discrimination on the basis of disability has tainted any employment decisions, as prohibited by Title I of the Act. See § 12112(a). Nor can he establish a Title II claim that "by reason of" any disability he has been "excluded from participation in or . . . denied the benefits of the services, programs, or activities of a public entity, or . . . subjected to discrimination by any such entity." § 12132. And the facts do not suggest he has been "discriminated against . . . in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation," as proscribed **[*24]** by Title III. § 12182(a). Finally, there are no allegations that he "has opposed any act or practice made unlawful by" the ADA, or that he has "exercised or enjoyed, or . . . aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected" by the ADA. See § 12203(a)-(b). Font therefore has stated no ADA cause of action.

D. The Treaty of Paris and International Law

Font frequently refers to the Treaty of Paris of 1898, the Universal Declaration of Human Rights, and various Latin phrases sounding in customary international law. None of those, however, can establish a cause of action on Font's facts. I first consider the 1898 Treaty of Paris between the United States and Spain, under which control of Puerto Rico was ceded to the United States. Font cites Article IX, which provides:

> *Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty*, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they *shall also have the right to carry on their industry, commerce,* ***[*25]*** *and professions, being subject in respect thereof to such laws as are applicable to other foreigners*. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.
> The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

Treaty of Peace, U.S.-Spain, art. IX, Dec. 10, 1898, *as quoted inDownes v. Bidwell, 182 U.S. 244, 339-40 (1901)* (White, J., concurring) (emphasis added). But this article only confers rights on a small group of people: Spanish-born subjects who were then residing in ceded territory. Font was born in Puerto Rico in 1950, and therefore has no rights under this provision. (See Docket No. 5-1, p. 3).

Even less compelling is his invocation of the Universal Declaration of Human Rights, since that document "is precatory: that is, it creates aspirational goals but not legal **[*26]** obligations, even as between states." *Igartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005)* (citing *Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004))*. And "[a]lthough sometimes said by enthusiasts to be law like other law, customary international law is a diffuse and often highly uncertain body of norms whose force and enforceability vary greatly even in the international sphere; and its status in our domestic courts is even more qualified." *Id. at 151*.

E. Summary

Font's factual allegations do not state any discernible claim arising under federal law. I stress that the fatal defect is not one of legal technicality, but of a failure to allege that any events taking place in the world have offended his federal rights. Cf. *Ahmed, 118 F.3d at 890* (affirming dismissal where "the formal elements of the claim were stated without the requisite supporting facts."). Taking every *fact*—not conclusion—in Font's narrative as true, he is not entitled to any redress under the constitution, laws, or treaties of the United States; therefore, all defendants are entitled to dismissal of the federal claims against them.

V. Supplemental Jurisdiction

Once all claims conferring original jurisdiction have been dismissed, a district court has discretion, assessing "the totality of the attendant circumstances," in retaining supplemental jurisdiction **[*27]** over other claims. *28 U.S.C. § 1367(c)*; *Rodríguez v. Doral Mortgage Corp., 57 F.3d 1168, 1177 (1st Cir. 1995)*. Factors informing this exercise of discretion include judicial economy, convenience, fairness, and comity. Id. (citing *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n. 7 (1988))*. But "[a]s a general principle, the unfavorable disposition of a plaintiff's federal claims at the early stages of a suit" counsel dismissal without prejudice. Id.

This case is only at the pleading stage, and no discovery appears to have taken place. Therefore, judicial economy, convenience, and fairness all weigh towards dismissing the Puerto Rico claims without prejudice.[3] See *Martínez v. Colón, 54 F.3d 980, 990-91 (1st Cir. 1995)* (affirming dismissal "far in advance of trial" at summary judgment).

VI. Pretrial Dismissal and the *Seventh Amendment*

In the portions of Font's opposing motions that are written in English, he directs the court's attention to the *Seventh Amendment*, which provides that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." Font takes the position that "ALL[] 'motion[s] to dismiss' of the lawyers . . . VIOLATE[] the JUST & IMPARTIAL JURY TRIAL under [the] GUARANTEE **[*28]** in [the] *VII Amendment*," and requests that a jury be impaneled forthwith. (See Docket No. 101, 102, 103). But "the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791." *Curtis v. Loether, 415 U.S. 189, 193 (1974)*. It has long been understood that "[n]o one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined." *In re Peterson, 253 U.S. 300, 310 (1920)*. Because the jurisdictional and legal analyses above do not resolve any disputed issues of fact (indeed, the complaint's factual allegations are taken as true), dismissal does not violate Font's *Seventh Amendment* rights.

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[3] I do not address the insurance defendants' *res judicata* arguments for two reasons. First, since supplemental jurisdiction is not proper, analyzing an affirmative defense would invite decision on a Commonwealth-law controversy that is not before this court. In any case, the insurance defendants filed only untranslated Spanish-language documents from the Commonwealth courts. This violates Local Rule 5(g), and considering such documents to decide a *res judicata* defense could be reversible error. See *Puerto Ricans for Puerto Rico Party v. Dalmau, 544 F.3d 58, 67 (1st Cir. 2008)*.

CONCLUSION

For the foregoing reasons, I recommend that the pending motions to dismiss be **GRANTED**, and that Font's complaint be **DISMISSED**.

This report and recommendation is filed pursuant to *28 U.S.C. 636(b)(1)(B)* and Rule 72(d) of the Local Rules of this Court. Any objections to the same must be specific and must be filed with the Clerk of Court within fourteen (14) days of its receipt. Failure to file timely and specific objections to the report and recommendation is a waiver of the right to appellate review. See *Thomas v. Arn, 474 U.S. 140, 155 (1985)*; *Davet v. Maccorone, 973 F.2d 22, 30-31 (1st Cir. 1992)*; *Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985 (1st Cir. 1988)*; *Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987)*.

IT IS SO RECOMMENDED.

In San Juan, Puerto Rico, this 22nd day of August, 2012.

/s/ Bruce J. McGiverin

BRUCE J. McGIVERIN

United States Magistrate Judge

In re Titanium Dioxide Antitrust Litig.

United States District Court for the District of Maryland

August 28, 2012, Decided; August 28, 2012, Filed

CIVIL ACTION NO.: RDB-10-0318

Reporter

284 F.R.D. 328 *; 2012 U.S. Dist. LEXIS 122156 **; 2012-2 Trade Cas. (CCH) P78,044; 2012 WL 3711890

IN RE: TITANIUM DIOXIDE ANTITRUST LITIGATION; THIS DOCUMENT RELATES TO: ALL ACTIONS

Subsequent History: Petition denied by *Titanium Dioxide Antitrust Litig. v. Haley Paint Co., 2012 U.S. App. LEXIS 27011 (4th Cir., Nov. 14, 2012)*

Motion denied by *In re Titanium Dioxide Antitrust Litig., 2012 U.S. Dist. LEXIS 167671 (D. Md., Nov. 27, 2012)*

Prior History: *Haley Paint Co. v. E.I. Dupont De Nemours & Co., 2012 U.S. Dist. LEXIS 46875 (D. Md., Apr. 3, 2012)*

Core Terms

prices, class certification, increased price, announcements, conspiracy, class member, damages, predominance, cartel, Plaintiffs', titanium dioxide, regression, class-wide, antitrust, class period, price-fixing, alleged conspiracy, products, class action, Defendants', appointed, factors, commonality, quotations, artificially, purchasers, courts, named plaintiff, price fixing, implemented

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Preponderance of Evidence

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN1[] **Class Actions, Certification of Classes**

To obtain class certification, the plaintiffs must meet all four requirements of *Fed. R. Civ. P. 23(a)*, and at least one of the requirements of *Rule 23(b)*. Class certification requires a finding that each of the requirements of *Rule 23* has been met by a preponderance of the evidence.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN2[] **Class Actions, Certification of Classes**

The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. As recently noted by the United States Supreme Court, *Fed. R. Civ. P. 23* does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule, that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common issues of law or fact, etc. In ruling on a class certification motion, a court must take a close look at the facts relevant to the certification question, even if those facts tend to overlap with the merits of the case. While an evaluation of the merits is not part of a *Rule 23* analysis, the factors spelled out in *Rule 23* must be addressed through findings, even if they overlap with issues on the merits. The Supreme Court notes that sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and that certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of *Rule 23(a)* have been satisfied. The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Admissibility > Expert Witnesses

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN3[] **Class Actions, Certification of Classes**

The rigorous analysis that must be undertaken in the class certification context extends to disputes between experts: Resolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court, no matter whether a dispute might appear to implicate the credibility of one or more experts. Of course, there are limits to a court's resolution of expert disputes, and a court should only engage itself in statistical dueling of experts if such dueling presents a valid basis for granting or denying class certification. As noted by the Third Circuit, that weighing expert opinions is proper does not make it necessary in every case or unlimited in scope, and rigorous analysis need not be hampered by a concern for avoiding credibility issues; as findings with respect to class certification do not bind the ultimate fact-finder on the merits. A court's determination that an expert's opinion is persuasive or unpersuasive on a *Fed. R. Civ. P. 23* requirement does not preclude a different view at the merits stage of the case.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN4[] **Class Actions, Certification of Classes**

Fed. R. Civ. P. 23(a)(1) provides that one of the requirements to bring a class action is that the class be so numerous that joinder of all members is impracticable. The Fourth Circuit has held that no specified number is needed to maintain a class action. The United States District Court for the District of Maryland has previously noted that, generally speaking, courts find classes of at least 40 members sufficiently large to satisfy the impracticability requirement.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN5[] Prerequisites for Class Action, Commonality

Fed. R. Civ. P. 23(a)(2) requires a question of law or fact common to the class. A common question is one that can be resolved for each class member in a single hearing, and does not turn on a consideration of the individual circumstances of each class member. The Fourth Circuit has held that, in a class action brought under Rule 23(b)(3), the commonality requirement of Rule 23(a)(2) is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class predominate over other questions. In the Fourth Circuit, the common questions must be dispositive and overshadow other issues. Thus, the commonality requirement is relatively toothless in comparison with the related requirements of typicality and predominance. As the United States Supreme Court has noted, commonality requires the plaintiff to demonstrate that the class members have suffered the same injury.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Evidence > Burdens of Proof > Preponderance of Evidence

HN6[] Prerequisites for Class Action, Commonality

The commonality element of Fed. R. Civ. P. 23(a) is satisfied because there is at least one common question, namely, whether the alleged conspiracy in fact existed. Accordingly, the United States District Court for the District of Maryland finds by a preponderance of the evidence that the existence of the alleged conspiracy, standing alone, is sufficient to establish commonality.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN7[] Prerequisites for Class Action, Commonality

Fed. R. Civ. P. 23(a)(3) requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class. Courts have recognized that the commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected. The typicality requirement determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. The class representative must be part of the class and possess the same interest and suffer the same injury as the class members. Essentially, the typicality requirement ensures that only those plaintiffs who can advance the same factual and legal arguments may be grouped together as a class. The essence of the typicality requirement is captured by the notion that as goes the claim of the named plaintiff, so goes the claims of the class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN8[] Class Actions, Certification of Classes

The final prerequisite under Fed. R. Civ. P. 23(a) is that the persons representing the proposed class must be able to fairly and adequately to protect the interests of all members of the class. The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. As noted by the Fourth Circuit, for a conflict to defeat class certification, the conflict must be more than merely speculative or hypothetical; it must be fundamental and go to the heart of the litigation. The typicality requirement has been liberally construed by courts and in the antitrust context, typicality will be established by the plaintiffs and all class members alleging the same antitrust violations by the defendants.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN9[] Class Actions, Certification of Classes

To establish the typicality prong of *Fed. R. Civ. P. 23(a)*, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN10[] Prerequisites for Class Action, Adequacy of Representation

Pursuant to the 2003 amendments to *Fed. R. Civ. P. 23*, a court's inquiry into the qualifications and experience of the plaintiffs' counsel are no longer investigated under *Rule 23(a)*, but instead are to be determined under *Rule 23(g)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN11[] Prerequisites for Class Action, Predominance

When the plaintiffs have satisfied *Fed. R. Civ. P. 23(a)*'s requirements, the court turns *Rule 23(b)(3)*, which requires a finding that common questions predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The *Rule 23(b)(3)* predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. Although the predominance inquiry of *Rule 23(b)(3)* is similar to the commonality requirement of *Rule 23(a)*, the Fourth Circuit has held that the predominance requirement is more stringent than the *Rule 23(a)* requirement. The *Rule 23(b)(3)* criterion is far more demanding than the commonality requirement. In determining whether the plaintiffs have satisfied their burden, the court must conduct a rigorous analysis of the *Rule 23(b)(3)* requirements and the plaintiffs' methodology for proving those requirements, and must act as finder of fact in the face of conflicting expert testimony.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN12[] Prerequisites for Class Action, Commonality

In order to meet the predominance prong of *Fed. R. Civ. P. 23(b)(3)*, a plaintiff must demonstrate that the elements of the legal claim is capable of proof at trial through evidence that is common to the class rather than individual. Because the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual, a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Admissibility > Expert Witnesses

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN13[] **Class Actions, Certification of Classes**

In ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case. That extends to the resolution of expert disputes concerning the import of evidence concerning the factual setting.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Evidence > Burdens of Proof > Allocation

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

HN14[] **Regulated Practices, Price Fixing & Restraints of Trade**

When a buyer shows that the price paid by him is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN15[] **Class Actions, Certification of Classes**

In considering the *Fed. R. Civ. P. 23(b)(3)* predominance requirement, a court's rigorous analysis begins with the elements of the underlying cause of action. If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.

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

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN16[] **Per Se Rule & Rule of Reason, Sherman Act**

To establish an antitrust violation, a plaintiff must prove three elements: (1) a violation of the antitrust laws; (2) individual injury resulting from that violation; and (3) measurable damages. *15 U.S.C.S. § 1*. However, at the class certification stage, the plaintiffs need only show by a preponderance of the evidence that these elements are capable of proof at trial through evidence that is common to the class rather than individual to its members.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN17[] **Cartels & Horizontal Restraints, Price Fixing**

A horizontal price-fixing scheme is a per se violation of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN18[] **Cartels & Horizontal Restraints, Price Fixing**

The second element of an antitrust action in violation of the Sherman Act, *15 U.S.C.S. § 1*, requires the plaintiffs to establish that the class members suffered injury from the alleged price-fixing conspiracy. That element, commonly referred to as impact, can be likened to the causation element in a negligence cause of action. The term means simply that the antitrust violation caused injury to the antitrust plaintiff. Of course, at the certification stage in the litigation, the plaintiffs need not prove this element, instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members. In other words, the plaintiffs' burden of showing antitrust impact is satisfied by its proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury. That elements involves two distinct questions: One is the familiar factual question whether the plaintiff has indeed suffered harm, or injury-in-fact. The other is the legal question whether any such injury is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN19[] **Cartels & Horizontal Restraints, Price Fixing**

The Eighth Circuit defines common proof in a price fixing case as follows: The nature of the evidence that will suffice to resolve a question determines whether the question is common or individual. If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question. Often in horizontal price fixing cases, the plaintiffs seek to show that element is capable of common proof by comparing a hypothetical but-for price, for example, the price that would have been paid in the absence of the conspiracy, with the prices actually paid by the plaintiffs during the class period. In that kind of but-for comparison, prices are analyzed in a scenario that is free of the restraints and conduct alleged to be anticompetitive. If the plaintiffs can show that they paid a higher actual price than the but-for price using evidence common to the class, they have met their burden on the impact element.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN20[] **Cartels & Horizontal Restraints, Price Fixing**

As the Rail Freight court has summarized, there are various methods by which plaintiffs may prove that common evidence is capable of proving impact: One way of showing that common questions predominate on the issue of injury-in-fact is to show that there is a common method for proving that the class plaintiffs paid higher actual prices than in the but-for world, such as using an economic regression model incorporating a variety of factors to demonstrate that a conspiracy variable was at work during the class period, raising prices above the but-for level for all the plaintiffs. Comparing but-for prices with actual transaction prices by regression analysis, however, is not the only way for the plaintiffs to succeed in a motion for class certification. Other accepted types of evidence for establishing class-wide injury-in-fact include: evidence of lock-step increases of national price lists; proof that defendants conspired to maintain an inflated base price from which all negotiations began; and evidence of structural factors that make an industry susceptible to successful collusion. Ultimately, the question is whether the plaintiffs have shown by a preponderance of the evidence, through regressions, structural industry factors, or any other persuasive means, that methods of common proof exist to show class-wide impact.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN21[] **Class Actions, Certification of Classes**

Because the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual, a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case. Common questions predominate where even if each class member were to bring suit individually, each plaintiff would have to allege and prove virtually identical facts.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Evidence > Burdens of Proof > Preponderance of Evidence

HN22[] **Remedies, Damages**

The final element the plaintiffs in an antitrust suit will have to prove at trial is that they suffered measurable damages. In contrast to the impact prong of the Fed. R. Civ. P. 23(b) analysis, which asks only whether the plaintiffs were harmed, the damages prong asks by how much. At the class certification stage, the plaintiffs must show, by a preponderance of the evidence, that they will be able to prove damages using common proof.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN23[] Remedies, Damages

The Fourth Circuit has consistently held that average or aggregate damages are not an appropriate measure of damages in an antitrust case. The need to inquire into individual damage calculations, however, is not an impediment to class certification. As summarized by the Fourth Circuit, a damages inquiry necessarily requires individual proof: Fed. R. Civ. P. 23 contains no suggestion that the necessity for individual damage determinations destroys commonality, typicality, or predominance, or otherwise forecloses class certification. In fact, Rule 23 explicitly envisions class actions with such individualized damage determinations. The necessity of making an individualized determination of damages for each class member generally does not defeat commonality. Indeed, in actions for money damages under Rule 23(b)(3), courts usually require individual proof of the amount of damages each member incurred. When such individualized inquiries are necessary, if common questions predominate over individual questions as to liability, courts generally find the predominance standard of Rule 23(b)(3) to be satisfied.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN24[] Remedies, Damages

As discussed by the Second Circuit, there are at least five methods to deal with the individual damages inquiry in an antitrust class action: (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class. While there exist numerous individual questions of damages, that is not enough to defeat class certification, and one or more of the above-listed methods may need to be utilized as a case progresses.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN25[] Class Actions, Certification of Classes

Class certification provides a single proceeding in which to determine the merits of the plaintiffs' claims, and therefore protects the defendant from inconsistent adjudications.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN26[] **Prerequisites for Class Action, Superiority**

The final requirement of *Fed. R. Civ. P. 23(b)(3)* is that a court must determine that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. In deciding whether certification of a class is superior to other trial methods, the court considers whether the resolution of common issues advances the litigation as a whole, as opposed to leaving a large number of issues for case-by-case adjudication.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN27[] **Class Actions, Certification of Classes**

Fed. R. Civ. P. 23(c)(1)(C) provides simply that an order that grants or denies class certification may be altered or amended before final judgment. A district court has broad discretion in determining whether the action may be maintained as a class action, and so long as the court considers the proper criteria, it is permitted to exercise such discretion. A federal district court possesses the same broad discretion in determining whether to modify or even decertify a class. In fact, a federal district court judge has an affirmative obligation to ensure that the class membership remains at all times consistent with the underlying facts and procedural posture of the case. Under *Rule 23*, the district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts. The court is duty bound to monitor its class decision and, where certification proves improvident, to decertify, subclassify, alter, or otherwise amend its class certification.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN28[] **Alternative Dispute Resolution, Validity of ADR Methods**

The possible arbitration, or other contractual bar, of some class members does not, by itself, defeat class certification.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN29[] **Prerequisites for Class Action, Adequacy of Representation**

Pursuant to the 2003 amendments to *Fed. R. Civ. P. 23*, the qualifications and experience of the plaintiffs' counsel are now considered under *Rule 23(g)*. *Rule 23(g)(1)* provides that a court that certifies a class must appoint class counsel. In appointing class counsel, a court must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

Counsel: [1]** For Haley Paint Company, Plaintiff: Michael C Dell Angelo, LEAD ATTORNEY, PRO HAC VICE, Berger and Montague PC, Philadelphia, PA; Charles Andrew Dirksen, Solomon B Cera, PRO HAC VICE, Gold Bennett Cera and Sidener LLP, San Francisco, CA; Daniel M Hutchinson, Eduardo E Santacana, Eric B Fastiff, PRO HAC VICE, Lieff Cabraser Heimann and Bernstein LLP, San Francisco, CA; Daniel E Seltz, Steven E Fineman, PRO HAC VICE, Lieff Cabraser Heimann and Bernstein LLP, New York, NY; Daniel J Walker, Eric L Cramer, Matthew P McCahill, PRO HAC VICE, Berger and Montague PC, Philadelphia, PA; Eric R Harlan, John Joseph Lovejoy, Paul Mark Sandler, Robert B Levin, Shapiro Sher Guinot and Sandler, Baltimore, MD; Joseph R. Saveri, PRO HAC VICE, Saveri Law Firm, San Francisco, CA; Kendall S Zylstra, Stephen E Connolly, PRO HAC VICE, Faruqi and Faruqi LLP, Jenkintown, PA; Kevin Bruce Love, PRO HAC VICE, Criden and Love PA, South Miami, FL; Kevin E Rayhill, Lisa J Leebove, PRO HAC VICE, Joseph Saveri Law Firm, San Francisco, CA.

For Isaac Industries, Inc., on behalf of themselves and all others similarly situated, Plaintiff: Michael C Dell Angelo, LEAD ATTORNEY, PRO HAC VICE, Berger and Montague PC, Philadelphia, **[**2]** PA; Charles Andrew Dirksen, Solomon B Cera, PRO HAC VICE, Gold Bennett Cera and Sidener LLP, San Francisco, CA; Daniel M Hutchinson, Eduardo E Santacana, Eric B Fastiff, PRO HAC VICE, Lieff Cabraser Heimann and Bernstein LLP, San Francisco, CA; Daniel E Seltz, Steven E Fineman, PRO HAC VICE, Lieff Cabraser Heimann and Bernstein LLP, New York, NY; Daniel J Walker, Eric L Cramer, Matthew P McCahill, PRO HAC VICE, Berger and Montague PC, Philadelphia, PA; Eric R Harlan, John Joseph Lovejoy, Paul Mark Sandler, Robert B Levin, Shapiro Sher Guinot and Sandler, Baltimore, MD; Jason G Andrew, PRO HAC VICE, Criden and Love PA, South Miami, FL; Joseph R. Saveri, PRO HAC VICE, Saveri Law Firm, San Francisco, CA; Kendall S Zylstra, Stephen E Connolly, PRO HAC VICE, Faruqi and Faruqi LLP, Jenkintown, PA; Kevin Bruce Love, PRO HAC VICE, Criden and Love PA, South Miami, FL; Kevin E Rayhill, Lisa J Leebove, PRO HAC VICE, Joseph Saveri Law Firm, San Francisco, CA; Linda P Nussbaum, Shelly L Friedland, PRO HAC VICE, Grant and Eisenhofer PA, New York, NY.

For East Coast Colorants LLC, doing business as Breen Color Concentrates, Intervenor Plaintiff: Renae D Steiner, Vincent J Esades, LEAD ATTORNEYS, PRO **[**3]** HAC VICE, Heins Mills and Olson PLC, Minneapolis, MN; Brian M Sund, PRO HAC VICE, Morrison Sund PLLC, Minnetonka, MN; John Joseph Lovejoy, Paul Mark Sandler, Robert B Levin, Shapiro Sher Guinot and Sandler, Baltimore, MD; Joseph R. Saveri, Saveri Law Firm, San Francisco, CA; Kendall S Zylstra, Stephen E Connolly, PRO HAC VICE, Faruqi and Faruqi LLP, Jenkintown, PA; Kevin E Rayhill, PRO HAC VICE, Joseph Saveri Law Firm, San Francisco, CA; Michael C Dell Angelo, Berger and Montague PC, Philadelphia, PA; Scott W Carlson, PRO HAC VICE, Heins Mills and Olson PLC, Minneapolis, MN; Steven J Greenfogel, PRO HAC VICE, Lite DePalma Greenberg LLC, Philadelphia, PA; William H London, PRO HAC VICE, Freed Kanner London and Millen LLC, Bannockburn, IL.

For E.I. Dupont De Nemours and Company, Defendant: Jeffrey Blumenfeld, Kent A Gardiner, Lucy Grace D Noyola, Ryan C Tisch, PRO HAC VICE, John Luke Cuddihy, Shari Ross Lahlou, Crowell and Moring LLP, Washington, DC.

For Huntsman International LLC, Defendant: David B Hamilton, LEAD ATTORNEY, Womble Carlyle Sandridge and Rice PLLC, Baltimore, MD; David T Harvin, Erica T Krennerich, James Arthur Reeder, Jr, Stacey Neumann Vu, PRO HAC VICE, Vinson and Elkins **[**4]** LLP, Houston, TX; John W Mackay, Justin T Toth, PRO HAC VICE, Ray Quinney and Nebeker PC, Salt Lake City, UT; Shari Ross Lahlou, Crowell and Moring LLP, Washington, DC.

For Kronos Worldwide Inc., Defendant: Paul Edward Coggins, LEAD ATTORNEY, Kelly Rothermel Vickers, Kiprian Edward Mendrygal, Locke Lord Bissell and Liddell LLP, Dallas, TX; Adam S Tyler, Locke Lord LLP, Dallas, TX; Shari Ross Lahlou, Crowell and Moring LLP, Washington, DC.

For Millennium Inorganic Chemicals, Inc., a Delaware corporation with its principal place of business in Hunt Valley, Baltimore County, Maryland, Defendant: Richard Arthur Ripley, LEAD ATTORNEY, Haynes and Boone LLP, Washington, DC; Andrew Mercer Treaster, James L Cooper, Justin P Hedge, Ryan Watts, PRO HAC VICE, Robert A Stolworthy, Jr, Arnold and Porter LLP, Washington, DC; Christopher A Rogers, PRO HAC VICE, Haynes and Boone LLP, Dallas, TX; Dimitri J Nionakis, Susanne M Calabrese, PRO HAC VICE, Howrey LLP, Washington, DC; Lauren Ann Perotti, Nora Lorraine Whitehead, PRO HAC VICE, Haynes and Boone LLP, Washington, DC; Shari Ross Lahlou, Crowell and Moring LLP, Washington, DC.

Judges: Richard D. Bennett, United States District Judge.

Opinion by: Richard D. Bennett

Opinion

[*333] MEMORANDUM [5] OPINION**

This case concerns an alleged price-fixing conspiracy in the market for titanium dioxide. Plaintiffs Haley Paint Company and Isaac Industries, Inc., and Intervening Plaintiff East Coast Colorants, LLC d/b/a Breen Color Concentrates (collectively, "Plaintiffs") claim that Defendants E.I. du Pont de Nemours & Co. ("DuPont"), Huntsman International LLC ("Huntsman"), Kronos Worldwide Inc. ("Kronos"), and Millennium Inorganic Chemicals, Inc. ("Millennium") (collectively, "Defendants") engaged in an unlawful conspiracy in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*, to fix, raise, or maintain the price of titanium dioxide in the United States. [1] Plaintiffs allege that as a consequence of the unlawful conspiracy, Defendants were successful in charging artificially inflated prices for titanium dioxide products—thereby injuring all Plaintiffs.

Presently pending is Plaintiffs' Motion for Class Certification and for Appointment of Class Counsel (ECF No. 246). This Court has reviewed the record, as well as the pleadings and exhibits, and conducted a full-day class certification hearing on August 13, 2012. For the reasons that follow, Plaintiffs' Motion for Class Certification will be GRANTED.

BACKGROUND

I. THE PLAINTIFFS' FACTUAL ALLEGATIONS

The allegations contained in the Plaintiffs' Consolidated Amended Complaint (ECF No. 51) were fully set forth in this Court's previous Memorandum Opinion entered on March 29, 2011. *See Haley Paint Co. v. E.I. du Pont de Nemours & Co., 804 F. Supp. 2d 419 (D. Md. 2011)* **[**7]** (denying Defendants' motion to dismiss complaint). That background is repeated here, in part, so as to provide context for the pending motion for class certification.

Defendants are the leading suppliers of titanium dioxide ("TiO_2") in the world, and control approximately 70 percent of the global production capacity. Consol. Am. Compl. ("CAC") ¶ 1. TiO_2, a so-called "quality of life" product, is a dry chemical powder that is the "world's most widely used pigment for providing whiteness, brightness, and opacity . . . to many products, particularly paints and other coatings." *Id.* ¶ 33. TiO_2 has few competitive substitutes, and demand for it tends to be inelastic. *Id.* ¶ 35. Plaintiffs allege that, as a result of a declining market for TiO_2, Defendants conspired to fix, raise, maintain, and stabilize the price of the product. *Id.* ¶ 2, 69. This conspiracy is alleged to have occurred between February 1, 2003, through the present (hereinafter referred to as the "Class Period"). [2] *Id.* ¶ 21. During **[*334]** the Class Period, TiO_2 prices increased, and Defendants earned billions of dollars in revenue. *Id.* ¶ 3, 1.

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[1] In addition to the named Defendants, Plaintiffs have named several co-conspirators, including, *inter alia*, Tronox Inc. ("Tronox") and The National Titanium Dioxide Company Ltd. (d/b/a "Cristal"). Tronox filed for Chapter 11 bankruptcy protection in January 2009, and is therefore precluded from being named as a defendant. *See 11 U.S.C. § 362(a)*. **[**6]** Plaintiffs originally sought to include Cristal as a named defendant in this case, but this Court dismissed Cristal for want of jurisdiction on March 31, 2011. *See* Mem. Op. and Order, ECF Nos. 101 & 102. Subsequently, Plaintiffs have sought formal reconsideration of that decision on two occasions. On April 3, 2012, this Court denied the Plaintiffs first motion for reconsideration by Memorandum Order (ECF No. 268). At the August 13, 2012 Class Certification hearing, this Court again denied the Plaintiffs' request to add Cristal as a defendant. *See* Order, ECF No. 332.

[2] Plaintiffs originally defined the Class Period as beginning in March of 2002. Plaintiffs **[**8]** have since modified the Class Period to begin on February 1, 2003 because "[t]he evidence shows that while the Cartel behavior began as early as 2002, it does not appear to have become fully effective until February 2003. [citation omitted] As a result, and to be conservative,

II. The Titanium Dioxide Market

As previously mentioned, Defendants are the market leaders in the production of TiO_2. The market is global in scope, with the majority of trade conducted internationally. *Id.* ¶ 49. The market for the chemical has high barriers to entry—it is estimated that a new plant would require $450-500 million and three to five years to build. *Id.* ¶ 43. As a result, the industry is highly centralized. *Id.* ¶ 42-48. Beginning in the early 1990s, prices for TiO_2 began to decline for a variety of reasons, such as global overcapacity and customer consolidation. *Id.* ¶ 68. Prices increased in the late 1990s, but fell significantly in 2001. *Id.* Plaintiffs allege, that as a result of declining prices and declining **[**9]** demand, "Defendants were motivated to reach, and did reach, an agreement or understanding in or about early 2002 to increase prices and improve margins in the industry." *Id.* ¶ 69.

A. Alleged Conspiracy to Fix Prices of Titanium Dioxide

It is alleged that on January 24, 2002, a TiO_2 industry meeting took place in Finland. *Id.* ¶ 54. Shortly thereafter, and in spite of flat or declining demand for TiO_2, Defendants and their co-conspirators announced price increases to be effective March 1, 2002. Further price increases were announced and implemented in the summer of 2002. *Id.* The following year, a TiO_2 conference took place in Miami, Florida. That conference was attended by Defendants, and the former Vice President of Defendant Millennium specifically told attendees to expect further price increases. *Id.* ¶ 55. Numerous other meetings and conferences were held over the next several years, and those meetings neatly corresponded to TiO_2 price increases during the Class Period. *Id.* ¶¶ 52, 56-61. Plaintiffs allege that it was at these conferences where Defendants agreed and conspired to fix the price and supply and capacity of TiO_2. *Id.* ¶ 62.

In addition to conferences and trade meetings, Plaintiffs **[**10]** also allege that the conspiracy was furthered through industry publications and through conversations with industry consultants, customers, and others. *Id.* ¶ 51. "After having reached an unlawful agreement or understanding . . . , Defendants used consultants, customers, and others as conduits to signal or confirm intended pricing and other actions to each other." *Id.* These conversations and signals allowed Defendants to monitor the conspiracy and cut down on potential "cheating," whereby one participant could undercut the others by reducing their prices. *Id.* Plaintiffs also allege that Defendants privately discussed industry conditions and TiO_2 pricing at dinner meetings before and after the various trade association and industry meetings. *Id.* ¶ 53. In short, Plaintiffs allege that Defendants had ample ability to conspire to fix the price and capacity of TiO_2.

B. Titanium Dioxide Pricing

According to the Plaintiffs, in the face of declining demand, reduced costs, and increased production capacity, *see* ¶¶ 54, 69, 71, 74, 81-82, 84, 102, the price of TiO_2 actually increased substantially during the Class Period. *Id.* ¶ 103. Plainitffs allege that Defendant DuPont, the titanium dioxide market **[**11]** leader, typically would announce a price increase which would be quickly followed by all other Defendants. *Id.* ¶¶ 67, 72-75, 77-78, 80, 82-101. According to the Plaintiffs, Defendants announced and implemented multiple and nearly simultaneous TiO_2 price increases in lock-step fashion. Of crucial importance to Plaintiffs case is their contention that these price increases were implemented in the midst of market conditions, such as declining demand, decreasing manufacturing costs, and excess production capacity, that Plaintiffs allege are completely incompatible with across the board price increases among the market leaders of a product.

[*335] Although the price increases were spaced out over five years, they increased in frequency in 2008. Plaintiffs allege that "over the course of approximately 14 weeks, from late May 2008 to early September 2008, Defendants and their co-conspirators announced three separate Titanium Dioxide price increases and at least two energy surcharges," and that these price increases were made amidst declining demand for TiO_2. *Id.* ¶ 99.

Plaintiffs propose to delay the start of the Class period until February 1, 2003, despite the evidence of illegal antitrust activity before that date." Pls.' Class Mem. at 3 n.2, ECF No. 247.

In light of the market conditions for TiO_2, Plaintiffs allege that the price increases implemented by Defendants cannot be explained **[**12]** as anything other than an illegal agreement to fix prices and supply of the chemical. In support of this contention, Plaintiffs draw an analogy to the period in the 1990s—where there is no price fixing conspiracy alleged—when industry overcapacity lead to lower prices and slim profit margins. *Id.* ¶ 102. Plaintiffs allege that the price increases were profitable for Defendants. The average price per ton of TiO_2 increased nearly a third between 2002 and 2006, and Defendants increased their operating incomes and margins. *Id.* ¶ 103.

As a result of this alleged conspiracy, Plaintiffs contend that price competition in the sale of TiO_2 by Defendants (who control approximately 70 percent of global production capacity) has been restrained, suppressed, and eliminated throughout the United States. *Id.* ¶ 104. Plaintiffs further allege that prices for TiO_2 have been raised, fixed, maintained, and stabilized at artificial levels, and as a result, direct purchasers of TiO_2 have been "deprived of the benefit of free and open competition in the purchase" of the chemical. *Id.*

III. CLASS CERTIFICATION ARGUMENTS—FRAMING THE ISSUES

In Plaintiffs' Motion for Class Certification, they seek certification of **[**13]** the following class:

> All persons and entities who purchased titanium dioxide in the United States directly from one or more Defendants or Tronox, or from any predecessors, parents, subsidiaries, or affiliates thereof, between February 1, 2003 and the present ("Class Period"). Excluded from the Class are Defendants, their co-conspirators, parent companies, predecessors, subsidiaries and affiliates, and all governmental entities.

Pls. Class Mot. at 1, ECF No. 246. According to the Plaintiffs, "[t]his case is directly analogous to the legion of antitrust price fixing cases that federal courts have routinely certified as class actions." Pls.' Class Mem. at 2. In that regard, Plaintiffs maintain that all the *Rule 23* requirements are satisfied, and in particular, the predominance requirement of *Rule 23(b)(3)* has been met insofar as "[t]he trial will focus almost entirely on proving that the Cartel Members formed a cartel and conspired to artificially inflate prices for titanium dioxide, that they were successful in raising prices to supra-competitive levels, and that, as a result of this conspiracy, Class members sustained injury and damages when they paid artificially-inflated prices on their **[**14]** purchases of titanium dioxide." *Id.* at 2-3.

Defendants argue that this case is not amenable to class treatment and contest certification of this class on the grounds that: (1) the named Plaintiffs have not satisfied the *Rule 23(a)* requirements of typicality and adequacy of representation; and (2) the *Rule 23(b)(3)* requirements of predominance cannot be met insofar as the Plaintiffs have set forth a flawed methodology for proving individual antitrust impact and damages on a class-wide basis. More specifically, Defendants argue that the named Plaintiffs' claims are not typical of the class because they are small purchasers of TiO_2, are located in narrow geographies, and have individual interests antagonistic to the class as a whole. In this regard, Defendants argue that the named Plaintiffs are not adequate class representatives. Regarding the predominance prong of *Rule 23(b)*, Defendants argue that even if the Plaintiffs could prove the existence of a price-fixing conspiracy, proof of individual injury and damages cannot be computed in a class-wide manner, and therefore must be resolved on an individual basis.

On the typicality and adequacy of representation prongs of *Rule 23(a)*, Plaintiffs **[**15]** maintain that each named Plaintiff suffered the same injury—*i.e.*, they paid artificially inflated prices for TiO_2—and therefore their **[*336]** interests are aligned with the class as a whole. On the predominance prong of *Rule 23(b)*, Plaintiffs contend that they have sufficient class-wide proof to establish individual impact and damages. Plaintiffs plan to present evidence that Defendants colluded to fix the price of TiO_2 in the United States in the form of: (1) proof that Defendants implemented lock-step price increase announcements; (2) proof that Defendants regularly attended industry meetings that facilitated the workings of the conspiracy; and (3) expert analysis regarding the structure of the TiO_2 market and how that structure facilitates collusive agreements. To prove common impact, Plaintiffs plan to present expert testimony showing that, as a result of the cartel, TiO_2 prices were supra-competitive across the class, and as a result affected each individual member of the class. To prove damages, Plaintiffs rely on the same expert analysis and methodology to show that the "aggregate" overcharge was felt uniformly across the class.

Accordingly, while each element of the *Rule 23* class certification **[**16]** analysis will be addressed, this Court will focus on the issues most closely contested by the Defendants— typicality and adequacy of representation, and predominance of common issues.

THE LEGAL STANDARD FOR CLASS CERTIFICATION UNDER RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

HN1[] To obtain class certification, the Plaintiffs must meet all four requirements of *Federal Rule of Civil Procedure 23(a)*, and at least one of the requirements of *Rule 23(b)*. *Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 423 (4th Cir. 2003)*. Here, Plaintiffs seek certification of the proposed class under *Rule 23(b)(3)*, which requires that common questions of law predominate. "Class certification requires a finding that each of the requirements of *Rule 23* has been met" by a preponderance of the evidence. *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008)*.

HN2[] "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes, __ U.S. __, 131 S. Ct. 2541, 2550, 180 L. Ed. 2d 374 (2011)* (internal quotation marks and citation omitted). As recently noted by the Supreme Court in the *Wal-Mart* opinion, "*Rule 23* does **[**17]** not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common issues of law or fact, etc." *Id. at 2551*. In ruling on a class certification motion, a court must take a close look at the facts relevant to the certification question, even if those facts "tend to overlap with the merits of the case." *Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 319 (4th Cir. 2006)*; *accord Gariety v. Grant Thornton, LLP, 368 F.3d 356, 366 (4th Cir. 2004)* ("[W]hile an evaluation of the merits is not part of a *Rule 23* analysis, the factors spelled out in *Rule 23* must be addressed through findings, even if they overlap with issues on the merits.").

The Supreme Court recently noted that "'sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,' and that certification is proper only if 'the trial court is satisfied, after a *rigorous analysis*, that the prerequisites of *Rule 23(a)* have been satisfied.'" *Wal-Mart 131 S. Ct. at 2551* (quoting *Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982))* **[**18]** (emphasis added); *see also Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)* ("[T]he class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'") (quoting *Mercantile Nat. Bank v. Langdeau, 371 U.S. 555, 558, 83 S. Ct. 520, 9 L. Ed. 2d 523 (1963))*.

HN3[] The "rigorous analysis" that must be undertaken in the class certification context extends to disputes between experts: "Resolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court—no matter whether a dispute might appear to implicate the 'credibility' of one or more experts . . . ." *In re Hydrogen Peroxide, 552 F.3d at 323-24*. Of course, there are limits **[*337]** to a court's resolution of expert disputes, and "a court should only engage itself in statistical dueling of experts if such dueling presents a valid basis for granting or denying class certification." *In re Rail Freight Fuel Surcharge Antitrust Litig., __ F. Supp. 2d __, 2012 U.S. Dist. LEXIS 97178, 2012 WL 2870207, at *17 (D.D.C. June 21, 2012)* (internal quotations, citations, and alterations omitted). As noted by the Third Circuit, "[t]hat weighing expert opinions is proper does **[**19]** not make it necessary in every case or unlimited in scope[,]" and "[r]igorous analysis need not be hampered by a concern for avoiding credibility issues; as . . . findings with respect to class certification do not bind the ultimate fact-finder on the merits. A court's determination that an expert's opinion is persuasive or unpersuasive on a *Rule 23* requirement does not preclude a different view at the merits stage of the case." *In re Hydrogen Peroxide, 552 F.3d at 324*.

ANALYSIS

I. *Rule 23(a)* FINDINGS & CONCLUSIONS

As previously noted, Plaintiffs must first establish—by a preponderance of the evidence—the four requirements of *Rule 23(a)*: numerosity, commonality, typicality, and adequacy of representation. Each will be addressed in turn.

A. Numerosity

Rule 23(a)(1) ***HN4***[] provides that one of the requirements to bring a class action is that the class be "so numerous that joinder of all members is impracticable." The Fourth Circuit has held that "[n]o specified number is needed to maintain a class action." *Brady v. Thurston Motor Lines, 726 F.2d 136, 145 (4th Cir. 1984)* (quoting *Cypres v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648, 653 (4th Cir. 1967))*. This Court has previously **[**20]** noted that, generally speaking, "courts find classes of at least 40 members sufficiently large to satisfy the impracticability requirement." *Peoples v. Wendover Funding, Inc., 179 F. R.D. 492, 497 (D. Md. 1998)*.

Here, Plaintiffs assert that at least 700, and as many as several thousand TiO_2 purchasers were affected by the Defendants' alleged conspiracy. *See* Pls. Class Mem. at 18. Defendants do not contest this assertion, and this Court finds that the numerosity requirement is met in this case.

B. Commonality

Rule 23(a)(2) ***HN5***[] requires a question of law or fact common to the class. "A common question is one that can be resolved for each class member in a single hearing," and does not "turn[ ] on a consideration of the individual circumstances of each class member." *Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 319 (4th Cir. 2006)* (internal quotation marks and citation omitted). The Fourth Circuit has held that, "in a class action brought under *Rule 23(b)(3)*, the 'commonality' requirement of *Rule 23(a)(2)* is 'subsumed under, or superseded by, the more stringent *Rule 23(b)(3)* requirement that questions common to the class predominate over' other questions." *Lienhart v. Dryvit Systems, Inc., 255 F.3d 138, 147 n.4 (4th Cir. 2001)* **[**21]** (quoting *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 609, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))*. Therefore, in the Fourth Circuit "[t]he common questions must be dispositive and overshadow other issues." *Lienhart, 255 F.3d at 146*. "Thus, the commonality requirement is relatively toothless in comparison with the related requirements of typicality and predominance." *In re Puerto Rican Cabotage Antitrust Litig., 269 F.R.D. 125, 131 (D.P.R. 2010)*.

As the Supreme Court recently noted, "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart, 131 S. Ct. at 2551* (internal quotations and citation omitted). Here, Plaintiffs allege a multi-year price-fixing conspiracy that led to all class members being subjected to artificially inflated prices for TiO_2. Generally speaking, in the antitrust context, "courts have held that the existence of an alleged conspiracy or monopoly is a common issue that will satisfy" the commonality requirement." 1 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 3.10 (4th ed. 2002); *see also* 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1763 (3d ed. 2005) ("the **[*338]** claimed existence of **[**22]** a conspiracy to fix prices . . . in violation of the antitrust laws has been found to present common questions in actions brought by plaintiffs who asserted that they had been harmed by those activities") (hereinafter "FEDERAL PRACTICE AND PROCEDURE"); *In re Florida Cement and Concrete Antitrust Litig., 2012 U.S. Dist. LEXIS 281, 2012 WL 27668, at *3 (S.D. Fla. Jan. 3, 2012)* (collecting cases).

Plaintiffs have identified several questions that they assert are common to the class. Most notably, Plaintiffs maintain that the existence of the conspiracy is *the* central issue in this litigation. Defendants acknowledge this point in noting that ***HN6***[] "the commonality element of *Rule 23(a)* is satisfied because there is at least one common question—namely, whether the alleged conspiracy in fact existed." Defs.' Class Opp'n at 15, ECF no. 293. Accordingly, this Court finds by a preponderance of the evidence that the existence of the alleged conspiracy, standing alone, is sufficient to establish commonality. In other words, the Plaintiffs' claims "depend upon a common contention," and that common contention is "of a nature that is capable of classwide resolution—which means that its truth or falsity will resolve an issue that **[**23]** is central to the validity of each one of the claims in one stroke." *Wal-Mart, 131 S. Ct. at 2551*.

C. Typicality & Adequacy of Representation[3]

Rule 23(a)(3) ***HN7***[] requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Fed. R. Civ. P. 23(a)(3)*. Courts have recognized that the commonality and typicality requirements of *Rule 23(a)* tend to merge. "Both serve as guideposts for determining whether . . . the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected . . . ." *Gen. Tel. Co. of the SW. v. Falcon, 457 U.S. 147, 157 n.13, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*. As this Court has previously noted, the typicality requirement determines "whether a sufficient relationship exists between the injury to the named plaintiff and **[**24]** the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Bullock v. Bd. of Educ. of Montgomery County, 210 F.R.D. 556, 560 (D. Md. 2002)* (citations omitted). The class representative "must be part of the class and possess the same interest and suffer the same injury as the class members." *Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 338 (4th Cir. 1998)*. Essentially, the typicality requirement ensures that "only those plaintiffs who can advance the same factual and legal arguments may be grouped together as a class." *Id. at 340*. "The essence of the typicality requirement is captured by the notion that 'as goes the claim of the named plaintiff, so goes the claims of the class.'" *Deiter v. Microsoft Corp., 436 F.3d 461, 466 (4th Cir. 2006)* (citing *Broussard, 155 F.3d at 340*).

HN8[] The final prerequisite under *Rule 23(a)* is that the persons representing the proposed class must be able "fairly and adequately to protect the interests" of all members of the class. The adequacy inquiry under *Rule 23(a)(4)* "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem, 521 U.S. at 625* **[**25]** (citing *Falcon, 457 U.S. at 157-58 n.13*.). As noted by the Fourth Circuit, for a conflict to defeat class certification, the conflict "must be more than merely speculative or hypothetical;" it "must be fundamental" and "go to the heart of the litigation." *Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 430-31 (4th Cir. 2003)* (internal quotations and citations omitted).

The typicality requirement "has been liberally construed by courts . . . [and] in the antitrust context, typicality will be established by plaintiffs and all class members alleging the same antitrust violations by **[*339]** defendants." *In re Rail Freight, 2012 U.S. Dist. LEXIS 97178, 2012 WL 2870207, at *26* (quoting *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd., 246 F.R.D. 293, 301 (D.D.C. 2007))*. Notwithstanding courts' liberal reading of the typicality requirement in price-fixing cases, Defendants maintain that the named Plaintiffs' claims are not typical of the putative class for several reasons. For example, Defendants argue that the named Plaintiffs' claims are not typical of the proposed class because they "(1) represent a very small portion of the total volume of titanium dioxide sold, (2) purchased a small number of the total titanium **[**26]** products offered by defendants, and (3) are located in narrow geographies." Defs.' Class Opp'n at 42.

This Court finds these arguments unavailing. As noted, ***HN9***[] to establish the typicality prong of *Rule 23(a)*, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Deiter, 436 F.3d at 466*. While some factual differences between the named Plaintiffs and the putative class may exist, they all seek the same relief: overcharge damages as a result of a price-fixing conspiracy in violation of *Section 1* of the Sherman Act. *See* *In re Polyester Staple Antitrust Litig., 2007 U.S. Dist. LEXIS 52525, 2007 WL 2111380, at *10 (W.D.N.C. July 19, 2007)* ("In determining whether the claims of the class representatives are typical of the class, the Court looks to the *nature* of the claims asserted (i.e, the legal theory)

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[3] In their Class Opposition Memorandum, Defendants make the same arguments for both the typicality and adequacy of representation prongs of *Rule 23*. *See* Defs.' Class Opp'n at 42-46. Because the typicality inquiry "tend[s] to merge with the adequacy of representation requirement," *Falcon, 457 U.S. at 158 n.13*, the Court will address these elements together.

rather than any specific factual differences amongst class members.") (citations omitted, emphasis added). Because Plaintiffs' claims arose from the same alleged conduct, their claims are typical insofar as they will seek relief under the same legal theory and will "tend to advance the interests of the absent class members." *Deiter, 436 F.3d at 466*.

Defendants **[**27]** also argue that each named Plaintiff will not adequately represent the interests of the class because of specific disqualifying problems. For example, Defendants argue that because Plaintiff Isaac is a chemical wholesaler, it is unlike the majority of the putative class members that are in the business of manufacturing products using TiO_2. Moreover, Defendants point out that Isaac purchased only a small volume of TiO_2 in 2004, and later sold that product at a profit. Defendants argue that it is therefore unlikely that Isaac suffered any actual injury as a result of the alleged conspiracy. [4] *See* Defs.' Class Opp'n at 43-44. With respect to Intervener Plaintiff Breen, Defendants highlight deposition testimony by Breen's class representative that indicates Breen was not aware of any price-fixing until 2011—years after the filing of the lawsuit. Finally, Defendants argue that Plaintiff Haley is also an inadequate class representative. Defendants argue that because Haley ceased purchasing TiO_2 in 2008, it therefore has no incentive to "prove a conspiracy beyond mid-2008 when it sold its manufacturing business and no longer had a need to purchase titanium dioxide." Defs.' Class Opp'n at **[**28]** 45. When Haley did purchase TiO_2, it purchased the product through a buying group that negotiated low prices, thereby lessening any alleged impact of the price-fixing conspiracy. [5] Moreover, Defendants argue that they have unique defenses pertaining to Haley, particularly with respect to the statute of limitations.

Notwithstanding these minor issues identified by the Defendants, this Court can discern no "fundamental" conflict that goes to the "heart of the litigation." *Gunnells, 348 F.3d at 430-31*. The thrust of the litigation will concern the *Defendants'* conduct and the existence of the alleged conspiracy. Accordingly, the named Plaintiffs and the putative class will "share common objectives and the same factual and legal positions," and therefore "have the same interest in establishing the liability of [Defendants]." *Id. at 431*. As such, this Court finds, by a preponderance of the evidence, that Plaintiffs have satisfied the typicality and adequacy of representation prongs of *Rule 23(a)*. [6]

[*340] II. *Rule 23(b)(3)* Findings & Conclusions

HN11[] Having determined that the Plaintiffs have satisfied *Rule 23(a)*'s requirements, the Court now turns *Rule 23(b)(3)* which requires a finding that common questions "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. "The *Rule 23(b)(3)* predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem, 521 U.S. at 623*. Although the predominance inquiry of *Rule 23(b)(3)* is similar to the commonality requirement of *Rule 23(a)*, the Fourth Circuit has held that the predominance requirement is "more stringent" than the *Rule 23(a)* requirement. *Thorn, 445 F.3d at 319* (quoting *Lienhart v. Dryvit Sys. Inc., 255 F.3d 138, 147 n.4 (4th Cir. 2001))*; *see also Amchem, 521 U.S. at 624* (the *Rule 23(b)(3)* criterion is "far more **[**30]** demanding" than the commonality requirement). In determining whether the Plaintiffs have satisfied their burden, this Court must conduct a "rigorous analysis" of the *Rule 23(b)(3)* requirements and the Plaintiffs' methodology for proving those requirements, and must act as finder of fact in the face of conflicting expert testimony. *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 323-24*. ***HN12***[] In order to meet the predominance prong of *Rule 23(b)(3)*, a plaintiff must "demonstrate that the element[s] of [the legal claim] is capable of proof at trial through evidence that is common to the class rather than individual." *Id. at 311*.

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[4] To the extent that this argument overlaps with the predominance inquiry relating to impact, that argument will be addressed *infra*.

[5] *See supra* note 4.

[6] ***HN10***[] Pursuant to the 2003 amendments to *Rule 23*, **[**29]** the Court's inquiry into the qualifications and experience of Plaintiffs' counsel are no longer investigated under *Rule 23(a)*, but instead are to be determined under *Rule 23(g)*. *See infra* at Section IV for that discussion.

"Because the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual, a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." *Id.* (internal quotations and citations omitted).

With that standard in mind, the Court notes at the outset that, like many courts confronting class certification motions involving horizontal price-fixing claims, it is presented with a battle of the experts **[**31]** with regard to the predominance prong of *Rule 23(b)(3)*. Both parties rely heavily on their respective—and diametrically opposed—expert declarations. [7] Nevertheless, this Court has rigorously analyzed the conflicting testimony, making credibility findings as needed, in order to determine whether Plaintiffs have met their burden on each class certification requirement. *See In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 324*. Because much of the conflicting expert testimony is informed by competing factual characterizations regarding the nature of the market for TiO_2, this Court will first make the necessary factual findings regarding that market before proceeding on to the substantive requirements of *Rule 23(b)(3)*. *See Blades v. Monsanto Co., 400 F.3d 562, 575 (8th Cir. 2005)* ***HN13***[] ("[I]n ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case. This extends to the resolution of expert disputes concerning the import of evidence concerning the factual setting—such as economic evidence as to business operations or market transactions.").

A. The Titanium Dioxide Market—Findings of Fact

As will be discussed *infra*, in order for this Court to certify a class in this case, it must be satisfied that the Plaintiffs have set forth a plausible methodology for proving class-wide impact as a result of the alleged conspiracy. In other words, assuming the alleged conspiracy existed, Plaintiffs still must be able to show that each class member was injured, or "impacted" by that conspiracy through evidence that is common to the class as a whole. Generally speaking, this will require the Plaintiffs to show that the class members paid a higher price for TiO_2 purchased from Defendants than they would have absent the existence of a conspiracy. *See Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 489, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)* ***HN14***[] ("when a buyer shows **[*341]** that the price paid by him . . . is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage").

Seemingly following the plaintiff-side class certification script [8] for horizontal price fixing cases, Plaintiffs have introduced an expert declaration **[**33]** that relies, in part, on certain oligopolistic tendencies in the TiO_2 market that Plaintiffs allege facilitate collusion and proves common impact. Specifically, Plaintiffs' Expert, Dr. Russell Lamb, maintains that (1) the multiple nearly simultaneous price increase announcements indicate coordinated pricing; (2) the TiO_2 market is dominated by Defendants; (3) TiO_2 is a commodity-like product that is interchangeable across suppliers; (4) there are many buyers in the market for TiO_2; (5) there are high barriers to entry in the market for TiO_2; (6) demand for TiO_2 was stable or declining during the Class Period; and (7) competition occurs primarily on the basis of price in the TiO_2 market. *See* Report of Dr. Russell Lamb ("Lamb Report") ¶¶ 28-62. These factors undergird Dr. Lamb's conclusion that if a price-fixing conspiracy occurred, that conspiracy would have impacted all members of the class by way of artificially inflated prices for TiO_2.

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[7] At the August 13, 2012 class certification hearing, the parties did not introduce live expert **[**32]** testimony—instead, they introduced excerpts of deposition testimony, and excerpts of the expert declarations.

[8] For example, Dr. John Beyer, a frequent plaintiffs' expert in class certification cases, has outlined the relevant market factors used to prove common impact in *The Role of Economics in Class Certification and Class-Wide Impact, in* LITIGATING CONSPIRACY: **[**34]** AN ANALYSIS OF COMPETITION CLASS ACTIONS (Stephen Pitel ed. 2006).

Following their own script, [9] Defendants argue that certain of these market factors are not present in the market for TiO_2, and as a result, Dr. Lamb's conclusion that common proof of class-wide impact exists is therefore erroneous. Specifically, Defendants' expert, Dr. Michelle Burtis, contends that: (1) Defendants produce hundreds of different TiO_2 products, and therefore TiO_2 cannot be considered a commodity-like product; (2) TiO_2 pricing is highly complex, individualized, and is not the primary basis for competition among Defendants; and (3) class members had the ability to purchase TiO_2 from producers that are not alleged cartel members, thereby necessitating individual inquiry. *See* Report of Dr. Michelle Burtis ("Burtis Report") ¶¶ 14-57.

Each of these TiO_2 **[**35]** market characteristics will be analyzed below.

Price increase announcements indicate coordinated behavior. After analyzing "more than ten years' worth of price increase announcements issued by the Cartel Members," Dr. Lamb concludes that "throughout the Class Period, the Cartel Members announced multiple nearly simultaneous price increases that applied across the board to all users of titanium dioxide, and to all products and grades of titanium dioxide sold by the Cartel Members." Lamb Report ¶ 29. Furthermore, Dr. Lamb concludes that these price increase announcements occurred close-in-time to meetings in which many of the cartel members participated. Accordingly, Dr. Lamb posits that "[w]hile [firms] can certainly announce price increases without coordination, it is hard to explain the same, or nearly the same, price increases being repeatedly announced nearly simultaneously by different firms supposedly acting independently." *Id.* ¶ 28. In support of his conclusions, Dr. Lamb presents a table summarizing the price increase announcements announced by the Defendants in this case. *See id.* at Table 2. Importantly, Dr. Lamb concludes that the price increase announcements "were efforts **[**36]** by the Cartel Members to confirm their cartel behavior and signal to each other and to their customers that price increases would be implemented and enforced market-wide." *Id.* ¶ 29.

In response, Defendants' expert, Dr. Burtis does not take issue with the *existence* of the price increase announcements, but rather, with the *interpretation* of those announcements. Specifically, Dr. Burtis maintains that the price increase announcements by Defendants are not necessarily evidence **[*342]** of collusion. Citing a textbook on industrial organization, Dr. Burtis contends that parallel pricing behavior is a natural consequence of competition in oligopolies, and therefore "it would be expected that a unilateral price increase announcement by one Defendant would influence the decisions of the other Defendants, and that a plausible response would be to announce similar price increases quickly." Burtis Report ¶ 117. Finally, Dr. Burtis argues that even if price increases were *announced* nearly simultaneously, there is no evidence that they were *implemented* in any uniform way. *Id.* ¶ 116.

This Court finds credible Dr. Lamb's conclusions that the Defendants implemented multiple nearly simultaneous price increases **[**37]** throughout the class period, and those price increases can be used to prove coordinated pricing. As noted, Dr. Burtis does not dispute the fact that the price increase announcements were made, but does dispute the inferences that can be drawn from those announcements.

TiO_2 Market Dominance by Defendants.

In Plaintiffs' Consolidated Amended Complaint, they allege that Defendants are the leading suppliers of TiO_2 in the world, and control approximately 70 percent of the global production capacity. CAC ¶ 1. Dr. Lamb, using publicly available documents common to the class as a whole, confirmed this assertion, and concludes "class-wide evidence shows that the Cartel Members controlled the vast majority of sales of titanium dioxide to the Class members during the Class Period in this matter." Lamb Report ¶¶ 30-31. The Defendants' Annual Reports and SEC filings confirm this finding and indicate that the Defendants produce between 70 to 75 percent of the world's supply of TiO_2. *See id.* ¶ 31. Furthermore, Dr. Lamb's analysis concludes that the Cartel Members controlled 98 percent of the North American market for TiO_2 during the Class Period. *Id.* ¶ 34, and Table 4. Dr. Lamb concludes that "[w]hen

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[9] *See* John H. Johnson & Gregory K. Leonard, *Economics and the Rigorous Analysis of Class Certification in Antitrust Cases*, 3 J. COMPETITION L. & ECON., 341, 344-345 (2007) (taking issue with the "prototypical plaintiffs' argument and arguing that "the requirement of common proof of antitrust injury should usually present a substantial hurdle for plaintiffs.").

[38]** a small group of firms dominate the market for a product, it makes it easier for them to form a cartel such as the one alleged here." *Id.* ¶ 36.

Dr. Burtis does not directly contradict Dr. Lamb's assertions regarding the market power belonging to the alleged conspirators in this case. Instead, she argues that evidence exists showing that TiO_2 customers had the ability to purchase the product from producers other than the alleged co-conspirators throughout the relevant period. Burtis Report ¶ 57. In this regard, Dr. Burtis argues that the ability to purchase TiO_2 from other producers necessitates individual inquiry into "each putative class member's ability to use TiO_2 products produced 'offshore' and the extent to which they used this ability to negotiate prices with Defendants. *Id.* However, because Dr. Burtis does not dispute Dr. Lamb's general conclusions that the market for TiO_2 is a highly concentrated one, this Court will take that fact as established, and will address the import of Dr. Burtis' argument in the predominance section *infra.*

TiO_2 as a commodity-like product & competition based primarily on price

According to Dr. Lamb, TiO_2 is a commodity-like product and is interchangeable **[**39]** [10] across suppliers. Lamb Report ¶ 37. This factor has two main implications: first, when a product is characterized as a commodity, competition is based primarily on price and, second, when a product is interchangeable with other similar products produced by competitors, coordination among firms is facilitated because "firms wishing to form a cartel can more easily monitor and detect defections from a price-fixing agreement." *Id.* Dr. Lamb concludes that TiO_2 is a commodity-like product even though each Defendant produces numerous different grades of the product for many different applications. In so concluding, Dr. Lamb relies on the Defendants' SEC filings, market research reports, and internal documents indicating that the different grades of TiO_2 produced by one Defendant were fungible with those produced by other Defendants. *See id.* ¶ 40. According **[*343]** to Dr. Lamb, this factor "makes the Cartel for titanium dioxide far more likely."

Dr. Burtis and Defendants take great issue with Dr. Lamb's conclusion that TiO_2 is a commodity-like product. Dr. Burtis contends that, although the TiO_2 products produced by the Defendants all contain the same chemical, they vary widely in their intended use and application. Dr. Burtis points to evidence indicating that when TiO_2 purchasers considered changing suppliers, they frequently needed to test the new product to make sure it would work in their production process. Burtis Report ¶ 16. Furthermore, certain TiO_2 purchasers were required to reformulate their production processes to accommodate different TiO_2 products. *Id.* In short, Dr. Burtis has provided substantial evidence indicating that the TiO_2 products produced by the different Defendants were not identical to each other, and that the individual Defendants spent time and money attempting to differentiate their products from those of their competitors.

Notwithstanding this, after reviewing all the evidence, Defendants' contention that titanium dioxide is not a commodity-like product is simply belied by their own characterization of the chemical. For example, in its 2006 Form 10-K, [11] Defendant Millennium **[**41]** stated: "[d]ue to the *commodity nature* of certain of [its] products, competition in [the global titanium dioxide market] is based primarily on price . . ." Lamb Report ¶ 38. Similarly, in its 2010 10-K, Defendant Kronos stated that "the majority of our grades and substantially all of our production are considered *commodity* pigments with price and availability being the most significant competitive factors." *Id.* Defendants also produced so-called "crosswalk" documents that note which products offered by competitors are compatible or interchangeable with their own. *See id.* ¶ 40 n. 93 and accompanying text.

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[10] "Interchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there may be some degree of preference for one over the other, either would work effectively." *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 437 (3d Cir. 1997)* **[**40]** (citation omitted).

[11] Required by the Securities and Exchange Commission, the Form 10-K is a comprehensive annual report summarizing a company's performance and financial condition.

Accordingly, while there is certainly some differentiation among TiO_2 products produced by the Defendants, the Court credits Dr. Lamb's conclusion that TiO_2 is a commodity-like product and that competition among produces is based primarily on price. [12]

Many buyers in the TiO_2 market.

Dr. Lamb concludes that each cartel member maintains a large customer base and that there are numerous purchasers of TiO_2. In this regard, Dr. Lamb asserts that "[w]hen there are many buyers in a market for a particular good, a cartel such as the one alleged here is more likely to be effective." Lamb Report ¶ 44. "This is because the incentive to a cartel member for undercutting the conspiracy is lower when there are many smaller purchasers since each potential sale is small while the risk of disrupting the cartel can carry large penalties." *Id.* Dr. Burtis does not dispute the fact that the buying side of the TiO_2 market is unconcentrated. Accordingly, the Court will take this fact as established.

High barriers to entry.

Next, Dr. Lamb concludes that there are high barriers to entry in the market for TiO_2. Specifically, there is a significant level of capital investment required to build a competitive TiO_2 manufacturing facility—it is estimated that a new plant would require $250-500 million and three to five years to build. Lamb Report ¶¶ 49-50. Additionally, the current TiO_2 producers hold patents for **[**43]** the proprietary productions processes, which would impose another significant barrier to entry into the market. Defendants and Dr. Burtis do not dispute the fact that there are high barriers to entry in the TiO_2 market, and this Court will take this fact as established.

Stable or declining demand for titanium dioxide and excess production capacity

Dr. Lamb concludes that demand for TiO_2 experienced a 34.8 percent decline between 2002 and 2009. Lamb Report ¶ 60. Moreover, he concludes that during this period, **[*344]** there was significant excess capacity in the production of the chemical—meaning that TiO_2 producers were producing less of the chemical than their capabilities allowed. *Id.* ¶ 71-74. According to Dr. Lamb, standard economic theory predicts that, in the absence of a cartel, these factors would lead to falling prices for TiO_2 as a result of competition for market share among competitors. *See id.* ¶ 69. However, Dr. Lamb determined that prices for TiO_2 did not fall as economic theory predicts, but instead rose significantly during the Class Period. *Id.* ¶ 70. According to Dr. Lamb, "[t[his combination of stable or falling demand and increasing prices constitutes common proof that the effect **[**44]** of the anticompetitive behavior which forms the heart of this Cartel was to raise prices above those that would have prevailed in the market otherwise." *Id.*

While Dr. Burtis disputes Dr. Lamb's conclusion that these market factors constitute common proof of class-wide impact, she does not directly refute his underlying findings— that demand for TiO_2 declined during the Class Period and that substantial excess capacity existed in the industry. Accordingly, this Court will take those facts as established, and will consider their import below.

B. Predominance

HN15[] In considering the *Rule 23(b)(3)* predominance requirement, "a court's rigorous analysis begins with the elements of the underlying cause of action." *In re Rail Freight, 2012 U.S. Dist. LEXIS 97178, 2012 WL 2870207, at*

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[12] This conclusion relates only to the commodity-like nature of TiO_2. Defendants' arguments that pricing for TiO_2 is determined by individual negotiations and varied contract terms **[**42]** will be discussed in the predominance section *infra.*

*30. "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311.

HN16[] To establish an antitrust violation, a plaintiff must prove three elements: (1) a violation of the antitrust laws—here, Section 1 of the Sherman Act; (2) individual injury resulting from that violation; and (3) measurable damages. *See* 15 U.S.C. § 1; Deiter v. Microsoft Corp., 436 F.3d 461, 467 (4th Cir. 2006). **[**45]** However, at the class certification stage, Plaintiffs need only show by a preponderance of the evidence that these elements are "*capable of proof* at trial through evidence that is common to the class rather than individual to its members." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311-12 (emphasis added). Each element is addressed in turn.

i. Violation of Antitrust Law

Plaintiffs allege that Defendants conspired to fix the price of TiO_2. CAC ¶ 2. HN17[] This type of horizontal price-fixing scheme, if it existed, is a *per se* violation of the Sherman Act. *See* Texaco, Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006). Defendants do not dispute that this element may be proved by common evidence. *See* Defs.' Class Opp'n at 15; *see also* 7AA Federal Practice and Procedure § 1781 (3d ed. 2005) ("whether a conspiracy exists is a common question that is thought to predominate over the other issues in the case and has the effect of satisfying the first prerequisite in Rule 23(b)(3)"). The question of whether a conspiracy to fix the price of TiO_2 existed is a fact capable of common proof because "plaintiffs' allegations of price fixing indisputably will focus on the actions of the defendants, and, as such, **[**46]** proof for these issues will not vary among class members." In re Rail Freight, 2012 U.S. Dist. LEXIS 97178, 2012 WL 2870207, at *31 (quotation and citations omitted). Accordingly, this Court finds by a preponderance of the evidence that the element of antitrust injury is capable of proof at trial through evidence that is common to the class.

The Court now turns to the real crux of Defendants' opposition to class certification—that is, whether the Plaintiffs can prove the elements of common impact and damages on a class-wide basis.

ii. Impact

HN18[] The second element the Plaintiffs will need to establish is that the class members suffered injury from the alleged price-fixing conspiracy. [13] This element, commonly **[*345]** referred to as "impact," can be "likened to the causation element in a negligence cause of action. The term means simply that the antitrust violation caused injury to the antitrust plaintiff." In re Urethane Antitrust Litig., 251 F.R.D. 629, 634 (D. Kan. 2008) (quoting State of Alabama v. Blue Bird Body Co., 573 F.2d 309, 317 (5th Cir. 1978)). Of course, at this stage in the litigation, the Plaintiffs need not *prove* this element, "[i]nstead, the task for plaintiffs at class certification is to demonstrate that the **[**47]** element of antitrust impact is *capable of proof* at trial through evidence that is common to the class rather than individual to its members." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311-12 (emphasis added). In other words, Plaintiffs' burden of showing antitrust impact is "satisfied by its proof of *some damage* flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is

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[13] This elements involves two distinct questions: "One is the familiar factual question whether the plaintiff has indeed suffered harm, or 'injury-in-fact.' The other is the legal question whether any such injury is 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 106 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)). Because Plaintiffs in this case allege only one injury—that they were subjected **[**48]** to artificially inflated prices for TiO_2 as a result of a price-fixing conspiracy in violation of Section 1 of the Sherman Act—the Defendants do not challenge this element. *See* Cordes, 502 F.3d at 107 ("Because each class member allegedly suffered the same type of injury, the legal question of whether such an injury is 'of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful,' Brunswick, 429 U.S. at 489, is a common one."). Accordingly, the legal question of injury is common to the class, and this Court will focus on the first prong of the impact analysis—whether the class members suffered "injury-in-fact."

enough that the illegality is shown to be a material cause of the injury." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)* (emphasis added).

To meet their burden, therefore, Plaintiffs must show, using evidence common to the class, that class members paid a higher price for TiO_2 from Defendants than they would have absent the alleged conspiracy. *See Hanover Shoe, 392 U.S. 481, 489, 88 S. Ct. 2224, 20 L. Ed. 2d 1231*. In *Blades v. Monsanto Co.*, ***HN19***[] the Eighth Circuit defined common proof as follows:

> The nature of the evidence that will suffice to resolve a question determines whether the question is common or individual. If, to make a prima facie showing on a given question, the members of a proposed **[**49]** class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question.

400 F.3d at 566 (citations omitted).

As is often the case in horizontal price fixing cases, Plaintiffs here seek to show this element is capable of common proof by comparing a hypothetical "but-for" price—*i.e.*, the price that would have been paid in the absence of the conspiracy—with the prices actually paid by the Plaintiffs during the Class Period. *See In re EPDM Antitrust Litig., 256 F.R.D. 82, 88 (D. Conn. 2009)*. In this kind of but-for comparison, prices are analyzed in a scenario that is "free of the restraints and conduct alleged to be anticompetitive." *In re Rail Freight, 2012 U.S. Dist. LEXIS 97178, 2012 WL 2870207, at *41* (quoting *Blades v. Monsanto, Co., 400 F.3d at 569*. If Plaintiffs can show that they paid a higher actual price than the but-for price using evidence common to the class, they have met their burden on the impact element.

HN20[] As the *Rail Freight* **[**50]** court recently summarized, there are various methods by which plaintiffs may prove that common evidence is capable of proving impact:

> [O]ne way of showing that common questions predominate on the issue of injury-in-fact
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>> is to show that there is a common method for proving that the class plaintiffs paid higher actual prices than in the but-for world, such as using an economic regression model incorporating a variety of factors to demonstrate that a conspiracy variable was at work during the class period, raising prices above the "but-for" level for all plaintiffs.
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>> *In re EPDM Antitrust Litig., 256 F.R.D. at 88*. . . .
>
> Comparing but-for prices with actual transaction prices by regression analysis, **[*346]** however, is not the only way for plaintiffs to succeed in a motion for class certification. Other accepted types of evidence for establishing class-wide injury-in-fact include: evidence of lock-step increases of national price lists; proof that defendants conspired to maintain an inflated base price from which all negotiations began; and evidence of structural factors that make an industry susceptible to successful collusion. Ultimately, the question is whether plaintiffs have shown by a preponderance **[**51]** of the evidence—through regressions, structural industry factors, or any other persuasive means—that methods of common proof exist to show class-wide impact.

*In re Rail Freight, 2012 U.S. Dist. LEXIS 97178, 2012 WL 2870207, at *41* (internal quotations and citations omitted).

Plaintiffs in this case seek to prove impact by way of all the enumerated methods above—they proffer class-wide evidence in the form of: (1) industry characteristics tending to show that the TiO_2 industry was ripe for collusion before the alleged conspiracy; (2) evidence of nearly simultaneous (lock-step) price increase announcements during the relevant period; (3) Defendants' own transactional data showing that prices rose over the period; (4) evidence showing that even if the price increase announcements were not "implemented" uniformly, they nevertheless served to set an artificially high base level upon which the Defendants' began negotiations; (5) a multiple regression model designed by Dr. Lamb that attempts to show that, absent the alleged conspiracy, the but-for prices for TiO_2 would have been lower; and (6) a pricing structure analysis that attempts to show that prices for TiO_2 would **[**52]** have responded similarly to coordinated pricing activity.

In arguing that common evidence exists to show impact on a class-wide basis, Plaintiffs rely heavily on the fact that defendants announced multiple nearly simultaneous price increase announcements throughout the class period. Plaintiffs argue that these price increase announcements amount to common proof insofar as they served to raise prices for TiO_2 across the board for all purchasers. Defendants counter that, regardless of the price increase *announcements*, the evidence shows that price increases were not *implemented* uniformly, and more importantly, individual TiO_2 transactions between buyers and sellers were the result of extensive negotiations between the parties. This is a valid point, and there certainly is substantial evidence showing that the end prices paid by TiO_2 customers were the product of individual negotiation. *See, e.g.* Burtis Report ¶¶ 34-56. However, according to the Plaintiffs, these price increase announcements served to set an artificially high baseline for price negotiations, and point to compelling evidence supporting this proposition. *See, e.g.*, Lamb Rebuttal ¶ 91 nn. 115-16 and accompanying text, ECF **[**53]** No. 306-1.

Having reviewed the submissions and the parties' arguments, this Court concludes that the evidence of the nearly simultaneous price increase announcements, in conjunction with the structural factors present in the TiO_2 industry, *see supra*, makes the element of antitrust impact "capable of proof at trial through evidence that is common to the class rather than individual to its members." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311-12*. As discussed in *In re Rail Freight*, "this case falls within the line of cases holding that class-wide injury-in-fact can be proven at trial by showing that the allegedly conspiratorial [price increases] were the starting point from which negotiations for discounts began." *2012 U.S. Dist. LEXIS 97178, 2012 WL 2870207, at *62* (collecting cases).

Next, the Plaintiffs argue that class-wide impact can be demonstrated by showing that the prices actually paid by TiO_2 customers were higher than they would have been but-for the conspiracy. To do this, Plaintiffs rely on a multiple regression model created by Dr. Lamb. As described in a reference guide published by the Federal Judicial Center:

> Multiple regression analysis is a statistical tool used to understand the relationship **[**54]** between or among two or more variables. Multiple regression involves a variable to be explained—called the dependent variable—and additional explanatory variables that are thought to produce or be associated with changes in the dependent variable. For example, . . . in an antitrust cartel **[*347]** damages case, the plaintiff's expert might utilize multiple regression to evaluate the extent to which the price of a product increased during the period in which the cartel was effective, after accounting for costs and other variables unrelated to the cartel. The defendant's expert might use multiple regression to suggest that the plaintiff's expert had omitted a number of price-determining variables.

DANIEL L. RUBINFELD, REFERENCE GUIDE ON MULTIPLE REGRESSION 305-06 (Fed. Judicial Ctr., 3d ed. 2011).

In his report, Dr. Lamb explains the variables used in his regression analysis to isolate the effect of the cartel on prices for TiO_2. Lamb Report ¶¶ 75-95. He concludes that, as a result of the cartel, prices for TiO_2 were more than seven percent higher during the Class Period. *Id.* ¶ 94. Defendants attack Dr. Lamb's regression model on numerous grounds which will not be discussed in detail here. That **[**55]** is because:

> The real question before this court is whether the plaintiffs have established a *workable* multiple regression equation, not whether plaintiffs' model actually *works*, because the issue at class certification is not which expert is the most credible, or the most accurate modeler, but rather have the plaintiffs demonstrated that there is a way to prove a class-wide measure of [impact [14]] through generalized proof.

In re EPDM Antitrust Litig., 256 F.R.D. at 100.

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[14] The *EPDM* court made this statement in the context of evaluating the damages prong of the predominance inquiry. However, it is equally applicable on the "impact" prong as well.

In short, this Court finds that Dr. Lamb's regression analysis accurately reflects the characteristics of the titanium dioxide industry, and the facts in this case. While his model may not be perfect, [15] this Court concludes that a regression model is certainly *capable* of proving class-wide impact at trial. In light of the structural factors in the TiO_2 industry, this case falls squarely within the type of case that courts have found well-suited to regression analyses. *See, e.g.* *In re Rail Freight Antitrust Litig., 2012 U.S. Dist. LEXIS 97178, 2012 WL 2870207, at *72* (collecting **[**56]** cases). Defendants' quibbles with Dr. Lamb's regression model largely center on the *results* of his analysis—in other words, Defendants argue that if Dr. Lamb included more data, or extended certain dates, his very own regression would show that prices of TiO_2 did not increase during the time period. However, by "merely disputing the *results* of the plaintiffs' experts' analysis rather than the feasibility of using a single formula methodology," Defendants raise a "merits issue, not a class certification issue." *In re EPDM Antitrust Litig., 256 F.R.D. at 96*. Considering similar arguments, the United States District Court for the Southern District of New York recently stated:

> [D]efendants do not assert that plaintiffs have failed to prove some factual predicate necessary for demonstrating causation and artificiality on a class-wide basis. Instead, defendants' objections go *solely* to whether plaintiffs' models will *in fact* demonstrate causation and artificiality, and hence, are unrelated to the requirements of class certification. Indeed, by arguing that plaintiffs' models, as corrected by defendants' expert, show that Amaranth did not cause any artificiality during the Class Period, defendants **[**57]** impliedly concede that causation can be evaluated on a class-wide basis.

In re Amaranth Natural Gas Commodities Litig., 269 F.R.D. 366, 385 (S.D.N.Y. 2010). Accordingly, this Court concludes that Dr. Lamb's multiple regression model is "capable" of proving class-wide impact at trial "through evidence that is common to the class rather than individual to its members." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311-12*. Defendants will be free to attack the probativeness of that model or its perceived shortcomings as they see fit.

As previously noted, ***HN21***[] "[b]ecause the nature of the evidence that will suffice to resolve a **[*348]** question determines whether the question is common or individual, a district court must *formulate some prediction* as to how specific issues will play out in order to determine whether common or individual issues predominate **[**58]** in a given case." *Id.* (internal quotations and citations omitted, emphasis added). It does not take a crystal ball to predict the way this case will play out at trial—Plaintiffs will overwhelmingly rely on common evidence to prove the existence of a price-fixing conspiracy. Accordingly, "[c]ommon questions predominate where 'even if each Class Member . . . were to bring suit individually, each plaintiff would have to allege and prove virtually identical facts.'" *In re EPDM Antitrust Litig., 256 F.R.D. at 103* (quoting *In re Merrill Lynch & Co. Research Reports Sec. Litig., 246 F.R.D. 156, 165 (S.D.N.Y. 2007)*.

iii. Damages

HN22[] The final element Plaintiffs will have to prove at trial is that they suffered "measurable damages." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311*. In contrast to the "impact" prong of the *Rule 23(b)* analysis, which asks only "*whether* the plaintiffs were harmed," the damages prong asks "by how much." *In re EPDM Antitrust Litig., 256 F.R.D. at 88*. At the class certification stage, Plaintiffs must show, by a preponderance of the evidence, that they will be able to prove damages using common proof. *In re Rail Freight, 2012 U.S. Dist. LEXIS 97178, 2012 WL 2870207, at *74*.

In this case, Plaintiffs **[**59]** argue that common proof of damages exists in in the form of Dr. Lamb's regression analysis. Dr. Lamb contends that his regression method is "a standard economic method [ ] that is capable of being used to compute aggregate damages to the class as a whole." Lamb Report ¶ 114. Briefly, he uses his regression

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[15] Dr. Lamb notes that his model is "preliminary, given that discovery is ongoing." He states that he is "highly confident that a model similar to this one will be capable of showing the degree to which prices were artificially inflated as a result of the Cartel and computing aggregate overcharges to the Class as a whole at trial." Lamb Report ¶ 82.

analysis to arrive at a seven percent overcharge during the course of the alleged conspiracy (*i.e.*, prices for TiO_2 were seven percent higher than they would have been absent the conspiracy). He then proposes to multiply the total volume of TiO_2 purchases by Class Members during the period by that percentage overcharge to arrive at "the total amount of damages owed to the Class." *Id.* ¶ 116. In other words, Dr. Lamb's regression is only capable of calculating an "aggregate" overcharge that is not capable of distinguishing between individual class members.

As the well-developed economic literature on cartels, relied on by Plaintiffs for their "impact" argument, makes clear, certain structural factors in an industry make collusion more attractive or more feasible. At the same time, however, that same literature teaches that one cannot assume an illegal price-fixing agreement would damage **[**60]** each class member in the same manner. That is because those very same structural factors that encourage collusion also encourage "cheating" by co-conspirators, thereby rendering individual damage amounts different among the members of a class. This theory, first enunciated by Nobel laureate George Stigler in *A Theory of Oligopoly*, 72 J. Pol. Econ. 44, 46 (1964), is well-established in the antitrust context. *See, e.g.*, RICHARD A. POSNER, ***ANTITRUST LAW*** 60-69 (2d ed. 2001). As demonstrated by Stigler, the empirical evidence indicates that even where a horizontal price-fixing agreement has been reached, that agreement will likely result in a range of impacts across the class. 72 J. Pol. Econ. At 46.

HN23[] The Fourth Circuit has consistently held that "average" or "aggregate" damages are not an appropriate measure of damages in an antitrust case. For example, in *Windham v. Am. Brands, Inc.*, the court stated, "[t]he language that Congress used in [the Antitrust statute] . . . leaves no room for awarding damages to some amorphous 'fluid class' rather than, or in addition, to one or more actually injured persons. It likewise does not permit any person to recover damages sustained not by him, but **[**61]** by someone else who happens to be a member of such class." *565 F.2d 59, 66 (4th Cir. 1977)* (quotations and citation omitted). While individual issues do not predominate for the purposes of this Court's "impact" analysis, individual issues certainly overshadow common issues with respect to damages. For example, as the Defendants have clearly shown, some level of individual negotiation took place between buyers and sellers of TiO_2 regarding rebates, price, non-price terms, and the like. If a price-fixing conspiracy existed, it is clear that **[*349]** such a conspiracy would necessarily have damaged the individual class members differently.

The need to inquire into individual damage calculations, however, is not an impediment to class certification. As summarized by the Fourth Circuit, a damages inquiry *necessarily* requires individual proof:

> . . . *Rule 23* contains no suggestion that the necessity for individual damage determinations destroys commonality, typicality, or predominance, or otherwise forecloses class certification. In fact, *Rule 23* explicitly envisions class actions with such individualized damage determinations. *See* *Fed. R. Civ. P. 23* advisory committee's note (1966 Amendment, *subdivision (c)(4)*) **[**62]** (noting that *Rule 23(c)(4)* permits courts to certify a class with respect to particular issues and contemplates possible class adjudication of liability issues with "the members of the class . . . thereafter . . . required to come in individually and prove the amounts of their respective claims."); *see also* 5 *Moore's Federal Practice § 23.23[2]* (1997) ("[T]he necessity of making an individualized determination of damages for each class member generally does not defeat commonality.").
>
> Indeed, "[i]n actions for money damages under *Rule 23(b)(3)*, courts *usually* require individual proof of the amount of damages each member incurred." *Id.* at § 23.46[2][a] (1997) (emphasis added). When such individualized inquiries are necessary, if "common questions predominate over individual questions as to liability, courts generally find the predominance standard of *Rule 23(b)(3)* to be satisfied." *Id.*

Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 427-28 (4th Cir. 2003). Given the inherent difficulties in assessing individual damages questions in this type of case, the Court notes that it has several options with which to consider damages at a future date. ***HN24***[] As discussed by the Second Circuit, there **[**63]** are at least five methods to deal with the individual damages inquiry:

> (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.

In re Visa Check/ MasterMoney Antitrust Litig., 280 F.3d 124, 141 (citations omitted). Indeed, the Fourth Circuit in the *Gunnells* case reiterated its previous admonition to "take full advantage of the provision in [Rule 23(c)(4)] permitting class treatment of separate issues . . . to reduce the range of disputed issues in complex litigation." 348 F.3d at 426 (quoting In re A.H. Robins Co., Inc., 880 F.2d 709, 740 (4th Cir. 1989)).

Accordingly, while there exist numerous individual questions of damages, that is not enough to defeat class certification, and one or more of the above-listed methods may need to be utilized as this case progresses. *See* Gunnells, 348 F.3d at 427 **HN25**[] ("class certification 'provides a single proceeding in which to determine **[**64]** the merits of the plaintiffs' claims, and therefore protects *the defendant* from inconsistent adjudications.'") (quoting 5 Moore's Federal Practice § 23.02 (1999)).

C. Superiority

HN26[] The final requirement of Rule 23(b)(3) is that this Court must determine that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "In deciding whether certification of a class is superior to other trial methods, the Court considers whether the resolution of common issues advances the litigation as a whole, as opposed to leaving a large number of issues for case-by-case adjudication." In re Polyester Staple Antitrust Litig., 2007 U.S. Dist. LEXIS 52525, 2007 WL 2111380, at *31 (W.D.N.C. July 19, 2007) (internal quotation and citation omitted). Here, the Defendants have not specifically argued that the superiority prong has not been met, and this Court concludes that because common issues predominate, class action treatment is superior to other available methods of adjudicating the Plaintiffs' claims. In short, class treatment will "achieve economies of time, effort, and expense, and promote . . . **[*350]** uniformity of decision as to persons similarly situated, **[**65]** without sacrificing procedural fairness or bringing about undesirable results." Amchem, 521 U.S. at 615.

III. Additional Issues

Rule 23(c)(1)(C) of the Federal Rules of Civil Procedure **HN27**[] provides simply that "[a]n order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C). This Court has previously stated that "[a] district court has 'broad discretion in determining whether the action may be maintained as a class action,' . . . and so long as the court considers the proper criteria, it is permitted to exercise such discretion." *Doe v. Lally, 467 F. Supp. 1339, 1345 (D. Md. 1979)* (citations omitted). As this court previously held, "[a] federal district court possesses the same broad discretion in determining whether to modify or even decertify a class." *Wu v. MAMSI Life & Health Ins. Co., 256 F.R.D. 158, 162 (D. Md. 2008)* (citing Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)). In fact, a federal district court judge has an affirmative obligation to ensure that the class membership remains at all times consistent with the underlying facts and procedural posture of the case. *See* Richardson v. Byrd, 709 F.2d 1016, 1019 (5th Cir. 1983) **[**66]** ("Under Rule 23 . . . the district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts."); Chisolm v. TranSouth Fin. Corp. 194 F.R.D. 538, 544 (E.D. Va. 2000) ("[T]he Court is duty bound to monitor its class decision and, where certification proves improvident, to decertify, subclassify, alter, or otherwise amend its class certification.").

Here, in opposing class certification, the Defendants have raised several additional issues that do not fit neatly into the previously discussed Rule 23 categories. For example, Defendants claim that many members of the putative class entered into contracts with Defendants that contain mandatory arbitration provisions, forum-selection clauses, and jury waiver provisions. Neither party briefed these issues extensively, and they were only briefly addressed at the August 13 class certification hearing. Because it is unclear to what extent the putative class members have this type of contractual provision, and to what extent the Defendants will seek to uphold those agreements, this Court concludes that **HN28**[] "the possible arbitration [or other contractual bar] of some class **[**67]** members does not, by itself, defeat class certification." In re Rail Freight Antitrust Litig., 2012 U.S. Dist. LEXIS 97178, 2012 WL 2870207, at *28 (internal quotation and citation omitted).

Accordingly, to the extent certain putative class members' contracts render them atypical of the class as a whole, this Court will exercise its discretion to amend its class certification Order as necessary.

IV. *Rule 23(g)*—APPOINTING CLASS COUNSEL

HN29[] Pursuant to the 2003 amendments to *Rule 23*, the qualifications and experience of Plaintiffs' counsel are now considered under *Rule 23(g)*. *Rule 23(g)(1)* provides that "a court that certifies a class must appoint class counsel." *Fed. R. Civ. P. 23(g)(1)*. In appointing class counsel, a court must consider:

> (i) the work counsel has done in identifying or investigating potential claims in the action;
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
> (iii) counsel's knowledge of the applicable law; and
> (iv) the resources that counsel will commit to representing the class[.]

Id. This Court has already appointed the following interim co-lead class counsel: Gold Bennett Cera & Sidener LLP; Leiff, Cabraser, Heimann & Bernstein **[**68]** LLP; and the Joseph Saveri Law Firm. *See* Amended Case Mgmt. Order, ECF No. 326. Those law firms, with the addition of Eric L. Cramer of Berger & Montague, P.C. and Linda Nussbaum of Grant & Eisenhofer, P.A. have been appointed members of the Plaintiffs' Executive Committee. *See* Case Mgmt. Order, ECF No. 106. Finally, Paul Mark Sandler of **[*351]** Shapiro Sher Guinot & Sandler has been appointed Liaison Counsel. *See id.* As noted by the Plaintiffs:

> Since their initial appointment, the above-listed firms . . . have devoted substantial time and resources to this case, including complex legal matters on a variety of motions, case management, discovery planning, and extensive meetings and conferrals with Defendants regarding ongoing discovery. Moreover, proposed Class Counsel have demonstrated their extensive experience and expertise prosecuting antitrust, class action, and complex civil litigation cases and have successfully litigated antitrust class actions and other similar cases in courts throughout the United States.

Pls. Class Mem. at 41-42.

Defendants do not object or disagree with the Plaintiffs' characterization of their representation. This Court has reviewed the *Rule 23(g)(1)* requirements, **[**69]** and concludes that Plaintiffs' proposed co-lead counsel are well qualified to represent the class in this case. Accordingly, those counsel listed above will be appointed class counsel.

CONCLUSION

For the reasons stated above, this Court finds by a preponderance of the evidence that the Plaintiffs have established each necessary element of *Rule 23 of the Federal Rules of Civil Procedure*. Accordingly, Plaintiffs' Motion for Class Certification and for Appointment of Class Counsel (ECF No. 246) will be GRANTED.

Dated: August 28, 2012

A separate Order follows.

/s/ Richard D. Bennett

United States District Judge

ORDER

For the reasons stated in the foregoing Memorandum Opinion, this Court concludes that Plaintiffs and the proposed Class have satisfied the requirements of *Federal Rules of Civil Procedure 23(a)* and *23(b)(3)* as follows:

1. The proposed class is so numerous that joinder is impracticable. *Fed. R. Civ. P. 23(a)(1)*;

2. There are issues of law and fact common to the Class. *Fed. R. Civ. P. 23(a)(2)*;

3. The claims of the named Plaintiffs are typical of the Class claims. *Fed. R. Civ. P. 23(a)(3)*;

4. Named Plaintiffs have the same interests as the Class and are adequate Class representatives. *Fed. R. Civ. P. 23(a)(4)*;

5. Questions of law or fact common to the Class members predominate over questions affecting only individual members. *Fed. R. Civ. P. 23(b)(3)*; and

6. A class action is a superior method of adjudication. *Fed. R. Civ. P. 23(b)(3)*.

Accordingly, it is this 28th day of August, 2012, ORDERED that:

Plaintiffs' Motion for Class Certification and for Appointment of Class Counsel (ECF No. 246) is GRANTED

The following Class is certified under *Rule 23 of the Federal Rules of Civil Procedure*:

All persons and entities who purchased titanium dioxide in the United States directly from one or more Defendants or Tronox, or from any predecessors, parents, subsidiaries, or affiliates thereof, between February 1, 2003 and the present ("Class Period"). Excluded from the Class are Defendants, their co-conspirators, parent companies, predecessors, subsidiaries and affiliates, and all governmental entities.

Plaintiffs Haley Paint Company and Isaac Industries, Inc., and Intervening Plaintiff East Coast Colorants, LLC d/b/a Breen Color Concentrates are appointed as representatives of the Class.

Pursuant to *Federal Rule of Civil Procedure 23(g)*, the Court appoints (a) Gold Bennett Cera & Sidener LLP; Leiff, Cabraser, Heimann & Bernstein LLP; and the Joseph Saveri Law Firm as Co-Lead Class Counsel, (b) Eric L. Cramer of Berger & Montague, P.C. and Linda Nussbaum of Grant & Eisenhofer, P.A. as members of the Plaintiffs' Executive Committee (along with the Co-Lead Class Counsel), and (c) Paul Mark Sandler of Shapiro Sher Guinot & Sandler as Liaison Counsel.

The parties shall confer and submit to the Court a proposed form of notice to the Class **[*352]** no later than 30 days from entry of this Order.

Dated: August 28, 2012

/s/ Richard D. Bennett

United States District Judge

End of Document

[Static Control Components, Inc. v. Lexmark Int'l, Inc.](#)

United States Court of Appeals for the Sixth Circuit

March 6, 2012, Argued; August 29, 2012, Decided; August 29, 2012, Filed

File Name: 12a0289p.06

Nos. 09-6287/6288/6449

Reporter
697 F.3d 387 *; 2012 U.S. App. LEXIS 18316 **; 2012 FED App. 0289P (6th Cir.) ***; 104 U.S.P.Q.2D (BNA) 1352 ****; 2012-2 Trade Cas. (CCH) P78,027; 2012 WL 3765010

STATIC CONTROL COMPONENTS, INC., Plaintiff-Appellant/Cross-Appellee, v. LEXMARK INTERNATIONAL, INC., Defendant-Appellee/Cross-Appellant.

Subsequent History: Rehearing denied by, Rehearing, en banc, denied by *Static Control Components, Inc. v. Lexmark Int'l, Inc., 2012 U.S. App. LEXIS 23975 (6th Cir., Oct. 26, 2012)*

US Supreme Court certiorari granted by *Lexmark Int'l, Inc. v. Static Control Components, Inc., 569 U.S. 1017, 133 S. Ct. 2766, 186 L. Ed. 2d 217, 2013 U.S. LEXIS 4236 (June 3, 2013)*

Affirmed by *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392, 2014 U.S. LEXIS 2214 (Mar. 25, 2014)*

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Kentucky at Lexington. Nos. 02-00571; 04-00084—Gregory F. Van Tatenhove, District Judge.

Static Control Components, Inc. v. Lexmark Int'l, Inc., 615 F. Supp. 2d 575, 2009 U.S. Dist. LEXIS 29479 (E.D. Ky., Mar. 31, 2009)
Static Control Components, Inc. v. Lexmark Int'l, Inc., 2006 U.S. Dist. LEXIS 73845 (E.D. Ky., Sept. 28, 2006)
Static Control Components, Inc. v. Lexmark Int'l, Inc., 2008 U.S. Dist. LEXIS 79805 (E.D. Ky., Oct. 3, 2008)
Static Control Components, Inc. v. Lexmark Int'l, Inc., 749 F. Supp. 2d 542, 2010 U.S. Dist. LEXIS 115009 (E.D. Ky., Oct. 28, 2010)
Static Control Components, Inc. v. Lexmark Int'l, Inc., 487 F. Supp. 2d 830, 2007 U.S. Dist. LEXIS 31445 (E.D. Ky., Apr. 24, 2007)
Lexmark Int'l, Inc. v. Static Control Components, Inc., 253 F. Supp. 2d 943, 2003 U.S. Dist. LEXIS 3734 (E.D. Ky., Feb. 27, 2003)

Disposition: The dismissal of the competitor's federal antitrust claims was affirmed, but the dismissal of its claims under the Lanham Act and claims under state law was reversed. The remainder of the judgment was affirmed.

Core Terms

cartridges, infringement, patents, district court, remanufacturers, microchips, Prebate, allegations, antitrust, toner, counterclaim, customers, inducement, damages, printers, claimant, supplier, exhaustion, relevant market, bond amount, indirect, parties, matter of law, Lanham Act, purchasers, prices, new trial, appearance, factors, summary judgment

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

HN1[] **Jurisdiction Over Actions, Exclusive Jurisdiction**

The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals from final decisions of a district court if the jurisdiction of that court was based, in whole or in part, on *28 U.S.C.S. § 1338* (amended). *28 U.S.C.S. § 1295(a)(1)* (amended). *Section 1338* gives federal district courts original jurisdiction exclusive of the state courts over any civil action arising under any Act of Congress relating to patents. *28 U.S.C.S. § 1338(a)* (amended). Because Congress used the phrase "arising under," patent issues raised in relation to a defense or as counterclaims (prior to the amendments of *§§ 1295*, *1338*) are insufficient to confer Federal Circuit jurisdiction.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN2[] **Pleadings, Amendment of Pleadings**

Constructive amendments typically occur when a specific claim is not raised, but the parties by their actions act as if they consent to making the claim a part of the proceedings. Constructive amendment typically requires express or implied consent of the parties.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

Civil Procedure > Preliminary Considerations > Removal > Nonremovable Actions

HN3[] **Subject Matter Jurisdiction, Federal Questions**

The United States Supreme has compared the "arising under" inquiry for *28 U.S.C.S. § 1338* (amended) to the "arising under" inquiry for original jurisdiction under *28 U.S.C.S. § 1331*. And third-party defendants may not remove a controversy to federal court solely because the original defendant filed related federal claims against them.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN4[] **Preclusion of Judgments, Law of the Case**

Issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case.

Civil Procedure > Remedies > Injunctions > General Overview

HN5[] Remedies, Injunctions

A bond amount shall be set in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. *Fed. R. Civ. P. 65(c)*. District courts have broad discretion in setting the bond amount. The court may order a bond that does not completely secure the enjoined party or the court may decline to order a bond, if necessary for the purpose of effecting justice between the parties.

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

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

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

HN6[] Standards of Review, De Novo Review

An appellate court reviews de novo a district court's decision to dismiss a counterclaim for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*. In reviewing a motion to dismiss, the appellate court accepts all non-conclusory allegations of fact as true and decides whether the claimant has stated a plausible claim for relief. The pleading must state enough facts to state a claim to relief that is plausible on its face; failure to plead sufficient facts will lead to dismissal of the claim.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

Antitrust & Trade Law > Sherman Act > Claims

HN7[] Clayton Act, Claims

Pursuant to the Clayton Act, *15 U.S.C.S. § 15(a)*, private parties may bring private actions for violations of the Sherman Act. *Section 1* of the Sherman Act prohibits conspiracies to restrain trade. *15 U.S.C.S. § 1*. A *§ 1* conspiracy requires more than a manufacturer's unilateral refusal to deal. There must be evidence that tends to exclude the possibility that the conspirators were acting independently.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > Sherman Act > Claims

HN8[] Actual Monopolization, Claims

Section 2 of the Sherman Act prohibits the illegal monopolization of a market. *15 U.S.C.S. § 2*. To bring a claim under *§ 2*, a claimant must show (1) possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident.

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

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

HN9[] **Standing, Requirements**

To bring a private claim for damages under either *§§ 1*, *2*, of the Sherman Act, the claimant must first demonstrate that it has standing. Although required in all cases, standing in an antitrust case is more onerous than the conventional U.S. Const. art. III inquiry. Antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement a court must dismiss it as a matter of law. The district court decides whether a claimant has adequately pleaded antitrust standing by balancing five factors: (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation. No one factor controls.

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

HN10[] **Standing, Requirements**

Traditionally, only claimants who are competitors or consumers within the injured market have standing to sue for anti-competitive conduct. However, claimants who are not direct players in the relevant market may nonetheless have standing if their injury is inextricably intertwined with the injury sought to be inflicted upon the relevant market or participants therein. The inextricably intertwined exception, however, is narrow. This exception was not designed to give standing to claimants whose injuries are a tangential byproduct of monopolistic conduct in a related market. To succeed, the claimant must show that the defendants manipulated or utilized the claimant as a fulcrum, conduit or market force to injure competitors or participants in the relevant product and geographical markets.

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

HN11[] **Standing, Requirements**

An inextricably intertwined injury, for purposes of standing to sue for anti-competitive conduct, is one that results from the manipulation of the injured party as a means to carry out the restraint of trade in the product market.

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

HN12[] **Standing, Requirements**

Antitrust causation is much more limited than U.S. Const. art. III standing.

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

HN13[] **Standing, Requirements**

Where there are more-direct victims of the anticompetitive conduct, those victims have the standing to sue, rather than those affected indirectly.

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

HN14[] Exclusive & Reciprocal Dealing, Exclusive Dealing

Merely demonstrating the existence of an exclusive distributorship in a market area does not violate Robinson-Patman -- or any other antitrust provision.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN15[] Regulated Practices, Price Fixing & Restraints of Trade

Antitrust injury does not arise for purposes of § 4 of the Clayton Act until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct. Cases have routinely rejected claims of antitrust violations that may very well be violations when the claimants stood to gain from the anticompetitive conduct. Therefore, a plaintiff cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN16[] Noerr-Pennington Doctrine, Sham Exception

The act of filing suit generally does not constitute an antitrust injury under the Noerr-Pennington doctrine. Although exceptions are made when the filing is a sham for interfering with competition, the first inquiry for identifying sham litigation is objective reasonableness: only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation.

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN17[] Justiciability, Standing

Standing is a jurisdictional requirement that cannot be waived, and such may be brought up at any time in the proceeding.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN18[] Remedies, Injunctions

The Clayton Act permits a private party to obtain injunctive relief against threatened loss or damage by a violation of the antitrust laws. *15 U.S.C.S. § 26*.

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

HN19[] Clayton Act, Remedies

The Clayton Act does not authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred. The only difference between a claim for equitable relief and one for damages is that equitable relief is available at the mere threat of antitrust injury.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Scope

Trademark Law > ... > Federal Unfair Competition Law > False Designation of Origin > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

HN20[] Federal Unfair Competition Law, Lanham Act

See *15 U.S.C.S. § 1125(a)(1)*.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

HN21[] False Advertising, Elements of False Advertising

A Lanham Act claimant need not demonstrate actual losses as a result of the defendant's misleading use of the claimant's trademarks in its advertisements, only a likelihood of injury and causation. Under the "reasonable interest" approach, the claimant has standing if the claimant can demonstrate (1) a reasonable interest to be protected against the alleged false advertising and (2) a reasonable basis for believing that the interest is likely to be damaged by the alleged false advertising.

Trademark Law > ... > Federal Unfair Competition Law > False Designation of Origin > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

HN22[] Federal Unfair Competition Law, False Designation of Origin

The United States Court of Appeals for the Sixth Circuit agrees with the Third Circuit's reasoned analysis rejecting a distinction between a claim under *15 U.S.C.S. § 1125(a)(1)(A)* for false association of trademark and under *§ 1125(a)(1)(B)* for false advertising claims for purposes of standing.

Governments > Courts > Judicial Precedent

HN23[] Courts, Judicial Precedent

An appellate panel cannot overturn a prior published decision of the appellate court absent inconsistent United States Supreme Court precedent or an en banc reversal.

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

HN24[] Private Actions, Standing

The "target area" test gives antitrust standing to anyone who was within the zone of economic harm caused by the anticompetitive conduct whose harm was proximately caused by such conduct.

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN25[] Fundamental Rights, Trial by Jury in Civil Actions

See *U.S. Const. amend. VII*.

Civil Procedure > Trials > Bench Trials

Civil Procedure > Trials > Jury Trials > General Overview

HN26[] Trials, Bench Trials

To convert a trial from a jury trial to a bench trial (or vice-versa) in the middle of the proceedings is to interfere with counsel's presentation of their case and, quite possibly, to prejudice one side or the other.

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

Civil Procedure > Trials > Judgment as Matter of Law > Postverdict Judgment

HN27[] Standards of Review, De Novo Review

An appellate court reviews de novo a district court's decision to deny a motion for a judgment as a matter of law under *Fed. R. Civ. P. 50*. A renewed motion for a judgment as a matter of law following an adverse jury verdict may only be granted if, when viewing the evidence in a light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences, reasonable minds could come to but one conclusion in favor of the moving party. Judgment as a matter of law is appropriate only where there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party on that issue. *Fed. R. Civ. P. 50(a)(1)*. The appellate court will not substitute its interpretation of the evidence for the jury's, even if it would have reached a different conclusion.

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

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN28[] Standards of Review, Abuse of Discretion

An appellate court reviews for abuse of discretion a district court's decision to deny a motion for a new trial under *Fed. R. Civ. P. 59*. A new trial is warranted after a jury verdict for any reason for which a new trial has heretofore been granted in an action at law in federal court. *Fed. R. Civ. P. 59(a)*. A new trial is appropriate when the jury reaches a seriously erroneous result as evidenced by (1) the verdict being against the clear weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion, i.e., the proceedings being influenced by prejudice or bias.

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

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN29[] **Entitlement as Matter of Law, Appropriateness**

An appellate court reviews de novo a district court's grant of summary judgment. The moving party is entitled to summary judgment when there is no genuine issue of material fact and the issue may be resolved as a matter of law. *Fed. R. Civ. P. 56(a)*. The evidence on summary judgment must be construed in the light most favorable to the non-moving party. When genuine issues of material fact remain, the proper course of action is to submit such questions to the finder of fact.

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Indirect Infringement

Patent Law > Infringement Actions > Burdens of Proof

HN30[] **Infringing Acts, Indirect Infringement**

To establish a claim for patent inducement under *35 U.S.C.S. § 271(b)*, a plaintiff bears the burden of showing by a preponderance of the evidence that (1) a third party directly infringed the plaintiff's patents; (2) the defendant took active steps that induced the third party's infringement; (3) the defendant intended the third parties to take the infringing acts; and (4) the defendant knew or willfully disregarded the risk that those actions by the third party would constitute direct infringement. Patent infringement by a third-party is therefore a necessary predicate to inducement to infringe.

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Indirect Infringement

Patent Law > Remedies > Damages > Measure of Damages

HN31[] **Infringing Acts, Indirect Infringement**

A plaintiff can establish the first element of inducement to infringe either by demonstrating specific instances of direct infringement or a finding that the accused products necessarily infringe. When the plaintiff can show only individual instances of direct infringement, the plaintiff may recover only for the damages from those individual acts. If the plaintiff can show an entire class of third parties necessarily infringed, damages can be sought more broadly across the entire class.

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Indirect Infringement

Patent Law > Infringement Actions > Defenses > General Overview

HN32[] **Infringing Acts, Indirect Infringement**

Direct patent infringement occurs under *35 U.S.C.S. § 271(a)* when someone (1) without authority (2) makes, uses, offers to sell, sells, or imports (3) the patented invention (4) within the United States, its territories, or its possessions (5) during the term of the patent. Determining whether someone is making, using, or selling a patented invention requires a finding that the patent claim covers the alleged infringer's product or process. The determination that a patent's claims cover a specific device is often referred to as "literal infringement." Literal infringement alone is not enough to support a claim for inducement, because the predicate to inducement is a violation of *§ 271(a)*, which requires more than that the accused devices literally infringe. For example, a party could not be liable for inducing infringement if an accused device literally infringed a patent claim but the literal infringer had authority to use the patent or a patent had otherwise expired, thereby defeating a determination of direct patent infringement.

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Indirect Infringement

HN33[] **Infringing Acts, Indirect Infringement**

An accused device will necessarily infringe a patent, permitting a finding of direct infringement by a class of customers and an inference that the inducer intended the infringement, if the customers can only use the defendant's products in an infringing way. When an accused device could be used in either an infringing or a non-infringing way, a claim of direct infringement based on necessary infringement fails and cannot sustain an inducement claim.

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Indirect Infringement

Patent Law > ... > Defenses > Patent Invalidity > General Overview

HN34[] **Infringing Acts, Indirect Infringement**

Exhaustion of a patentee's rights is a defense to direct infringement and is not the same as establishing a non-infringing use of a patented device, which would defeat a finding that a defendant's customers necessarily infringed the patents.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Evidence > ... > Presumptions > Particular Presumptions > Regularity

HN35[] **Jury Trials, Jury Instructions**

Jurors are presumed to be diligent in following the precise instructions given to them.

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Indirect Infringement

Patent Law > Infringement Actions > Burdens of Proof

HN36[] **Infringing Acts, Indirect Infringement**

A plaintiff bears the burden of establishing by a preponderance of the evidence that a defendant had the requisite intent to induce infringement. This means that the alleged inducer must intend the customers to take the acts that ultimately constituted infringement and the inducer must know or willfully disregard the risk that those actions by its customers would constitute direct infringement.

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Indirect Infringement

HN37[] **Infringing Acts, Indirect Infringement**

Advertising infringing uses, instructing how to engage in infringing uses, demonstrating infringing uses, and recommending infringing uses is strong evidence of specific intent to cause the actions that constitute direct infringement.

Patent Law > ... > Defenses > Patent Invalidity > General Overview

HN38[] **Defenses, Patent Invalidity**

Patent invalidity is a defense to a claim for patent infringement. *35 U.S.C.S. § 282*.

Evidence > Burdens of Proof > Clear & Convincing Proof

Patent Law > Infringement Actions > Burdens of Proof

Patent Law > ... > Defenses > Patent Invalidity > Fact & Law Issues

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

HN39[] **Burdens of Proof, Clear & Convincing Proof**

All patents are presumed valid, and the burden of overcoming this presumption rests on the party seeking invalidity. *35 U.S.C.S. § 282*. Invalidity must be established by clear and convincing evidence. Patent validity is a question of law. However, where legal analysis rests on factual findings, an appellate court will not reverse such findings absent clear error.

Patent Law > Subject Matter > Design Patents > Functionality

Patent Law > Subject Matter > Design Patents > Ornamentality Requirement

HN40[] **Design Patents, Functionality**

Design patents are issued to whoever invents any new, original and ornamental design for an article of manufacture. *35 U.S.C.S. § 171*. A design patent is not ornamental if the design serves only functional purposes. In other words, a design patent cannot be obtained to protect a mechanical function or cover an article whose configuration affects its utility alone. An article is less likely to be ornamental if it is not observed, and the United States Court of Appeals for the Federal Circuit looks not just to whether the article is ever seen but whether the appearance of the article may become a "matter of concern" at any point during the article's "normal and intended use."

Patent Law > Infringement Actions > Burdens of Proof

Patent Law > ... > Defenses > Patent Invalidity > General Overview

Patent Law > Subject Matter > Design Patents > General Overview

HN41[] **Infringement Actions, Burdens of Proof**

To establish invalidity of a design patent, the infringer must show that consumers do not consider the patented design to be significant.

Counsel: ARGUED: Seth D. Greenstein, CONSTANTINE & CANNON LLP, Washington, D.C., for Appellant/Cross-Appellee.

Steven B. Loy, STOLL KEENON OGDEN PLLC, Lexington, Kentucky, for Appellee/Cross-Appellant.

ON BRIEF: Seth D. Greenstein, CONSTANTINE & CANNON LLP, Washington, D.C., Joseph C. Smith, Jr., BARTLIT BECK HERMAN PALENCHAR & SCOTT, LLP, Denver, Colorado, William L. London III, STATIC CONTROL COMPONENTS, INC., Stanford, North Carolina, M. Miller Baker, Stefan M. Meisner, McDERMOTT WILL & EMERY LLP, Washington, D.C., W. Craig Robertson III, Mickey T. Webster, WYATT, TARRANT & COMBS, LLP, Lexington, Kentucky, for Appellant/Cross-Appellee.

Steven B. Loy, Anthony J. Phelps, Christopher L. Thacker, STOLL KEENON OGDEN PLLC, Lexington, Kentucky, William J. Hunter, Jr., STOLL KEENON OGDEN PLLC, Louisville, Kentucky, Timothy C. Meece, Binal J. Patel, Matthew P. Becker, Jason S. Shull, Michael L. Krashin, BANNER & WITCOFF, LTD., Chicago, Illinois, Joseph M. Potenza, Christopher B. Roth, BANNER & WITCOFF, **[**2]** LTD., Washington, D.C., for Appellee/Cross-Appellant.

Judges: Before: KEITH, BOGGS, and MOORE, Circuit Judges.

Opinion by: KAREN NELSON MOORE

Opinion

[**1356] [*394] [***2]** KAREN NELSON MOORE, Circuit Judge. Lexmark International, Inc. ("Lexmark") is a major producer of laser printers **[*395]** and toner cartridges for its laser printers. Other companies, called remanufacturers, acquire used Lexmark toner cartridges, refill them, and sell them to owners of Lexmark printers at a lower cost. Lexmark developed microchips for both the toner cartridges and the printers so that Lexmark printers will reject any toner cartridges not containing a matching microchip, and over time Lexmark has patented certain aspects of the cartridges. Static Control Components, Inc. ("Static Control") has identified how to replicate the cartridge microchips and sells the microchips to the remanufacturers along with other parts to facilitate the repair and resale of Lexmark toner cartridges.

Lexmark sued Static Control in 2002 (the "02 Action") for copyright violations related to its source code in making the duplicate microchips and was given a preliminary injunction by the district court. Static Control counterclaimed under federal and state antitrust and false-advertising **[**3]** laws. While that suit was pending, Static Control redesigned its microchips and sued Lexmark for declaratory judgment in 2004 (the "04 Action") to establish that the redesigned microchips did not infringe any copyright.[1] Lexmark counterclaimed again for copyright violations and this time added patent counterclaims against Static Control and eventually three of the remanufacturers. The two suits were consolidated into the 04 Action.

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[1] Citations to the record herein are to the 04 Action unless designated with "02R."

On appeal of the preliminary injunction, the Sixth Circuit vacated and rejected Lexmark's copyright theories. *Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522 (6th Cir. 2004)* ("*Lexmark* ***[****1357]*** *I*"). On remand, Lexmark successfully moved to dismiss all of Static Control's counterclaims. The case proceeded to trial, and the only issues ultimately submitted to the jury were Lexmark's claim of patent inducement **[***3]** against Static Control and Static Control's defense of patent misuse. The district judge instructed the jury that its findings on patent misuse would be advisory; the jury held that Static Control did not induce patent infringement and advised that Lexmark misused **[**4]** its patents. Lexmark renewed its earlier request for a judgment as a matter of law and also filed a motion for a retrial, which the district court denied. Both parties timely appealed.

For the following reasons, we **AFFIRM** the district court's dismissal of Static Control's federal antitrust claims, but **REVERSE** the dismissal of Static Control's claims under the Lanham Act and certain claims under state law. We **AFFIRM** the remainder of the judgment on appeal.

I. BACKGROUND

A. Factual Background

Lexmark manufactures laser printers, which require toner cartridges to print. The market for printers and toner cartridges generally has many players, e.g., Xerox, Epson, Hewlett-Packard, and Canon, and Lexmark's share of the overall printer market is less than 15%. Second Appellee Br. at 4. Each company generally manufactures its printers to work with only its own style of cartridges, and each company's cartridges will work with only its brand of printers. Therefore, each company typically dominates the aftermarket for cartridges compatible with its brand of printers, although the primary market for printers is well populated.

Remanufacturers are companies that participate in the toner-cartridge aftermarkets **[**5]** by acquiring used toner cartridges of all kinds of printers, repairing and refilling them, and selling them to **[*396]** owners of that kind of printer at a lower price.[2] First Appellant Br. at 11. Lexmark also acquires and repairs its used toner cartridges for resale. In the 1990s, Lexmark started a "Prebate" program with certain large customers whereby Lexmark would sell new toner cartridges at an upfront discount of around 20% **[***4]** if the end user agreed to (1) a single-use license and (2) a restriction that the cartridge be returned to Lexmark for remanufacturing or recycling and not to a third-party remanufacturer. Second Appellee Br. at 6. These terms were printed on several notices on the outside of the toner-cartridge box, which instructed the user that opening the box would indicate acceptance of the terms. Regular cartridges not subject to the Prebate terms are still sold, but at a higher price than the Prebate cartridges. According to Static Control, the price of Lexmark toner cartridges increased following the implementation of the program because of reduced competition from remanufacturers. First Appellant Br. at 16.[3]

Lexmark toner cartridges each contain a microchip that communicates with the printer once installed. Toner cartridges that are otherwise compatible with Lexmark printers will not function without the microchip. Lexmark obtains these microchips from a supplier that has allegedly agreed to sell microchips only to Lexmark. All Lexmark toner cartridges are initially manufactured with the necessary microchip, but the microchip for the Prebate cartridges is specifically designed to enforce the Prebate terms by disabling the cartridge for future use after the cartridge runs out of toner. To use the Prebate cartridge again, the microchip needs to **[**7]** be replaced. To use a non-Prebate cartridge again, the microchip does not need to be replaced unless it was damaged.

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[2] Wazana Brothers International, Inc. d/b/a Micro Solutions Enterprises **[**6]** ("Wazana"), Pendl Companies, Inc. ("Pendl"), and NER Data Products, Inc. ("NER") are three remanufacturers who have purchased microchips from Static Control for Lexmark toner cartridges and were once third-party defendants to the suit. They are not parties to the appeal.

[3] In comparison, Static Control claims that the price of Hewlett Packard toner cartridges fell during the same period because Hewlett Packard does not employ a similar "Prebate" program and remanufacturers are able to occupy a larger share of the aftermarket for Hewlett Packard toner.

Lexmark eventually obtained several patents relating to its toner cartridges. At issue on appeal are nine utility patents that the remanufacturers allegedly infringe (referred to as the "nine mechanical patents") and two design patents relating to seven different toner cartridges. Static Control developed a microchip that could replace the microchip on the Prebate toner cartridges, permitting a third party to remanufacture and sell the toner cartridge again. Static Control also sent its customers a letter, referred to as an "Anti-Prebate kit," consisting of information from Static Control's general counsel regarding why the Prebate program is not valid under principles of contract law. Second Appellee Br. at 33. Remanufacturers buy these microchips from **[****1358]** Static Control, along **[***5]** with other parts. Static Control does not manufacture, remanufacture, or sell toner cartridges of any kind, but it is the market leader on making and selling the components necessary to remanufacture Lexmark cartridges. First Appellant Br. at 11. Lexmark, on the other hand, sells toner cartridges **[**8]** but does not sell any of the component parts necessary to repair or remanufacture its toner cartridges, whether Prebate cartridges or not.

B. Procedural Background

Lexmark sued Static Control in December 2002 for violations of federal copyright **[*397]** laws and the Digital Millennium Copyright Act ("DMCA"), relating to two computer programs on its printer chips. Lexmark sought to halt Static Control's sale of the allegedly infringing chips. Static Control responded, ultimately counterclaiming under federal and state antitrust and false-advertising laws. Static Control claimed that Lexmark's Prebate program unlawfully excluded competition in the aftermarket for Lexmark-compatible cartridges, reducing competition and increasing prices, and that Lexmark falsely told remanufacturers that Static Control was infringing on Lexmark's patents. Lexmark then counterclaimed in reply, adding remanufacturers as defendants and making additional claims under the DMCA and various state-law claims, but no patent claims.

On January 8, 2003, Lexmark received a temporary restraining order in the 02 Action, and on January 24, 2003, the district court required Static Control to post an injunction bond of $75,000. On **[**9]** February 7, 2003, the district court increased the bond to $250,000 and extended relief for 21 days. On February 27, 2003, district court granted the preliminary injunction. Static Control appealed both the injunction and the bond amount, and in October 2004 the Sixth Circuit reversed the preliminary injunction, making no comment on the bond amount. *Lexmark I, 387 F.3d at 551*. Static Control sought rehearing on the issue of the bond amount, which we denied in a one-sentence order. *Lexmark Int'l, Inc. v. Static Control Components, Inc., No. 03-5400, 2004 U.S. App. LEXIS 27422 (6th Cir. Dec. 29, 2004)* (unpublished order). In light of the ruling, the parties stipulated to **[***6]** summary judgment against Lexmark on its DMCA claims. R. 216 (D. Ct. Order 2/23/06).

Before the Sixth Circuit ruled, however, Static Control initiated the 04 Action seeking declaratory judgment under federal copyright laws and the DMCA that its newly modified chips did not infringe Lexmark's copyrights. Lexmark counterclaimed raising patent infringement, DMCA violations, and tort claims, and added three remanufacturers as third-party defendants—Wazana, NER, and Pendl. Following the Sixth Circuit's remand, Lexmark moved to dismiss Static Control's **[**10]** counterclaims. The district court granted the motion in September 2006. During the course of the proceedings, which concluded in a jury trial, nine of Lexmark's mechanical patents were held valid, *see* R. 1008 (D. Ct. Order 4/24/07), and summary judgment was granted to Lexmark on its claims of direct patent infringement against Wazana, NER, and Pendl, see R. 1203 (D. Ct. Order 5/25/07); R. 1245 (D. Ct. Order 5/31/07). All three defendant remanufacturers ultimately settled with Lexmark at various points before the verdict. The district court also granted summary judgment to Lexmark on the validity of its single-use license for Prebate cartridges, which the district court concluded prevented Lexmark's patents from exhausting following the initial sale of the Prebate toner cartridges to end users. R. 1008 (D. Ct. Order 4/24/07).

By the close of trial, the only remaining issues were Lexmark's patent-infringement-inducement claims against Static Control and Static Control's equitable defense of patent misuse. Because the district court had already ruled on summary judgment that three of the remanufacturers directly infringed, the jury was asked to decide whether the unnamed remanufacturers **[**11]** directly infringed as a class and whether Static Control induced any direct infringement. Because the district court determined that patent misuse was an equitable defense, the final jury instructions indicated that the jury's findings with respect to misuse would be merely advisory. R. 1365 (Jury Instructions). The jury returned a verdict that Lexmark had failed **[*398]** to show that the remanufacturers as a class directly infringed Lexmark's patents and failed to show that Static Control induced the direct infringement of the three named remanufacturers, **[***7]** Wazana, NER, and Pendl. R. 1366 (Special Verdict Form at 1-3). The jury then advised that it found Static Control had proven by a preponderance of the evidence certain facts that supported Static Control's defense that Lexmark misused its patents. *Id*. at 11-19; *see also* R. 1365 (Jury Instructions at 35-41) (defining misuse).

Lexmark moved for judgment as a matter of law both before and after the verdict and also filed a motion for a new trial on its patent inducement claim, arguing that the evidence **[****1359]** was sufficient to establish direct infringement by Static Control's customers as a class and that, with respect to inducement, the district court **[**12]** erroneously excluded evidence at trial. The district court denied the motions. R. 1430 (D. Ct. Op. 10/03/08); R. 1521 (D. Ct. Op. & Order 10/28/10). The district court subsequently reversed its prior ruling that Lexmark's patents were not exhausted in its Prebate cartridges in light of recent Supreme Court precedent. R. 1443 (D. Ct. Op. & Order 3/31/09). Both parties filed timely appeals.

II. JURISDICTION

The parties did not state in their initial briefs the basis for this court's appellate jurisdiction. We therefore asked the parties to submit letter briefs addressing whether we have jurisdiction over this appeal or whether the Federal Circuit has exclusive jurisdiction to review the case under *28 U.S.C. § 1295*. After all, the entirety of Lexmark's appeal requires us to resolve substantive issues of patent law. Static Control responds that this court has jurisdiction; Lexmark maintains that the Federal Circuit has exclusive jurisdiction. On review, we determine that *28 U.S.C. § 1295* does not require that the Federal Circuit hear this case on appeal. We have jurisdiction under *28 U.S.C. § 1291*.

HN1[] The Federal Circuit has exclusive jurisdiction over appeals from final decisions of a district **[**13]** court "if the jurisdiction of that court was based, in whole or in part, on *section 1338* of this title." *28 U.S.C. § 1295(a)(1) (2000)*. *Section 1338* gives federal district courts original jurisdiction exclusive of the state courts over "any civil action arising under any Act of Congress relating to patents." *28 U.S.C. § 1338(a) (1999)*. Because Congress used the phrase "arising under," the Supreme Court has held that **[***8]** patent issues raised in relation to a defense or as counterclaims are insufficient to confer Federal Circuit jurisdiction. *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 831, 122 S. Ct. 1889, 153 L. Ed. 2d 13 (2002)*. Congress amended *28 U.S.C. §§ 1295* and *1338* in the Leahy-Smith America Invents Act to provide additionally for exclusive Federal Circuit jurisdiction over "any civil action in which a party has asserted a compulsory counterclaim arising under[] any Act of Congress relating to patents," but the amendment is applicable only "to any civil action commenced on or after the date of the enactment of this Act." Pub. L. 112-29, § 19(b), (e), 125 Stat. 333. The law was enacted on September 16, 2011. The civil actions here were commenced well before that date; therefore, the new **[**14]** provision does not apply.

At first glance, this case appears clear cut: In both the 02 and the 04 Actions, the issues implicating patent law arose as counterclaims. However, the Supreme Court has suggested—but declined to decide—that the evolving circumstances of a case may create a situation wherein exclusive Federal Circuit appellate jurisdiction would follow. *Holmes, 535 U.S. at 829 n.1* **[*399]** ("[T]his case does not call upon us to decide whether the Federal Circuit's jurisdiction is fixed with reference to the complaint as initially filed or whether an actual or constructive amendment to the complaint raising a patent-law claim can provide the foundation for the Federal Circuit's jurisdiction."); *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 814-15, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)* ("We need not decide under what circumstances, if any, a court of appeals could furnish itself a jurisdictional basis unsupported by the pleadings by deeming the complaint amended in light of the parties' 'express or implied consent' to litigate a claim.").

Whatever those evolving circumstances may be, however, they are not present in this case. Lexmark can point to no actual or constructive amendment of either complaint. **[**15]** ***HN2***[] Constructive amendments typically occur when a specific claim is not raised, but the parties by their actions act as if they consent to making the claim a part of the proceedings. *See* *Torry v. Northrop Grumman Corp., 399 F.3d 876, 878 (7th Cir. 2005)* (Posner, J.);

Sunbeam Prods., Inc. v. Wing Shing Prods. (BVI) Ltd., 153 F. App'x 703, 706-07 (Fed. Cir. 2005) (unpublished opinion), *cert. denied*, *546 U.S. 1095, 126 S. Ct. 1085, 163 L. Ed. 2d 863 (2006)* **[***9]** (holding Federal Circuit had jurisdiction because pretrial order that added patent issue debated by the parties constructively amended the complaint even though not raised as a claim). Here, the patent claims were raised *ab initio* by the interested party as counterclaims, and no amendment would be necessary to make them formally part of the suit. Furthermore, Lexmark sought actually to amend the complaint in the 02 Action to add its patent claims with the express purpose of assuring Federal Circuit jurisdiction. R. 456 (Lexmark's Mot. to Amend). Static Control objected, and Lexmark's motion was denied. R. 649 (D. Ct. Order 1/9/07). Constructive amendment typically requires express or implied consent of the parties, both of which are lacking. **[****1360]**

Lexmark's best argument is that **[**16]** its patent counterclaims in the 04 Action added new parties, and that the district court's jurisdiction over Lexmark's third-party complaint potentially "arose under" the patent laws. Unfortunately for Lexmark, this too seems insufficient to make the case one "arising under" patent laws. Lexmark offers no law or case addressing whether a third-party complaint can render any part of the controversy "arising under" patent law. However, ***HN3***[] the Supreme Court in *Holmes* compared the "arising under" inquiry for 28 U.S.C. § 1338 to the "arising under" inquiry for original jurisdiction under 28 U.S.C. § 1331. And we know that third-party defendants may not remove a controversy to federal court solely because the original defendant filed related federal claims against them. First Nat'l Bank of Pulaski v. Curry, 301 F.3d 456, 461-67 (6th Cir. 2002). Lexmark has presented no compelling reason to treat this case any differently. The district court's jurisdiction arose under 28 U.S.C. §§ 1331 and 1367, and not under § 1338. Therefore, we have appellate jurisdiction under 28 U.S.C. § 1291.

[***10] III. INJUNCTION-BOND AMOUNT

Static Control appeals the amount of the injunction bond entered by the district court **[**17]** when the district court issued the preliminary injunction in 2002.[4] **[*400]** The final bond amount entered by the district court was $250,000; Static Control sought estimated damages of over $17 million. When the preliminary injunction was entered in 2003, Static Control appealed both the injunction and the bond amount to the Sixth Circuit. We vacated the injunction, but we made no mention of the bond. Lexmark I, 387 F.3d 522. Static Control sought rehearing from the Sixth Circuit specifically on the issue of the proper injunction-bond amount, which we summarily denied.

In November 2009, only a few days after filing its notice of appeal, Static Control filed a Motion for Wrongful Injunction Damages in the district court, seeking actual damages of $7-10 million, well in excess of the $250,000 injunction-bond amount. R. 1473 (Static Control's Mot. to Vacate). Lexmark opposed, arguing that the bond amount should serve as the cap on damages. R. **[**18]** 1495 (Lexmark's Opp. to Mot. to Vacate). As late as January 29, 2010, Static Control was imploring the district court to "recalculate the bond to reflect the projected damages and set an evidentiary hearing to allow Static Control to prove its actual damages." R. 1503 (Static Control's Reply Mot. to Vacate at 14). After oral argument in this appeal and prompting from Lexmark, the district court recently denied this motion and ordered the clerk to release the security bond to Static Control. R. 1530 (D. Ct. Order 4/24/12). Static Control has sent us a letter brief asking us to ignore this order because the district court lacked jurisdiction to decide this amount following the filing of Static Control's notice of appeal, an argument which Static Control presented in its most recent papers before the district court but not in its initial motion seeking the very relief it now claims the district court lacks the jurisdiction to award.

[*11]** Lexmark contends that this panel should not consider this argument because the Sixth Circuit necessarily rejected Static Control's claim in declining to vacate the bond amount on the initial appeal. Static Control argues that this issue may be considered because **[**19]** it was never "*squarely decided*" on the first appeal. First Appellant Br. at 24 n.9 (internal quotation marks omitted). ***HN4***[] "Issues decided at an early stage of the

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[4] Static Control concedes that "a party cannot recover more than the value of the bond for injunction-related damages." First Appellant Br. at 25 & n.10 (citing Mich. AFSCME Council 25, Local 1640 v. Matrix Human Servs., 589 F.3d 851, 860 (6th Cir. 2009)).

litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case." *Hanover Ins. Co. v. Am. Eng'g Co., 105 F.3d 306, 312 (6th Cir. 1997)* (internal quotation marks omitted); *see also* *Bowles v. Russell, 432 F.3d 668, 676-77 (6th Cir. 2005)*, *aff'd*, *551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007)*. Static Control appears to have the better of the argument, because we do not see how the prior panel's lack of commentary on the bond amount (and subsequent decision not to rehear the appeal on the bond amount) contains a necessary inference that we found the bond amount to be proper. Ultimately, however, whether our refusal to reconsider Static Control's appeal of the bond amount constitutes the law of the case does not matter because the bond amount was not improper.

HN5[] A bond amount shall be set "in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." *Fed. R. Civ. P. 65(c)*. District courts have broad discretion in setting the bond **[**20]** amount. *Div. No. 1, Detroit, Bhd. of Locomotive Eng'rs v. Consol. Rail Corp., 844 F.2d 1218, 1226 (6th Cir. 1988)*. "[T]he court may order a bond that does not completely secure the **[*401]** enjoined party or the court may decline to order a bond, if necessary for the purpose of effecting **[****1361]** justice between the parties." *Id. at 1227 n.15* (internal quotation marks omitted).

At the preliminary injunction hearing, Static Control's CEO testified that the company would lose $17,463,580 if forced to halt sales for two years. The CEO testified to the overall method his company used to calculate that number, but never presented any underlying calculations. Cross-examination revealed a number of assumptions underlying Static Control's estimate, including the assumption that it would take six years for Static Control to regain its previous market position if enjoined. The fact that the ultimate bond amount selected by the district court was only two percent of Static **[***12]** Control's claimed damages therefore carries little weight. The district court was not required to credit Static Control's testimony solely because Lexmark did not present evidence to the contrary. The district court received evidence from Static **[**21]** Control, weighed the evidence against the strength of Lexmark's claims, which were deemed strong at the time, and accordingly raised the initial bond from $75,000 to $250,000. We decline to hold that the district court abused its discretion in setting the bond amount under these circumstances.

IV. STATIC CONTROL'S FEDERAL ANTITRUST COUNTERCLAIMS

Static Control counterclaimed in the 02 Action under *§§ 4* and *16* of the Clayton Act, *15 U.S.C. §§ 15*, *26*, for violations of *§§ 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*, seeking damages and injunctive relief. 02R. 172 (2d Am. Answer & Counterclaim). The district court granted Lexmark's motion to dismiss on the basis that Static Control did not have standing to bring the federal antitrust claims for damages or injunctive relief. R. 392 (D. Ct. Order 9/28/06).

A. Standard of Review

HN6[] We review de novo a district court's decision to dismiss a counterclaim for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)*. *United Ass'n of Journeyman & Apprentices of the Plumbing and Pipefitting Indus., Local No. 577 v. Ross Bros. Constr. Co., 191 F.3d 714, 716 (6th Cir. 1999)*. In reviewing a motion to dismiss, we accept all non-conclusory **[**22]** allegations of fact as true and decide whether the claimant has stated a plausible claim for relief. *Ashcroft v. Iqbal, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. The pleading must state "enough facts to state a claim to relief that is plausible on its face"; failure to plead sufficient facts will lead to dismissal of the claim. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

B. Antitrust Standing for Counterclaims with Money Damages

HN7[] Pursuant to the Clayton Act, 15 U.S.C. § 15(a), private parties may bring private actions for violations of the Sherman Act. Section 1 of the Sherman Act prohibits conspiracies to restrain trade. 15 U.S.C. § 1. "A Section 1 conspiracy requires more **[***13]** than a manufacturer's unilateral refusal to deal. 'There must be evidence that tends to exclude the possibility that the [conspirators] were acting independently.'" *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc., 648 F.3d 452, 457 (6th Cir. 2011)* (internal citation omitted) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*. HN8[] Section 2 of the Sherman Act prohibits the illegal monopolization of a market. 15 U.S.C. § 2. **[*402]** To bring a claim under § 2, a claimant must show "'(1) possession **[**23]** of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident.'" *Tarrant Serv. Agency, Inc. v. Am. Standard, Inc., 12 F.3d 609, 613 (6th Cir. 1993)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*, *cert. denied*, *512 U.S. 1221, 114 S. Ct. 2708, 129 L. Ed. 2d 836 (1994)*.

HN9[] To bring a private claim for damages under either section of the Sherman Act, the claimant must first demonstrate that it has standing. Although required in all cases, standing in an antitrust case is more onerous than the conventional Article III inquiry. "[A]ntitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement we must dismiss it as a matter of law . . . ." *NicSand, Inc. v. 3M Co., 507 F.3d 442, 450 (6th Cir. 2007)* (en banc). The district court decides whether a claimant has adequately pleaded antitrust standing by balancing five factors:

> (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's **[**24]** alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery **[****1362]** or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation.

Southaven Land Co., Inc. v. Malone & Hyde, Inc., 715 F.2d 1079, 1085 (6th Cir. 1983) (citing **[***14]** *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters ("AGC"), 459 U.S. 519, 537-45, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*. No one factor controls. *Peck v. Gen. Motors Corp., 894 F.2d 844, 846 (6th Cir. 1990)*.

Static Control alleges that Lexmark conspired with unidentified microchip suppliers and resellers of Lexmark-manufactured printers to restrain trade and otherwise monopolize "the relevant markets," thereby reducing output, increasing prices, and maintaining Lexmark's monopoly. Static Control defines the "relevant markets" as including three distinct but related aftermarkets for Lexmark-specific products: (1) the market for Lexmark replacement toner cartridges, (2) the market for component parts for Lexmark cartridges, and **[**25]** (3) the market for microchips for Lexmark cartridges.[5] 02R. 172 (2d Am. Answer & Countercl. at ¶¶ 17-18). The allegations repeatedly refer to the "relevant markets" as a group when the specific facts relate only to the market for replacement cartridges. For example, Static Control alleges that Lexmark has "an 85% share in each of the relevant markets," *id*. at ¶ 18, but on closer examination the counterclaim alleges that Lexmark competes only in the market for toner cartridges, *id*. at ¶¶ 12, 24. Static Control alleges that Lexmark's anticompetitive chips "exclude competition, restrict output, and increase end-user prices in the relevant markets," *id*. at ¶ 47, but **[*403]** the counterclaim never identifies any change in competition, output, or prices in the market for component parts or microchips as a result of Lexmark's conduct. The only specific allegations as to price and output relate to the market for toner cartridges. *Id*. at ¶¶ 50-52, 58. Therefore, although we read the allegations of the counterclaim in the light most favorable to Static Control, we must carefully consider the actual factual allegations underlying such conclusory allegations. *Twombly, 550 U.S. at 556-57*.

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[5] Lexmark argued **[**26]** below that the relevant market was the larger primary market for all brands of laser printer cartridges and parts, not just the aftermarket for Lexmark products. The jury in its advisory findings sided with Static Control. R. 1366 (Special Verdict Form at 15). On appeal, Lexmark does not concede its position on the relevant market, but argues against standing using the aftermarket. Second Appellee Br. at 40.

In its counterclaim, Static Control's allegations can be categorized into five practices by Lexmark that Static Control claims constitute anticompetitive conduct: **[***15]** (1) the Prebate program;[6] (2) using "lock-out" microchip technology in its printers, causing them to disable when any non-Lexmark replacement cartridge is inserted; (3) requiring Lexmark's microchip supplier to refuse to sell replacement chips to anyone but Lexmark; (4) redesigning its microchips specifically to render cartridges that used Static Control's microchips incompatible; and (5) filing the 02 Action targeting Static Control. First Appellant Br. at 12-15; 02R. 172 (2d Am. Answer & Countercl. at ¶¶ 32, 44-46, 54-56). When the allegations are read for specificity and plausibility, these actions target and affect **[**27]** the different markets in different ways. We therefore examine each of these alleged violations separately to see if Static Control has standing to pursue any of them.

1. Prebate Program

Static Control alleges that the Prebate Program, through its lower prices and misleading statements that the end user committed to a license agreement when no such license existed, cajoled end users into purchasing fewer remanufactured cartridges and thereafter returning them primarily to Lexmark. As a result, Static Control was also harmed because it lost profits from the decline in sales of microchips and components for Lexmark-compatible cartridges following the decline in sales of remanufactured cartridges. First Appellant Br. at 16.

As alleged, the Prebate Program targets only the market for remanufactured cartridges. No part of **[**28]** the Prebate Program relates to the market for microchips or components, even though the allegations support the Prebate Program's incidental effects in the other markets. Static Control itself states that "Lexmark specifically launched its Prebate program to intimidate and to exclude competition *from remanufacturers*." 02R. 172 (2d Am. Answer & Countercl. at ¶ 33) (emphasis added). And as discussed above, although Static Control's allegations often refer to the "relevant markets," the specific factual allegations explain **[****1363]** only Prebate's impact on the market **[***16]** for remanufactured cartridges. For example, when Static Control alleges that Lexmark used Prebate to "effect[] its deliberate, unlawful, anticompetitive intent to raise prices and exclude competition," *id*., we can conclude only that this allegation relates to the market for toner cartridges because of the lack of any allegations that the prices were raised in other markets. Having identified the proper market, we easily conclude that all five of the *AGC* factors are lacking with respect to the Prebate program.

[*404] Although causation in the traditional sense appears properly alleged—the implementation of the Prebate program decreased the **[**29]** number of remanufactured Lexmark cartridges, which in turn decreased Static Control's sales—Static Control fails to allege plausibly that the Prebate program was intended to harm Static Control. As the district court correctly held, the intended targets of Lexmark's Prebate Program were the end users and the remanufacturers, not Static Control. R. 392 (D. Ct. Order 9/28/06 at 9). Static Control asserts that these conclusions erroneously rely on factual averments and that the district court failed to accept its facts as alleged, but Static Control itself alleges this: "Lexmark specifically launched its Prebate program to intimidate and to exclude competition from remanufacturers." 02R. 172 (2d Am. Answer & Countercl. at ¶ 33); *see also id*. at ¶ 42 ("Lexmark's sole purpose for deceiving end-users to believe they are contractually bound by [the Prebate Program] is to preserve, maintain, and enhance its unlawful monopoly power in the relevant markets.").

Static Control also fails sufficiently to identify its role in the relevant market for remanufactured cartridges. ***HN10***[] Traditionally, only claimants who are competitors or consumers within the injured market have standing to sue. *Southaven, 715 F.2d at 1086*. **[**30]** However, claimants who are not direct players in the relevant market may nonetheless have standing if their injury is "'inextricably intertwined' with the injury sought to be inflicted upon the relevant market or participants therein." *Id*. The "inextricably intertwined" exception, however, is narrow. *See Blue Shield of Va. v. McCready, 457 U.S. 465, 483-84, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*. This exception was not designed to give standing to claimants whose injuries are a tangential byproduct of monopolistic conduct in a

[6] Specifically, Static Control complains that Lexmark engaged in anticompetitive conduct by creating two classes of otherwise identical cartridges, Prebate and non-Prebate, selling the non-Prebate cartridges at artificially inflated prices, falsely invoking patent rights to prevent remanufacturers from repairing Prebate cartridges, and engaging in other threatening behavior.

related market. Southaven, 715 F.2d at 1086. To succeed, the claimant must show that the **[***17]** defendants "manipulated or utilized [the claimant] as a fulcrum, conduit or market force to injure competitors or participants in the relevant product and geographical markets." *Id*.

Static Control must therefore have alleged that an injury in Lexmark's market—the market for replacement toner cartridges—is inextricably intertwined with the injuries Static Control claims to be suffering in the market for component parts and microchips. The district court rejected Static Control's argument, because Static Control failed adequately to allege that it was "manipulated or utilized by the defendant as a fulcrum, **[**31]** conduit or market force to injure competitors or participants in the relevant product and geographical market." R. 392 (D. Ct. Order 9/28/06 at 10) (quoting Province v. Cleveland Press Publ'g Co., 787 F.2d 1047, 1052 (6th Cir. 1986) (internal quotation marks and brackets omitted)). "If anyone is being manipulated according to [Static Control's] allegations, it is the end consumer." *Id*. at 10-11. We agree.

Static Control's counterclaim makes no mention of being used by Lexmark as a fulcrum, and Static Control does not allege that it was harmed because it was manipulated into harming the remanufacturers. Static Control on appeal argues that Lexmark used Static Control as a fulcrum to injure the remanufacturers by (1) falsely telling remanufacturers that using Static Control's products would constitute infringement; (2) redesigning its microchips, thus forcing Static Control to redesign its microchips to remain compatible; (3) threatening legal action against Static Control; (4) and suing Static Control for baseless copyright claims. First Appellant Br. at 39. But, although these specific **[*405]** allegations are sprinkled in various sections of the counterclaim to support other arguments, we can **[**32]** find no allegations in the counterclaim that Lexmark manipulated Static Control in any way to carry out its anticompetitive Prebate Program in the market for remanufactured cartridges. ***HN11***[] "An inextricably intertwined injury is one that results from the manipulation of the injured party as a means to carry out the restraint of trade in the product market." Province, 787 F.2d at 1052.

[*18]** Static Control's allegations establish that it was negatively affected by Lexmark's manipulation of the end users into buying Prebate cartridges, but that Static Control itself was not used as a conduit to achieve the alleged anticompetitive effect in the remanufactured cartridge market. *See* ***[*406]*** *Southaven*, 715 F.2d at 1086 (harm from tangential effects of anticompetitive conduct not enough to convey **[****1364]** standing). Indeed, the allegations make very clear that Lexmark is using the end users to obtain the desired anticompetitive effects, rather than using Static Control. Static Control specifically alleges that Lexmark "fraudulently induces customers' use of Prebate cartridges" and "exploit[s] consumers' lack of information about choices in replacement cartridges" to reduce the number of non-Prebate cartridges on the **[**33]** market. 02R. 172 (2d Am. Answer & Countercl. at ¶ 37); *see also id*. at ¶ 38 ("Lexmark's anticompetitive *exploitation of consumers' and end-users'* lack of adequate information increases prices and reduces output in the relevant markets.") (emphasis added). No such allegations of exploitation or manipulation exist with respect to Static Control. The level of manipulation of the claimant—and the necessity of the success of such manipulation to achieve the anticompetitive conduct—is simply not present in this case with respect to Static Control. *See* Peck, 894 F.2d at 847.

Even if we were to consider Static Control's injury in the market for components and microchips sufficiently related to the harm caused by the Prebate Program in the remanufactured cartridges market, Static Control still lacks standing due to its failure to satisfy the remaining AGC factors. *See* Fallis v. Pendleton Woolen Mills, Inc., 866 F.2d 209, 211 (6th Cir. 1989) (holding no antitrust standing despite assuming claimant was used as a fulcrum in relevant market), *abrogated on other grounds by* Humphreys v. Bellaire Corp., 966 F.2d 1037 (6th Cir. 1992). ***HN12***[] Antitrust causation is much more limited than Article III standing. **[**34]** Here, Static Control's injury is too attenuated to qualify. "[Static Control's] injury is derivative; it is simply a side effect of [Lexmark's] alleged antitrust violations." Fallis, 866 F.2d at 210.

Static Control also fails to establish the final three AGC factors, which all relate to the directness of Static Control's injuries relative to potentially more-direct victims. **[***19]** Static Control's injuries as a result of the Prebate program are clearly a "byproduct" of the alleged antitrust violation. Province, 787 F.2d at 1053; Fallis, 866 F.2d at 211. The more-direct victims are the end users, who according to the allegations had to pay more for their cartridges as a result of the allegedly anticompetitive conduct, and the remanufacturers, who were unable to compete in the market for Lexmark-compatible toner cartridges after Lexmark's Prebate program undercut their prices and reduced supply. Although the end users may have little incentive to sue, two of the remanufacturers raised (and ultimately settled) antitrust claims against Lexmark in the same action. R. 392 (D. Ct. Order 9/28/06 at 12). ***HN13***[] Where there are more-direct victims of the anticompetitive conduct, those victims have the standing **[**35]** to sue, rather than those affected indirectly. *Southaven, 715 F.2d at 1087*; *Province, 787 F.2d at 1053-54*.

The existence of this clear class of direct victims increases the danger of duplicative recovery should Static Control be given antitrust standing to pursue the Prebate Program and receive treble damages.[7] Static Control may seek only the damages from its own losses, but the concern of duplicative recovery relates more broadly to the issue of requiring a defendant to pay treble damages to parties both directly and indirectly injured from the same antitrust violation. *See Ill. Brick Co. v. Illinois, 431 U.S. 720, 731 n.11, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)* (discussing risk of duplicative recovery between direct and indirect purchasers). Finally, we agree with the district court that Static Control's calculation of over $18 million in damages is speculative. R. 392 (D. Ct. Order 9/28/06 at 11).

Static Control's argument for directness of its injury relies heavily on the Second Circuit case *Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290, 294-95 (2d Cir. 1983)*, *cert. denied*, *467 U.S. 1252, 104 S. Ct. 3536, 82 L. Ed. 2d 841 (1984)*, as does much **[**36]** of its argument on standing. The plaintiff in *Crimpers* had standing because HBO and Showtime colluded to prevent his tradeshow from serving as a middleman between television show producers and cable operators, which was the only alternative forum for them to communicate. Crimpers had standing because "[i]njury to Crimpers was the precisely **[***20]** intended consequence of defendants' boycott," even more than the resulting injury to the tradeshow participants. *Id. at 294*. Here, the allegations of both intent and injury are less direct. The Prebate program reduced the number of cartridges available for remanufacture, which in turn reduced the number of microchips sold by Static Control to the remanufacturers. Static Control's allegations resemble a classic case of a supplier seeking standing to recover for indirect damages following anticompetitive conduct directed at its customers' market. *Crimpers* is simply inapposite. We agree that Static Control lacks standing to pursue its antitrust claims as they relate to the Prebate program. **[****1365]**

2. Restraints on Microchips in Lexmark Printers and Cartridges

Static Control also argues that the existence of microchips in the cartridges in the first place and **[**37]** Lexmark's exclusive distribution agreement with its own microchip supplier are anticompetitive acts. These acts differ from the Prebate program because they directly target the microchip market in which Static Control is a competitor. Although Lexmark does not compete in the market for microchips, the allegations suggest that Lexmark uses its influence to restrain trade in the microchip market in order to restrain trade in the remanufactured cartridge market. Here, however, Static Control again lacks standing because it has failed to allege how Lexmark's actions caused any antitrust injury.

Static Control objects to the initial creation of the "anticompetitive microchips," but fails to allege how the existence of a microchip requirement alone caused Static Control any injury. *See* 02R. 172 (2d Am. Answer & Countercl. at ¶ 44). Static Control makes no allegations at all relating to the change in prices for components and microchips as a result of Lexmark's use of microchips in its toner cartridges, and Static Control makes no allegations regarding how a microchip requirement affected Static Control's share of the market for components and microchips. Indeed, **[*407]** Static Control fails to allege **[**38]** plausibly how the creation of a microchip requirement hurt Static Control's share of the microchip market, because without the requirement that market would not exist. It is possible that, without the microchips, Static Control would be able to sell more component parts, but Static Control does not make this allegation. Static **[***21]** Control has failed to allege how the existence of a microchip requirement injured Static Control or otherwise gave Lexmark a monopoly in the related market for Lexmark component parts.

Static Control's allegations relating to Lexmark's microchip supplier's refusal to compete with third parties fares no better. As a self-proclaimed "leading supplier to toner cartridge remanufacturers," *id*. at ¶ 30, Static Control fails to

[7] The district court did not explicitly discuss the potential for duplicative recovery.

allege how the *removal* of one of its direct competitors from the components and microchips market following an exclusive distributorship agreement with a single customer caused any damage to Static Control's position within those markets or profits. *See New Albany Tractor, Inc. v. Louisville Tractor, Inc., 650 F.3d 1046, 1052 (6th Cir. 2011)* (**HN14**[] "Merely demonstrating the existence of an exclusive distributorship in a market area does not violate **[**39]** Robinson-Patman—or any other antitrust provision."). In general, the removal of a competitor increases (not decreases) the remaining suppliers' market share, and Static Control has not alleged that Lexmark was a former customer or that absent the exclusive agreement Lexmark would have purchased from Static Control.

HN15[] "Antitrust injury does not arise for purposes of *§ 4* of the Clayton Act until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (citation and emphasis omitted). Cases have routinely rejected claims of antitrust violations that may very well be violations when the claimants stood to gain from the anticompetitive conduct. Therefore, "[Static Control] cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 583, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *Datagate, Inc. v. Hewlett-Packard Co., 941 F.2d 864, 868-69 (9th Cir. 1991)* ("As an existing competitor, [claimant] would have benefitted from any chilling of new entry into the market. Therefore, [claimant] can **[**40]** claim no injury as a result of such chilling.") (citation omitted), *cert. denied*, *503 U.S. 984, 112 S. Ct. 1667, 118 L. Ed. 2d 388 (1992)*. Static Control has failed plausibly to allege any antitrust injury stemming from Lexmark's decision to use microchips in its cartridges and to remove its own supplier from the market for microchips.

[***22] 3. Redesigning Microchips to Circumvent Static Control's product

Once the market for microchips was created, however, the issue becomes whether Lexmark can engage in a conspiracy to eliminate that market or stifle competition within that market. If Lexmark were able to maintain a monopoly on remanufactured toner cartridges by making cartridge parts wholly unavailable, Static Control might have standing to pursue an antitrust violation. *See Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 463-64, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. The allegations, however, do not sufficiently allege such behavior. Static Control does not specifically allege a tying scheme under *§ 1* of the Sherman Act, as was the case in *Eastman Kodak*, nor does Static Control allege any facts to suggest that the prices **[*408]** for parts increased as a result of being illegally tied to the market for cartridges. Static Control alleges that Lexmark **[**41]** continuously redesigned its microchips "to exclude **[****1366]** competitors from the relevant markets, restrict output, and increase end-user prices." 02R. 172 (2d Am. Answer & Countercl. at ¶ 45). But Static Control does not allege how Lexmark's redesign decreased competition in the markets in which Static Control competes, the market for microchips or parts. Static Control does not even identify in its pleading who competes in the microchip or parts markets, what their market share is, whether they are controlled by Lexmark, what their prices were, or how their prices were affected by Lexmark's redesign (or any of Lexmark's conduct for that matter). *See CBC Companies, Inc. v. Equifax, Inc., 561 F.3d 569, 572 (6th Cir. 2009)* (holding allegations insufficient to establish antitrust injury in part due to failure to identify other market players). The counterclaim lacks other supporting allegations such as the nature and frequency of Lexmark's redesigns and how quickly replacement products were able to adapt to the changes. Nor does Static Control make any non-conclusory allegations to refute the possible business explanation that Lexmark, like most companies, continuously updates its products over **[**42]** the years for legitimate competitive reasons. *Twombly, 550 U.S. at 553*. Static Control's allegations with respect to the microchip redesign therefore also fail to establish antitrust standing for any cognizable antitrust injury.

[***23] 4. Filing Suit

Lexmark further correctly observes that *HN16*[] the act of filing suit generally does not constitute an antitrust injury under the *Noerr-Pennington* doctrine.[8] Second Appellee Br. at 47; *see* *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*. Although exceptions are made when the filing is a sham for interfering with competition, the first inquiry for identifying sham litigation is objective reasonableness: "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*. We cannot say that Static Control has plausibly alleged that the 02 Action was "objectively meritless." *See* 02R. 172 (2d Am. Answer & Countercl. at ¶ 56). Static Control's allegations focus solely on Lexmark's intent behind bringing the copyright action; Static **[**43]** Control does not offer any allegations upon which we can plausibly conclude that the copyright action was "objectively meritless." The Sixth Circuit's ultimate conclusion that Lexmark lacked a valid copyright claim is not determinative of whether the initial suit was reasonable. *Prof'l Real Estate, 508 U.S. at 60 n.5*. We agree with Lexmark that its efforts in federal court, as alleged, should be immune from antitrust suit.

C. Antitrust Standing for Counterclaims Seeking Injunctive Relief

HN18[] The Clayton Act also permits a private party to obtain injunctive relief **[*409]** "against threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*. The district court did not distinguish between Static Control's request for injunctive relief and its request for monetary damages when dismissing the counterclaim for lack **[**44]** of standing. *See* R. 392 (D. Ct. Order 9/28/06 at 12). Static Control argues that the district court separately erred in dismissing its claim for equitable relief because the last three *AGC* factors are inapplicable to whether a claimant has standing to seek injunctive relief. **[***24]** First Appellant Br. at 51. Lexmark argues that the standing requirements for obtaining injunctive relief are no different from the standing requirements for obtaining monetary relief when, as here, Static Control also seeks money damages. Second Appellant Br. at 56 ("The requirements for antitrust standing are the same whether the antitrust plaintiff seeks damages only or damages and injunctive relief.").

HN19[] The Clayton Act does not "authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred." *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 112, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. The only difference between a claim for equitable relief and one for damages is that equitable relief is available at the mere threat of antitrust injury. Because we have held that Static Control has failed to plead an antitrust injury, we affirm the dismissal **[**45]** of Static Control's claim for equitable relief. *See* *Valley Prods. Co. v. Landmark, 128 F.3d 398, 402 (6th Cir. 1997)*.

V. STATIC CONTROL'S LANHAM ACT COUNTERCLAIM

Static Control contends that Lexmark violated the Lanham Act by engaging in false advertising. **[****1367]** Static Control alleges that Lexmark "falsely informed customers that SCC's products infringe Lexmark's purported intellectual property," and "misled . . . customers of SCC's products that license agreements prohibit remanufacturing Lexmark toner cartridges, when no license agreements actually exist," causing Static Control's customers to believe that Static Control is engaging in illegal conduct and thereby damaging Static Control's business and reputation.[9] 02R. 172 (2d Am. Answer & **[***25]** Countercl. at ¶¶ 2, 84-90). The district court

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[8] Static Control claims Lexmark's *Noerr-Pennington* argument is waived as it was not raised below and was raised on appeal only in a footnote. Third Appellant Br. at 7 n.3. However, *HN17*[] "standing is a jurisdictional requirement that cannot be waived, and such may be brought up at any time in the proceeding." *Zurich Ins. Co. v. Logitrans, Inc., 297 F.3d 528, 531 (6th Cir. 2002)*.

[9] The Lanham Act provides:

dismissed Static Control's counterclaim for lack of Lanham Act standing because Static Control lacked antitrust standing, holding that "[m]ultiple courts have held that the factors" for antitrust standing are the same as for Lanham Act standing. R. 392 (D. Ct. Order 9/28/06 at 13) (citing Fifth and Third Circuit cases).

Static Control maintains that the test "[i]n this Circuit" is "not the same **[*410]** as the . . . test for antitrust standing." First Appellant Br. at 53 (citing *Frisch's Rests., Inc. v. Elby's Big Boy of Steubenville, Inc., 670 F.2d 642, 649-50 (6th Cir.)*, *cert. denied*, *459 U.S. 916, 103 S. Ct. 231, 74 L. Ed. 2d 182 (1982)*). *Frisch's Restaurants* held that ***HN21***[] a Lanham Act claimant need **[**47]** not demonstrate actual losses as a result of the defendant's misleading use of the claimant's trademarks in its advertisements, only a "'likelihood of injury and causation.'" *Id. at 650* (quoting *Johnson & Johnson v. Carter-Wallace, Inc., 631 F.2d 186, 190 (2d Cir. 1980))*. Since *Frisch's Restaurants*, the Second Circuit has further described its approach, called the "reasonable interest" approach, as finding that the claimant has standing if the claimant can demonstrate "(1) a reasonable interest to be protected against the alleged false advertising and (2) a reasonable basis for believing that the interest is likely to be damaged by the alleged false advertising." *Famous Horse, Inc. v. 5th Ave. Photo Inc., 624 F.3d 106, 113 (2d Cir. 2010)*. We have not addressed Lanham Act standing since *Frisch's Restaurants*.

Lexmark urges us to follow one of the narrower approaches adopted by our sister circuits. The Seventh, Ninth, and Tenth use a categorical test, permitting Lanham Act suits only by an actual competitor making an unfair-competition claim. *L.S. Heath & Son, Inc. v. AT & T Info. Sys., Inc., 9 F.3d 561, 575 (7th Cir. 1993)*; *Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1108-09 (9th Cir. 1992)*, **[**48]** *cert. denied*, *506 U.S. 1080, 113 S. Ct. 1047, 122 L. Ed. 2d 355 (1993)*; *Stanfield v. Osborne Indus., Inc., 52 F.3d 867, 873 (10th Cir.)*, *cert. denied*, *516 U.S. 920, 116 S. Ct. 314, 133 L. Ed. 2d 217 (1995)*. These circuits, however, have distinguished the standing inquiry between claims of false association under *15 U.S.C. § 1125(a)(1)(A)* and false advertising under **[***26]** *§ 1125(a)(1)(B)* and do not require direct competition for claims of false association. *See e.g., Waits, 978 F.2d at 1108-09*. Static Control's claim is for false advertising and would fail under this stricter standard, because Static Control and Lexmark are not actual competitors.

The Third, Fifth, Eighth, and Eleventh Circuits all reference antitrust standing or the *AGC* factors in deciding Lanham Act standing. *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 233-34 (3d Cir. 1998)* (Alito, J., authoring); *Procter & Gamble Co. v Amway Corp., 242 F.3d 539, 562-63 (5th Cir.)*, *cert. denied*, *534 U.S. 945, 122 S. Ct. 329, 151 L. Ed. 2d 243 (2001)*; *Gilbert/Robinson, Inc. v. Carrie Beverage-Missouri, Inc., 989 F.2d 985, 990-91 (8th Cir.)*, *cert. denied*, *510 U.S. 928, 114 S. Ct. 338, 126 L. Ed. 2d 282 (1993)*; *Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1156, 1162-64 (11th Cir. 2007)*, *cert. denied*, *552 U.S. 1275, 128 S. Ct. 1647, 170 L. Ed. 2d 385 (2008)*. The Third Circuit nominally **[**49]** uses a "reasonable interest" approach, but applies it by looking to the five *AGC* factors. *Conte Bros., 165 F.3d at 233-34*. The Third Circuit has also rejected any distinction in standing between the two types of Lanham Act claims. *Id. at 232*. The Second Circuit's more recent cases reject the Third **[****1368]** Circuit's conflation of the reasonable-interest test with the *AGC* factors as "unnecessarily complicat[ing] the inquiry," *Famous Horse, 624 F.3d at 115 n.3*, setting its approach apart. Therefore, Lexmark's statement that the reasonable interest test and the *AGC* test are not "conceptually different," Second Appellee Br. at 60, is not correct.

> ***HN20***[] Any person who, on or in connection with any goods or services, **[**46]** or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which
>
> > (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
> >
> > (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1).

Although the claimant in *Frisch's Restaurants* brought a claim under 15 U.S.C. § 1125(a)(1)(A) for false association of trademark, not under § 1125(a)(1)(B) for false advertising, **HN22**[] we agree with the Third Circuit's reasoned analysis rejecting a distinction between these two types of claims **[*411]** for purposes of standing. Conte Bros., 165 F.3d at 232-33. Because we have already addressed the appropriate level of standing for claims brought under 15 U.S.C. § 1125(a), even if we were to prefer the approach taken by our sister circuits, **HN23**[] we cannot overturn a prior published **[**50]** decision of this court absent inconsistent Supreme Court precedent or an en banc reversal.[10] Geiger v. Tower Auto., 579 F.3d 614, 622 (6th Cir. 2009) **[***27]** . Static Control has therefore sufficiently alleged a Lanham Act claim. Static Control alleged a cognizable interest in its business reputation and sales to remanufacturers and sufficiently alleged that these interests were harmed by Lexmark's statements to the remanufacturers that Static Control was engaging in illegal conduct. This is sufficient to state a claim under the Lanham Act. We therefore **REVERSE** the district court's dismissal of this claim and **REMAND** with instructions to reinstate the Lanham Act claim.

VI. STATE-LAW COUNTERCLAIMS

The district court dismissed Static Control's counterclaims for unfair competition and false advertising under North Carolina law for lack of standing. Static Control appeals and agrees that substantively the state law claims all "substantially mirror" the federal claims. First Appellant Br. at 54.[11]

The parties dispute whether standing under the North Carolina Unfair Deceptive Trade Practices Act ("NCUDTPA"), N.C. Gen. Stat. §§ 75-1, et seq., which is the state-law equivalent of the Sherman, Clayton, and Lanham Acts, is identical to the standing requirements of the federal acts. The district court held that North Carolina had not yet decided the question, and applying "North Carolina's general rule that federal case law is persuasive and instructive in construing North Carolina's own antitrust statutes," the district court dismissed the state-law counterclaims "for the same reasons that it dismissed [Static Control's] federal claims above." R. 392 (D. Ct. Order 9/28/06 at 16). Static Control disagrees that the North Carolina standard is the same.

[*28]** North Carolina has held that the *AGC* factors "do not apply in determining which indirect purchasers have standing to sue under the North Carolina antitrust statutes." Teague v. Bayer AG, 195 N.C. App. 18, 671 S.E.2d 550, 557 (N.C. Ct. App. 2009). Static Control is a supplier rather than an indirect purchaser, but Static Control argues that *Teague* supports the general proposition that North Carolina antitrust standing diverges **[*412]** from federal antitrust **[**53]** standing. Although ruling before *Teague* came down, the district court rejected the relevance of a similar case upon which *Teague* relied—Hyde v. Abbott Labs., Inc., 473 S.E.2d 680, 681-82, 123 N.C. App. 572 (N.C. Ct. App.), *rev. denied*, *344 N.C. 734 (1996), 478 S.E.2d 5*—precisely because the present case did not involve an indirect purchaser. Teague does not state, as Static Control suggests, that antitrust standing under North Carolina law is generally more flexible than the equivalent federal law. We must therefore closely examine North Carolina's departure from federal law on the question of standing for indirect purchasers to determine whether North Carolina would similarly depart on the question of standing for suppliers.

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[10] Even if we were to adopt the *AGC* factors, Static Control's claim would not necessarily fail. Although we have determined that Static Control failed to satisfy the *AGC* factors regarding its antitrust allegations, this does not necessarily mean Lanham Act standing would be lacking. Not all of Lexmark's conduct supposedly in violation of the Lanham Act is the same as the conduct supposedly violating the Sherman Act. In particular, Static Control alleges that Lexmark violated the Lanham Act when Lexmark falsely advertised that Static **[**51]** Control infringed Lexmark's patents. Because this was not part of Static Control's antitrust allegations, the district court at a minimum should have applied the *AGC* factors to Static Control's allegations of false advertising directly targeting Static Control (not just the Prebate program) and its injuries in conducting the five-factor analysis.

[11] The district court also dismissed the state-law civil-conspiracy claim for lack of standing; however, Static Control has not raised this issue on appeal. Static Control mentioned in a footnote in its opening brief that the district court also erred in dismissing its state-law civil-conspiracy claim. First Appellant Br. at 56 n.14. Lexmark then pointed out the waiver, Second Appellee Br. at 62, and Static Control did not dispute the waiver or make any arguments on either waiver or the civil-conspiracy claim in its Third **[**52]** Brief.

In deciding to reject the federal test for standing for indirect purchasers, the North **[****1369]** Carolina Court of Appeals examined the standing landscape when the North Carolina statute governing standing, *N.C. Gen. Stat. §§ 75-16*, was most recently substantively amended in 1969. *Hyde, 473 S.E.2d at 684-85* (citing *Ill. Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, and *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968))*. Because the amendments expanded the class of persons who could recover **[**54]** under the Act to all consumers, and indirect purchasers were frequently consumers, the court found it "unlikely" that the legislature intended to exclude indirect purchasers as a class. *Id. at 684*. Although acknowledging federal law as "persuasive authority" in interpreting North Carolina antitrust provisions, *id. at 685*, the court observed that most federal circuits permitted suit by indirect purchasers in 1969 when the amendments were passed. The Supreme Court's decision in *Illinois Brick* that indirect purchasers lacked standing to bring antitrust claims was not issued until 1977. *Id. at 683*.

[*29]** Applying the same considerations to the circumstances at hand, we believe North Carolina would grant standing to suppliers such as Static Control. Prior to 1969, the law, at least in the Sixth Circuit, was that suppliers like Static Control lacked standing. *See Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395 (6th Cir. 1962)* ("It is well established in the law that a supplier is too remote and too far removed from the direct injury to recover damages resulting from violation of the anti-trust laws directed against the supplier's customer."), *cert. denied*, *372 U.S. 907, 83 S. Ct. 721, 9 L. Ed. 2d 717 (1963)*. **[**55]** However, the Fourth Circuit had declined to say that no supplier could bring a claim and followed what was previously known as the "target area" test for antitrust standing. *S.C. Milk Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 418 (4th Cir.)*, *cert. denied*, *385 U.S. 934, 87 S. Ct. 295, 17 L. Ed. 2d 215 (1966)*. ***HN24***[↑] The "target area" test gave antitrust standing to anyone who was within the zone of economic harm caused by the anticompetitive conduct whose harm was proximately caused by such conduct. *Id*.

In ruling that indirect purchasers were not subject to the *AGC* factors, the court in *Teague* emphasized the differences between cases involving indirect purchasers and those, such as *AGC* itself, that did not. *Teague, 671 S.E.2d at 556* (rejecting analogies to *AGC* and other state cases applying *AGC* factors to state-law claims because they did not involve indirect purchasers). However, the *Hyde* court independently rejected many of the concerns identified in *Illinois Brick* (and later repeated in *AGC*) as simply inapplicable to state-law antitrust statutes. *Hyde, 473 S.E.2d at 687-88* (addressing issues of multiple liability, incentives to sue, and complexity of damages). Because the state of the law in 1969 in the Fourth **[**56]** Circuit appears more **[*413]** consistent with North Carolina's reasoning in *Hyde* than the Sixth Circuit's position on supplier standing in 1969, we conclude that North Carolina would not apply the *AGC* factors to cases like this one. As a result, Static Control's counterclaims under state law were incorrectly dismissed for lack of standing. We **REVERSE** and **REMAND** for further proceedings on these claims.

[***30] VII. IMPACT OF JURY VERDICT ON REMAND

Because we have reinstated some of Lexmark's counterclaims, Static Control requests that we instruct the district court on remand to treat retroactively the advisory jury's findings that Lexmark misused its patents as binding jury findings. Lexmark unsurprisingly objects to this. The *Seventh Amendment* provides that ***HN25***[↑] "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States." *U.S. Const. amend. VII*. Static Control claims that presenting the reinstated antitrust claims now to a binding jury would violate this prohibition because these issues were already presented once to a jury, albeit an advisory one. Because those claims must be decided by a jury if reinstated, Static Control suggests that the only remedy to this problem is retroactively **[**57]** to call the advisory jury's findings of fact binding, as opposed to proceeding with a new trial before a new, binding jury.[12]

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[12] Static Control is right that if a district court erroneously dismisses a legal claim otherwise entitled to a jury determination, any subsequent findings of fact by the judge must be vacated and the claim relitigated before a jury. *Lytle v. Household Mfg., Inc., 494 U.S. 545, 552-53, 110 S. Ct. 1331, 108 L. Ed. 2d 504 (1990)*. That procedural posture, however, is not present in this case. Nonetheless, when a party has the right to a jury determination on an issue under the *Seventh Amendment*, there is ample

The differences between the defense of patent misuse and affirmative state-law antitrust claims or a Lanham Act claim notwithstanding, we decline to deem an advisory jury's findings binding retroactively. *See* *Hildebrand v. Bd. of Trs. of Mich. State Univ.,* ***[****1370]*** *607 F.2d 705, 710 (6th Cir. 1979)* (***HN26***[] "To convert a trial from a jury trial to a bench trial (or vice-versa) in the middle of **[**58]** the proceedings is to interfere with counsel's presentation of their case and, quite possibly, to prejudice one side or the other."); *Fischer Imaging Corp. v. Gen. Elec. Co., 187 F.3d 1165, 1174 (10th Cir. 1999)* (rejecting argument by claimant that advisory jury's verdict should retroactively become binding); *Pradier v. Elespuru, 641 F.2d 808, 811 (9th Cir. 1981)* (noting significant tactical differences in litigating before an advisory jury). Although here the tactical differences are minimal given that the change to an advisory jury occurred when the district court gave the final jury instructions, we decline to speculate as to whether the change in the jury's instruction altered the jury's analysis of the issue Static Control now **[***31]** seeks to treat as binding. *Cf.* *Romano v. Oklahoma, 512 U.S. 1, 8-9, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994)* (holding that court may not "mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.") (internal quotation marks omitted). We therefore decline Static Control's request.

VIII. LEXMARK'S PATENT COUNTERCLAIMS

Lexmark counterclaimed in the 04 Action that Static Control induced the remanufacturers **[*414]** **[**59]** to infringe several patents relating to Lexmark's toner cartridges. At trial, the jury determined that Lexmark had failed to meet its burden of showing direct infringement by Static Control's customers as a class and its burden of showing Static Control induced infringement by the three named remanufacturers already held to be direct infringers. Following the trial, Lexmark renewed a motion for judgment as a matter of law and filed a motion for a new trial on whether the jury's verdict was unreasonable in light of the evidence of direct infringement by the class, which the district court denied. Lexmark also sought a new trial on the issue of inducement after the district court excluded questions at trial relating to the procurement of opinion-of-counsel letters, which the district court also denied. Lexmark appeals these rulings, and we affirm. Lexmark also appeals an earlier ruling by the district court on summary judgment that Lexmark's design patents were invalid as a matter of law, which we also affirm.

A. Standards of Review

HN27[] We review de novo a district court's decision to deny a motion for a judgment as a matter of law under *Federal Rule of Civil Procedure 50*. *Mike's Train House, Inc. v. Lionel, L.L.C., 472 F.3d 398, 405 (6th Cir. 2006)*. **[**60]** A renewed motion for a judgment as a matter of law following an adverse jury verdict "may only be granted if, when viewing the evidence in a light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences . . . reasonable minds could come to but one conclusion in favor of the moving party." *Barnes v. City of Cincinnati, 401 F.3d 729, 736 (6th Cir.)*, *cert. denied*, *546 U.S. 1003, 126 S. Ct. 624, 163 L. Ed. 2d 506 (2005)*. Judgment as a matter of law is **[***32]** appropriate only where there is no "legally sufficient evidentiary basis" for a reasonable jury "to find for the [non-moving] party on that issue." *Fed. R. Civ. P. 50(a)(1)*. We will not substitute our interpretation of the evidence for the jury's, even if we would have reached a different conclusion. *Barnes, 401 F.3d at 738*.

HN28[] We review for abuse of discretion a district court's decision to deny a motion for a new trial under *Federal Rule of Civil Procedure 59*. *Mike's Train House, 472 F.3d at 405*. A new trial is warranted after a jury verdict "for any reason for which a new trial has heretofore been granted in an action at law in federal court." *Fed. R. Civ. P. 59(a)*. We have previously held that a new trial is appropriate when the **[**61]** jury reaches a "seriously erroneous result as evidenced by (1) the verdict being against the [clear] weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion, i.e., the proceedings being influenced by prejudice or bias." *Mike's Train House, 472 F.3d at 405* (internal quotation marks and alterations omitted) (quoting *Holmes v.*

precedent that an advisory jury does not satisfy that requirement. *See* *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 n. 24, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)* ("[A]n advisory jury . . . would not in any event have been a *Seventh Amendment* jury.").

City of Massillon, 78 F.3d 1041, 1045-46 (6th Cir.), *cert. denied*, *519 U.S. 935, 117 S. Ct. 312, 136 L. Ed. 2d 228 (1996))*; *see also* Barnes v. Owens-Corning Fiberglas Corp., 201 F.3d 815, 820 (6th Cir. 2000) (new trial appropriate only if "verdict is against the clear weight of the evidence"). Lexmark's argument relies on the first and third of these potential errors.

HN29[] We review de novo a district court's grant of summary judgment. *Int'l Union v. Cummins, Inc., 434 F.3d 478, 483 (6th Cir. 2006)*. The moving party is entitled to summary judgment when there is no genuine issue of material fact and the issue may be resolved as a matter of law. *Fed. R. Civ. P. 56(a)*. The evidence on summary judgment must be construed **[****1371]** in the light most favorable to the non-moving **[*415]** party. *Matsushita, 475 U.S. at 587*. When genuine issues of material fact remain, **[**62]** the proper course of action is to submit such questions to the finder of fact.

B. Evidence of Direct Infringement by Static Control's Customers as a Class

Lexmark argues on appeal that the evidence established as a matter of law that Static Control's customers as a class directly infringed Lexmark's patents. Lexmark seeks to overturn the jury's verdict to the contrary. **HN30**[] To establish a claim for patent **[***33]** inducement under *35 U.S.C. § 271(b)*, Lexmark bore the burden of showing by a preponderance of the evidence that (1) Static Control's customers directly infringed Lexmark's patents; (2) Static Control took active steps that induced the customers' infringement; (3) Static Control intended the customers to take the infringing acts; and (4) Static Control knew or willfully disregarded the risk that those actions by its customers would constitute direct infringement. *See* Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2065-67, 179 L. Ed. 2d 1167 (2011). Patent infringement by a third-party is therefore a necessary predicate to inducement to infringe.

HN31[] A plaintiff can establish the first element of inducement to infringe either by demonstrating "specific instances of direct infringement or a finding that **[**63]** the accused products necessarily infringe." *Lucent Techs., Inc. v. Gateway, Inc., 580 F.3d 1301, 1322 (Fed. Cir. 2009)*, *cert. denied*, *560 U.S. 935, 130 S. Ct. 3324, 176 L. Ed. 2d 1240 (2010)*; *see also* Dynacore Holdings Corp. v. U.S. Philips Corp., 363 F.3d 1263, 1275-76 (Fed. Cir. 2004) (citing *Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 441, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984))*; 5 DONALD S. CHISUM, CHISUM ON PATENTS § 17.04[1] (2011). When the plaintiff can show only individual instances of direct infringement, the plaintiff may recover only for the damages from those individual acts. *Dynacore, 363 F.3d at 1274*. If the plaintiff can show an entire class of customers necessarily infringed, damages can be sought more broadly across the entire class. *Id*.

HN32[] Direct patent infringement occurs under *35 U.S.C. § 271(a)* when someone "(1) without authority (2) makes, uses, offers to sell, sells, or imports (3) the patented invention (4) within the United States, its territories, or its possessions (5) during the term of the patent." HERBERT F. SCHWARTZ & ROBERT J. GOLDMAN, PATENT LAW AND PRACTICE 163-64 (6th ed. 2008); *see also* Global-Tech, 131 S. Ct. at 2065 n.2 ("Direct infringement has long been understood to require no more than the **[**64]** unauthorized use of a patented invention."). Determining whether someone is making, using, or selling a patented invention "requires a finding that the patent claim covers the alleged infringer's product or process," *Markman v. Westview Instruments, Inc., 517 U.S. 370, 374, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996)* (internal quotation marks omitted). The determination that a patent's claims cover a **[***34]** specific device is often referred to as "literal infringement." SCHWARTZ, *supra*, at 174. Literal infringement alone is not enough to support a claim for inducement, because the predicate to inducement is a violation of *35 U.S.C. § 271(a)*, which requires more than that the accused devices literally infringe. For example, a party could not be liable for inducing infringement if an accused device literally infringed a patent claim but the literal infringer had authority to use the patent or a patent had otherwise expired, thereby defeating a determination of direct patent infringement. *See, e.g.,* Aro Mfg. Co. v. Convertible Top Replacement **[*416]** Co., 377 U.S. 476, 483, 84 S. Ct. 1526, 12 L. Ed. 2d 457, 1964 Dec. Comm'r Pat. 760 (1964) (sustaining claim for contributory infringement upon determining that user of patented item lacked authorization, thereby directly infringing).

HN33[] An accused device **[**65]** will necessarily infringe, permitting a finding of direct infringement by a class of customers and an inference that the inducer intended the infringement, if the "customers can only use the [defendant's] products in an infringing way." *Symantec Corp. v. Computer Assocs. Int'l, Inc., 522 F.3d 1279, 1293 (Fed. Cir. 2008)* (reversing summary judgment on inducement because plaintiff did not need to show specific instances of direct infringement when defendants' product could not be used in a non-infringing way); *see also* *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 932, 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005)* ("[W]here an article is good for nothing else but infringement, there is no injustice in presuming or imputing an intent to infringe.") (internal quotation marks and citation omitted). When an accused device could be used in either an infringing or a non-infringing way, a claim of direct infringement based on necessary infringement fails and cannot sustain an inducement claim. *ACCO Brands, Inc. v. ABA Locks Mfr. Co., 501 F.3d 1307, 1313-14 (Fed. Cir. 2007)* (reversing jury verdict of inducement to infringe patented method because no evidence of direct infringement and accused product **[****1372]** could be used **[**66]** in either an infringing or a non-infringing way); CHISUM, *supra*, § 17.04[1].

Prior to the jury's verdict, the district court granted summary judgment to Lexmark on whether the three named remanufacturers—Wazana, NER, and Pendl—directly infringed Lexmark's nine valid mechanical patents. R. 1245 (D. Ct. **[***35]** Order 5/31/07) (holding direct infringement); R. 1008 (D. Ct. Order 4/24/07 at 48-49) (holding mechanical patents valid). Lexmark had therefore established the necessary predicate to inducement, but could recover only for those three remanufacturers' infringement unless Lexmark could demonstrate that all of Static Control's customers as a class necessarily infringed. The question of direct infringement by Static Control's customers as a class was submitted to the jury, which held that Lexmark had failed to meet its burden. R. 1366 (Special Verdict Form at 1). The district court denied Lexmark's renewed motion for a judgment as a matter of law and also Lexmark's motion for a new trial on this issue, finding that the evidence in support of Lexmark did not compel a different result. The district court upheld the jury's verdict because "[t]hough Lexmark presented evidence of infringement **[**67]** by Static Control's customers, that evidence was not so overwhelming that reasonable people could come to but one conclusion." R. 1430 (D. Ct. Order 10/03/08 at 9).

Lexmark argues that the district court erroneously conflated the direct-infringement inquiry, which Lexmark must establish, with the affirmative defense of patent exhaustion, which Static Control must establish. Lexmark offered as circumstantial evidence of infringement by the class the testimony of an expert establishing that the toner cartridges remanufactured by Wazana, NER, and Pendl all literally infringed the claims present in the nine mechanical patents. Although Lexmark offered no testimony regarding specific cartridges from other remanufacturers, Static Control has not argued or even suggested that the unidentified remanufacturers' cartridges did not literally infringe at least some of the more than one hundred patent claims that cover the original cartridges. Instead, Static Control argues that Lexmark confuses literal infringement **[*417]** with direct infringement, and, as the district court held, some of the toner cartridges could not sustain a claim for direct infringement because they were sold domestically first, thereby **[**68]** exhausting Lexmark's patent rights. Third Appellant Br. at 40-41. Lexmark has conceded that its patent rights were exhausted in the non-Prebate cartridges sold first in the United States and certain cartridges sold to IBM customers.

[*36]** Part of the problem here is that the jury instructions never defined what it means for a party to "directly infringe" a patent. Lexmark maintains that when the jury was asked to decide whether Static Control's customers as a class "directly infringed," the question must have related solely to whether the remanufactured toner cartridges as a class literally infringed, because Static Control's sole arguments against direct infringement related to patent exhaustion, which was delineated as a separate question on the jury's special-verdict form. R. 1366 (Special Verdict Form at 1, 4). Lexmark is theoretically correct—***HN34***[] exhaustion of a patentee's rights is a defense to direct infringement and is not the same as establishing a non-infringing use of a patented device, which would defeat a finding that Static Control's customers necessarily infringed the patents. However, this distinction was never clearly made to the jury.

Lexmark's claim fails upon closer examination **[**69]** of the jury's instructions. The jury instructions explicitly suggested that patent exhaustion would defeat a finding of "direct" infringement, as opposed to operating only as a defense following a showing of direct infringement:

> I instruct you that there are at least two kinds of uses of microchips made by Static Control that are lawful and *do not directly infringe* any Lexmark patent. . . . The first non-infringing use of Static Control's microchips is in the remanufacture of Non-Prebate Lexmark cartridges that were first sold by Lexmark in the United States. Static Control has no liability for active inducement of infringement when its microchips are used in those cartridges because those cartridges may be lawfully remanufactured by anyone *without directly infringing* any patent rights of Lexmark.

R. 1365 (Jury Instructions at 18) (emphasis added). The district court then gave the same instruction with respect to the IBM cartridges. Although Lexmark is correct that exhaustion should be an affirmative defense,[13] at no point did Lexmark object to the district court's statement that exhausted cartridges could not **[****1373]** "directly infringe" Lexmark's patents. *See* R. 1119 (Lexmark's Objections to **[**70]** Proposed Jury Instructions); **[***37]** R. 1171 (Jury Instructions Hr'g Tr.); R. 1361 (Joint Proposed Corrections to Final Instructions).

HN35[] Jurors are presumed to be "diligent in following the precise instructions given to them." *United States v. Tosh, 330 F.3d 836, 842 (6th Cir. 2003)*. The evidence presented by Lexmark was not so strong as to prevent a reasonable juror from concluding that some members of the class remanufactured cartridges in a non-infringing manner, as defined by the district court. With two categories of cartridges that categorically did not "directly infringe," according to the jury instructions, the jury reasonably could have concluded Lexmark had not met its burden of showing that the remanufacturers as a class "necessarily infringed" Lexmark's **[*418]** patents by remanufacturing exhausted cartridges. *See* *ACCO Brands, 501 F.3d at 1313* ("Because the accused device can be used at any given time in a noninfringing manner, the accused device does not necessarily **[**71]** infringe the [plaintiff's] patent."). Nor was Lexmark's circumstantial evidence of literal infringement sufficient to compel a conclusion that all of Static Control's customers literally infringed, even if this were an appropriate inquiry. Lexmark's own expert, Dr. Reinholtz, stated that he examined remanufactured cartridges from only the three named companies and did not know if other companies' remanufactured cartridges literally infringed. R. 1216 (Trial Tr. 5/25/07 at 42-43). Although this may have been sufficient circumstantial evidence to sustain a jury verdict of infringement, the evidence certainly does not compel one. As a result, Lexmark was not entitled to judgment as a matter of law or a new trial on the issue of whether Static Control's customers directly infringed as a class. *Barnes, 401 F. 3d at 736* (holding post-trial judgment as a matter of law improper unless "reasonable minds could come to but one conclusion in favor of the moving party"); *Owens-Corning, 201 F.3d at 821* (holding new trial improper "if a reasonable juror could have reached the challenged verdict").

C. Excluded Evidence Relating to Intent to Induce Infringement

Lexmark claims that it was entitled to **[**72]** a new trial on the issue of inducement of the three direct infringers because the district court erroneously excluded certain **[***38]** questions relating to opinion-of-counsel letters at trial, rendering the proceedings unfair. We review for abuse of discretion.[14]

At trial, Lexmark was not allowed to ask Static Control's CEO explicitly whether Static Control had ever obtained a legal opinion regarding potential patent or antitrust violat ions. R. 1269 (Trial Tr. at 108-09). Static Control objected to the presentation of evidence relating to Static Control's failure to obtain advice of counsel, even though Static Control had made available to third parties advice of counsel on the issue of whether Prebate violated contract **[**73]** law.[15] R. 1269 (Trial Tr. 06/04/07 at 108-09). The district court agreed and instructed the witness not to

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[13] The jury instructions later also define exhaustion as Static Control's burden, using the exact same categories of cartridges the jury was previously instructed did not "directly infringe." R. 1365 (Jury Instructions at 25-26).

[14] Lexmark suggests on appeal that the entirety of the jury's verdict on inducement was "unreasonable and against the weight of the evidence." Second Appellee Br. at 32. This argument, however, is briefed in the context of the excluded opinion-of-counsel letter and only further elaborated upon in Reply. Despite Lexmark's apparent waiver of this issue, the merits of the sufficiency-of-the-evidence argument is discussed herein due to its relevance to the opinion-of-counsel issue.

answer. Lexmark claims that it was "manifestly unfair" to permit the CEO to testify regarding the procurement of exculpatory advice from counsel but not permit Lexmark "to identify failures to procure such **[*419]** advice as circumstantial evidence of intent to infringe." Second Appellee Br. at 34 (quoting *Broadcom Corp. v. Qualcomm Inc., 543 F.3d 683, 699 (Fed. Cir. 2008))*.

Lexmark's argument on appeal relies heavily on *Broadcom, 543 F.3d 683*, a Federal Circuit case issued after trial but before the district court ruled on Lexmark's motion. *Broadcom* held that "[i]t would be manifestly unfair to allow opinion-of-counsel evidence to serve an exculpatory function . . . and yet not permit patentees to identify failures to procure such advice as circumstantial evidence of intent to **[****1374]** infringe." *Broadcom, 543 F.3d at 699*. Although *Broadcom* appears to support Lexmark's position, the district court ruled against Lexmark, *see* R. 1521 (D. Ct. Op. & Order at 16-19), after reading *Broadcom* in the context of the Federal Circuit's prior **[***39]** ruling in *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp., 383 F.3d 1337 (Fed. Cir. 2004)* (en banc), which held that it would be "inappropriate to draw a[n] . . . adverse inference from failure to consult counsel" when an accused infringer was under no obligation in the first place to obtain advice of counsel on whether it was **[**75]** infringing. *Id. at 1345*.

We need not decide whether a party's failure to obtain an opinion-of-counsel letter may ever constitute circumstantial evidence of the requisite intent to induce infringement. Even if we assume that this evidence was wrongly excluded, the best-case scenario for Lexmark—a negative answer to the forbidden question—would not have changed the jury's verdict on this issue.

HN36[] Lexmark bore the burden of establishing by a preponderance of the evidence that Static Control had the requisite intent to induce infringement. The Supreme Court has recently clarified that this means that the alleged inducer must intend the customers to take the acts that ultimately constituted infringement and the inducer must know or willfully disregard the risk that those actions by its customers would constitute direct infringement. *See Global-Tech, 131 S. Ct. at 2065*. By way of analogy, the Supreme Court compared a used-car salesman who encouraged a customer to buy a car that later turned out to be damaged to a used-car salesman who encouraged a customer to buy a car knowing it was damaged; we fault the latter more than the former.

Lexmark correctly explains that ***HN37***[] "advertising infringing uses, **[**76]** instructing how to engage in infringing uses, demonstrating infringing uses, and recommending infringing uses is strong evidence of specific intent to cause the actions that constitute direct infringement." Second Appellee Br. at 31 (citing *Grokster, 545 U.S. at 936*). But, given the jury instructions that delineated certain cartridges as non-infringing, Lexmark's evidence needed to show that Static Control advertised, instructed, or otherwise recommended the remanufacture of *infringing* cartridges, which at the time of trial were the Prebate cartridges and the cartridges first sold outside the United States. Lexmark's proof, however, is not compelling enough for us to find that the district court abused its discretion in upholding the jury verdict.

[*40]** Lexmark argues that it presented specific evidence demonstrating that Static Control encouraged and instructed remanufacturers to remanufacture Prebate cartridges and cartridges first sold overseas, the two categories not deemed "non-infringing" at trial. But the testimony primarily indicated that Static Control encouraged and instructed its customers to remanufacture cartridges generally and such instructions did not distinguish between **[**77]** foreign or domestic-sold cartridges or Prebate cartridges. *See, e.g.*, R. 1242 (Trial Tr. 5/30/07 at 37-38) (testimony **[*420]** from Static Control that instructions would enable remanufacture of cartridges, including

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[15] Static Control's general counsel had previously obtained a legal opinion letter regarding the illegality of Lexmark's Prebate program under principles of property and contract law. Static Control provided this letter to its customers as assurance that "Prebate does not create any legal barrier to the purchase and reuse by others of 'prebate' cartridges." J.A. at 1280 (Letter from Static Control). The letter from counsel stated that it "does not deal with the application of either patent law or ***antitrust law***" to Lexmark's Prebate program. However, despite this assertion, the letter includes a short paragraph stating that counsel "see[s] nothing in either area of [patent or ***antitrust] law*** that would raise any questions **[**74]** about my conclusion [and] there are doctrines in both areas of law that might well prevent the successful adoption by any manufacturer" of a program to prevent reuse of toner cartridges. *Id*. at 1286.

Prebate); id. at 121-22 (testimony from NER that Static Control did not differentiate between Prebate and non-Prebate at tradeshows). However, Static Control offered testimony that its instructions contained explicit warnings not to use the Static Control chips on Prebate cartridges unless they were first sold in North Carolina after October 1, 2003,[16] and not for resale in the United States. *See, e.g*., J.A. at 657 (Instructions for Replacement Chip). And employees of Static Control were under strict instructions to repeat those conditions to any customer who called to inquire about the microchips. R. 1285 (Trial Tr. 6/6/07 at 88-89). Although Lexmark offered testimony that there was simply no way for a remanufacturer to distinguish between a foreign-sold cartridge and a United States cartridge just by looking at the cartridge, *id*. at 155, Static Control offered testimony that the remanufacturers could determine origin by inquiring at the time of acquisition, *id*. at 88. The jury **[**78]** was best situated to weigh the competing evidence and determine whether Static Control had the requisite intent to induce the infringing acts. The evidence offered by Lexmark may have been sufficient to sustain a jury finding of inducement; however, this evidence certainly does not compel such a finding when the jury has rejected it.

The excluded question during Static Control's CEO's testimony does not change this calculus. Lexmark inflates the significance of the exclusion. Static Control's CEO was asked if he "ever had an outside patent attorney . . . give you advice on the issue of single-use patent licenses," to which the CEO responded in **[****1375]** the negative. R. 1269 **[***41]** (Trial Tr. 6/4/07 at 94). He was then asked explicitly whether he sought out legal counsel relating to Prebate, and the CEO answered affirmatively that he "sought advice about prebate cartridges that had been either put into the landfill or were on the way to the landfill." *Id*. at 95. When asked **[**79]** if that was all he sought advice on, he unequivocally said "Yes." *Id*. It was only when counsel later asked specifically whether Static Control sought advice relating to patent or ***antitrust law*** that Static Control objected and the district court instructed the witness not to answer. *Id*. 108-09. And despite this exclusion in the CEO's testimony, Static Control's general counsel was asked about and specifically discussed concerns over patent-law issues, including whether or not Static Control's actions could constitute inducement to infringe. R. 1242 (Trial Tr. 5/30/07 at 249-50, 263-65, 272-73).

Lexmark bore the burden of establishing Static Control's knowledge or willful blindness to the underlying infringing acts. Based on the related evidence already on the record, we cannot conclude that the jury would have reached a different conclusion had the jury been told that Static Control failed to obtain an opinion-of-counsel letter specifically on issues of patent law. The exclusion of this potential evidence was harmless in light of the other elements that Lexmark failed to establish by a preponderance of the evidence. *See Bridgeport Music, Inc. v. Justin Combs Publ'g, 507 F.3d 470, 481 (6th Cir. 2007)*, **[**80]** *cert. denied*, *555 U.S. 818, 129 S. Ct. 85, 172 L. Ed. 2d 29 (2008)*.

D. Exhaustion of Prebate Cartridges

Lexmark also challenges the district court's post-trial ruling holding that Lexmark's **[*421]** sale of Prebate cartridges exhausted its patent rights in their cartridges. The relief Lexmark seeks on this issue, however, is unclear. Whether the Prebate agreement prevented the exhaustion of Lexmark's patent rights as a matter of law does not change the outcome of the jury trial, because at the time of trial the district court had ruled favorably to Lexmark that Prebate cartridges prevented exhaustion. R. 1008 (D. Ct. Order 4/24/07). Thus, unlike the non-Prebate cartridges sold in the United States and the IBM cartridges, the jury was never instructed that Prebate cartridges could not serve the basis for direct infringement by Static Control's customers as a class. Nor does the **[***42]** question of exhaustion bear in any way on the jury's verdict that Static Control did not induce the direct infringement by Wazana, Pendl, and NER. We therefore decline to resolve this extremely complex and unsettled question, because it would have no relevance to the outcome of this appeal.

E. Design-Patent Invalidity

[16] North Carolina passed a law in October 2003 that Static Control believed made Prebate restrictions unenforceable in North Carolina. The jury was instructed that these cartridges could not infringe. R. 1365 (Jury Instructions at 19).

The district court held on summary **[**81]** judgment that two of Lexmark's design patents relating to the appearance of its toner cartridges—D399,249 and D458,300—were invalid. R. 1008 (D. Ct. Order 4/24/07). ***HN38***[] Patent invalidity is a defense to a claim for patent infringement. *35 U.S.C. § 282*. As a result of this ruling, the issue of whether any party directly infringed Lexmark's design patents or induced someone else to infringe was never decided. Lexmark appeals, and we affirm.

HN39[] All patents are presumed valid, and the burden of overcoming this presumption rests on the party seeking invalidity. *35 U.S.C. § 282*; *Campbell v. Spectrum Automation Co., 513 F.2d 932, 935-36 (6th Cir. 1975)*. Invalidity must be established by clear and convincing evidence. *Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238, 2243, 180 L. Ed. 2d 131 (2011)*. Patent validity is a question of law. *Schnadig Corp. v. Gaines Mfg. Co., 494 F.2d 383, 387-88 (6th Cir. 1974)*. However, where legal analysis rests on factual findings, we will not reverse such findings absent clear error. *Id. at 388*.

HN40[] Design patents are issued to whoever "invents any new, original and ornamental design for an article of manufacture." *35 U.S.C. § 171*; *Schnadig, 494 F.2d at 387* ("To be patentable a design **[**82]** must be new, original, ornamental and nonobvious."). A design patent is not ornamental if the design serves only functional purposes. In other words, "[a] design patent cannot be obtained to protect a mechanical function or cover an article whose configuration affects its utility alone." *Kwik-Site Corp. v. Clear View Mfg. Co., 758 F.2d 167, 171 (6th Cir. 1985)* (internal quotation marks and emphasis omitted) (holding design patent for rifle scope mount invalid because configuration served solely functional purposes); *Fuji Kogyo Co. v. Pacific Bay Int'l, Inc., 461 F.3d 675, 683 (6th Cir. 2006)* ("[I]f the particular design is essential to the use of the article, it can not be the subject of a design patent.") (internal quotation marks omitted), *cert. denied*, **[***43]** *549 U.S. 1252, 127 S. Ct. 1373, 167 L. Ed. 2d 160 (2007)*. An article is less likely to be ornamental if it is not observed, **[****1376]** and the Federal Circuit looks not just to whether the article is ever seen but whether the *appearance* of the article may become a "matter of concern" at any point during the article's "normal and intended use." *In re Webb, 916 F.2d 1553, 1558 (Fed. Cir. 1990)* (holding design of hip implants could be patented because even though not seen during **[**83]** normal use the "design[was] clearly intended to be noticed during the process of sale.").

[*422] The district court held that Lexmark's design patents were invalid because the design of Lexmark's toner cartridges was primarily functional and "the appearance of Lexmark's printer cartridges in question are [sic] of no matter of concern during those cartridges' entire existence." R. 1008 (D. Ct. Order 4/24/07 at 10-11). The design of the cartridges was primarily functional because the design of the printer dictated the exact design of the cartridge. *Id*. at 13-14 (citing *Best Lock Corp. v. Ilco Unican Corp., 94 F.3d 1563, 1566 (Fed. Cir. 1996)* (holding design of key not patentable because dictated by function, i.e., the design of the corresponding lock)). And even though the cartridges may be seen at some point during their lifetime, at no point was their appearance a matter of concern to the end-user. *Id*. at 11 (citing *In re Stevens, 173 F.2d 1015, 36 C.C.P.A. 1017, 1019-20, 1949 Dec. Comm'r Pat. 303 (C.C.P.A. 1949))*.

Lexmark claims that the district court improperly shifted the burden of proof onto Lexmark to show validity and improperly credited disputed issues of fact in Static Control's favor. Lexmark does not dispute the general proposition **[**84]** that ***HN41***[] to establish invalidity, the infringer must show "that consumers do not consider [the patented design] to be significant." Second Appellee Br. at 36 (quoting *Int'l Seaway Trading Corp. v. Walgreens Corp., 589 F.3d 1233, 1242 (Fed. Cir. 2009))*. Lexmark objects to the lack of survey evidence showing consumers do not consider Lexmark's cartridge appearance to be a matter of concern and argues that the district court ignored the presence of photographs of the cartridges on the website where the cartridges were sold and on the cartridge boxes. Lexmark argues that this determination is an issue of fact subject to genuine dispute and therefore inappropriate on summary judgment.

[*44]** The district court applied the correct standard and evaluated the undisputed facts offered by Static Control establishing that the design of the cartridges was functional and not ornamental.[17] The toner cartridges are visible to users at some points, but are generally hidden from view inside the printer. Their design is dictated solely by the printer with which they are compatible. Lexmark itself explained that the advertisements containing photographs were primarily to assist the customer in selecting the cartridge **[**85]** that was *compatible* with the printer they owned. R. 506 (Lexmark's Opp. to Summ. J. at 10). The cartridges' appearance had no other role in the purchaser's decision of which cartridge to purchase. "[T]he purpose of the statute is to give encouragement to the decorative arts. It contemplates not so much utility as appearance." *Cavu Clothes, Inc. v. Squires, Inc., 184 F.2d 30, 32 (6th Cir. 1950)* (citing *Gorham Mfg. Co. v. White, 81 U.S. 511, 524, 20 L. Ed. 731 (1871))*.

On appeal, Lexmark does not attempt to dispute any of these material facts, arguing instead that Static Control should have presented *more* evidence, such as consumer surveys, and suggesting that the presence of photographs of the product should be enough to create a dispute over whether appearance matters. Second Appellee Br. at 36-37. Although **[**86]** we make all inferences in favor of Lexmark on this issue, Static Control has demonstrated by undisputed clear and convincing evidence that **[*423]** the design patents were invalid. Lexmark has not pointed to any genuine fact disputes that would undermine this conclusion. We therefore **AFFIRM** the district court's holding that Lexmark's design patents are invalid.

IX. CONCLUSION

For the aforementioned reasons, we **AFFIRM** the district court on all claims except the dismissal of some of Static Control's counterclaims under the Lanham Act and North Carolina state law, which we **REVERSE** and **REMAND** for further proceedings consistent with this opinion. **[****1377]**

End of Document

[17] Lexmark relies heavily on the district court's statement that "Lexmark fail[ed] to set forth any evidence," R. 1008 (D. Ct. Order 4/24/07 at 15). The district court recited at length Static Control's burden and applied it to the facts. *Id*. at 9-15. The district court appears to have been emphasizing that Lexmark's suggestion that there were open issues of fact was unsupported by any actual evidence.

Corr Wireless Communs., L.L.C. v. AT&T, Inc.

United States District Court for the Northern District of Mississippi, Western Division

August 31, 2012, Decided; August 31, 2012, Filed

CIVIL ACTION NO. 3:12CV036- SA

Reporter

893 F. Supp. 2d 789 *; 2012 U.S. Dist. LEXIS 124042 **; 2012-2 Trade Cas. (CCH) P78,035; 2012 WL 3782601

CORR WIRELESS COMMUNICATIONS, L.L.C., CELLULAR SOUTH, INC., and CELLULAR SOUTH LICENSES, LLC, PLAINTIFFS v. AT&T, INC., AT&T MOBILITY LLC, MOTOROLA SOLUTIONS, INC., MOTOROLA MOBILITY, INC., QUALCOMM INCORPORATED, and JOHN DOES 1-10, DEFENDANTS

Subsequent History: Dismissed by, in part *Corr Wireless Communs., L.L.C. v. AT&T, Inc., LLC, 907 F. Supp. 2d 793, 2012 U.S. Dist. LEXIS 156801 (N.D. Miss., 2012)*

Reaffirmed, Request denied by, Motion granted by, Dismissed by *Corr Wireless Communs., L.L.C. v. AT&T, Inc., 2013 U.S. Dist. LEXIS 128891 (N.D. Miss., Sept. 10, 2013)*

Core Terms

Band, spectrum, Cellular, allegations, roaming, Block, conspiracy, monopolize, wireless, motion to dismiss, Sherman Act, manufacturers, antitrust, licenses, concerted action, carriers, Interoperability, competitors, speculative, Auction, factual allegations, anti trust law, comments, oral argument, technology, delaying, relates, mobile, monopoly power, parties

Counsel: **[**1]** For Corr Wireless Communications, L.L.C., Cellular South, Inc., Cellular South Licenses, LLC, Plaintiffs: Alan Walter Perry, Daniel J. Mulholland, Walter H. Boone, LEAD ATTORNEYS, FORMAN, PERRY, WATKINS, KRUTZ & TARDY, PLLC, Jackson, MS; Brian Craig Kimball, Charles Louis McBride, Jr., Joseph Anthony Sclafani, Martin Patrick McDowell, LEAD ATTORNEYS, Katie L. Wallace, BRUNINI, GRANTHAM, GROWER & HEWES, Jackson, MS; Walter T. Johnson, WATKINS & EAGER, Jackson, MS.

For AT&T, Inc., AT&T Mobility LLC, Defendants: Aaron M. Panner, Kenneth M. Fetterman, Michael K. Kellogg, William J. Rinner, LEAD ATTORNEYS, PRO HAC VICE, KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL PLLC, Washington State, DC; David Walker Upchurch, HOLLAND RAY UPCHURCH & HILLEN, Tupelo, MS.

For Motorola Solutions, Inc., Defendant: Chahira Solh, John S. Gibson, LEAD ATTORNEYS, PRO HAC VICE, CROWELL & MORING LLP, Irvine, CA; Jason C. Murray, LEAD ATTORNEY, PRO HAC VICE, CROWELL & MORING LLP, Los Angeles, CA; Jim Ming Greenlee, LEAD ATTORNEY, James D. Johnson, HOLCOMB DUNBAR - Oxford, Oxford, MS.

For Qualcomm Incorporated, Defendant: Carrie R. Bierman, Roger G. Brooks, Yonatan Even, LEAD ATTORNEYS, PRO HAC VICE, CRAVATH SWAINE & **[**2]** MOORE, LLP, New York, NY; L. F. Sams, Jr., Margaret Sams Gratz, LEAD ATTORNEYS, Otis R. Tims, MITCHELL, MCNUTT & SAMS, Tupelo, MS.

Judges: Sharion Aycock, U.S. DISTRICT JUDGE.

Opinion by: Sharion Aycock

Opinion

[*794] MEMORANDUM OPINION

Before the Court are numerous motions filed by the party Defendants to the lawsuit, AT&T, Inc., AT&T Mobility, LLC, Motorola Solutions, Inc., Motorola Mobility, Inc., and Qualcomm Incorporated, brought by Plaintiffs, Corr Wireless Communications, LLC, Cellular South, Inc., and Cellular South Licenses, LLC, for violations of federal antitrust laws. [1] Plaintiffs' 146-page complaint revolves around the development of standards governing wireless spectrum utilized by providers of commercial wireless services. On April 12, 2012—ten days after Plaintiffs filed their complaint—Plaintiffs filed a Motion to Expedite Scheduling and Case Management Conference and for Other Relief [10]. After considering the arguments made by all parties on the motion to expedite, the Court deferred ruling on the motion until the Defendants had an opportunity to file motions to dismiss, specifically motions to dismiss under Federal *Rule 12(b)(6)*. All parties agreed on a scheduling order for such motions, and the Court **[**3]** accepted the same.

The motions now currently pending and ripe for judicial review are as follows: (1) a Motion to Dismiss Pursuant to *Federal Rule of Civil Procedure 12(b)(2)* [61] filed by AT&T, Inc.; (2) Motion to Dismiss for Failure to State a Claim or, in the alternative, Pursuant to the Doctrine of Primary Jurisdiction by AT&T Mobility LLC [65]; (3) a Motion to Dismiss for Failure to State a Claim or, in the alternative, Pursuant to the Doctrine of Primary Jurisdiction [67] by Qualcomm Incorporated; (4) Motion Request for Judicial Notice [69] filed by Qualcomm Incorporated; (5) Motion to Dismiss for Failure to State a Claim [70] filed by Motorola Solutions, Inc.; and (6) Supplemental Motion for Request for Judicial Notice [90] filed by Qualcomm Incorporated. On July 17, 2012, the Court entertained oral arguments on all of the aforementioned motions.

After marshaling through the motion-to-dismiss record, carefully considering the arguments articulated in the hearing, and reviewing the pertinent authority, **[**4]** [2] the Court finds that Plaintiffs' complaint fails to state a claim and, for this reason, Defendants' motions brought pursuant to *Rule 12(b)(6)* shall be granted. As the Supreme Court explained in *Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929* ***[*795]*** *(2007)*, "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects *Rule 8(a)(2)*'s threshold requirement that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" Here, Plaintiffs have simply "not nudged their claims across the line from conceivable to plausible[; thus], their complaint must be dismissed." Id.

Relevant Background Facts

Spectrum

The antitrust allegations in this case concern electromagnetic spectrum, which at a basic level, essentially refers to wireless capacity. Since the mid-1990s, the Federal Communications Commission ("FCC") has conducted auctions of licenses for such electromagnetic spectrum. That is, the FCC makes available, through auctions and a competitive bidding process, new **[**5]** spectrum for mobile telephony and/or broadband. The spectrum at issue in Plaintiffs' complaint is the 700 MHz band, which is comprised of 70 megahertz of commercial, non-guard band spectrum, 4 megahertz of guard band spectrum, 24 megahertz of public safety spectrum, and 10 megahertz of spectrum that will be reallocated for public safety use pursuant to congressional mandate.

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[1] For clarification, the Court notes that the Plaintiffs to this lawsuit are referred to collectively as either "Plaintiffs" or "Cellular South" throughout this memorandum opinion.

[2] The Court notes that it has reviewed the case law supplemented by Plaintiffs on August 22, 2012 [98].

The FCC recently launched proceedings to "free up" the 700 MHz band for commercial mobile services, as this spectrum was once occupied by analog television broadcasters in TV channels 52-69. Commercial licenses for this spectrum were assigned through several FCC auction proceedings. The FCC auctioned licenses for the guard bands in the Upper 700 MHz band in 2000, and it initially auctioned licenses in the Lower C and D Blocks in 2002. In 2008, the FCC auctioned licenses in the Lower 700 MHz band A, B, and E Blocks, as well as the Upper 700 MHz band C Block.

3GPP and Long-Term Evolution Wireless Broadband Technology

The service at issue here is the fourth-generation ("4G") [3] Long-Term Evolution ("LTE") service, which Plaintiffs refer to as the "gold standard" of wireless technology. The Plaintiffs state that "[although **[**6]** 4G-LTE is not required to be deployed on 700 MHz spectrum, it is described in the industry as 'beachfront spectrum.'" Industry standards for such LTE wireless broadband technology to be deployed on 700 MHz spectrum are developed by a non-profit standard setting organization called Third Generation Partnership Project ("3GPP"). [4] 3GPP is a consensus-driven international partnership of industry-based telecommunications standards bodies. 3GPP, established in 1998, is an industry-based group and it is not associated with any governmental agency.

As **[**7]** noted, the FCC held an auction to sell and repurpose licenses in the 700 MHz spectrum in 2008. The complaint filed in this action focuses on three blocks of spectrum in the Lower 700 MHz band: the A, B, and C Blocks. AT&T purchased licenses in the Lower B and C Block. Cellular South purchased spectrum in the Lower A Blocks.

[*796] In this Lower 700 MHz band, there are currently two different operating bands:

- **Band Class 12**, which covers operations in the Lower A, B, and C Blocks; and
- **Band Class 17**, which covers operations in the Lower B and C Blocks only.

Band Class 17 was created through the 3GPP process after "Auction 73," and the creation of Band Class 17 is the focal point of Plaintiffs' claims of conspiracy, as Band Class 17 does not include the Lower A Block that was purchased by Cellular South. [5] The entities involved in the creation of Band Class 17 during 3GPP proceedings, which include the Defendants named in this action, assert that it was necessary to create a separate band class for Lower 700 MHz B and C Block licenses in order to avoid interference issues from DTV in Channel 51 and high power operations in the E Block. Due to the creation of this separate band class, certain **[**8]** Lower MHz A Block licensees, including Cellular South, filed a petition for rulemaking with the FCC in late 2009.

FCC Petition for Rulemaking

In 2009, Cellular South Licenses, Inc., Cavalier Wireless, LLC, Continuum 700, LLC, and King Street Wireless, L.P. — all holders of Lower 700 MHz A Block licenses — filed a petition for rulemaking, asking the FCC to assure that consumers will have access to all paired 700 MHz spectrum that the FCC licenses. The FCC was also requested to put an immediate freeze on the authorization of mobile equipment that is not capable of operation on all paired commercial 700 MHz frequencies. The Wireless Telecommunications Bureau sought comment on the petition in

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[3] 4G is the successor to 3G and 2G technologies and, according to Plaintiffs, is intended eventually to supplant those standards.

[4] See *Golden Bridge Technology, Inc. v. Motorola, Inc., 547 F.3d 266, 269 (5th Cir. 2008)* (The 3GPP "institutes uniform technology standards for the telecommunications industry to ensure worldwide compatibility of cellular devices and systems. More than 260 companies belong to 3GPP, representing all levels of the cell phone industry. The 3GPP members are responsible for creating and developing the 3GPP standard, which means determining what technologies will be included in the standard as either mandatory or optional features").

[5] Band Class 17 was originally labeled Band Class 15.

2010, and the FCC received comments and reply comments. In order to update the record and gather additional information, the Wireless Telecommunications Bureau held a workshop on the status and availability of interoperable mobile user equipment across commercial spectrum blocks in the 700 MHz band. Thereafter, the FCC issued a notice of proposed rulemaking to address the issues raised by the petition for rulemaking, seeking comment, data, and evidence **[**9]** on the argument that an interoperability requirement in the 700 MHz band is necessary to obtain affordable, advanced mobile devices to deploy service to consumers in smaller, regional, and rural service areas. This notice of proposed rulemaking was issued in March 2012, and less than two weeks before Plaintiffs filed the instant action. All of the Defendants named in this action maintain that the FCC has "primary jurisdiction" [6] over this dispute.

Allegations in Plaintiffs' Complaint

A. 3GPP Process

Plaintiffs filed their complaint on April 2, 2012, filed an amended complaint on June 8, 2012, and provide a "summary of the allegations in the complaint" in their **[*797]** response in opposition to the Defendants' motion to dismiss. Plaintiffs essentially contend that AT&T, Motorola, and Qualcomm maintained a conspiracy that manipulated the 3GPP standard setting process. The antitrust allegations began in 2008, shortly after "Auction 73." [7] In May of 2008, Motorola proposed that a separate band—now known as Band Class 17—be created to *include* the Lower B and C Block 700 MHz spectrum (*i.e.*, the spectrum purchased by AT&T), yet *exclude* the Lower A Block 700 MHz spectrum licenses (*i.e.*, the spectrum purchased by Cellular South and others, including Verizon Wireless). Plaintiffs maintain that "Motorola, as a current and prospective wireless device supplier to AT&T, would have never made its proposal in the first place without the prior consent, blessing, and agreement of AT&T."

After Motorola proffered its proposal, Plaintiffs assert that, in June 2008, AT&T submitted a paper that "supported the creation of what became Band Class 17." In the report for the June 2008 meeting, Qualcomm also allegedly agreed with AT&T's conclusion on Band Class 17 with respect to "user equipment." Plaintiffs maintain that Qualcomm's support for the creation of Band Class 17 was against its own self-interest, and "can only be explained by a preceding agreement with AT&T." Plaintiffs further argue that "neither [Qualcomm or Motorola] would have taken such steps . . . without such a prior agreement [with AT&T]." Plaintiffs contend that Ericsson, a device manufacturer, raised concerns that the creation of a separate band class would "go[] against the economies of scale." Ericsson, however, subsequently withdrew its initial objection to the creation of this separate band class.

In August 2008, the 3GPP, acting by a consensus, adopted the proposal to create Band Class 17, with no dissent. Plaintiffs maintain that the 3GPP "rubber-stamped" the "concerted work" of the Defendants concerning Band Class 17. Plaintiffs, however, do not **[**12]** contest that the 3GPP process itself was strictly followed. That is, technical arguments supporting the creation of Band Class 17 were set out in writing for evaluation by experts, and the 3GPP acted by a consensus with no objection from anyone concerning Band Class 17.

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[6] The doctrine of primary jurisdiction operates, when applicable, to postpone judicial consideration of a case until an agency with special competence in the area makes a determination regarding a particular issue involved in the case. *Mercury Motor Express, Inc. v. Brinke, 475 F.2d 1086, 1092-93 (5th Cir. 1973)*. The doctrine "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States v. Western Pac. R.R., 352 U.S. 59, 63-64, 77 S. Ct. 161, 1 L. Ed. 2d 126, 135 Ct. Cl. 997 (1956)*; **[**10]** see also *Wagner & Brown v. ANR Pipeline Co., 837 F.2d 199, 201 (5th Cir. 1988)*.

[7] As discussed *supra*, "Auction 73" happened in 2008, when the FCC licensed rights in the 700 **[**11]** MHz spectrum, including the Lower A, B, and C Blocks.

B. Alleged Delay of Band Class 12 Standards

Plaintiffs assert that after the Defendants "caused 3GPP to fragment Band 12 by creating Band 17, AT&T and the other Defendants continued to preserve what their concerted action had wrought (*i.e.*, AT&T's private ecosystem) when that private ecosystem was threatened by Cellular South." After Plaintiffs filed the aforementioned petition for rulemaking with the FCC, Plaintiffs maintain that AT&T and the other Defendants agreed to improperly delay Band Class 12 standards. Plaintiffs contend that they "do[] not claim that the Defendants' opposition to the Interoperability Petition before the FCC was actionable . . . Rather, the Complaint alleges that it was the Defendants' conduct beyond its opposition before the government in threatening Cellular South with the delay of Band 12, actually delaying Band 12, and attempting to secure Cellular South's withdrawal of the Interoperability **[**13]** Petition which was, and is, actionable." Plaintiffs maintain that while Band Class 12 was recognized prior to "Auction 73," "work was left to be done by 3GPP to develop the technical specifications necessary for the implementation of Band 12 by carriers and equipment manufacturers." Plaintiffs maintain that Defendants **[*798]** "block[ed] and/or delay[ed]" the development of such specifications. To support this assertion, Plaintiffs set forth factual evidence in the form of comments made by employees of Motorola and Qualcomm.

First, Plaintiffs maintain that in May 2010—approximately two years after Band Class 17 was created—Qualcomm representative, Michael Chard, allegedly stated to Brian Caraway of Cellular South that "there may be individuals participating in 3GPP discussions who would oppose amendments to the Band 12 standard." Chard allegedly also commented that the Interoperability Petition was a "conflict generator" and that "there could be some 'blocking' of Band 12 by the 3GPP participants that were concerned about the Interoperability Petition." In the same conference call, Chard also allegedly stated that "Qualcomm was concerned that the actions of the companies that filed the Interoperability **[**14]** Petition — including Cellular South — conflicted with the best interests of Qualcomm's 'other carrier partners.'" In Plaintiffs' brief in opposition to the motions to dismiss, Plaintiffs contend that "Chard's reference to its 'carrier partners' . . . had to include AT&T." Chard also allegedly commented that "most if not all of what happens in RAN 4 [discussions] happens before the meeting."

Second, Plaintiffs contend that at a June 2010 3GPP meeting, Gene Fong of Qualcomm had a conversation with Brian Caraway of Cellular South. When asked by Caraway if the Interoperability Petition had caused delays in the advancement of Band 12 standards, Fong allegedly stated, "I would be lying if I said no." However, Fong then also stated, "but I am still going to do my job." Fong also allegedly noted that Qualcomm's position on adoption of Band Class 12 standards was subject to "external influences."

Third, Plaintiffs assert that at the same 3GPP June 2010 meeting, Edgar Fernandes of Motorola, who was also the Vice Chairman of the RAN 4 Working Group at 3GPP, asked Brian Caraway of Cellular South and others if their companies were part of the group that had filed the Interoperability Petition. Caraway **[**15]** confirmed that Cellular South, among others, had filed the Interoperability Petition. Fernandes allegedly stated to Caraway that the petition and related filings "have made us hesitant to do anything with Band 12." Fernandes also allegedly commented that the petition "had gummed up the works."

As it relates to these comments from Qualcomm and Motorola employees, Plaintiffs argue that because they "came virtually simultaneously, it is clear that they acted in concert both to protect the newly created AT&T private ecosystem and to punish Cellular South for its role in filing the Interoperability Petition." Plaintiffs further maintain that the "only interpretation that can be given to these statements which directly evidence concerted action is that Motorola and Qualcomm were acting at least with AT&T." Plaintiffs additionally assert that Qualcomm refused to build chipsets that function on Band Class 12; however, Plaintiffs concede that "[s]hortly thereafter . . . Qualcomm announced that it had decided to build a Band 12 chip after all." Plaintiffs maintain that Qualcomm decided to build the Band 12 chip to "cover its tracks" concerning the alleged conspiracy. According to Plaintiffs, **[**16]** the revised final standards for Band 12 were approved by 3GPP in November 2010.

C. Exclusive Dealing

Plaintiffs also base their antitrust claims on alleged exclusive dealing arrangements. That is, Plaintiffs proffer that, "on information and belief, Cellular South believes that AT&T has secured its 4G-LTE devices on an exclusionary basis." In their response in opposition to the motions to dismiss, Plaintiffs contend that, "[t]hose **[*799]** [alleged] formal agreements, whose existences and whose content are known (at least before the parties to this litigation have conducted discovery) solely to the defendants, are susceptible to legal attack under *Section 2* of the Sherman Act as they are under *Section 1*."

D. Roaming

Plaintiffs additionally set forth allegations concerning AT&T's "increased power and opportunity" to deny Cellular South roaming on AT&T's national network. Roaming services are essentially network services that customers of regional carriers, such as Cellular South, may utilize when outside of their service area. Plaintiffs contend that "[b]ased on prior knowledge and experience, AT&T will abuse its monopoly power over 4G-LTE nationwide data roaming in the Lower 700 MHz spectrum to **[**17]** delay or refuse to provide meaningful nationwide roaming to [Plaintiffs]." As the complaint sets forth by its very language, and as Plaintiffs concede in oral argument, Plaintiffs' claim for denial of roaming is not based on any action that AT&T has already taken. Rather, it is based on a course of future action that AT&T, at some point, may pursue.

Summary of Plaintiffs' Antitrust Claims

Plaintiffs maintain that Defendants' alleged conduct presents a "very mixed combination" of (a) concerted action by all three Defendants; and (b) unilateral abuse of monopoly power by AT&T." Plaintiffs allege that these claims fall under both *Section 1* and *2* of the Sherman Act. According to Plaintiffs, the complaint "has alleged a claim for violation of *Section 1* arising out of two types of conduct: (1) the Defendants' collective and concerted action to fragment and delay Band 12, delaying the development of Band 12 devices and depriving Cellular South and others of roaming; and (2) AT&T's exclusive agreements with manufacturers to produce Band 17 devices, and refusal to sell devices to AT&T's competitors."

Plaintiffs' complaint further alleges that AT&T is also liable under *Section 2* of the Sherman **[**18]** Act. Plaintiffs contend that, in assessing *Section 2* liability, "AT&T's conduct must be considered as a whole — including the creation of Band 17, the agreements with device manufacturers, and AT&T's pattern of conduct designed to deprive competitors of roaming access."

Legal Standards

Pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, a plaintiff must state a claim upon which relief can be granted or the complaint may be dismissed with prejudice as a matter of law. *Fed. R. Civ. P. 12(b)(6)*. When considering a motion to dismiss for failure to state a claim, the "court accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007)* (quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004)* and *Jones v. Greninger, 188 F.3d 322, 324 (5th Cir. 1999))*. To withstand a *Rule 12(b)(6)* motion, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570-72, 127 S. Ct. 1955*.

Rule 8 of the Federal Rules of Civil Procedure sets out the fundamental pleading standard for civil **[**19]** litigation and governs all claims in a civil suit, requiring "a short plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. "A plaintiff's obligation to provide the 'grounds of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555, 127 S. Ct. 1955*. Factual allegations must be enough to raise a right to relief above the speculative level. Id. Although the Supreme **[*800]** Court in Twombly stressed that it did not impose a probability standard at the pleading stage, the allegation of a mere possibility of relief does not satisfy the threshold requirement of Rule 8(a)(2) that the "plain statement" of a claim include factual "allegations plausibly suggesting (not merely consistent with)" an entitlement to relief. Id. at 557, 127 S. Ct. 1955; see also Ashcroft v. Iqbal, 556 U.S. 662, 684, 129 S. Ct. 1937, 1953, 173 L. Ed. 2d 868 (2009).

When ruling on a motion to dismiss under Rule 12(b)(6), a court must accept as true all of the factual allegations contained in the complaint. Twombly, 550 U.S. at 555-56, 127 S. Ct. 1955 (citing **[**20]** Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 n.1, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002); Neitzke v. Williams, 490 U.S. 319, 326-27, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)). But, a court need not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions," which will not defeat a Rule 12(b)(6) motion to dismiss. Plotkin v. IP Axess, Inc., 407 F.3d 690, 696 (5th Cir. 2005) (citing Southland Sec. Corp. v. INSpire Ins. Solutions, Inc., 365 F.3d 353, 361 (5th Cir. 2004)).

In Iqbal, the Court formalized a two-pronged approach to apply the underlying jurisprudential principles of Twombly. The first prong requires the Court to separate factual allegations from legal conclusions. Id. The Court in Iqbal dismissed those allegations deemed to be "conclusory" on the basis that bare legal conclusions are not entitled to the privilege that all well-pleaded facts be taken as true at the motion to dismiss stage. Id. [8] The second prong then applies the plausibility test to the remaining allegations. Id. (explaining that although the court must "take all of the factual allegations in **[**21]** the complaint as true," it is "not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). That two-pronged approach is now the standard for evaluating the plausibility of a complaint under Rule 8(a)(2).

Discussion and Analysis

Section 1 Claim Against All Defendants

Section 1 of the Sherman Act states: "Every **[**23]** contract, combination in **[*801]** the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Although § 1 could be read to outlaw all contracts, it has long been interpreted to only proscribe unreasonable restraints. See Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007). To establish a § 1 violation, a plaintiff must prove that: (1) the defendants engaged in a conspiracy; (2) that restrained trade; (3) in the relevant market. See Apani Sw., Inc. v. Coca-Cola Enter., Inc., 300 F.3d 620, 627 (5th Cir. 2002). Once a plaintiff establishes that a conspiracy occurred, whether it violates § 1 is

[8] Iqbal illustrated its analysis of the first prong as follows:

> We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Complaint ¶ 96, App. to Pet. for Cert. 173a-174a. The complaint alleges that Ashcroft was the "principal architect" of this invidious policy, id., ¶ 10, at 157a, and that Mueller was "instrumental" in adopting and executing it, id., ¶ 11, at 157a. These bare assertions, much like the pleading of conspiracy in Twombly, amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, 550 U.S., at 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929, **[**22]** namely, that petitioners adopted a policy " 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group ." Feeney, 442 U.S., at 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870. As such, the allegations are conclusory and not entitled to be assumed true. Twombly, supra, 550 U.S., at 554-555, 127 S. Ct. 1955, 167 L. Ed. 2d 929. To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in Twombly rejected the plaintiffs' express allegation of a "'contract, combination or conspiracy to prevent competitive entry,'" id. at 551, 127 S. Ct. 1955, 167 L. Ed. 2d 929, because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.

Id. at 1951.

determined by the application of either the per se rule or the rule of reason. See *Spectators' Commc'n Network, Inc. v. Colonial Country Club, 253 F.3d 215, 222-23 (5th Cir. 2001)*. If the court determines that the defendant's conduct "would always or almost always tend to restrict competition and decrease output," the restraint is per se illegal and no further inquiry occurs. Id. However, if the conduct is not deemed per se unreasonable, **[**24]** the plaintiff will also have to prove that the conduct unreasonably restrains trade in light of actual market forces under the rule of reason. Id. [9]

Regarding the conspiracy element, the Supreme Court recently observed that "the crucial question [in a § 1 claim] is whether the challenged anticompetitive conduct stems from independent decision or from an agreement." *Twombly, 550 U.S. at 553 127 S. Ct. 1955* (internal quotations omitted). The plaintiff must present evidence that the defendants engaged in concerted **[**25]** action, defined as having "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. Concerted action may be shown by either direct or circumstantial evidence. Direct evidence explicitly refers to an understanding between the alleged conspirators, while circumstantial evidence requires additional inferences in order to support a conspiracy claim. See *Tunica Web Adver. v. Tunica Casino Operators Ass'n, 496 F.3d 403, 409 (5th Cir. 2007)*. Independent parallel conduct, or even conduct among competitors that is consciously parallel, does not alone establish the contract, combination, or conspiracy required by *§ 1*. See *Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929*.

As noted *supra*, Plaintiffs "ha[ve] alleged a claim for violation of *Section 1* arising out of two types of conduct: (1) the Defendants' collective and concerted action to fragment and delay Band 12, delaying the development of Band 12 devices and depriving Cellular South and others of roaming; and (2) AT&T's exclusive agreements with manufacturers to produce Band 17 devices, and refusal to sell devices to AT&T's **[**26]** competitors." While, in considering whether Plaintiffs' allegations state an antitrust violation, the Court considers the allegations together, the Court analyzes each allegation separately in order to flesh out all of Plaintiffs' arguments in more detail.

[*802] A. 3GPP and the Creation of Band Class 17

The genesis of Plaintiffs' antitrust claims begins in 2008. Plaintiffs maintain that "AT&T — with the assistance of Motorola and Qualcomm — [ ] caused the 3GPP to create a private band for the benefit of AT&T." During oral argument on this issue, Plaintiffs again reiterated that Motorola "started" the alleged concerted action by proffering a paper at the 2008 3GPP meeting recommending the creation of a separate band class. While Plaintiffs contend that Motorola would never have made its 2008 proposal at 3GPP to create Band Class 17 without the "prior consent, blessing, and agreement of AT&T," Plaintiffs provide no factual support for such a proposition either in the complaint or the response in opposition to Defendants' motions to dismiss. Due to this factual void in Plaintiffs' filings, the Court inquired from Plaintiffs at oral argument what facts they had to support the claim that Motorola **[**27]** recommended the creation of a separate band class based on a prior "agreement" with AT&T. Plaintiffs, instead of providing *facts*, simply maintained that Motorola "had to have talked to AT&T about it." Plaintiffs further stated, "We can be reasonably assured that Motorola did not change AT&T's spectrum because it made a difference to AT&T." Plaintiffs, as to this issue, additionally stated, "That just doesn't happen."

Plaintiffs have articulated the same threadbare allegations concerning Qualcomm as it relates to the creation of Band Class 17 in 2008. Plaintiffs contend that, in June 2008, AT&T and Qualcomm joined Motorola in support of the creation of Band Class 17. According to Plaintiffs, "Qualcomm's support, like Motorola's . . . can only be explained by a preceding agreement with AT&T." Plaintiffs provide *no* factual support for such an assertion. In fact, when

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[9] Plaintiffs contend that the Court "need not make the determination about whether the per se or rule of reason applies at this juncture since that question need not be decided the context of the current motions." The Court agrees. See *TruePosition, Inc. v. LM Ericsson Telephone Co., 844 F. Supp. 2d 571, 2012 WL 22075, at *18 (E.D. Pa. 2012)* ("We agree with the Defendants that a decision concerning the standard we will use [*i.e.*, rule of reason or per se] to determine whether the restraint on trade is unreasonable is a premature question if the Complaint fails to allege a conspiracy. Therefore, we will reach this question only if we find that TruePosition has sufficiently alleged a conspiracy.").

questioned about whether Plaintiffs had any facts to support the proposition that there was a prior agreement amounting to concerted action, Plaintiffs simply reiterated that Motorola "started it," Qualcomm "supported it," and "they had to have some reason to do it." Plaintiffs continued with this highly speculative and entirely **[**28]** conclusory argument, noting that the parties "had strong motives to act in concert" because they "needed AT&T as a customer."

While Plaintiffs maintain that Qualcomm and Motorola had such "motives" to engage in concerted action, accusations of a motive do not establish a Sherman Act violation, and Plaintiffs provide no factual allegations to plausibly show the existence of an agreement. That is, there are no allegations of when such a purported agreement happened, nor are there facts showing that particular individuals met at particular times, or even what such an alleged agreement entailed. It should go without saying that merely articulating that an agreement "had to have" occurred prior to Motorola's 2008 recommendation to create a separate band class is not a *factual* allegation that raises Plaintiffs' right to relief above the speculative level in accordance with Twombly. See *Twombly, 550 U.S. at 565 n.10, 127 S. Ct. 1955*; *TruePosition, Inc. v. LM Ericsson Tel. Co., 844 F. Supp. 2d 571, 2012 WL 33075, at *21 (E.D. Pa. 2012)*. Even if Motorola, Qualcomm, and AT&T all supported the creation of Band Class 17 during the 3GPP process—due to what each contend is technologically justified because of **[**29]** interference concerns with the Lower A Block—"[c]ircumstantial evidence of parallel behavior must be pled in 'a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.'" *Burtch v. Milberg Factors, Inc., 662 F.3d 212, 226-27 (3d Cir. 2011)* (quoting *Twombly, 550 **[*803]** U.S. at 557, 127 S. Ct. 1955*). "Parallel conduct in itself is insufficient to state a claim for conspiracy because it is 'consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions in the market.'" Id. (quoting *Twombly, 550 U.S. at 554, 127 S. Ct. 1955*).

Here, other than Plaintiffs' conclusory statements that an agreement happened regarding the creation of Band Class 17, the only factual allegations provided show that Motorola, Qualcomm, and AT&T participated in the 3GPP process. Yet, the Fifth Circuit has consistently maintained that "it has long been recognized that the establishment and monitoring of trade standards is a legitimate and beneficial function." *Consol. Metal Prods. Inc. v. Am. Petroleum Inst., 846 F.2d 284, 293-94 (5th Cir. 1988)* (finding **[**30]** that though a trade association naturally involves collective action by competitors, it is not by its nature a "walking conspiracy"). In *Golden Bridge Technology, Inc. v. Motorola, Inc., 547 F.3d 266 (5th Cir. 2008)*, the court affirmed summary judgment in a challenge brought by the developer of wireless communications technologies for cellular networks against other members of the 3GPP nonprofit origination. There, Golden Bridge Technology, a member of 3GPP, alleged that the defendants unlawfully conspired not to deal with Golden Bridge in violation of the Sherman Act. Id. The Fifth Circuit, in addressing the function of the 3GPP, noted as follows:

> The standards 3GPP sets allow the numerous necessary components of cellular communications to operate compatibly. Potential procompetitive benefits of standards promoting technological compatibility include facilitating economies of scale in the market for complementary goods, reducing consumer search costs, and increasing economic efficiency. See ABA Section of ***Antitrust Law***, Handbook on the Antitrust Aspects of Standard Setting 10 (2004).

Id.; see also, e.g., *Consolidated Metal Prods., 846 F.2d at 294*; *TruePosition, 844 F. Supp. 2d 571, 2012 WL 33075, at *2* **[**31]** (dismissing antitrust claim based on alleged conspiracy to exclude technology from 3GPP standard).

To be clear, the Court is not holding that joint standard setting cannot be the basis of a Sherman Act violation, as such standard setting has been successfully challenged under *Section 1*. See *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)*. Plaintiffs rely heavily on Allied Tube to support their claim. However, *Allied Tube* is quite distinguishable.

In that case, the Supreme Court addressed both the risks and benefits of standard-setting. The case involved a steel manufacturing corporation that set out to convince an SDO not to change its standards in a way that would negatively affect steel manufacturers. *Id. at 495-97, 108 S. Ct. 1931*. The standards setting organization, the National Fire Protection Association, published the National Electric Code each year. Until 1981, the Code had approved only steel as an electrical conduit. When a new material suitable for use as an electrical conduit became available, the steel company rounded up everyone it could to vote against incorporating this new material into the code as another viable **[**32]** material for electrical conduits. Id. (stating the facts). The issue in the case was whether this behavior violated *Section 1* of the Sherman Act by unreasonably restraining trade, or whether the steel company was immune from such liability because it was merely lobbying a legislative body for the result it desired. *Id. at 495, 108 S. Ct. 1931* (citing *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct.* ***[*804]*** *523, 5 L. Ed. 2d 464 (1961)* (providing antitrust immunity for individuals who petition the government to adopt a rule or law that would restrain trade)).

The Court in Allied Tube held that the steel company did not enjoy any such immunity. *Id. at 509-10, 108 S. Ct. 1931*. The Court found that the steel company, which had a clear economic interest in stifling competition from this new material, *was biasing the standard setting process.* It therefore refused to grant the steel company antitrust immunity, and concluded that efforts to influence private standard setting organizations *may* violate antitrust laws. *Id. at 509-10, 108 S. Ct. 1931*.

Unlike *Allied Tube,* which involved a standard setting process that was biased through the use of improper and unfair **[**33]** practices and procedures, see *Clamp-All Corp. v. Cast Iron Soil Pipe Institute, 851 F.2d 478, 488 (1st Cir. 1988)* (Breyer, J.) (discussing Allied Tube), in this case *sub judice*, the Defendants' conduct during the 3GPP process in 2008 is, on its face, lawful. While Plaintiffs argue that Defendants' technical justifications set forth during the 3GPP process are merely pretext for anticompetitive behavior, the 3GPP process was followed to the letter. That is, there are no facts demonstrating procedural irregularities within the process, that the 3GPP process was subverted or turned into a sham, or that the Defendants agreed to employ—or indeed did employ—any improper practices within the standard setting process. The highly complex and technical arguments in favor of creating Band Class 17 were set out in writing for evaluation by experts, and the concerns relating to such creation of Band Class 17 were duly contemplated at 3GPP meetings. The 3GPP acted by a consensus as it relates to the creation of Band Class 17, and there was no objection from any person or entity, including the Plaintiffs and Verizon Wireless, who also holds spectrum licenses in the Lower A Block. As the Court made **[**34]** clear in Golden Bridge,

> We have found it "axiomatic" that a standard setting organization must exclude some products, and such exclusions are not themselves antitrust violations. See *Consol. Metal Prods., 846 F.2d at 294* . To hold otherwise would stifle the beneficial functions of such organizations, as "fear of treble damages and judicial second-guessing would discourage the establishment of useful industry standards." *Id. at 297*. Accordingly, we decline to infer conspiratorial action on the basis of limited circumstantial evidence, particularly where this evidence is at least as consistent with permissible competition, and with independent action, as with unlawful conspiracy. See *Matsushita, 475 U.S. at 588, 106 S. Ct. 1348*.

547 F.3d at 273. Here, Plaintiffs have not alleged plausible facts demonstrating that the 3GPP standard setting process was biased or otherwise subverted, or that the Defendants engaged in any type of conspiracy or concerted action as it relates to the creation Band Class 17.

B. Delaying Development of Band Class 12 Devices

Plaintiffs additionally contend that AT&T agreed with Defendants Motorola and Qualcomm to improperly delay Band Class 12 standards. During oral **[**35]** argument, Plaintiffs attempted to clarify their argument related to the alleged delay of Band Class 12. Plaintiffs maintain that, in order to preserve Band Class 17, the Defendants conspired to delay the finalization of Band Class 12, and that such a threat was made in order to force Cellular South to withdraw its Interoperability Petition filed with the FCC. At the outset, the Court notes that the Plaintiffs, during oral argument, noted that Band Class 12 was, **[*805]** in reality, only "slightly delayed at 3GPP." Plaintiffs made clear that the standards for Band Class 12 were in fact already set prior to "Auction 73," but there were still some "finalizations" to be made. To support its contention that delay was at least threatened, Plaintiffs point to comments made by employees of Qualcomm and Motorola. [10] These comments are as follows:

- First, that a Qualcomm employee (Michael Chard), two years after Band Class 17 was created, stated that there **may be** individuals participating in 3GPP discussions who would oppose amendments to the Band 12 standard. That the same Qualcomm employee also stated that the petition was conflict generator, that there **could be** some blocking of Band 12 by the 3GPP **[**36]** participants that were concerned about the petition, that Qualcomm was concerned that the petition conflicted with the interests of its other carrier partners, and that most of what happens at the RAN 4 3GPP meetings happens before the meeting. [11]
- Second, that another Qualcomm employee (Gene Fong) was asked at a June 2010 3GPP meeting if the petition had caused delays in the advancement of Band 12 standards, and the response was, "I would be lying if I said no . . . but I am still going to do my job." The employee also allegedly stated that Qualcomm's position on the adoption of Band Class 12 standards was subject to external influences. [12]
- Third, that the Vice Chairman of RAN 4, who is also a Motorola employee (Edgar Fernandes), stated that the petition and related filings "have made us hesitant to do anything with Band 12" and that the petition "had gummed up the works." [13]

As it relates to such comments, Plaintiffs first contend that they are "direct evidence" of concerted action taken by the Defendants. Allegations of direct evidence of an unlawful agreement must be "explicit and require[ ] no inferences to establish the proposition or conclusion being asserted." *In re Baby Food Antitrust Litig., 166 F.3d 112, 118 (3d Cir. 1999)*; *Golden Bridge, 547 F.3d at 272* ("Direct evidence explicitly refers to an understanding between the alleged conspirators"); *Tunica, 496 F.3d at 410* (finding that email communications **[**38]** show conspiracy because they contain direct evidence stating that the parties entered into a "gentlemen's agreement" not to deal with another company). Here, unlike *Tunica*, the statements made by Qualcomm and Motorola employees do not constitute direct evidence of any type of conspiracy. Accordingly, the Court reviews such allegations under the standard required for circumstantial evidence.

As discussed above, regarding the conspiracy element, the Supreme Court has **[*806]** observed that "the crucial question [in a § 1 claim] is whether the challenged anticompetitive conduct stems from independent decision or from an agreement." *Twombly, 550 U.S. at 544, 127 S. Ct. 1955*. (internal quotations omitted). A plaintiff must present evidence that the defendants engaged in concerted action, defined as having "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. Plaintiffs here have failed to present evidence of a conspiracy, either to create Band Class 17, or to preserve Band Class 17 by delaying Band Class 12. Plaintiffs have in fact failed to point to any action taken, **[**39]** or any agreement to take action, by any of the Defendants that delayed or resulted in some delay of any Band Class 12 standards, specifications, or technical finalizations. Instead, Plaintiffs cite to comments made by Qualcomm and Motorola employees over a year after Band Class 17 was adopted without objection, that do not refer to any agreement, much less an agreement by the party Defendants to this action. The comments at most can be said to plausibly show that the FCC petition inserted uncertainty or delay into Band Class 12 finalization and "may" have caused certain—unnamed and apparently unknown—members of the

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[10] The Court notes that Plaintiffs do not point to any comments made by AT&T or any commentary made by any individual referencing any action taken by AT&T.

[11] While a Qualcomm employee allegedly stated that there "could be" blocking by such unnamed 3GPP members, there is no allegation that any blocking actually **[**37]** occurred.

[12] The Court notes that even Plaintiffs' version of this conversion (which is taken as true) only states that the petition itself caused delay in Band 12. The comment from Gene Fong does not state, or even infer, that an "agreement" or a "conspiracy" between any individuals or entities, much less the Defendants to this action, could or would cause such delay.

[13] As noted in relation to the comment made by Gene Fong, the comment made by Edgar Fernandes states that the petition and related filings "gummed up the works." The comment does not state nor infer that any agreement or concerted action by any of Defendants caused or threatened such alleged delay.

world wide 3GPP organization "hesitant" to proceed with Band Class 12 development. The comments do nothing to suggest any "agreement" or conspiracy between Qualcomm, Motorola, and AT&T, much less an unlawful and speculative agreement that "had to have" initially occurred at some unknown time prior to the 2008 3GPP meeting and resulted in three multinational companies submitting numerous public and fraudulent technical papers and related filings to a standard setting organization and the FCC in order to harm Cellular South, a smaller regional carrier. [14]

Plaintiffs additionally cite evidence that Qualcomm initially allegedly announced it would not supply Band Class 12 chips. However, Qualcomm—only one month later— unilaterally and publically announced it would supply such chips. Plaintiffs have provided no factual evidence suggesting there was an agreement between Motorola, AT&T, and Qualcomm not to provide such chips, much less that it was agreed amongst the Defendants—one month later—to change course and supply Band Class 12 chips after all. In fact, both alleged announcements were made publically by Qualcomm. Nevertheless, it is not enough for Cellular South to state Qualcomm initially refused to supply Band Class 12 chips, as Cellular South cannot claim that Qualcomm had an obligation under federal ***antitrust law*** to engage **[**41]** in the immediate development of chips in order to satisfy Cellular South's needs as they related to Band Class 12. Far to the contrary; Cellular South has the burden to allege a plausible *agreement* between the Defendants to delay such Band Class 12 devices and standards. Neither the complaint and memorandum brief nor oral arguments proffered by Plaintiffs plausibly allege such an agreement.

C. Denial of Roaming

Plaintiffs' antitrust allegations also concern AT&T's alleged refusal to provide roaming services [15] access to Cellular **[*807]** South. Plaintiffs maintain that "[b]ased on prior knowledge and experience, AT&T will abuse its monopoly power over 4G-LTE nationwide data roaming in the Lower 700 MHz spectrum to delay or refuse to provide meaningful nationwide roaming." As the very language of Plaintiffs' complaint illustrates, Plaintiffs claims do not challenge any present conduct taken by AT&T. Instead, such a claim is based on allegations that AT&T might, at some point in the future, deny roaming access. In fact, Plaintiffs have yet to request roaming services from AT&T. When questioned about such allegations during oral argument, Plaintiffs maintained that they are asking the Court to "fence **[**42]** [AT&T] in" as it relates to roaming services. The Court finds that such speculative assertions about conduct that may—or may not—occur in the future is not a proper basis for seeking relief here. Just as conclusory allegations that an agreement "had to have" occurred do not plausibly state a claim for relief under Twombly, conclusory speculation regarding what could happen at some unknown date in the future also fails to plausibly state a violation of federal antitrust laws. See *Twombly, 550 U.S. at 555, 127 S. Ct. 1955*.

Additionally, the Court notes that when mobile wireless carriers must provide roaming access is already the subject of FCC regulation, see *47 C.F.R. § 20.12*, and Cellular South has not alleged that AT&T has presently failed to comply with its regulatory obligation to provide roaming access on commercially reasonable terms and conditions. Further, beyond this regulatory obligation, Plaintiffs have not alleged that AT&T has an independent duty under federal antitrust laws to provide roaming services to one particular regional **[**43]** company such as Cellular South. Indeed, such antitrust laws generally do not "'restrict the long recognized right of [a] trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom he will deal.'" *Verizon Commc'ns Inc. v. Law Offices of Curts V. Trinko, LLP, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (quoting *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919))*.

[14] Each of the comments **[**40]** allegedly made occurred after the petition for rulemaking and after each of the Defendants had already set forth in public filings its opposition on technical grounds to the regulatory relief that Cellular South and other carriers had requested. As Cellular South even recognizes, it was publically known that AT&T, Verizon, and numerous others in the industry opposed the regulatory relief requested by Cellular South.

[15] As noted *supra*, roaming services are network services that customers of Cellular South may utilize when outside of Cellular South's service area.

However, as the Trinko Court recognized, "'[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.'" *540 U.S. at 408, 124 S. Ct. 872* (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985))*. "Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate *§ 2*." *Trinko, 540 U.S. at 408, 124 S. Ct. 872*. The Supreme Court, however, has been "very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm." Id. The leading case for *§ 2* **[**44]** liability based on refusal to cooperate with a rival is Aspen Skiing, a case upon which all parties to this litigation understandably devote time to discussing.

The Aspen ski area consisted of four mountain areas. *Aspen Skiing, 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467*. The defendant in Aspen Skiing, who owned three of those areas, and the plaintiff, who owned the fourth, had cooperated for years in the issuance of a joint, multiple-day, all-area ski ticket. After repeatedly demanding an increased share of the proceeds, the defendant canceled the joint ticket. The plaintiff, concerned that skiers would bypass its mountain without some joint offering, tried a variety of increasingly desperate measures to re-create the joint ticket, even to **[*808]** the point of in effect offering to buy the defendant's tickets at retail price. *Id. at 593-94, 105 S. Ct. 2847*. The defendant refused even that. The Supreme Court upheld a jury verdict for the plaintiff, reasoning that "[t]he jury may well have concluded that [the defendant] elected to forgo these short-run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor." *Id. at 608, 105 S. Ct. 2847*.

As **[**45]** the Trinko Court expressly made clear, "Aspen Skiing is at or near the outer boundary of *§ 2* liability." *Trinko, 540 U.S. at 409, 124 S. Ct. 872*. The Court in Aspen Skiing found significance in the defendant's decision to cease participation in a cooperative venture. *Aspen Skiing, 472 U.S. at 608, 610-11, 105 S. Ct. 2847*. The Court found that the unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. Id. Similarly, the Court concluded that the defendant's unwillingness to renew the ticket even if compensated at retail price revealed a distinctly anticompetitive bent. Id. Moreover, in Aspen Skiing, the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher. Id.

In the case *sub judice*, the claims related to an alleged refusal to deal do not fit within the "limited exception" recognized by *Aspen Skiing*. *Trinko, 540 U.S. at 409, 124 S. Ct. 872*; see also *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1224-25 (10th Cir. 2009)* (quoting *Trinko, 540 U.S. at 409, 124 S. Ct. 872*) **[**46]** (emphasis in original) ("Aspen Skiing controls *only* where the monopolist's 'unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggest[s] a willingness to forsake short-term profits to achieve an anticompetitive end.'"); *In re Elevator Antitrust Litig., 502 F.3d 47, 53-54 (2nd Cir. 2007)* (per curiam) (noting that termination after prior course of dealing is "sole exception to the right of refusal to deal"). That is, a speculative and entirely conjectural refusal to provide roaming access to Cellular South at some unknown point in the future does not state a claim under federal antitrust laws in this case.

Along the same lines, Plaintiffs have not alleged how a speculative future dispute over roaming access with one particular regional carrier could give rise to competition as a whole. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* ("[A]ntitrust laws . . . were enacted for the protection of competition, not competitors.") (internal quotations omitted); *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)* ("The purpose of the [Sherman] Act is not **[**47]** to protect businesses from the working of the market; it is to protect the public from the failure of the market."). Accordingly, Plaintiffs' allegations concerning AT&T's alleged refusal to allow roaming services fail, as such arguments do not challenge any present conduct, provide concrete factual evidence that there is a threat of such conduct in the future, allege that AT&T has a duty under federal ***antitrust law*** to provide such access, or factually allege how some possible future refusal to provide roaming to Cellular South will harm competition.

D. Exclusive Agreements

Plaintiffs also base their antitrust claims on alleged exclusive dealing arrangements. That is, Plaintiffs proffer that, "on information and belief, Cellular South believes that AT&T has secured its 4G-LTE devices on an exclusionary basis." Plaintiffs contend that "[u]pon information **[*809]** and belief, AT&T has entered into formal and informal understandings with manufacturers that limit the ability of those manufacturers to provide 4G-LTE devices to smaller carriers such as Cellular South and Corr Wireless on a timely basis." Both Plaintiffs' brief in opposition to Defendants' motions to dismiss and the contentions made **[**48]** at oral argument on the allegations of exclusive agreements illustrate why Twombly's plausibility standard is crucial in antitrust cases, as well as other forms of litigation. It is clear from Plaintiffs' own admissions in this case that Plaintiffs cannot plausibly allege any such agreements are actually in existence. In fact, Plaintiffs have not named a single manufacturer that has entered into an exclusive agreement—or is considering entering into such an agreement—with AT&T.

Instead, Plaintiffs assert that the "existence and [ ] content" of such alleged agreements "are known (at least before the parties to this litigation have conducted discovery) solely to the defendants." As such a statement makes clear, Plaintiffs apparently seek to utilize discovery in order to establish whether such agreements exist. That is, Plaintiffs request this Court to allow enormously expensive and protracted antitrust discovery to proceed in order so that Plaintiffs may "discover" whether they have claim for purported exclusive dealing agreements between AT&T and such unnamed manufacturers. But, as the Court in Twombly made clear in applying the plausibility standard to a Sherman Act claim, "stating **[**49]** such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *550 U.S. at 556, 127 S. Ct. 1955*. Plaintiffs' complaint in this action provides no factual matter to infer an agreement "was made." Instead, Plaintiffs concede that their complaint rests on factual matter currently not known, and Plaintiffs' contention that "[w]hether such agreements exist now is a red herring" is directly contrary both to Twombly and basic pleading standards. Federal *Rule 8(a)(2)*— even before Twombly articulated its plausibility standard—requires Plaintiffs to set forth a "'plain statement' possess[ing] enough heft to 'sho[w] that the pleader is entitled to relief.'" Id. (quoting *Fed. R. Civ. P. 8(a)(2)*). That is, *Rule 8(a)(2)* does not state that plaintiffs may set forth a plain statement showing they might be entitled to relief if they can engage in discovery and such discovery reveals the existence and content of an agreement, and such agreement is unlawful and runs afoul of federal antitrust laws. If *Rule 8(a)(2)* allowed a pleader to overcome a motion to dismiss for failure to state a claim simply by stating that discovery could reveal such a claim, even **[**50]** though the "existence and content" of the claim is not yet known, Federal *Rule 12(b)(6)* would become utterly futile.

Antitrust litigation is expensive, see *Twombly, 550 U.S. at 558, 127 S. Ct. 1955*; *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528 n.17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."), [16] and while it does **[*810]** not require heightened fact pleading of specifics, there must be enough facts to "state a claim of relief that is plausible on its face." *Twombly, 550 U.S. at 570, 127 S. Ct. 1955*. Plaintiffs here have not alleged a plausible claim based on exclusive dealing by AT&T, and Plaintiffs' allegations that AT&T might, at some unknown time in the future, enter into such agreements is a naked speculation that the Court shall not presume is or will become true absent factual evidence to support such. Likewise, while Plaintiffs contend that such agreements—assuming they unlawfully exist—would harm competition, Plaintiffs' complaint fails to allege facts in support of this. That is, there is no allegation **[**51]** of the scope of this particular market, the number of potential manufacturers, or the terms and duration of such alleged exclusive agreements. Accordingly, the Court finds Plaintiffs' complaint fails to plausibly state a claim based on alleged exclusive dealing agreements entered into by AT&T.

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[16] See also *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)* ("[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint"); Note, Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation, *78 N.Y. U. L. Rev. 1887, 1898-1899 (2003)* (discussing the unusually high cost of discovery in antitrust cases); Manual for Complex Litigation, Fourth, § 30, p. 519 (2004) (describing extensive scope of discovery in antitrust cases); Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000) (reporting **[**52]** that discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed).

***Section 2* Claim**

Plaintiffs' complaint further alleges that AT&T is also liable under *Section 2* of the Sherman Act. Plaintiffs contend that, in assessing *Section 2* liability, "AT&T's conduct must be considered as a whole - including the creation of Band 17, the agreements with device manufacturers, and AT&T's pattern of conduct designed to deprive competitors of roaming access." *Section 2* of the Sherman Act establishes a cause of action against single firms that monopolize, or attempt to monopolize, or conspire to monopolize, "any part of the trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 2*; *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Discount Ctrs., Inc., 200 F.3d 307, 315 (5th Cir. 2000)*; *C.A.T. Indus. Disposal, Inc. v. Browning-Ferris Indus., Inc., 884 F.2d 209, 210 (5th Cir. 1989)*. The Court addresses all three causes of action, and concludes that Plaintiffs' complaint fails to state a claim against AT&T under *Section 2* of the Sherman Act.

A. Conspiracy to Monopolize

The Court begins by addressing Plaintiffs' conspiracy to monopolize claim. **[**53]** Such a claim can be established only by proof of (1) the existence of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the conspiracy; and (4) an effect upon a substantial amount of interstate commerce. *Stewart Glass & Mirror, Inc., 200 F.3d at 316*. Such proof is nonexistent here. As the Court's analysis under *Section 1* demonstrates, Plaintiffs have failed to plead sufficient plausible facts of any agreement or conspiracy, anticompetitive or otherwise, between the Defendants. Because a conspiracy to monopolize claim requires joint action, Plaintiffs' deficiencies are fatal to their *Section 2* claim. Accordingly, Plaintiffs' claims under *Section 2* of the Sherman Act for conspiracy to monopolize shall also be dismissed.

B. Attempted Monopolization and Monopolization

Next, the Court addresses the claims of attempted monopolization and monopolization. In order to prevail on an attempt to monopolize claim under *section 2*, a plaintiff must prove that (1) the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize and (3) a dangerous **[*811]** probability of achieving monopoly **[**54]** power. See *Salts v. Moore, 107 F. Supp. 2d 732, 743 (N.D. Miss. 2000)*. "Unfair or predatory conduct may be sufficient to prove the necessary intent to monopolize." Id. However, intent alone is insufficient to establish the dangerous probability of success, which requires inquiry into the relevant product and geographic market and the defendant's economic power in that market. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 113 S. Ct. 884, 122 L. Ed. 2d 247* (citing *Swift & Co. v. United States, 196 U.S. 375, 396, 25 S. Ct. 276, 49 L. Ed. 518 (1905)*). "Thus, Defendants may not be liable for attempted monopolization under *§ 2* of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize." *Salts, 107 F. Supp. 2d at 743*.

Plaintiffs' complaints against AT&T concern allegations of exclusion from the Lower A Block 700 MHz "competitive playing field." Plaintiffs base such allegations on "three different but related types of conduct." This conduct, as quoted by Plaintiffs, is as follows:

- By creating Band 17, AT&T has excluded smaller carriers seeking to use Lower A Block spectrum from competition by denying **[**55]** them access to Band 12 devices and roaming access. AT&T acted with the other Defendants so this conduct is actionable under *Section 1* and as a conspiracy to monopolize subject to *Section 2*. Wholly apart from its actions in concert with the other Defendants, AT&T's conduct in creating and using Band 17 unilaterally is actionable as actual and attempted monopolization under *Section 2*.
- In addition, AT&T has exacerbated the effect of the creation of Band 17 by continuing its prior practice of entering into exclusive arrangements with manufacturers of wireless devices and extending it to 4G-LTE devices, with the purpose and intent of denying smaller carriers access to devices.

• Finally, by creating Band 17, AT&T has now created at least a pretextual, and perhaps a real, incompatibility that provides AT&T an excuse for denying nationwide 4G-LTE roaming to carriers using Lower 700 MHz spectrum. Moreover, AT&T's exploitation of what is effectively a private wireless ecosystem within Band 17 may enable it to build additional technical incompatibility into its network over and above that required by the difference in frequencies used by Band 12 and Band 17. Even if the Court requires AT&T to **[**56]** eliminate all of those technological incompatibilities, AT&T may continue the denial of roaming that is now occurring by the next step in the plan — simply refusing to allow roaming on any feasible basis.

The Court has already addressed many of Plaintiffs' allegations under its Section 1 analysis. First, even accepting all factual allegations as true, the Court concludes that Plaintiffs have failed to state a plausible antitrust violation as it relates to the creation of Band Class 17. In fact, the only factual evidence presented as it relates to AT&T's actions regarding the creation of Band Class 17 is that AT&T supported Motorola's position on the issue during the 3GPP standard setting process. [17] There is no reference to any action AT&T has taken, other than its participation **[*812]** in the 3GPP, which would demonstrate anticompetitive conduct or a specific intent to monopolize. That is, there is no factual allegation that AT&T subverted or manipulated the 3GPP process to create or strengthen monopoly power. Instead, the facts alleged show that AT&T, as one company among hundreds, participated in the 3GPP process, which acted by a consensus without objection as to Band Class 17. Plaintiffs' **[**57]** amended complaint, which adds a new theory of purported intent driving AT&T's actions, does not cure this factual pleading deficiency.

In Plaintiffs' amended complaint, it is alleged that AT&T's "motives in creating Band 17 have become even clearer in light of two recent statements of AT&T's Chief Executive Officer." The statement Plaintiffs rely on is included in Plaintiffs' complaint and is as follows:

> Yeah, most of your other large economies — and you can go through it, whether it be Korea or the large economies in Europe, Japan — there are much fewer numbers of competitors in those markets, so therefore you have a more rational allocation of spectrum. But, you know, I don't know what the optimal number is; I'm not into industrial design or industrial planning. I think our policymakers, whether it be the Department of Justice or the FCC, has got to come to a realization that the current structure **[**58]** will not accommodate what they want to do in terms of growing these services and these capabilities. It is — obviously, the more competitors you have, the less efficient the allocation of the spectrum will be. It just — that's mathematical. And, obviously, you know, there's probably an optimal place in there; I think the markets are more than capable of kind of sorting that out. But it's going to have to change; whether they want it to change, or not, it will probably change. I don't think the market is going to accommodate the number of competitors that are currently in the marketplace. [18]

Based on this statement, Plaintiffs maintain that AT&T sought to develop Band Class 17 in order to devalue the Lower A Block, and then purchase it for a lower price years later. Thus, Plaintiffs maintain that AT&T defrauded both the FCC and the 3GPP in order to make the Lower A Block spectrum available for purchase at a cheaper price. Such an allegation is based on layer after layer of factual speculation as to make the theory utterly implausible.

• First, the Court would have to assume, without factual support, that AT&T intentionally did not bid on the Lower A Block spectrum during the FCC auction **[**59]** in 2008 but, instead, concocted and launched a conspiracy with Motorola and Qualcomm to allow other entities, including Verizon, to buy the spectrum.

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[17] As discussed *supra*, while Plaintiffs proffer, under their Section 1 claim, that an agreement between AT&T and Motorola "had to have" happened prior to Motorola's proposal in 2008 to create a separate band class, there is not a single factual allegation supporting such a conclusory assertion.

[18] See Transcript of Milken Institute 2012 Global Conference, April 29-May 2, 2012, Los Angeles, A Conversation With AT&T's Randall Stephenson (11:00 AM-Wednesday May 2, 2012, at p. 2).

• Second, the Court would have to infer, without factual support, that AT&T, purportedly with the help or assent of the other Defendants, had the intent to devalue this spectrum by submitting numerous and public fraudulent technical submissions and related filings to both 3GPP and the FCC.
• Third, the Court would have to assume, without factual support, that Motorola and Qualcomm, among others, joined in AT&T's concocted scheme to defraud both 3GPP and the FCC by also submitting fraudulent public submissions.

[*813] • Fourth, the Court would have to accept, without factual support, that Verizon, the largest holder of A Block spectrum and a major competitor of AT&T, simply acquiesced to the actions taken by AT&T at 3GPP that were, according to Plaintiffs, taken to devalue the very spectrum it had just purchased. [19]

• Fifth, the Court would have to assume, without factual support, that AT&T engaged in this conduct with the foresight that the Lower A Block spectrum would be devalued, thus allowing AT&T the ability to possibly purchase the spectrum **[**60]** from A Block carriers four years later for a lower price.
Such suggestions based on entirely unsupported factual predicates create only implausible speculations. Moreover, inserting into an amended complaint a factually unsupported yet possible "motive" on AT&T's part does not establish an antitrust violation.

As it relates to Plaintiffs' claims of exclusionary conduct, the Court has already addressed Plaintiffs' allegations regarding AT&T's alleged exclusive agreements with manufacturers. Other than providing a blanket assertion that such agreements exist and/or will exist at some unknown time in the future, Plaintiffs provide no facts plausibly supporting such an allegation. Plaintiffs' speculative claims concerning roaming access are also discussed in more detail above and they fall on the same footing as Plaintiffs' allegations related to exclusive dealing agreements. The complaint does **[**61]** not allege that AT&T has ever denied Cellular South the opportunity to roam, or that AT&T even has a duty under ***antitrust law***—as opposed to a regulatory obligation from the FCC—to allow Cellular South to do so.

Plaintiffs' claims of monopolization, as distinguished from attempted monopolization, also fail. As noted, *Section 2* of the Sherman Act declares that a firm shall not "monopolize" or "attempt to monopolize." It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *Trinko, 540 U.S. at 407, 124 S. Ct. 872*. "The mere possession of monopoly power . . . is not only not unlawful; it is an important element of the free-market system." *Trinko, 540 U.S. at 407, 124 S. Ct. 872*. As the Supreme Court has made clear, "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of **[**62]** anticompetitive *conduct.*" Id. (emphasis in original). Plaintiffs' complaint is void of plausible factual allegations illustrating anticompetitive conduct on the part of AT&T. While Plaintiffs' complaint details, in 146 pages, its allegations and the background leading up to this action, Twombly does not require longer complaints. *Twombly*, instead, requires that a complaint state enough facts, as opposed to conclusions, so that relief is plausible. That is, Plaintiffs must "nudge[] their claims across the line from conceivable to plausible." Plaintiffs have failed to do so here.

Conclusion

For the foregoing reasons, Defendants' motions to dismiss for failure to state a **[*814]** claim brought pursuant to *Federal Rule of Civil Procedure 12(b)(6)* shall be granted. Because the Court has concluded that such motions are due to be granted, Defendants' motions to dismiss pursuant to the doctrine of primary jurisdiction are deemed moot.

SO ORDERED, this the 31st day of August, 2012.

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[19] For clarification, the Court notes that Verizon did not object to the creation of Band Class 17 at 3GPP in 2008.

/s/ Sharion Aycock

U.S. DISTRICT JUDGE

Davis v. HSBC Bank

United States Court of Appeals for the Ninth Circuit

February 6, 2012, Argued and Submitted, Pasadena, California; August 31, 2012, Filed

No. 10-56488

Reporter

691 F.3d 1152 *; 2012 U.S. App. LEXIS 18503 **; 2012 WL 3804370

GARY DAVIS, an individual on behalf of himself, as Private Attorney General and on behalf of all others similarly, Plaintiff-Appellant, v. HSBC BANK NEVADA, N.A., a National Bank; BEST BUY CO., INC., a Minnesota corporation; BEST BUY STORES, L.P., a Virginia limited partnership; HSBC FINANCE CORPORATION, a Delaware corporation, Defendants-Appellees.

Subsequent History: As Corrected September 18, 2012.

Prior History: **[**1]** Appeal from the United States District Court for the Central District of California. D.C. No. 2:08-cv-05692-GHK-JC. George H. King, District Judge, Presiding.

Davis v. HSBC Bank Nev., N.A., 557 F.3d 1026, 2009 U.S. App. LEXIS 4043 (9th Cir. Cal., 2009)

Disposition: AFFIRMED.

Core Terms

advertisements, disclosure, annual fee, consumer, safe harbor, Regulation, unfair, quotation, marks, district court, card, alleges, Reward, online, documents, Terms, fraudulent, courts, disclosure document, authenticity, disclose, motion to dismiss, credit card, terms and conditions, business practice, misleading, concealed, unfair competition, deceptive, deceived

LexisNexis® Headnotes

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

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

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

An appellate court reviews de novo a district court's order granting a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*. To survive dismissal, the complaint must allege enough facts to state a claim to relief that is plausible on its face. Factual allegations must be enough to raise a right to relief above the speculative level. The appellate court must accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party. At the same time, the appellate court can affirm a *Rule 12(b)(6)* dismissal on any ground supported by the record, even if the district court did not rely on the ground.

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

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

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

The court's relevant case law has recognized consistently that the district court may, but is not required to incorporate documents by reference. A court "may consider" evidence that is incorporated by reference. The incorporation doctrine "permits" the court to consider extrinsic documents. A document may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim. Additionally, *Fed. R. Civ. P. 12(b)(6)* specifically gives courts the discretion to accept and consider extrinsic materials offered in connection with these motions, and to convert the motion to one for summary judgment when a party has notice that the district court may look beyond the pleadings. Thus, the court has held, for example, that a district court's decision to take judicial notice of extrinsic evidence shall be reviewed for abuse of discretion.

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

Evidence > Authentication > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

HN3[] **Motions to Dismiss, Failure to State Claim**

Under the "incorporation by reference" doctrine in the Ninth Circuit, a court may look beyond the pleadings without converting the *Fed. R. Civ. P. 12(b)(6)* motion into one for summary judgment. Specifically, courts may take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff's pleading. A court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under *Rule 12(b)(6)*.

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

Evidence > Authentication > General Overview

HN4[] **Motions to Dismiss, Failure to State Claim**

In the context of the "incorporation by reference" doctrine, whether or not a party had access to and reviewed the proffered documents is a matter unrelated to their authenticity — i.e., whether the documents are "what its proponent claims."

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

HN5[] **Motions to Dismiss, Failure to State Claim**

In the context of the "incorporation by reference" doctrine, a party's ongoing and substantial reliance on documents as a basis for his allegations substantially weakens his position.

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

Evidence > Authentication > General Overview

HN6[] **Motions to Dismiss, Failure to State Claim**

Where the party opposing incorporation by reference argues only that he did not review or have access to the proffered copies, this does not amount to a challenge to those documents' authenticity.

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

Evidence > Authentication > General Overview

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

HN7[] **Motions to Dismiss, Failure to State Claim**

Where an appellant failed to assert an objection as to authenticity before the district court, he has waived this objection on appeal.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

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

HN8[] **False Advertising, State Regulation**

California's False Advertising Law, *Cal. Bus. & Prof. Code § 17500 et seq.*, makes it unlawful for any person to induce the public to enter into any obligation based on a statement that is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. *Cal. Bus. & Prof. Code § 17500*. Whether an advertisement is "misleading" must be judged by the effect it would have on a reasonable consumer. Unless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer. A reasonable consumer is the ordinary consumer acting reasonably under the circumstances. To prevail under this standard, a plaintiff must show that members of the public are likely to be deceived by the advertisement. In applying this test, the court is mindful that whether a business practice is deceptive will usually be a question of fact not appropriate for decision on a motion to dismiss.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN9[] **False Advertising, State Regulation**

California courts construe *Cal. Bus. & Prof. Code § 17500* to extend beyond literal falsities. The statute has been interpreted broadly to encompass not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public. Consequently, even a perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under this section.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN10[] **False Advertising, State Regulation**

In the context of *Cal. Bus. & Prof. Code § 17500*, a representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN11[] **Actual Fraud, Elements**

The elements of a cause of action for fraud in California are: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

HN12[] **Nondisclosure, Elements**

Under California law, a claim for fraudulent concealment requires that: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.

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

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN13[] **Jury Trials, Province of Court & Jury**

In an action for fraud under California law, recovery shall be denied if the conduct of the plaintiff in relying upon a misrepresentation in the light of his own intelligence and information was manifestly unreasonable. To establish manifest unreasonableness, it must appear that the plaintiff put faith in representations that were preposterous or shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth. The court bears in mind, however, that whether reliance on a misrepresentation was reasonable is a question of fact for the jury, and may be decided as a matter of law only if the facts permit reasonable minds to come to just one conclusion.

Contracts Law > Defenses > Failure to Read Contract

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

HN14[] **Defenses, Failure to Read Contract**

California courts have held that where the parties to an agreement deal at arm's length, it is not reasonable to fail to read a contract before signing it. There can be no reasonable reliance where the plaintiff, dealing at arm's length, had a reasonable opportunity to discover the true terms of the contract but simply failed to read the contract before signing it.

Banking Law > Consumer Protection > Truth in Lending > General Overview

HN15[] **Consumer Protection, Truth in Lending**

The Truth in Lending Act and its implementing regulations require "absolute compliance" by creditors.

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

HN16[] **Trade Practices & Unfair Competition, State Regulation**

The California Supreme Court has explained the "safe harbor" doctrine in this way: Although the Unfair Competition Law's, *Cal. Bus. & Prof. Code § 17200 et seq.*, scope is sweeping, it is not unlimited. Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a "safe harbor," plaintiffs may not use the general unfair competition law to assault that harbor. Under the safe harbor doctrine, to forestall an action under the Unfair Competition Law, another provision must actually "bar" the action or clearly permit the conduct.

Banking Law > Consumer Protection > Truth in Lending > Disclosure

HN17[] **Truth in Lending, Disclosure**

The Truth in Lending Act requires that applications for an account under an open end consumer credit plan must include certain disclosures. *15 U.S.C.S. § 1637(c)*. Where the application is provided online and contains "specific information" about the terms and conditions, the application must disclose, among other things, any annual fee, other periodic fee, or membership fee imposed for the issuance or availability of a credit card, including any account maintenance fee or other charge imposed based on activity or inactivity for the account during the billing cycle. *15 U.S.C.S. § 1637(c)(1)(A)(ii)(I)*, *(c)(3)(B)(i)(I)*. The disclosure must appear "clearly and conspicuously" in the tabular format commonly referred to as the Schumer Box. *15 U.S.C.S. § 1632(a)*, *(c)(2)*.

Banking Law > Consumer Protection > Truth in Lending > Disclosure

HN18[] **Truth in Lending, Disclosure**

The Truth in Lending Act delegates to the Board of Governors of the Federal Reserve Bank (Board) the duty to implement the disclosure requirements and to prescribe regulations governing the "form and manner" of the disclosures. *15 U.S.C.S. § 1632(c)(1)(A)*. Accordingly, the Board has promulgated "Regulation Z," *12 C.F.R. § 226.1 et seq.*, which imposes "even more precise" disclosure requirements. Regulation Z requires lenders to provide specific disclosures on or with a solicitation or an application to open a credit or charge card account. *12 C.F.R. § 226.5a(a)*, *(b)*. In pertinent part, the lender must disclose any annual or other periodic fee that may be imposed for the issuance or availability of a credit or charge card, including any fee based on account activity or inactivity; how frequently it will be imposed; and the annualized amount of the fee. *12 C.F.R. § 226.5a(b)(2)(i)*.

Further, the disclosure shall be in the form of a table with headings, content, and format substantially similar to any of the applicable tables found in G-10 in appendix G to this part. *12 C.F.R. § 226.5a(a)(2)(i)*.

Banking Law > Consumer Protection > Truth in Lending > Disclosure

HN19[] **Truth in Lending, Disclosure**

In the context of the Truth in Lending Act, both the statute and the regulations clearly permit, and indeed require with equal force, the disclosure of any annual fee in an application for a credit card.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN20[] **Federal & State Interrelationships, Erie Doctrine**

In a case requiring a federal court to apply California law, the court must apply the law as it believes the California Supreme Court would apply it.

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

HN21[] **Trade Practices & Unfair Competition, State Regulation**

Regarding whether the Unfair Practices Act provides a safe harbor to shield certain business conduct from liability under the Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, while an express statutory provision permitting specific conduct would be sufficient to create a safe harbor, the Legislature's mere failure to prohibit an activity does not prevent a court from finding it unfair. If no statute provides a safe harbor, the court must decide whether the alleged misconduct violates the UCL. The court rejects the notion that this last passing reference established a bright-line rule that only statutes can create safe harbors. Instead, the court understands the California Supreme Court to be outlining its analysis in the context of the case before it, which concerned only a potential statutory safe harbor. Furthermore, even if the Legislature's mere failure to prohibit an activity does not create a safe harbor, this does not preclude the possibility that one might arise where an implementing regulation clearly permits that activity.

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

Business & Corporate Compliance > ... > Medical Treatment > Patient Confidentiality > Medical Records Under HIPAA

HN22[] **Trade Practices & Unfair Competition, State Regulation**

If HIPAA regulations intended to permit a defendant's conduct, it cannot be "unfair" under *Cal. Bus. & Prof. Code § 17200*.

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

HN23[] **Trade Practices & Unfair Competition, State Regulation**

California intermediate courts agree with the conclusion that regulations can create safe harbors. Most recently, the state appellate court discussed approvingly the United States Court of Appeals for the Ninth Circuit's decision in Alvarez v. Chevron Corp., where the Ninth Circuit held that California gasoline regulations created a safe harbor against the Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*

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

HN24[] **Trade Practices & Unfair Competition, State Regulation**

In the context of the Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, even if regulations cannot create safe harbors, federal statutes can.

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

Banking Law > Consumer Protection > Truth in Lending > Disclosure

HN25[] **Trade Practices & Unfair Competition, State Regulation**

A credit card issuer's compliance with the Truth in Lending Act's disclosure requirements provides a safe harbor with respect to a plaintiff's Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, claims based only on the sufficiency of the issuer's disclosures.

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

HN26[] **Trade Practices & Unfair Competition, State Regulation**

In the context of the Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, the California Supreme Court has explained that when specific legislation affirmatively permits conduct, courts may not simply impose their own notions of the day as to what is fair or unfair. In other words, the safe harbor doctrine protects specific conduct not because of its provenance, but because the content of the conduct itself is deemed "fair" as a matter of law.

Banking Law > Consumer Protection > Truth in Lending > Disclosure

HN27[] **Truth in Lending, Disclosure**

The Truth in Lending Act and Regulation Z, *12 C.F.R. § 226.1 et seq.*, expressly permit and require that online credit card applications disclose the annual fee in a prescribed manner.

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

HN28[] **Trade Practices & Unfair Competition, State Regulation**

In the context of the Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, it is the conduct, not the actor, that the safe harbor embraces. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. To forestall an action under the UCL, another provision must actually "bar" the action or clearly permit the conduct. Acts that the Legislature has determined to be lawful may not form the basis for an action under the UCL. Courts may not use the UCL to condemn actions the Legislature permits.

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

Banking Law > Consumer Protection > Truth in Lending > General Overview

HN29[] **Standards of Review, Rule Interpretation**

Under Regulation Z, *12 C.F.R. § 226.1 et seq.*, a "solicitation" is defined as an offer by the card issuer to open a credit or charge card account that does not require the consumer to complete an application. *12 C.F.R. § 226.5a(a)(1)*. In other words, a solicitation is an offer made to a consumer who is pre-approved to be a cardholder and therefore need not undergo the credit approval process to acquire the card. This reading comports with the agency's official staff interpretation, which explains that where a card issuer merely contacts a consumer who has not been preapproved for a card account about opening an account and invites the consumer to complete an application, such a contact does not meet the definition of solicitation, unless the contact itself includes an application form in a direct mailing, electronic communication or "take-one"; an oral application in a telephone contact initiated by the card issuer; or an application in an in-person contact initiated by the card issuer. Div. of Consumer and Cmty. Affairs of the Fed. Reserve Bd., Official Staff Comm., 12 C.F.R. pt. 226, supp. I, *§ 226.5a* cmt. 5a(a)(1). The court has been directed to treat these official staff interpretations of Regulation Z as controlling unless demonstrably irrational.

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

Banking Law > Consumer Protection > Truth in Lending > Disclosure

HN30[] **Trade Practices & Unfair Competition, State Regulation**

In the context of the Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, to fall under a safe harbor, the omission of an annual disclosure from advertisements must be expressly permitted by some other provision. It is not enough if the Truth in Lending Act (TILA) and Regulation Z, *12 C.F.R. § 226.1 et seq.*, merely fail to prohibit such an omission. However, the court has not located any provision in TILA, Regulation Z, or elsewhere that clearly permits the omission of the annual fee disclosure from such advertisements. Instead, Regulation Z only specifies that if the advertisement sets forth a specific credit term that "triggers" additional disclosure, such as a finance charge, then the advertisement shall also clearly and conspicuously set forth, among other items, the annual membership fee. *12 C.F.R. § 226.16(b)*; Official Staff Comm., 12 C.F.R. pt. 226, supp. I, *§ 226.16(b)(1)* cmt. 6. Thus, the court cannot conclude that some provision affirmatively permits the absence of the annual fee disclosure from the advertisements.

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

HN31[] **Trade Practices & Unfair Competition, State Regulation**

The Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, prohibits "unfair competition," which is broadly defined to include three varieties of unfair competition — acts or practices which are unlawful, or unfair, or fraudulent. Because the statute is written in the disjunctive, it is violated where a defendant's act or practice violates any of the foregoing prongs.

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

HN32[] **Trade Practices & Unfair Competition, State Regulation**

To be "unlawful" under the Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, the advertisements must violate another "borrowed" law. *Cal. Bus. & Prof. Code § 17200* borrows violations of other laws and treats them as unlawful practices that the UCL makes independently actionable. Virtually any state, federal or local law can serve as the predicate for an action under *§ 17200*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Banking Law > Types of Banks & Financial Institutions > National Banks > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN33[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

OCC regulation *12 C.F.R. § 7.4008(c)* states that a national bank shall not engage in unfair or deceptive practices within the meaning of § 5 of the Federal Trade Commission Act, *15 U.S.C.S. § 45(a)(1)*, and regulations promulgated thereunder in connection with loans made under this *§ 7.4008*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN34[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

A practice is deceptive under Federal Trade Commission Act § 5, *15 U.S.C.S. § 45*, *(1)* if it is likely to mislead consumers acting reasonably under the circumstances (2) in a way that is material.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN35[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

A practice is "unfair" under Federal Trade Commission Act § 5, *15 U.S.C.S. § 45*, only if it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. *15 U.S.C.S. § 45(n)*. In determining whether consumers' injuries were reasonably avoidable, courts look to whether the consumers had a free and informed choice. An injury is reasonably avoidable if consumers have reason to anticipate the impending harm and the means to avoid it, or if consumers are aware of, and are reasonably capable of pursuing, potential avenues toward mitigating the injury after the fact.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN36[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

In the context of *15 U.S.C.S. § 45*, the question is not whether subsequent mitigation was convenient or costless, but whether it was "reasonably possible."

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

HN37[] **Trade Practices & Unfair Competition, State Regulation**

A business practice is fraudulent under the Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, if members of the public are likely to be deceived. The challenged conduct is judged by the effect it would have on a reasonable consumer.

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

HN38[] **Trade Practices & Unfair Competition, State Regulation**

The Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, does not define the term "unfair." In fact, the proper definition of "unfair" conduct against consumers is currently in flux among California courts. Before Cel-Tech, courts held that "unfair" conduct occurs when that practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. Under this approach, courts must examine the practice's impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In short, this balancing test must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.

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

HN39[] **Trade Practices & Unfair Competition, State Regulation**

Regarding "unfair" conduct under the Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, Cel-Tech held that the balancing test was "too amorphous" and provided too little guidance to courts and businesses. Instead, the California Supreme Court held that "unfair" means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition. It further required that any finding of unfairness to competitors under *Cal. Bus. & Prof. Code § 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. However, the California Supreme Court expressly limited its new test to actions by competitors alleging anti-competitive practices, emphasizing that nothing the California Supreme Court says relates to actions by consumers or by competitors alleging other kinds of violations of the UCL such as "fraudulent" or "unlawful" business practices or "unfair, deceptive, untrue or misleading advertising."

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

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

HN40[] **Trade Practices & Unfair Competition, Federal Trade Commission Act**

Following Cel-Tech, appellate court opinions have been divided over whether the definition of "unfair" under the Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, as stated in Cel-Tech should apply to UCL actions brought by consumers. The California courts have not yet determined how to define "unfair" in the consumer action context after Cel-Tech. Some courts in California have extended the Cel-Tech definition to consumer actions, while others have applied the old balancing test, or borrowed the three-pronged test set forth in the Federal Trade Commission Act.

Banking Law > Consumer Protection > Truth in Lending > Disclosure

HN41[] **Truth in Lending, Disclosure**

Although Regulation Z, *12 C.F.R. § 226.1 et seq.*, does not expressly permit the omission of the annual fee disclosure from advertisements, it surely does not require such disclosure where the advertisement does not include specific terms that trigger additional disclosure. *12 C.F.R. § 226.16(b)*.

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

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

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

Civil Procedure > Appeals > Standards of Review > General Overview

HN42[] **State Regulation, Claims**

In the context of the Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, while the court is mindful that what is "unfair" is a question of fact, which involves an equitable weighing of all the circumstances, the court will affirm a judgment of dismissal where the complaint fails to allege facts showing that a business practice is unfair.

Counsel: Drew E. Pomerance (argued), Burton E. Falk, Roxborough, Pomerance, Nye & Adreani, LLP, Woodland Hills, California, for the plaintiff-appellant.

Stuart M. Richter (argued), Gregory S. Korman, Katten Muchin Rosenman LLP, Los Angeles, California, for the defendants-appellees.

Judges: Before: Dorothy W. Nelson, Diarmuid F. O'Scannlain, and N. Randy Smith, Circuit Judges. Opinion by Judge Nelson.

Opinion by: Dorothy W. Nelson

Opinion

[*1157] NELSON, Senior Circuit Judge:

Gary Davis appeals the district court's dismissal of his First Amended Complaint ("FAC"). In this putative class action, Davis alleges that HSBC Bank Nevada, N.A. ("HSBC") and Best Buy Stores, L.P. ("Best Buy") (collectively, "Defendants") defrauded California customers by offering credit cards without adequately disclosing that cardholders would be subject to an annual fee. We must decide whether the district court erred when it considered extrinsic evidence in deciding Defendants' motion to dismiss, and whether dismissal was proper under *Federal Rule of Civil Procedure 12(b)(6)*. We have jurisdiction **[**2]** pursuant to *28 U.S.C. § 1291*, and we affirm.

I. BACKGROUND[1]

Best Buy operates a national chain of retail stores that sells consumer electronics and related services. As part of its marketing platform, Best Buy implements the "Reward Zone Program," which allows customers to earn "Reward Certificates" for their purchases at Best Buy stores and redeem the certificates for discounts off **[*1158]** future purchases at such stores. At the same time, qualified consumers may also obtain a Reward Zone Program MasterCard ("RZMC"), a credit card that is issued by HSBC, a federally chartered bank regulated by the Office of the Comptroller of the Currency ("OCC"). The owner of an RZMC is automatically enrolled in the Reward Zone Program, and may earn reward certificates by using the card not only at Best Buy, but wherever MasterCard is accepted. Accordingly, Defendants advertised the RZMC as providing the cardholder, among other things, with the ability to obtain reward certificates as well as exclusive bonus point offers to earn rewards more rapidly.

In or around April 2007, Davis read a newspaper **[**3]** advertisement for the RZMC stating that applicants would receive $25 worth of reward certificates with their very first purchase using the card. Davis applied online to become an RZMC holder. Before applying, however, he read a webpage entitled "Program Rules — Best Buy Reward Zone." Further, while applying, Davis viewed a webpage entitled "FAQ's" (Frequently Asked Questions). Neither webpage mentioned an annual fee for using the RZMC.

At step two of the application process, Davis was directed to Best Buy's website labeled "Best Buy MBBC Consumer — Review the Important Account Credit Terms." In the upper-left corner of the page, in boldface font at least twice as large as the other text on the page, read the words "Terms and Conditions." Immediately below that, also in bold, was the subheading, "Important Terms of Your Best Buy Credit Account and Disclosure Statement" ("Important Terms & Disclosure Statement"). Underneath stood a scrolling rectangular text box, the contents of which were only partially visible because one would need to scroll down to view the whole statement. The visible portion commenced with the instruction, "Read the notice below carefully and print and/or download **[**4]** a copy for your records," followed by the text:

> The Reward Zone® program MasterCard® Privacy Statement HSBC BANK NEVADA, N.A.

Beneath the text box was a small check-box, which was adjacent to the following affirmation: "I agree to the Important Terms & Disclosure Statement of the Best Buy Reward Zone® MasterCard®." The FAC does not allege that Davis read the contents of the Important Terms and Disclosure Statement, but only alleges that he checked the box and completed his online application.

Davis's application was approved and shortly thereafter he received his new credit card in the mail. Also enclosed with the card were seven brochures, including a document entitled "Cardholder Agreement and Disclosure Statement," as well as one entitled "Additional Disclosure Statement." Upon reading the latter, Davis was "surprised" to learn that there was a $59 annual fee for use of the card. At that point, Davis admits, he revisited the terms and conditions website, scrolled down toward the end of the Important Terms & Disclosure Statement, and discovered the disclosure of a possible annual fee. Davis asked HSBC to waive the annual fee, but the bank

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[1] Because this appeal is from an order granting dismissal, the facts are taken from the FAC.

declined. Instead of canceling the card, Davis **[**5]** refused to activate it and continued to pay the annual fee for five years.

On July 28, 2008, Davis filed a class action complaint in state court against Defendants[2] on behalf of a putative class including all California residents who applied **[*1159]** for an RZMC between 2004 and 2008, and were charged an annual fee. He alleges that Defendants failed to disclose adequately the existence of the annual fee. The case was removed to federal court and then remanded to state court, triggering an appeal to this Court, which reversed the remand order. *Davis v. HSBC Bank Nevada, N.A., 557 F.3d 1026, 1030 (9th Cir. 2009)*. Upon return to federal court, Defendants filed a motion to dismiss, which the district court granted on federal preemption grounds. Davis was given 30 days to amend the complaint.

On September 25, 2009, Davis filed the FAC on the same theory that Defendants failed to disclose adequately whether RZMC owners would be charged an annual fee. The operative complaint alleges four causes of action **[**6]** for (1) false advertising in violation of the *California Business & Professions Code § 17500, et seq*. ("False Advertising Law" or "FAL"), as to Best Buy; (2) fraudulent concealment as to both Defendants; (3) "unlawful" business practices in violation of the *California Business & Professions Code § 17200, et seq*. ("Unfair Competition Law" or "UCL") as to HSBC; and (4) "unfair" and "fraudulent" business practices in violation of the UCL as to Best Buy.

Defendants filed a *Rule 12(b)(6)* motion to dismiss the FAC, along with a motion requesting judicial notice of three disclosure documents that were referenced in, but not attached to the FAC: (1) a copy of the complete Important Terms & Disclosure Statement contained in the scrolling box from the online application; (2) a copy of the Additional Disclosure Statement received in the mail; (3) a copy of the Cardmember Agreement and Disclosure Statement received in the mail (collectively, "disclosure documents").

The district court dismissed all four claims with prejudice on the ground that they fail to state claims entitling Davis to relief.

Davis timely appealed the dismissal of his claims.

II. STANDARD OF REVIEW

HN1[] We review de novo a district court's **[**7]** order granting a motion to dismiss pursuant to *Rule 12(b)(6)*. *Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1018 (9th Cir. 2011)*. To survive dismissal, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "'Factual allegations must be enough to raise a right to relief above the speculative level.'" *Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008)* (quoting *Bell Atl. Corp., 550 U.S. at 555*). We must accept "all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Rowe v. Educ. Credit Mgmt. Corp., 559 F.3d 1028, 1029-30 (9th Cir. 2009)* (quoting *Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005))*. At the same time, "we can affirm a 12(b)(6) dismissal on any ground supported by the record, even if the district court did not rely on the ground." *United States v. Corinthian Colls., 655 F.3d 984, 992 (9th Cir. 2011)* (internal citation and quotation marks omitted). As we sit in diversity, California law governs our analysis of the state law claims. *See, e.g., Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 338 (9th Cir. 1996)*.

We **[**8]** take this opportunity to clarify what standard of review applies to a district court's decision to incorporate by reference documents outside the pleadings. ***HN2***[] Our relevant case law has recognized consistently that the district court may, but is not required to incorporate documents by reference. *See, e.g., Marder v. Lopez, 450 F.3d 445, 448 **[*1160]** (9th Cir. 2006)* (observing that a court "may consider" evidence that is incorporated by

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[2] The original complaint also brought claims against Defendants' affiliates, HSBC Finance Corporation and Best Buy Co., Inc. However, Davis has since voluntarily dismissed these affiliates from the case.

reference); *Knievel, 393 F.3d at 1076* (noting that the incorporation doctrine "permits" the court to consider extrinsic documents); *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)* (explaining that a document "may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff 's claim"). Additionally, in *Hamilton Materials, Inc. v. Dow Chemical Corp., 494 F.3d 1203, 1207 (9th Cir. 2007)*, we explained that "*Federal Rule of Civil Procedure 12(b)(6)* specifically gives courts the discretion to accept and consider extrinsic materials offered in connection with these motions, and to convert the motion to one for summary judgment when a party has notice that the district court **[**9]** may look beyond the pleadings." Thus, we have held, for example, that a district court's decision to take judicial notice of extrinsic evidence shall be reviewed for abuse of discretion. *Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1016 n.9 (9th Cir. 2012)*. The foregoing leads us to conclude that the district court's decision to incorporate by reference documents into the complaint shall be reviewed for an abuse of discretion.

III. DISCUSSION

On appeal, Davis argues preliminarily that the district court erred when it considered three disclosure documents that were not attached to the FAC, and which were introduced by Defendants in support of their motion to dismiss the FAC. Davis next argues the district court's conclusion that none of the four claims plausibly suggested a right to relief was error. We address each argument in turn.

A. Disclosure Documents

The district court expressly incorporated by reference three disclosure documents for which Defendants sought judicial notice in support of their motion to dismiss. ***HN3***[] Under the "incorporation by reference" doctrine in this Circuit, "a court may look beyond the pleadings without converting the *Rule 12(b)(6)* motion into one for summary **[**10]** judgment." *Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002)*. Specifically, courts may take into account "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff 's] pleading." *Knievel, 393 F.3d at 1076* (alteration in original) (internal citation and quotation marks omitted). A court "may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under *Rule 12(b)(6)*." *Ritchie, 342 F.3d at 908*.

In this case, it is beyond dispute that the FAC alleges the contents of the disclosure documents. The complaint emphasizes that only part of the contents of the Important Terms & Disclosure Statement were visible without scrolling down, and that the portion which was visible concerned only the Privacy Statement. Davis also alleges in detail that the Cardmember Agreement and Disclosure Statement did not mention the annual fee, whereas the Additional Disclosure Statement did. Davis does not dispute these references. Instead, he argues that the district court mistakenly determined that he did not challenge the **[**11]** documents' authenticity. He claims he raised this issue when he stated in his opposition to the motion to dismiss: "There is no evidence that these documents were ever reviewed by Plaintiff or made available to Plaintiff." We disagree **[*1161]** and conclude that Davis did not challenge the documents' authenticity.

HN4[] Whether or not Davis had access to and reviewed the proffered documents is a matter unrelated to their authenticity — i.e., whether the documents are "what its proponent claims." *Las Vegas Sands, LLC v. Nehme, 632 F.3d 526, 533 (9th Cir. 2011)* (internal citation and quotation marks omitted); *see also* *Fed. R. Evid. 901* (noting that authentication concerns whether "the item is what the proponent claims it is"). Here, Defendants claimed that the documents are copies of the disclosure documents referenced in the FAC. Even assuming these copies were not personally reviewed by Davis, that does not address, much less cast doubt on, whether the copies are accurate reproductions of the original disclosure documents. Therefore, Davis's objection was insufficient to challenge the documents' authenticity.

Our conclusion is supported by the fact that Davis had ample opportunity in district court **[**12]** to argue that the disclosure documents were not authentic, yet failed to do so. Davis initially objected to the admission of the documents in his opposition to the motion to dismiss the original complaint, on the ground that the documents were not reviewed by or made available to him. In their reply brief, Defendants pointed out that Davis "never questions the[ ] authenticity" of the proffered documents. If Davis had wished to contest this assertion, he could have done so in his subsequent opposition to the motion to dismiss the FAC. Yet he merely repeated verbatim his prior protestation that the documents were not reviewed by, or made available to him.

Further, ***HN5***[] Davis's "ongoing and substantial reliance on the [documents] as a basis for [his] allegations substantially weakens [his] position." *In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999)*, *abrogated on other grounds as recognized in South Ferry LP, No. 2 v. Killinger, 542 F.3d 776, 784 (9th Cir. 2008)*. In particular, having based his allegations on the contents and appearance of the Important Terms & Disclosure Statement, "[Davis] can hardly complain when [Defendants] refer to the same information in **[**13]** their defense." *Id*.

We therefore hold that ***HN6***[] where the party opposing incorporation by reference argues only that he did not review or have access to the proffered copies, this does not amount to a challenge to those documents' authenticity. Accordingly, the district court properly incorporated the disclosure documents.

Further, we reject Davis's attempt to challenge the documents' authenticity for the first time on appeal. ***HN7***[] Because Davis failed to assert an objection as to authenticity before the district court, he has waived this objection on appeal. *See McGonigle v. Combs, 968 F.2d 810, 825 (9th Cir. 1992)*.

B. False Advertising Claim Against Best Buy

Turning to the claims in the FAC, Davis first alleges that Best Buy's advertising was misleading because it failed to disclose the existence of an annual fee. We agree with the district court that no reasonable consumer would have been deceived by these advertisements into thinking that no annual fee would be imposed.

HN8[] California's False Advertising Law makes it unlawful for any person to "induce the public to enter into any obligation" based on a statement that is "untrue or misleading, and which is known, or which by the exercise of reasonable **[**14]** care should be known, to be untrue or misleading." *Cal. Bus. & Prof. Code § 17500*. Whether an advertisement is "misleading" must be judged by the effect it would have on a reasonable consumer. *Williams, 552* ***[*1162]*** *F.3d at 938*; *see also Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 129 Cal. Rptr. 2d 486, 494 (Cal. Ct. App. 2003)* ("[U]nless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer."). A reasonable consumer is "the ordinary consumer acting reasonably under the circumstances." *Colgan v. Leatherman Tool Group, Inc., 135 Cal. App. 4th 663, 38 Cal. Rptr. 3d 36, 48 (Cal. Ct. App. 2006)* (internal citation and quotation marks omitted). To prevail under this standard, Davis must "'show that members of the public are likely to be deceived'" by the advertisement. *Williams, 552 F.3d at 938* (quoting *Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995))*. In applying this test, we are mindful that "whether a business practice is deceptive will usually be a question of fact not appropriate for decision on [a motion to dismiss]." *Id*.

As an initial matter, we note that Davis does not allege that Best Buy's advertisement contained any statements that were actually **[**15]** false. He does not suggest, for example, that the advertisement stated that the RZMC would be free, or that it would generate a profit. Nor can Davis be heard to argue that the advertisement's failure to mention the annual fee, standing alone, supports a reasonable belief that there was no annual fee. Given the advertisement's legible disclaimer that "[o]ther restrictions may apply," no reasonable consumer could have believed that if an annual fee was not mentioned, it must not exist.

This does not end our inquiry, however, because ***HN9***[] California courts construe *Section 17500* to extend beyond literal falsities. The statute has been interpreted broadly to encompass "'not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public."' *Williams, 552 F.3d at 938* (quoting *Kasky v. Nike, Inc., 27 Cal. 4th 939, 119 Cal. Rptr. 2d 296, 45 P.3d 243, 250 (Cal. 2002))*. Consequently, even "[a] perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under th[is] section[ ]." *Day v. AT&T Corp., 63 Cal. App. 4th 325, 74 Cal. Rptr. 2d 55, 60 (Cal. Ct. App. 1998)*.

Davis **[**16]** contends that the omission of the annual fee was misleading because the promise of reward certificates beginning with the first purchase implied that no offsetting charges would operate to "nullify" those rewards. This argument fails. While it is true that an annual fee could offset the cash value of any rewards, the same tradeoff exists with respect to numerous other costs of owning a credit card, such as monthly interest charges, late-payment fees, and over-the-limit fees. It defies common sense to claim that this tradeoff would lead a rational consumer to conclude that any credit card that offers rewards for spending must therefore not have associated costs of ownership.

Of course, it is possible that some consumers might hazard such an assumption. But ***HN10***[] "[a] representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." *Lavie, 129 Cal. Rptr. 2d at 494* (internal citation and quotation marks omitted). We therefore hold that Best Buy's advertising was not likely to deceive a reasonable consumer; the district court's dismissal of **[**17]** the false advertising claim was proper.

C. Fraudulent Concealment Claim Against Best Buy and HSBC

Davis next alleges that Defendants fraudulently concealed the existence **[*1163]** of an annual fee in its advertising and marketing. ***HN11***[] "The elements of a cause of action for fraud in California are: (a) misrepresentation (false representation, concealment, or *nondisclosure*); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Kearns v. Ford Motor Co., 567 F.3d 1120, 1126 (9th Cir. 2009)* (emphasis in original) (internal citation and quotation marks omitted).

In particular, ***HN12***[] a claim for fraudulent concealment requires that: "(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff **[**18]** must have sustained damage." *Marketing West, Inc. v. Sanyo Fisher (USA) Corp., 6 Cal. App. 4th 603, 7 Cal. Rptr. 2d 859, 864 (Cal. Ct. App. 1992)*. Without reaching the other factors, the district court determined that Davis's claim fails because he cannot demonstrate justifiable reliance on the purported failure to disclose the annual fee. We agree.

HN13[] In an action for fraud under California law, recovery shall be denied "[i]f the conduct of the plaintiff [in relying upon a misrepresentation] in the light of his own intelligence and information was manifestly unreasonable." *Broberg v. Guardian Life Ins. Co. of Am., 171 Cal. App. 4th 912, 90 Cal. Rptr. 3d 225, 232 (Cal. Ct. App. 2009)* (alterations in original) (internal citation and quotation marks omitted). To establish manifest unreasonableness, "[i]t must appear that [plaintiff] put faith in representations that were preposterous or shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth." *Id*. (internal quotation marks omitted). We bear in mind, however, that "[w]hether reliance [on a misrepresentation] was reasonable is a question of fact for the jury, and may be decided as a matter of law only if the **[**19]** facts permit reasonable minds to come to just one conclusion." *Id*. (alterations in original) (internal citation and quotation marks omitted).

Fatal to Davis's claim is the undisputed fact that he failed to read the Important Terms & Disclosure Statement before checking the box accepting these terms and conditions. ***HN14***[] California courts have held that where, as here, the parties to an agreement deal at arm's length, it is not reasonable to fail to read a contract before signing it. *See, e.g.,* *Desert Outdoor Adver. v. Super. Ct., 196 Cal. App. 4th 866, 127 Cal. Rptr. 3d 158, 163 (Cal. Ct. App. 2011)*; *Brown v. Wells Fargo Bank, NA, 168 Cal. App. 4th 938, 85 Cal. Rptr. 3d 817, 833-34 (Cal. Ct. App. 2008)* (explaining that there can be no reasonable reliance where the plaintiff, dealing at arm's length, "had a reasonable opportunity to discover the true terms of the contract" but simply failed to read the contract before signing it).

Moreover, the existence of the annual fee was "within [Davis's] observation" because he concedes that he was able to discover the annual fee when he revisited Best Buy's website and scrolled through the Important Terms & Disclosure Statement. However, by refusing to read this document before completing the application, **[**20]** and instead assuming the absence of an annual fee, Davis "put faith" in a purported representation that was "shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the **[*1164]** truth." *Broberg, 90 Cal. Rptr. 3d at 232* (internal quotation marks omitted). The only conclusion that reasonable minds may draw is that Davis's reliance on the purported misrepresentation was manifestly unreasonable.

Davis's reliance on *Barrer v. Chase Bank USA, N.A., 566 F.3d 883 (9th Cir. 2009)*, is misplaced. He argues that *Barrer* leaves open the possibility that, where a disclaimer concerning a particular term is buried in the fine print of an agreement, a reasonable consumer may still be deceived by advertising or marketing materials concerning that term. This is not what *Barrer* says. Rather, we held in *Barrer* that because a provision empowering the defendant to change the cardholder's annual percentage rate for any reason was "buried too deeply in the fine print," the defendant could not show, as a matter of law, that the credit card agreement made "clear and conspicuous" disclosure of that provision, as required by Regulation Z and the **[**21]** Truth in Lending Act ("TILA"). *Barrer, 566 F.3d at 892*. However, whether a disclosure satisfies the "clear and conspicuous" standard under the federal regulatory framework, *see* *Rubio v. Capital One Bank, 613 F.3d 1195, 1199 (9th Cir. 2010)* (noting that ***HN15***[] TILA and its implementing regulations require "absolute compliance" by creditors), is inapposite to whether, in the common law context, it was reasonable for Davis to rely on a purported representation when he did not read the terms and conditions to which he assented. Thus, we conclude that Davis cannot demonstrate reasonable reliance and that the district court did not err in dismissing his fraud claim.

D. UCL Claims Against HSBC and Best Buy

Davis's third and fourth causes of action each allege that Defendants made inadequate disclosure of the annual fee in their advertising and marketing in violation of the UCL. Defendants argue that because their annual fee disclosure complied with, and was required by, TILA and Regulation Z, their conduct falls within a "safe harbor" that is impervious to the UCL. We agree in part and conclude that while the disclosures in the online application fall within the safe harbor, the advertisements do **[**22]** not.

First, it is necessary to understand what constitutes a safe harbor, and whether TILA and Regulation Z can meet this test. ***HN16***[] The California Supreme Court has explained the "safe harbor" doctrine in this way:

> Although the unfair competition law's scope is sweeping, it is not unlimited . . . . Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a "safe harbor," plaintiffs may not use the general unfair competition law to assault that harbor.

Cel-Tech Comms. Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 541 (Cal. 1999). Under the safe harbor doctrine, "[t]o forestall an action under the unfair competition law, another provision must actually 'bar' the action or clearly permit the conduct." *Id*.

We conclude that TILA and Regulation Z provide such a safe harbor with respect to Defendants' disclosures in the online application. ***HN17***[] TILA requires that applications for an account under an open-end consumer credit plan must include certain disclosures. *15 U.S.C. § 1637(c)*. **[**23]** Where, as here, the application is provided online and contains "specific information" about the terms and conditions, the application must disclose, among other things, "[a]ny annual fee, other periodic fee, or membership **[*1165]** fee imposed for the issuance or availability of a credit card, including any account maintenance fee or other charge imposed based on activity or inactivity for the account during the billing cycle." *15 U.S.C. §§ 1637(c)(1)(A)(ii)(I)*, *(c)(3)(B)(i)(I)*. The disclosure must appear "clearly and conspicuously" in the tabular format commonly referred to as the Schumer Box. *15 U.S.C. §§ 1632(a)*, *(c)(2)*.

HN18[] TILA delegates to the Board of Governors of the Federal Reserve Bank ("Board") the duty to implement these disclosure requirements and to prescribe regulations governing the "form and manner" of the disclosures. *15 U.S.C. § 1632(c)(1)(A)*. Accordingly, the Board has promulgated "Regulation Z," *12 C.F.R. § 226.1 et seq*., which imposes "even more precise" disclosure requirements. *Virachack v. Univ. Ford, 410 F.3d 579, 581 (9th Cir. 2005)*. Regulation Z requires lenders to provide specific disclosures "on or with a solicitation or an application to open a credit or charge card **[**24]** account." *12 C.F.R. §§ 226.5a(a)*, *(b)*. In pertinent part, the lender must disclose "[a]ny annual or other periodic fee that may be imposed for the issuance or availability of a credit or charge card, including any fee based on account activity or inactivity; how frequently it will be imposed; and the annualized amount of the fee." *12 C.F.R. § 226.5a(b)(2)(i)*. Further, the disclosure "shall be in the form of a table with headings, content, and format substantially similar to any of the applicable tables found in G-10 in appendix G to this part." *12 C.F.R. § 226.5a(a)(2)(i)*.

We have no trouble concluding that TILA and Regulation Z create a safe harbor for Defendants' disclosure in the online application. ***HN19***[] Both the statute and the regulations clearly permit, and indeed require with equal force, the disclosure of any annual fee in an application for a credit card such as the RZMC. Our comparison of the online application's disclosure with the sample Schumer table in Appendix G demonstrates that Defendants' disclosure complied with these federal requirements. Indeed, Davis has not and cannot allege any violation under these provisions. Because the disclosure in the application clearly was **[**25]** permitted by federal law, it cannot serve as the basis for UCL liability.

Davis relies on *Krumme v. Mercury Insurance Co., 123 Cal. App. 4th 924, 20 Cal. Rptr. 3d 485, 497 n.5 (Cal. Ct. App. 2004)*, for the contention that only statutes, not regulations, can create "safe harbors." In *Krumme*, the state intermediate court rejected an insurance company's argument that California insurance regulations provided a safe harbor against UCL liability. *Id*. It reasoned that such materials "are not germane to our analysis" because the California Supreme Court in *Cel-Tech* "held that only statutes can create a safe harbor." *Id*. (citing *Cel-Tech, 973 P.2d at 541-42*).

We are not persuaded that *Cel-Tech* stands for this rule. *See Kairy v. SuperShuttle Int'l, 660 F.3d 1146, 1150 (9th Cir. 2011)* (***HN20***[] "In a case requiring a federal court to apply California law, the court must apply the law as it believes the California Supreme Court would apply it.") (internal quotation marks omitted). *Cel-Tech* involved ***HN21***[] whether the Unfair Practices Act provided a safe harbor to shield certain business conduct from liability under the UCL. The court explained that while an express statutory provision permitting specific conduct would be sufficient to create **[**26]** a safe harbor, "the Legislature's mere failure to prohibit an activity does not prevent a court from finding it unfair." *Cel-Tech, 973 P.2d at 542*. The court then stated that "[i]f no statute provides a safe harbor," the court must decide whether the alleged misconduct violates the UCL. *Id*.

[*1166] We reject the notion that this last passing reference established a bright-line rule that only statutes can create safe harbors. Instead, we understand the court to be outlining its analysis in the context of the case before it, which concerned only a potential statutory safe harbor. Furthermore, even if "the Legislature's mere failure to prohibit an activity" does not create a safe harbor, *id. at 542*, this does not preclude the possibility that one might arise where an implementing regulation clearly permits that activity. At bottom, the question of whether regulations can create safe harbors simply was not before the *Cel-Tech* Court, and therefore any intimation on this point was non-essential dicta.[3] Rather, we follow our previous decision in *Webb v. Smart Document Solutions, LLC*, where we

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[3] ***HN23***[] California intermediate courts agree with our conclusion that regulations can create safe harbors. Most recently, in *Lopez v. Nissan North America, Inc., 201 Cal. App. 4th 572, 135 Cal. Rptr. 3d 116, 132 (Cal. Ct. App. 2011)*, the state appellate

observed that *HN22*[] if HIPAA regulations "intended to permit [the defendant's] conduct, it cannot be 'unfair' under **[**27]** *Section 17200*." *499 F.3d 1078, 1082 (9th Cir. 2007)*. We therefore recognize that Regulation Z does provide a safe harbor for Defendants' disclosures in the online application.

We would add that *HN24*[] even if regulations could not create safe harbors, Davis does not deny that federal statutes can. Indeed, we have held as much. *See* *Hauk v. JP Morgan Chase Bank USA, 552 F.3d 1114, 1122 (9th Cir. 2009)* (holding that *HN25*[] a credit card issuer's "compliance with TILA's disclosure requirements provides a safe harbor with respect to [the plaintiff 's] UCL claims based only on the sufficiency of [the issuer's] disclosures"). **[**28]** In this case, to reiterate, TILA not only clearly permits the annual fee disclosure in the online application, it mandates it. *See* *15 U.S.C. §§ 1632(a)*, *(c)(2)*; *15 U.S.C. §§ 1637(c)(1)(A)(ii)(I)*, *(c)(3)(B)(i)(I)*. At a minimum, therefore, Defendants' disclosure draws protection from a safe harbor under TILA.

Davis next objects that any safe harbor under TILA could not protect Best Buy because TILA does not govern retailers such as Best Buy. Even if TILA does not govern Best Buy, which we need not decide, Davis's argument misses the mark because the safe harbor doctrine immunizes conduct, not entities. In *Cel-Tech*, *HN26*[] the California Supreme Court explained that when specific legislation affirmatively permits conduct, "[c]ourts may not simply impose their own notions of the day as to what is fair or unfair." *973 P.2d at 541*. In other words, the safe harbor doctrine protects specific conduct not because of its provenance, but because the content of the conduct itself is deemed "fair" as a matter of law.[4] Here, **[*1167]** *HN27*[] TILA and Regulation Z expressly permit and require that online credit card applications disclose the annual fee in a prescribed manner. Best Buy operated the online application process **[**29]** in compliance with these rules, and therefore its conduct cannot give rise to UCL liability.

We are not convinced, however, that Defendants' advertisements may be swept into the ambit of this safe harbor. Unlike the online application, it is undisputed that the advertisements lacked any disclosure of the annual fee. Thus, to qualify for a safe harbor, we must be satisfied that the omission of the annual fee is permitted by some statute or regulation.

Taking the contrary view, Davis **[**30]** contends that the advertisements were "solicitations" that violated TILA and Regulation Z because they failed to disclose the annual fee. However, this argument rests on a misunderstanding of the definition of "solicitation." *HN29*[] Under Regulation Z, a "solicitation" is defined as "an offer by the card issuer to open a credit or charge card account that does not require the consumer to complete an application." *12 C.F.R. § 226.5a(a)(1)*. In other words, a solicitation is an offer made to a consumer who is pre-approved to be a cardholder and therefore need not undergo the credit approval process to acquire the card.

This reading comports with the agency's official staff interpretation, which explains that where a card issuer merely "contact[s] a consumer who has not been preapproved for a card account about opening an account . . . and invite[s] the consumer to complete an application[, s]uch a contact does not meet the definition of *solicitation*, . . . unless the contact itself includes an application form in a direct mailing, electronic communication or 'take-one'; an oral application in a telephone contact initiated by the card issuer; or an application in an in-person contact initiated **[**31]** by the card issuer." Div. of Consumer and Cmty. Affairs of the Fed. Reserve Bd., Official Staff Comm., 12 C.F.R. Pt. 226, Supp. I, *§ 226.5a cmt. 5a(a)(1)*; *see* *Johnson v. Wells Fargo Home Mortg., Inc., 635 F.3d 401, 417*

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court discussed approvingly our decision in *Alvarez v. Chevron Corp., 656 F.3d 925, 933 (9th Cir. 2011)*, where we held that California gasoline regulations created a safe harbor against the UCL. *See also* *Byars v. SCME Mortg. Bankers, Inc., 109 Cal. App. 4th 1134, 135 Cal. Rptr. 2d 796, 805-806 (Cal. Ct. App. 2003)* (noting that HUD policy statement created safe harbor for mortgage lender's conduct).

[4] Consistent with this view, *Cel-Tech* repeatedly explains that *HN28*[] it is the conduct, not the actor, that the safe harbor embraces. *See also* *973 P.2d at 541* ("If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination."); *id.* ("To forestall an action under the unfair competition law, another provision must actually 'bar' the action or clearly permit the conduct."); *id. at 541-42* ("Acts that the Legislature has determined to be lawful may not form the basis for an action under the unfair competition law . . . ."); *id. at 542* ("[C]ourts may not use the unfair competition law to condemn actions the Legislature permits.").

(9th Cir. 2011) ("We have been directed to treat these official staff interpretations of Regulation Z as controlling unless demonstrably irrational.") (internal quotation marks and alteration omitted). Here, Davis does not allege that he viewed any advertisement offering to extend him credit without requiring an application. In fact, he concedes that he was required to and did submit an application before he was approved for the RZMC. Thus, the advertisements were not solicitations lacking the requisite disclosure.

Nevertheless, ***HN30***[] to fall under a safe harbor, the omission of the annual disclosure from Defendants' advertisements must be expressly permitted by some other provision. It is not enough if TILA and Regulation Z merely fail to prohibit such an omission. *Cel-Tech, 973 P.2d at 542*. However, the parties have not provided, and we have not located, any provision in TILA, Regulation Z, or elsewhere that clearly permits the omission of the annual fee disclosure from such **[**32]** advertisements. Instead, Regulation Z only specifies that if the advertisement sets forth a specific credit term that "triggers" additional disclosure, such as a finance charge, then the advertisement "shall also clearly and conspicuously set forth," among other items, the annual membership fee. *See* *12 C.F.R. § 226.16(b)*; Official Staff Comm., 12 C.F.R. Pt. 226, Supp. I, § 226.16(b)(1) cmt. 6. Thus, we cannot conclude that some provision affirmatively permits the absence of the annual fee disclosure from the advertisements.

Because no authority provides a safe harbor, we must decide whether Davis **[*1168]** adequately has alleged that Defendants' advertisements violate the UCL. *Cel-Tech, 973 P.2d at 542-43*. ***HN31***[] The UCL prohibits "unfair competition," which is broadly defined to include "three varieties of unfair competition — acts or practices which are unlawful, or unfair, or fraudulent." *Id. at 540*. Because the statute is written in the disjunctive, it is violated where a defendant's act or practice violates any of the foregoing prongs. *See* *Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 731 (9th Cir. 2007)*. Davis claims that HSBC violated the "unlawful" prong, and that Best Buy violated the **[**33]** "fraudulent" and "unfair" prongs of the UCL. We address each contention in turn.

1. "Unlawful" Business Practices Claim Against HSBC

HN32[] To be "unlawful" under the UCL, the advertisements must violate another "borrowed" law. *Cel-Tech, 973 P.2d at 539-40* ("[S]ection 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.") (internal quotation marks omitted). "[V]irtually any state, federal or local law can serve as the predicate for an action under *section 17200*." *People ex rel. Bill Lockyer v. Fremont Life Ins. Co., 104 Cal. App. 4th 508, 128 Cal. Rptr. 2d 463, 469 (Cal. Ct. App. 2002)* (internal citation and quotation marks omitted). In this case, Davis alleges that the advertisements violated ***HN33***[] OCC regulation *12 C.F.R. § 7.4008(c)*, which states that "[a] national bank shall not engage in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act, *15 U.S.C. [§] 45(a)(1)*, and regulations promulgated thereunder in connection with loans made under this *§ 7.4008*." Defendants admit that the RZMC credit card loan was made pursuant to *12 C.F.R. § 7.4008*, so the question is whether their conduct was unfair **[**34]** or deceptive.[5]

HN34[] A practice is deceptive under section 5 "(1) if it is likely to mislead consumers acting reasonably under the circumstances (2) in a way that is material." *FTC v. Cyberspace.com LLC, 453 F.3d 1196, 1199 (9th Cir. 2006)*. For the same reasons discussed above with respect to the FAL claim, we reject the argument that the advertisements were deceptive under section 5. No reasonable consumer would have been deceived by these advertisements into thinking that no annual fee would be imposed.

Nor were the advertisements unfair. ***HN35***[] A practice is "unfair" under *section 5* only if **[**35]** it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." *15 U.S.C. § 45(n)*. "In determining whether

[5] Davis also argues that the disclosure of the annual fee in the online application was "unfair and deceptive" in violation of the OCC regulation and was therefore "unlawful" under the UCL. However, because the safe harbor protects the application, this basis for the UCL claim must fail. While we are sensitive that there may be some facial tension between the TILA safe harbor and the OCC regulation in this situation, we need not address it here because (1) the California Supreme Court has not indicated that such a tension thwarts the safe harbor, and (2) in any event, the parties have not raised this issue.

consumers' injuries were reasonably avoidable, courts look to whether the consumers had a free and informed choice." *FTC v. Neovi, Inc., 604 F.3d 1150, 1158 (9th Cir. 2010)*. An injury is reasonably avoidable if consumers "have reason to anticipate the impending harm and the means to avoid it," or if consumers are aware of, and are reasonably capable of pursuing, potential avenues toward mitigating **[*1169]** the injury after the fact. *Orkin Exterminating Co., Inc. v. FTC, 849 F.2d 1354, 1365-66 (11th Cir. 1988)* (cited approvingly in *Neovi, 604 F.3d at 1158*).

Davis's alleged injury was certainly avoidable before he completed the application for the RZMC. The advertisement contained the disclaimer, "other restrictions may apply," which would have motivated a reasonable consumer to consult the terms and conditions. If that were not enough, the online application used boldface and oversized font to alert Davis to the Important Terms & Disclosure Statement, **[**36]** instructing him to "read the notice below carefully." The disclaimer and the terms and conditions were enough to give a reasonable consumer "reason to anticipate" the possibility of fees. Additionally, the fact that Davis was required to check the box indicating his assent before completing the application meant that he could have aborted his application upon reading the terms and conditions. This provided "the means to avoid" the alleged harm.

The annual fee was also avoidable after the account was opened. Pursuant to the Cardmember Agreement, which Davis admits he received after completing the application, the annual fee was completely refundable if Davis closed his account within 90 days without using the card. Davis refused to do so, citing the negative impact it would have on his credit score. ***HN36***[] The question, however, is not whether subsequent mitigation was convenient or costless, but whether it was "reasonably possible." *Orkin, 849 F.2d at 1365*. Under these circumstances, we conclude that Davis reasonably could have avoided the annual fee, and therefore that the advertisements were not unfair under section 5. Accordingly, the advertisements were not "unlawful" under the UCL.

2. "Fraudulent" [**37] and "Unfair" Business Practices Claim Against Best Buy

HN37[] A business practice is fraudulent under the UCL if members of the public are likely to be deceived. *Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal. App. 4th 638, 72 Cal. Rptr. 3d 903, 909 (Cal. Ct. App. 2008)*. The challenged conduct "is judged by the effect it would have on a reasonable consumer." *Id*. (internal citation and quotation marks omitted). For the same reasons that we rejected Davis's FAL claim, we also conclude that the advertisements were not fraudulent under the UCL.

Last, we turn to Davis's contention that Best Buy's advertisements were "unfair" under the UCL. ***HN38***[] The UCL does not define the term "unfair." In fact, the proper definition of "unfair" conduct against consumers "is currently in flux" among California courts. *Lozano, 504 F.3d at 735*. Before *Cel-Tech*, courts held that "unfair" conduct occurs when that practice "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 85 Cal. Rptr. 2d 301, 316 (Cal. Ct. App. 1999)* (internal quotation marks omitted). Under this approach, courts must examine the practice's **[**38]** "impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer." *Id*. (internal quotation marks omitted). In short, this balancing test must weigh "the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Id*. (internal quotation marks omitted).

HN39[] *Cel-Tech* held that the balancing test was "too amorphous" and "provide[d] too little guidance to courts and businesses." *973 P.2d at 543*. Instead, the court held that "unfair" means **[*1170]** "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id. at 544*. It further required that "any finding of unfairness to competitors under *section 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Id*. However, the court expressly limited its new test to actions by competitors alleging anti-competitive practices, emphasizing that "[n]othing we say relates to actions by consumers or by competitors alleging other **[**39]** kinds of violations of the unfair competition law such as 'fraudulent' or 'unlawful' business practices or 'unfair, deceptive, untrue or misleading advertising.'" *Id. at 544 n.12*.

HN40[] "Following *Cel-Tech*, appellate court opinions have been divided over whether the definition of 'unfair' under the UCL as stated in *Cel-Tech* should apply to UCL actions brought by consumers." *Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 108 Cal. Rptr. 3d 682, 695 (Cal. Ct. App. 2010)* (internal citation and quotation marks omitted); *see also* *Lozano, 504 F.3d at 736* ("The California courts have not yet determined how to define 'unfair' in the *consumer* action context after *Cel-Tech*."). As we previously have summarized, some courts in California have extended the *Cel-Tech* definition to consumer actions, while others have applied the old balancing test, or borrowed the three-pronged test set forth in the FTC Act. *Lozano, 504 F.3d at 736*; *see also* *Durell, 108 Cal. Rptr. 3d at 695-96* (describing split of authority).

The question then is whether we are to apply the new definition in *Cel-Tech*, or to follow the former balancing test under *South Bay*. *504 F.3d at 736*. In this regard, the district court erred when it held that Davis could not **[**40]** invoke the unfairness prong at all. The proper inquiry is what definition of "unfair" must apply to Davis's claim.

We need not resolve that question here, however, because Davis fails to state a claim under either definition. With respect to *Cel-Tech*, Davis advances no factual allegations to support the claim that the omission of the annual fee in Best Buy's advertisements threatens to violate the letter, policy, or spirit of the antitrust laws, or that it harms competition. As for the balancing test, we begin by noting that nothing in the FAC supports the conclusion that the advertisements were against public policy, immoral, unethical, oppressive, or unscrupulous. Quite the opposite, the advertisements warned that "other restrictions might apply," and the subsequent application process clearly disclosed the annual fee. More than this, Davis had the opportunity to cancel the account for a full refund within 90 days.

Because Davis failed to read the terms and conditions before agreeing to them, and because he refused to cancel his card within 90 days, even when viewing the facts in Davis's favor, we must conclude that any harm he suffered was the product of his own behavior, not the **[**41]** advertisements. As a result, we cannot say that the FAC alleges "above the speculative level" that the advertisements themselves caused any harm. *Bell Atl. Corp., 550 U.S. at 555*. Meanwhile, any harm is offset by Best Buy's strong justification for publishing the advertisement. Specifically, ***HN41***[] although Regulation Z does not expressly permit the omission of the annual fee disclosure from advertisements, it surely does not require such disclosure where, as here, the advertisement does not include specific terms that trigger additional disclosure. *12 C.F.R. § 226.16(b)*. Therefore, Best Buy justifiably relied on **[*1171]** this federal guidance in circulating the advertisements. ***HN42***[] While we are mindful that what is "unfair" is a question of fact, "which involves an equitable weighing of all the circumstances, . . . we will affirm a judgment of dismissal where the complaint fails to allege facts showing that a business practice is unfair." *Bardin v. Daimlerchrysler Corp., 136 Cal. App. 4th 1255, 39 Cal. Rptr. 3d 634, 644 (Cal. Ct. App. 2006)*. Davis fails to plead facts to show that Best Buy engaged in an unfair business practice as defined in *South Bay*.

In sum, Defendants' online application is protected by the safe harbor doctrine. **[**42]** As for Defendants' advertisements, Davis fails to allege that they were "unlawful" as they were not deceptive and their alleged harm was reasonably avoidable. Davis also fails to allege that the advertisements were "fraudulent" or "unfair." Therefore, the district court properly dismissed the UCL claims in their entirety.[6]

IV. CONCLUSION

The district court properly incorporated the disclosure documents, and we affirm its order dismissing Davis's complaint with prejudice.

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[6] Although Defendants argue on appeal, as they did at the district court, that Davis's UCL claims are preempted by federal law, we need not reach that issue because we conclude that Davis has failed to state a claim under the UCL.

AFFIRMED.

Williamson v. Apple, Inc.

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

September 4, 2012, Decided; September 4, 2012, Filed

CASE NO. 5:11-cv-00377 EJD

Reporter
2012 U.S. Dist. LEXIS 125368 *; 2012 WL 3835104

BETSALEL WILLIAMSON, individually and on behalf of all others similarly situated, Plaintiff(s), v. APPLE, INC., Defendant(s).

Core Terms

iPhone, glass, consumer, cause of action, allegations, housing, phone, warranty, unfair, omissions, marketing materials, leave to amend, practices, dropped, unjust enrichment, misrepresentations, misleading, circumstances, cracked, reasons, representations, resistance, contends, disclose, argues, express warranty, advertised, fraudulent, smartphone, marketing

Counsel: **[*1]** For Betsalel Williamson, individually and on behalf of all others similarly situated, Plaintiff: Elaine T. Byszewski, LEAD ATTORNEY, Hagens Berman Sobol Shaprio LLP, Los Angeles, CA; Lee M. Gordon, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Pasadena, CA; Steve W. Berman, LEAD ATTORNEY, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio R. Zirpoli, Melissa Conwell Shapiro, R Alexander Saveri, Saveri and Saveri Inc, San Francisco, CA; Peter E. Borkon, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Apple, Inc., Defendant: Andrew David Muhlbach, LEAD ATTORNEY, Morrison & Foerster, San Francisco, CA; Alexei Klestoff, Morrison & Foerster LLP, San Francisco, CA.

Judges: EDWARD J. DAVILA, United States District Judge.

Opinion by: EDWARD J. DAVILA

Opinion

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

[Docket Item No(s). 25]

Defendant Apple, Inc. ("Apple") presently moves for an order dismissing the First Amended Class Action Complaint ("FAC") filed by Plaintiff Betsalel Williamson ("Plaintiff"). See Docket Item No. 25. Apple's motion will be granted for the reasons stated below.

I. FACTUAL BACKGROUND

A. The Product

Among other products, Apple designs, manufactures and markets smartphones. See FAC, Docket **[*2]** Item No. 18, at ¶¶ 5, 6. On June 7, 2010, Apple introduced a new product in its iPhone smartphone line, the iPhone 4, at the World Wide Developers Conference ("WWDC") in San Francisco. See id., at ¶¶ 7, 8. The iPhone 4 is 3.5 inches long, weighs 4.8 ounces, and is encased in aluminosilicate glass. See id., at ¶ 8. The glass feature of the iPhone 4 differed from its predecessor versions, which had back panels made of aluminum and plastic. See id., at ¶ 7.

Apple made available on its website a video of the iPhone 4's introduction. See id., at ¶ 8. The FAC alleges that during this introduction, Steve Jobs ("Jobs"), the former CEO of Apple, made a number of statements describing the iPhone 4:

- Jobs says it is "beyond a doubt this is one of the most beautiful and precise things we've ever made."
- Jobs goes on to state that the "precision of which this is made is beyond any consumer product we've ever seen."
- Jobs "called attention" to the glass paneling on the iPhone 4, stating that Apple utilized glass on the "front and back for optical quality and scratch resistance."

The FAC also alleges that Jonathan Ive, Apple's Senior Vice President of Industrial Design, referred to the iPhone 4's glass **[*3]** housing as "comparable in strength to sapphire crystal" and 30 times harder than plastic at the WWDC. See id., at ¶ 9. A video demonstration of the glass' strength, where a portion of the glass used on the iPhone 4 was bent to show that it can withstand bending of up to 30 degrees without cracking or breaking, was also included on Apple's website and widely reported by the media. See id.

According to the FAC, Apple has used the strength of the iPhone 4's glass housing as a marketing point. See id., at ¶ 10. Apple has described the glass as "the same type of glass used in the windshields of helicopters and high-speed trains." See id. Apple also markets the glass as "20 times stiffer and 30 times harder than plastic . . . ultradurable and more scratch resistant than ever." See id. Apple produced commercials available on national television and its own website showing the iPhone 4 being used without a protective cover. See id., at ¶ 11.

2. The Alleged Defect

The FAC alleges that within the first week of its release for sale, consumers and technology critics began to comment that the iPhone 4's glass housing was quickly scarred and broken by normal, foreseeable use despite Apple's representations **[*4]** that the glass was ultradurable. See id., at ¶¶ 14-17. A third-party phone insurer released a study finding that the glass housing on the iPhone 4 breaks at rate 82% higher than those reported for a prior version of the iPhone. See id., at ¶ 26. Broken or shattered glass renders the iPhone 4 useless. See id., at ¶ 19.

Consumers who purchased the iPhone 4 were charged $199 to replace the product if the glass housing was broken or $29 to replace a cracked glass panel. See id., at ¶ 33. Plaintiff contends these charges are a breach of the warranty Apple issues with the iPhone 4. See id., at ¶ 40.

3. The Plaintiff in this Case

Plaintiff purchased an iPhone 4 on October 26, 2010, for $319.93, after viewing various marketing materials describing the strength and durability of the device, including those attributed to Jobs as described above. See id., at ¶ 4. These marketing materials influenced Plaintiff's decision to purchase the iPhone 4. See id.

Approximately two days after purchasing his iPhone 4, Plaintiff's device fell from the arm of a chair which resulted in spider cracks across the back glass panel. See id. Plaintiff was required to pay $29 for a replacement panel. See id.

Plaintiff **[*5]** alleges he would not have purchased the iPhone 4 if he knew that the glass housing on the phone was more susceptible to cracking during normal and foreseeable usage than earlier iPhone versions. See id. He now seeks to represent a class of consumers who purchased an iPhone 4 in the United States.

II. LEGAL STANDARD

The legal standard governing Apple's motion is well-established and involves three common rules of procedure. The first is *Federal Rule of Civil Procedure 8(a)*, which requires a plaintiff to plead each claim with sufficient specificity to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Com. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929, (2007)* (internal quotations omitted). *Rule 8* works in tandem with the next applicable rule, *Federal Rule of Civil Procedure 12(b)(6)*. A complaint which falls short of the *Rule 8(a)* standard may be dismissed if it fails to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. "Dismissal under *Rule 12(b)(6)* is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008)*. **[*6]** The factual allegations "must be enough to raise a right to relief above the speculative level" such that the claim "is plausible on its face." *Twombly, 550 U.S. at 556-57*.

The third relevant rule requires more detailed allegations for causes of action based in fraud. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. Proc. 9(b)*. These allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)*. To that end, the allegations must contain "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)*. In other words, claims of fraudulent conduct must generally contain more specific facts than is necessary to support other causes of action.

Mechanically speaking, the court generally "may not consider any material beyond the pleadings" when **[*7]** deciding whether to grant a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990)*. The court must generally accept as true all "well-pleaded factual allegations." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)*. The court must also construe the alleged facts in the light most favorable to the plaintiff. *Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1988)*. There are notable exceptions to these guidelines, however. The court may consider material submitted as part of the complaint or relied upon in the complaint, and may also consider material subject to judicial notice. See *Lee v. City of Los Angeles, 250 F.3d 668, 688-69 (9th Cir. 2001)*. [1] In addition, "courts are not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly, 550 U.S. at 555*.

III. DISCUSSION

The FAC contains seven causes of action: (1) breach of express warranty in violation of *California Commercial Code § 2313*; (2) breach of implied warranty in violation of *California Commercial Code § 2314*; **[*8]** (3) violation of the Magnuson-Moss Warranty Act, *15 U.S.C. § 2301 et. seq.*; (4) violation of the Consumers Legal Remedies Act ("CLRA"), *California Business and Professions Code § 1750 et. seq.*; (5) violation of California's False Advertising Law ("FAL"), *California Business and Professions Code § 17500*; (5) violation of California's Unfair Competition Law ("UCL"), *California Business and Professions Code § 17200*, and (6) common law unjust enrichment. The court addresses each of cause of action in turn, beginning with the CLRA.

A. CLRA

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[1] Plaintiff's Request for Judicial Notice (Docket Item No. 27) is DENIED as the court finds the information contained therein irrelevant to this determination.

The CLRA makes unlawful "unfair methods of competition and unfair or deceptive acts or practices." *Cal. Civ. Code § 1770(a)*; *In re Actimmune Marketing Litig., 2009 U.S. Dist. LEXIS 103408, at *47, 2009 WL 3740648 (N.D. Cal. Nov. 6, 2009)*. In particular, the CLRA prohibits a person from "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have," "[r]epresenting that goods or services are of a particular standard, quality, or grade . . . if they are of another," or "[a]dvertising goods or services with intent not to sell them as advertised." *Cal. Civ. Code §§ 1770(a)(5)*, **[*9]** *(a)(7)*, *(a)(9)*. "The CLRA is interpreted liberally 'to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.'" *Buckland v. Threshold Enters., Ltd., 155 Cal. App. 4th 798, 809, 66 Cal. Rptr. 3d 543 (2007)*, overruled on other grounds by *Kwikset Corp. v. Super. Ct., 51 Cal. 4th 310, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)* (quoting *Cal. Civ. Code § 1760*).

Conduct that is "likely to mislead a reasonable consumer" violates the CLRA. *Keegan v. Am. Honda Motor Co., Inc., 838 F. Supp. 2d 929, 938, 2012 U.S. Dist. LEXIS 3007, 2012 WL 75443 (C.D. Cal. 2012)* (quoting *Colgan v. Leatherman Tool Group, Inc., 135 Cal. App. 4th 663, 680, 38 Cal. Rptr. 3d 36 (2006))*. "A 'reasonable consumer' is 'the ordinary consumer acting reasonably under the circumstances,' who 'is not versed in the art of inspecting and judging a product, [or] in the process of its preparation or manufacture. . . .'" Id. (quoting *Colgan, 135 Cal. App. 4th at 680*). "The CLRA proscribes both active misrepresentations about the standard, quality, or grade of goods, as well as active concealment related to the characteristics or quality of goods that are contrary to what has been represented **[*10]** about the goods." *Morgan v. Harmonix Music Sys., No. C08-5211 BZ, 2009 U.S. Dist. LEXIS 57528, at *9, 2009 WL 2031765 (N.D. Cal. July 7, 2009)*.

"Any consumer who suffers any damage as a result of the use or employment by any person of" the unlawful activity may bring an action under this section. *Cal. Civ. Code, § 1780(a)*. But like its common law counterpart, a plaintiff asserting a CLRA claim which sounds in fraud must establish reliance and causation. *Buckland, 155 Cal. App. 4th at 809*.

The essence of Plaintiff's allegations under the CLRA center on the statements of Apple employees as well as the marketing materials used to advertise the iPhone 4. Plaintiff contends that through these statements and materials, Apple knowingly misrepresented the characteristics of the phone's glass housing and failed to disclose any defects in the glass. In response, Apple argues that (1) Plaintiff failed to allege that the damages to his phone was caused by Apple; (2) Plaintiff failed to allege an actionable misrepresentation; and (3) Plaintiff failed to identify and allege an actionable omission.

1. Causation

Without doubt, the CLRA cause of action asserted by Plaintiff here is one which sounds in **[*11]** fraud, and the parties do not appear to disagree on this characterization. To succeed, Plaintiff must therefore allege that Apple's misrepresentations and omissions caused him damage and must meet the heightened pleading standard required by *Federal Rule of Civil Procedure 9*. Apple argues Plaintiff failed to do this in the FAC because the FAC does not attribute the damage to Plaintiff's phone to Apple. Instead, Apple contends that any damage to Plaintiff's phone was caused by Plaintiff's own carelessness when the phone dropped from the arm of a chair.

In making this argument, Apple mischaracterizes Plaintiff's theory of liability. The FAC does not allege or even suggest that Apple caused the phone to fall from the chair because such an assertion would be absurd. That type of claim would require a fanciful concoction of allegations, perhaps detailing a scheme by Apple employees to surreptitiously enter Plaintiff's home in order to push Plaintiff's new iPhone 4 from its resting place atop a piece of furniture while Plaintiff was not looking.

The theory presented here is not so unbelievable. Plaintiff, like many other CLRA plaintiffs, contends that misrepresentations and omissions concerning **[*12]** the quality of the product caused him to purchase something he would not have purchased had he been presented different information. See, e.g., *Henderson v. Gruma Corp.,* No. CV 10-04173 AHM (AJWx), 2011 U.S. Dist. LEXIS 41077, 2011 WL 1362188 (C.D. Cal. Apr. 11, 2011). In this case the product is Plaintiff's iPhone 4, and it took the fall from the chair for Plaintiff to realize that he may have been misled about the quality of its glass housing. Thus, the damage at issue is the economic loss from Plaintiff's purchase that he may not have otherwise made, not the actual physical damage to Plaintiff's phone that resulted from its impact with the floor.

As far as causation goes, Plaintiff alleges that the marketing materials he reviewed influenced his decision to purchase the iPhone 4, and that he would have acted differently under other circumstances. The court therefore rejects Apple's causation argument, which focuses too narrowly on the fall from the chair.

2. Actionable Misrepresentation

In a second attack on the CLRA claim, Apple argues that the misrepresentations identified in the FAC are either statements of fact not alleged to be false or non-actionable puffery. The court begins **[*13]** this portion of the discussion by addressing each of the cited statements separately. Apple is correct that the statements attributed to Jobs are not actionable under the CLRA. The descriptors used by Jobs - that the iPhone 4 is "beautiful," and "precise" - constitute puffery. "Generalized, vague, and unspecified assertions constitute 'mere puffery' upon which a reasonable consumer could not rely, and hence are not actionable." *Oestreicher v. Alienware Corp., 544 F. Supp. 2d 964, 973 (N.D. Cal. 2008)* (internal quotation marks and citations omitted), aff'd by *322 Fed. Appx. 489 (9th Cir. 2009)*. Vague or highly subjective claims about product superiority also amount to non-actionable puffery; it is only "misdescriptions of specific or absolute characteristics of a product [that] are actionable." Id. (quoting *Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1145 (9th Cir. 1997))*.

Jobs' explanation that glass was used "front and back for optical quality and scratch resistance" is no more than a description of the phone. It is not a specific commentary about the iPhone 4's durability, let alone one that is likely to mislead a "reasonable consumer." [2]

Nor does the Ive statement support the CLRA cause of action. Much like the statements from Jobs, Ive's comparison of the glass to sapphire crystal and the claim that it is "30 times harder than plastic" are not alleged in the FAC to be misdescriptions of the glass used on the iPhone 4, assuming these statements are specific enough so as to escape classification as puffery. The same goes for the video demonstration of the glass' strength. In any event, Plaintiff does not allege that he specifically relied on the Ive statements or video demonstration in a manner which meets the standard required by *Federal Rule of Civil Procedure 9(b)*. *Donohue v. Apple, Inc., No. 11-cv-05337 RMW, 871 F. Supp. 2d 913, 2012 U.S. Dist. LEXIS 65860, at *24, 2012 WL 1657119 (N.D. Cal. May 10, 2012)* (citing *Baltazar v. Apple, Inc., Case No. CV-10-3231-JF, 2011 U.S. Dist. LEXIS 13187, at *10-11, 2011 WL 588209 (N.D. Cal. Feb. 10, 2011))*.

The court also rejects Plaintiff's contention that commercials demonstrating use of the iPhone 4 without a cover equate to some affirmative commentary on the phone's durability for two primary reasons. First, the allegations describing the commercial **[*16]** depiction are not plead with the specificity mandated by *Rule 9(b)*. See id.

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[2] Plaintiff attempts to escape a **[*14]** determination that these statements are puffery by arguing that "factual assertions are not puffery." That much is true, but it does not assist Plaintiff here because it is also true that vague assertions are not actionable under the CLRA even if they are purported assertions of fact. See, e.g., ***Shroyer v. New Cingular Wireless Servs., 622 F.3d 1035, 1043 (9th Cir. 2010)*** ("'[A]ll the advantages that only the nation's largest wireless company can provide' is a vague statement and provides nothing concrete upon which [plaintiff] could reasonably rely.")

Moreover, the "classic example of an actionable representation of fact" cited by Plaintiff is inapposite to this case. While there does appear some facial similarly between an auto dealer's assertion that a windshield is made of shatterproof glass and this action since both do involve glass and the breaking of glass, the similarities end there. In the case underlying the "classic example," the auto dealer made a specific *written representation* that the glass windshield would not would not fly or shatter under the hardest impact. ***Baxter v. Ford Motor Co., 168 Wash. 456, 459-60, 12 P.2d 409 (1932)***. In contrast, Apple is not alleged to have made any similar **[*15]** statement concerning the glass housing on the iPhone 4.

Second, without more than what is contained in the FAC, the type of representation described is not actionable under the CLRA. A "reasonable consumer" viewing a commercial showing the iPhone 4 in use as a phone, but without a cover, would not be misled to believe that the iPhone 4 could withstand any particular level of impact if the phone was dropped. This is because the commercial has nothing to do with durability. The FAC does not allege, for example, that any of the television commercials showed a coverless iPhone 4 being dropped on the ground only to emerge unscathed. That type of representation could mislead the reasonable consumer in the way Plaintiff alleges; the commercial alluded to in the FAC would not. Plaintiff, therefore, reads too much into this piece of marketing material.

Relying on *Morgan v. AT&T Wireless Services, Inc., 177 Cal. App. 4th 1235, 99 Cal. Rptr. 3d 768 (2009)*, Plaintiff argues that he is relying on the allegedly misleading nature of Apple's marketing as a whole, rather than on any particular representation made by Apple. But the court is not convinced that the marketing described in the FAC can be interpreted **[*17]** in the same manner as that described in Morgan. In Morgan, plaintiffs cited to a combination of "AT&T's statements that it was committed to providing for all of its customers' wireless needs 'today and tomorrow'", "the fact that it held itself out as the world's leading provider of wireless communications services," and the "sale of expensive . . . phones that required service contracts for one, two, or more years" as material that would lead the average consumer to believe that AT&T would maintain a network compatible with the phone they purchased. *Morgan, 177 Cal. App. 4th at 1245-46*. The Morgan court noted that the plaintiffs' premise was possible under those circumstances. *Id. at 1243, 1256*.

Here, the representations taken as a whole would not lead the "reasonable consumer" to believe that the glass housing on the iPhone 4 was indestructible or drop-proof because of one important distinction not at issue in *Morgan*: it is a well-known fact of life that glass can break under impact, even glass that has been reinforced. This much is known to the ordinary, reasonable consumer. The shattered window of a storefront, the cracked windshield of a car, and the chipped smartphone screen are **[*18]** routine encounters of modern existence. It seems a suspension of logic to say that the marketing campaign described in the FAC, which notably has nothing to do with phone-dropping, somehow erases these images from the collective experience such that the reasonable consumer could expect that glass could not break if dropped.

3. Actionable Omission

Omissions are actionable under the CLRA only when the omission is contrary to a representation actually made by the defendant or where a duty to disclose exists. *Keegan, 838 F. Supp. 2d 929, at 938, 2012 U.S. Dist. LEXIS 3007*. Under California law, a duty to disclose arises in four circumstances: "(1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from plaintiff; or (4) when the defendant makes partial representations but also suppresses some material facts." *Id*. (quoting *Smith v. Ford Motor Co., 749 F. Supp. 2d 980, 987 (N.D. Cal. 2010))*.

Here, Plaintiff asserts the following omissions in the FAC: (1) "Apple failed to disclose and concealed from Plaintiff and Class members that normal use of **[*19]** the iPhone 4, including use as advertised, would result in cracked glass housing such that the device would not longer be functional," and (2) "[n]ormal wear and tear can easily render the device inoperable and a safety risk to the consumer. This information was not disclosed to the consumer." See FAC, at ¶¶ 22, 23. The problem with these allegations is that they do not constitute actionable omissions when construed with the representations actually attributed to Apple. No where in the FAC is Apple alleged to have stated that the iPhone 4 was resistant to normal wear and tear, that the glass housing would never break or crack under normal use, or that the phone might not be damaged if it was dropped. As already pointed out, phone-dropping is not alleged to have been depicted anywhere in the marketing material. The alleged omissions, then, are not contrary to any of Apple's actual representations.

Moreover, Plaintiff has not sufficiently plead facts supporting a duty to disclose on the part of Apple because Plaintiff does not allege what was actually known to Apple in anything less than a conclusory fashion. Alleged reports by unidentified consumers which neither reveals the timing of **[*20]** the reporting, who the reporting was made to, nor the specific content of the reporting is not consistent with Plaintiff's obligation to plead specific facts under *Rule 9*. See FAC, at ¶ 17. Similarly, the allegation that, "[a]ccording to sources inside and outside Apple," the company began working to correct the defect in the glass also fails under *Rule 9*. See FAC, at ¶ 29. The studies and internet articles which apparently discuss defects in the iPhone 4's glass housing fare no better because they do not create a duty disclose without an allegation explaining how or why Apple was aware of these items. See *Kent v. Hewlett-Packard Co., No. 09-5341 JF (PVT), 2010 U.S. Dist. LEXIS 76818, at *23-24, 2010 WL 2681767 (N.D. Cal. July 6, 2010)* (citing *Oestreicher, 544 F. Supp. 2d at 975 n.9*).

As discussed, Plaintiff has not plead either an actionable misrepresentation or omission. The CLRA claim will be dismissed with leave to amend.

B. FAL

The FAL makes it unlawful to make or disseminate any statement concerning property or services that is "untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading[.]" *Cal. Bus. & Prof. Code § 17500*.

For **[*21]** this cause of action, Plaintiff cites to the same marketing material discussed under the CLRA claim. Specific to the FAL, Plaintiff contends the material is misleading and "likely to deceive a reasonable consumer into believing that the iPhone [4] should be able to sustain the kind of short drop that occurs in the ordinary course of careful usage." See FAC, at ¶ 89.

For much the reasons that the allegations do not presently support liability under the CLRA, they similarly do not support liability under the FAL. Accordingly, the FAL claim will be dismissed with leave to amend.

C. Warranty Claims

1. Breach of Express Warranty

To prevail on a breach of express warranty claim under *California Commercial Code § 2313*, "a plaintiff must prove (1) the seller's statements constitute an 'affirmation of fact or promise' [which relates to the goods] or a 'description of the goods'; (2) the statement was 'part of the basis of the bargain'; and (3) the warranty was breached." *Weinstat v. Dentsply Int'l, Inc., 180 Cal. App. 4th 1213, 1227, 103 Cal. Rptr. 3d 614 (2010)* (quoting *Keith v. Buchanan, 173 Cal. App. 3d 13, 20, 220 Cal. Rptr. 392 (1985))*.

Since liability for breach of express warranty sounds in contract, "[a] manufacturer's liability **[*22]** for breach of an express warranty derives from, and is measured by, the terms of that warranty." *Cipollone v. Liggett Group, 505 U.S. 504, 525, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)*. "The key under *[§ 2313*] is that the seller's statements - whether fact or opinion - must become 'part of the basis of the bargain.'" *Hauter v. Zogarts, 14 Cal. 3d 104, 115, 120 Cal. Rptr. 681, 534 P.2d 377 (1975)* (quoting *Cal. Com. Code § 2313(1)(b)*).

Here, the language applying the warranty to "the hardware product manufactured by and for Apple" appears to cover the glass encasing the iPhone 4, and Apple does not directly dispute that defects in the glass case may be covered by the warranty under specified circumstances. But that determination notwithstanding, the facts contained in the FAC do not support the ultimate "affirmation of fact or promise" that Plaintiff relies on as a basis for this cause of action. Plaintiff argues in the his opposition that Apple warranted the iPhone 4 to have "damage-resistant glass housing." But the representation of "damage resistance" appears no where in the FAC. To the contrary, the fact that a warranty covering the glass even exists suggests that Apple never made or reasonably could make such a representation.

Furthermore, for reasons **[*23]** similar to those discussed in relation to the CLRA claim, the marketing material and statements by Apple employees which are cited in the FAC cannot be legitimately used as a representation that the iPhone 4 was completely damage-resistant, especially when the product at issue contains a component that is inherently breakable, like glass.Under the facts alleged, the marketing material could not become "part of the basis for the bargain" for the purposes of warranty liability.

In addition to these shortcomings, this cause of action is also deficiently plead because Plaintiff does not identify the purported defect in the glass housing, other than to simply say that the glass housing is defective because it broke when Plaintiff's iPhone 4 was dropped. But again, glass can break when it is dropped. Under these circumstances, Iqbal and Twombly require something more about the purported defect that what has been presented. This cause of action will therefore be dismissed with leave to amend.

2. Breach of Implied Warranty and Magnuson-Moss Warranty Act

The implied warranty of merchantability, which Plaintiff invokes through this cause of action, provides that a product must be "fit for the ordinary **[*24]** purposes for which such goods are used." *Cal. Com. Code § 2314*; see also *Hauter, 14 Cal. 3d at 118-19*.

Plaintiff contends that the iPhone 4 is not fit for its ordinary purpose because the glass housing is not ultradurable. That allegation, however, has nothing to do with the iPhone 4's intended use as a smartphone, which the court safely presumes includes functions like making and receiving calls, sending and receiving text messages, or allowing for the use of mobile applications. Notably, the FAC does not state that Plaintiff's iPhone 4 was deficient in any of these or other expected phone functions, and it is certainly a stretch to conclude that one "ordinary purpose" of the iPhone 4, or any smartphone for that matter, is to drop it on the ground. Accepting Plaintiff's theory of liability would mean that the iPhone 4 is not merchantable unless it is completely resistant from accidental breakage or damage. That cannot be.

This cause of action is dismissed with leave to amend. Since both warranty claims fail as plead and since Plaintiff's cause of action under the Maguson-Moss Warranty Act is derivative of those claims, that cause of action is also dismissed with leave to amend.

D. UCL

Under **[*25]** the UCL, there are three varieties of unfair competition: "acts or practices which are unlawful, or unfair, or fraudulent." *Khoury v. Maly's of California, Inc., 14 Cal. App. 4th 612, 618-19, 17 Cal. Rptr. 2d 708 (1993)*. "Unlawful" practices are "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Sup. Ct., 27 Cal. App. 4th 832, 838, 33 Cal. Rptr. 2d 438 (1999)*. "Unfair" practices constitute "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. The "fraudulent" prong under the UCL requires a showing of actual or potential deception to some members of the public, or harm to the public interest. See *id. at 180*; see also *McKell v. Wash. Mut., Inc., 142 Cal. App. 4th 1457, 49 Cal. Rptr. 3d 227 (2006)*; *Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995)*. The UCL 'borrows' violations of other laws and treats them as unfair business practices, and also "makes clear that a practice may be **[*26]** deemed unfair even if not specifically proscribed by some other law." *Cel-Tech, 20 Cal. 4th at 180*.

Here, Plaintiff bases the cause of action under the UCL on the same allegations as the CLRA cause of action. But the allegations do not support liability under the UCL for the same reasons they do not support liability under the CLRA.

Plaintiff's only allegations under the "unlawful" prong of the UCL relate to violations of the CLRA and the other statutes referenced by Plaintiff. Since the court has determined that each of those purported statutory causes of action fail as presently plead, Plaintiff has also failed to state a claim under this portion of the UCL.

Turning to the "unfair" prong, Plaintiff alleges Apple's practices are unfair because "consumers are led to believe that the iPhone 4 has qualities that it does not" and "are further injured when Apple refuses to replace or repair the defective device." See FAC, at ¶ 96. However, the court has already explained why reasonable consumers could not be misled by the materials described by Plaintiff, and has also indicated why Plaintiff's claims of defect with the iPhone 4's glass housing are not sufficiently plead. For these same reasons, **[*27]** Plaintiff has not stated a claim under the unfair prong of the UCL.

For the fraudulent prong, Plaintiff again makes the same claim he made under the CLRA based on the same facts: that Apple's "practices are misleading because they are likely to deceive consumers into believing that the iPhone 4 can sustain normal and reasonable use, including the use advertised by Apple, without damaging the front and back panels." See id., at ¶ 95. But the allegations fail to support liability based on fraudulent business practices under the UCL for the same reasons they do not state a claim under the CLRA.

For these reasons, the UCL claim will be dismissed with leave to amend.

E. Unjust Enrichment

Apple argues that the cause of action for unjust enrichment must be dismissed because it is not a recognized claim in California. The court agrees. "Courts consistently have held that unjust enrichment is not a proper cause of action under California law." *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig., 754 F. Supp. 2d 1145, 1194 (C.D. Cal. 2010)*. "Unjust enrichment is a general principle, underlying various legal doctrines and remedies, rather than a remedy itself." **[*28]** *Melchior v. New Line Prods., Inc., 106 Cal. App. 4th 779, 793, 131 Cal. Rptr. 2d 347 (2003)*. "Simply put, 'there is no cause of action in California for unjust enrichment.'" *In re Toyota Motor Corp., 754 F. Supp. 2d at 1194* (citing *Melchior, 106 Cal. App. 4th at 793*). Since Plaintiff's claim for unjust enrichment cannot state a claim for relief, it will be dismissed without leave to amend.

IV. ORDER

Based on the foregoing, Apple's Motion to Dismiss (Docket Item No. 25) is GRANTED. The cause of action for unjust enrichment is DISMISSED WITHOUT LEAVE TO AMEND. All other causes of action are DISMISSED WITH LEAVE TO AMEND. Any amended complaint must be filed within 21 days of the date of this order.

The court schedules this case for a Case Management Conference on **November 9, 2012, at 10:00 a.m.** The parties shall file an updated Joint Case Management Statement on or before **November 2, 2012**

IT IS SO ORDERED.

Dated: September 4, 2012

/s/ Edward J. Davila

EDWARD J. DAVILA

United States District Judge

Am. Airlines, Inc. v. Sabre, Inc.

United States Court of Appeals for the Fifth Circuit

September 5, 2012, Filed

No. 11-10759

Reporter

694 F.3d 539 *; 2012 U.S. App. LEXIS 18637 **; 2012-2 Trade Cas. (CCH) P78,038; 2012 WL 3827276

AMERICAN AIRLINES, INCORPORATED, Plaintiff-Appellee v. SABRE, INCORPORATED; SABRE HOLDINGS CORPORATION; SABRE TRAVEL INTERNATIONAL LIMITED, Defendants-Appellants

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

Am. Airlines, Inc. v. Sabre, Inc., 2011 U.S. Dist. LEXIS 86830 (N.D. Tex., Aug. 4, 2011)

Core Terms

attorney's fees, district court, state court, removal, antitrust, state-law, federal issue, interpreting

LexisNexis® Headnotes

Civil Procedure > ... > Removal > Postremoval Remands > Jurisdictional Defects

Civil Procedure > ... > Removal > Postremoval Remands > Motions for Remand

Civil Procedure > ... > Removal > Procedural Matters > Time Limitations

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN1[] **Postremoval Remands, Jurisdictional Defects**

See *28 U.S.C.S. § 1447(c)*.

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

Civil Procedure > ... > Removal > Postremoval Remands > Appellate Review

Civil Procedure > ... > Removal > Postremoval Remands > Motions for Remand

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN2[] Standards of Review, Abuse of Discretion

A court of appeals reviews a discretionary award of attorney's fees under *28 U.S.C.S. § 1447(c)* for an abuse of discretion.

Civil Procedure > ... > Removal > Postremoval Remands > General Overview

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN3[] Removal, Postremoval Remands

28 U.S.C.S. § 1447(c) provides that an order remanding a case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. However, there is no automatic entitlement to an award of attorney's fees. The mere determination that removal was improper does not require a district court to award attorney's fees. Rather, a court may award attorney's fees when the removing party lacks an objectively reasonable basis for removal. The appropriate test for awarding fees under *§ 1447(c)* should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress's basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied. In that regard, *§ 1447(c)* fee awards are cost recoupments, hence punitive in policy only.

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Civil Procedure > ... > Removal > Elements for Removal > Removability

HN4[] Specific Cases Removed, Federal Questions

The United States Supreme Court has articulated a multi-part test to determine when a state claim is removable: does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.

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

Civil Procedure > ... > Removal > Postremoval Remands > Appellate Review

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN5[] Standards of Review, Abuse of Discretion

A defendant's subjective good faith belief that removal was proper is insufficient to establish that the district court abused its discretion in awarding attorney's fees under *28 U.S.C.S. § 1447(c)*.

Antitrust & Trade Law > General Overview

Governments > Legislation > Interpretation

HN6[] Antitrust & Trade Law

The Texas Free Enterprise and Antitrust Act of 1983 (TFEAA) requires a state court to construe the statute in harmony with federal judicial interpretations of comparable federal antitrust statutes. *Tex. Bus. & Com. Code Ann. § 15.04*. However, nothing in the plain language of the TFEAA or Texas caselaw interpreting the TFEAA requires that federal law control Texas's interpretation of its state antitrust statute.

Antitrust & Trade Law > General Overview

Governments > Legislation > Interpretation

HN7[] **Antitrust & Trade Law**

See *Tex. Bus. & Com. Code Ann. § 15.04*.

Antitrust & Trade Law > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Antitrust & Trade Law**

State courts look to federal law interpreting the Sherman Act for guidance in interpreting the Texas Free Enterprise and Antitrust Act of 1983 (TFEAA). Claims under the TFEAA are wholly state-law claims that do not raise a federal issue.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

HN9[] **Preliminary Considerations, Federal & State Interrelationships**

A state legislature cannot by statute confer jurisdiction over a state-law claim to a federal court.

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Civil Procedure > ... > Removal > Elements for Removal > Removability

HN10[] **Specific Cases Removed, Federal Questions**

No reasonable argument can be made that the mere fact that a federal standard is to be referenced by a state court in determining whether there has been a state-law violation causes a state-law claim to necessarily raise a stated federal issue for removal purposes.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN11[] **Preliminary Considerations, Federal & State Interrelationships**

A plaintiff does not give up or alter its particular rights to pursue its state-law remedies in state court by simultaneously asserting rights under federal law.

Antitrust & Trade Law > General Overview

HN12[] **Antitrust & Trade Law**

Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies.

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

HN13[] **Specific Cases Removed, Federal Questions**

Neither the test set forth in Grable, nor caselaw applying the Grable test, adjusts the federal question removal analysis because of the existence of parallel state and federal proceedings; instead, the Grable test asks distinctively whether a state-law claim necessarily raises a stated federal issue. Grable directs courts to examine the state-law claim itself, not whether legal or factual determinations included in the state-law claim may also be implicated in a parallel federal proceeding.

Counsel: For AMERICAN AIRLINES, INC., Plaintiff - Appellee: Russell Rhea Barton, Bill F. Bogle, Harris, Finley & Bogle, P.C., Fort Worth, TX; Anna Rotman, Yetter Coleman, L.L.P., Houston, TX.

For SABRE, INC., SABRE HOLDINGS CORPORATION, SABRE TRAVEL INTERNATIONAL LIMITED, Defendants - Appellants: Stephen Lyle Tatum, Sr., Ralph H. Duggins, III, Esq., Scott Alan Fredricks, Philip Avery Vickers, Cantey Hanger, L.L.P., Fort Worth, TX; Sundeep Kumar Addy, Bartlit, Beck, Herman, Palenchar & Scott, Denver, CO; Christopher Lind, Esq., Andrew Polovin, Esq., Katherine M. Swift, Bartlit, Beck, Herman, Palenchar & Scott, L.L.P., Chicago, IL.

Judges: Before HIGGINBOTHAM, HAYNES, and HIGGINSON, Circuit Judges.

Opinion by: HIGGINSON

Opinion

[*540] HIGGINSON, Circuit Judge:

Defendants-Appellants Sabre Inc., Sabre Holdings Corporation, and Sabre Travel International Limited (collectively, "Sabre") appeal the district court's award of attorney's fees to Plaintiff-Appellee American Airlines, Inc. ("American") pursuant to *28 U.S.C. § 1447(c)*.[1] We AFFIRM the district court's ruling, finding that the district court did not abuse its discretion in awarding attorney's fees to **[**2]** American based on its assessment that Defendants-Appellants

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[1] *28 U.S.C. § 1447(c)* states:

> *HN1*[] (c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under *section 1446(a)*. If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Sabre did not have objectively reasonable grounds to believe removal of the case from state court to federal district court was legally proper.

FACTS AND PROCEEDINGS

Defendants-Appellants Sabre own and operate a computerized reservation system, known as a Global Distribution System ("GDS"), which is used by travel agents, corporate customers, and the traveling public to search, price, book, and ticket travel services offered by airlines, hotels, and other travel-related entities. **[**3]** In 1998, American and Sabre entered into a Participating Carrier Distribution and Services Agreement which generally set forth the terms and conditions under which Sabre would make American's fare and schedule information available to Sabre GDS subscribers. Recently, however, the business relationship between American and Sabre has become strained. **[*541]** American has incorporated newer, lower-cost technologies into the distribution of its products and services, and this "direct connection" system presents a competitive threat to Sabre's GDS business.

American filed a lawsuit against Travelport, Inc. in the District Court of Tarrant County, Texas, 67th Judicial District in November 2010 and later added Sabre as defendants. In this state court lawsuit, American alleged state-law causes of action for breach of contract and tortious interference with prospective business relations and sought a temporary restraining order and temporary injunction against Sabre. Specifically, American alleged that Sabre had been biasing American's fares and schedules in Sabre's displays, causing American to lose business to competing airlines by "misleading the public into believing that American's services either **[**4]** no longer existed or were not competitive with options offered by other air carriers" and that Sabre had more than doubled the fees it charged to distribute American flight/fare data in breach of the parties' contract.

In April 2011, American filed a lawsuit against Travelport Limited, Travelport, LP, and Orbitz Worldwide, LLC in the United States District Court for the Northern District of Texas. American added Sabre as defendants by amended complaint filed June 9, 2011. American's federal claims included alleged anti-competitive conduct by Sabre and the other defendants and violations of *Sections 1* and *2* of the Sherman Act. *15 U.S.C. §§ 1-2*.

Meanwhile, in its state court suit, American filed its third amended petition on July 8, 2011, which included a new claim against Sabre for monopolization in violation of *Section 15.05(b)* of the Texas Free Enterprise and Antitrust Act of 1983 ("TFEAA"). On July 13, 2011, American filed motions for expedited discovery and to compel production of documents in the state court suit and notified Sabre that the motions were to be heard at 2:00 pm on July 18, 2011. On the morning of July 18, 2011, Sabre filed a notice of removal, and the removed case **[**5]** was assigned to United States District Judge McBryde. On July 19, 2011, American filed an emergency motion to remand pursuant to *28 U.S.C. § 1447(c)*, which the district court granted after holding a telephone conference hearing on the motion.

On July 25, 2011, American filed a motion for an award of fees and costs for Sabre's removal, and Sabre filed a response. On August 4, 2011, the district court issued a 19-page Memorandum Opinion and Order which did not award the full $18,515.00 requested, but instead awarded American $15,955.00 in attorney's fees, finding that Sabre's removal from state court was objectively unreasonable. Sabre appeals the district court's Memorandum Opinion and Order and Final Judgment awarding attorney's fees to American under *28 U.S.C. § 1447(c)*, contending that the district court erred by finding that Sabre's removal was objectively unreasonable.

DISCUSSION

HN2[] This court reviews a discretionary award of attorney's fees under *28 U.S.C. § 1447(c)* for an abuse of discretion. *Hornbuckle v. State Farm Lloyds, 385 F.3d 538, 541 (5th Cir. 2004)*.

HN3[] *28 U.S.C. § 1447(c)* provides that, "[a]n order remanding the case may require payment of just costs and any actual expenses, **[**6]** including attorney fees, incurred as a result of the removal." However, "[t]here is no automatic entitlement to an award of attorney's fees." Valdes v. Wal-Mart Stores, Inc., 199 F.3d 290, 292 (5th Cir. 2000) (holding that the "mere determination that removal was improper" does not require a district court to award attorney's **[*542]** fees). Rather, a court "may award attorney's fees when the removing party lacks an objectively reasonable basis for removal." Howard v. St. Germain, 599 F.3d 455, 457 (5th Cir. 2010) (per curiam) (citing and referring to Martin v. Franklin Capital Corp., 546 U.S. 132, 141, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005) (holding that "[a]bsent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal")). The Supreme Court in *Martin* explained, "[t]he appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied." 546 U.S. at 140. In **[**7]** that regard, § 1447(c) fee awards are cost recoupments, hence punitive in policy only.

Sabre contends that the district court abused its discretion by awarding American attorney's fees despite Sabre's alleged reasonable, good faith[2] interpretation of Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005), as applied to American's parallel state and federal antitrust lawsuits. In *Grable*, **HN4**[] the Court articulated a multi-part test to determine when a state claim is removable: "does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." 545 U.S. at 314.

Addressing the first *Grable* prong, Sabre argues that American's TFEAA claim necessarily raises a stated federal issue because **[**8]** **HN6**[] the TFEAA requires the state court to construe the statute "in harmony with federal judicial interpretations of comparable federal antitrust statutes." *See* Tex. Bus. & Com. Code § 15.04. However, nothing in the plain language of the TFEAA or Texas caselaw interpreting the TFEAA requires that federal law control Texas's interpretation of its state antitrust statute.[3] The full text of Tex. Bus. & Com. Code § 15.04 states:

> **HN7**[] The purpose of [the TFEAA] is to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state. The provisions of [the TFEAA] shall be construed to accomplish this purpose and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes *to the extent consistent with this purpose*.

Tex. Bus. & Com. Code § 15.04 (emphasis added). As the Texas Supreme Court elaborated in Caller-Times Publ'g Co., Inc. v. Triad Commc'ns, Inc., 826 S.W.2d 576 (Tex. 1992), **HN8**[] state courts "look to federal **[*543]** law interpreting . . . the Sherman Act for guidance in interpreting . . . the Texas Antitrust Act." Id. at 580. Claims **[**9]** under the TFEAA are "wholly state-law claims" that do not raise a federal issue. Waste Control Specialists, LLC v. Envirocare of Texas, Inc., 199 F.3d 781, 784 (5th Cir. 2000), *modified in part*, 207 F.3d 225 (5th Cir. 2000).[4]

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[2] **HN5**[] A defendant's subjective good faith belief that removal was proper is insufficient to establish that the district court abused its discretion in awarding attorney's fees under Section 1447(c). Valdes, 199 F.3d at 292 ("To be sure, the district court may award fees even if removal is made in subjective good faith.").

[3] **HN9**[] A state legislature cannot by statute confer jurisdiction over a state-law claim to a federal court. *See* Burford v. Sun Oil Co., 319 U.S. 315, 317, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943). The district court observed that if it were to accept the argument that the "in harmony" language of the TFEAA presents a "stated federal issue," then "every cause of action brought in state court under the TFEAA would automatically be removable to federal court."

[4] Sabre contends that *Waste Control* does not apply here because *Waste Control* was decided before the Supreme Court's decision in *Grable* and concerned the question of whether a Texas antitrust claim is "completely preempted" by federal ***antitrust law***. Sabre points out that "significant federal issue" jurisdiction is different than jurisdiction based on complete preemption and that it is undisputed that state antitrust claims are not preempted by federal ***antitrust law***. *See* Bernhard v. Whitney Nat'l Bank, 523 F.3d 546, 551 (5th Cir. 2008) (holding that if **[**10]** a petition "alleges only state law claims, the district court [has] federal question jurisdiction over their case only if: (1) the state law claims necessarily raise a federal issue or (2) the state law claims

Notably, this case is distinguishable from *Grable*, where the **[**11]** Supreme Court held that federal question jurisdiction existed because "an essential element" of Grable's state-law claim was whether the plaintiff "was given notice within the meaning of the federal [tax] statute" and that issue "appear[ed] to be the only legal or factual issue contested in the case." *Grable, 545 U.S. at 315*. Plaintiff Grable had asserted a quiet title action in state court claiming that the defendant's title was invalid because the IRS failed to comply with a federal tax statute in giving notice of the seizure of Grable's property. *Id. at 311*. Here, in contrast, the state court would not be obligated to interpret a federal statute, like the federal notice statute in *Grable, id. at 315* (finding that "[t]he meaning of the federal tax provision is an important issue of federal law that sensibly belongs in a federal court"), because American's claims arise solely under the TFEAA. The district court did not abuse its discretion by concluding that, ***HN10***[] "[n]o reasonable argument can be made that the mere fact that a federal standard is to be referenced by a state court in determining whether there has been a state-law violation causes a state-law claim to 'necessarily raise **[**12]** a stated federal issue.'" *See Grable, 545 U.S. at 314*.

Sabre's argument, however, extends beyond the text of the TFEAA itself and focuses also on the language of the TFEAA in light of American's parallel state and federal antitrust claims. Sabre contends that, because the TFEAA must be interpreted "in harmony" with federal judicial interpretation of federal ***antitrust law***, "[i]f the federal court were to find American's single-product market definition to be deficient as a matter of law . . . or that Sabre's contractual terms were not exclusionary or anticompetitive as a matter of law . . . then American's parallel state antitrust case would suffer a similar fate." The district court correctly pointed out, however, that, "it's not unusual to have a **[*544]** parallel state court suit and federal court suit that involve the same legal and factual issues, but the difference is that sometimes one of them is brought under federal law and the other one is brought under state law." ***HN11***[] American did not give up or alter its particular rights to pursue its state-law remedies in state court by simultaneously asserting rights under federal law. *See ARC Am. Corp., 490 U.S. at 102* (***HN12***[] "Congress intended the federal **[**13]** antitrust laws to supplement, not displace, state antitrust remedies."). Moreover, ***HN13***[] neither the test set forth in *Grable*, nor caselaw applying the *Grable* test, adjusts the federal question analysis because of the existence of parallel state and federal proceedings; instead, the *Grable* test asks distinctively whether the state-law claim "necessarily raise[s] a stated federal issue." *Grable, 545 U.S. at 314*. *Grable* directs courts to examine the state-law claim itself, not whether legal or factual determinations included in the state-law claim may also be implicated in a parallel federal proceeding.

Because Sabre failed to satisfy the first prong of the *Grable* test—that is, failed to show that American's state-law claim *necessarily* raises a stated federal issue—we do not address the remaining prongs. Acknowledging the discretion we vest in district courts when assessing attorney's fees, we hold that the district court was within its discretion when it concluded that Sabre did not have objectively reasonable grounds to believe that removal was proper.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's award of attorney's fees to Plaintiff-Appellee American.

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are completely preempted by federal law."); *California v. ARC Am. Corp., 490 U.S. 93, 102, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)* ("Congress has not pre-empted the field of ***antitrust law*** . . . . Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies."). However, this court's assertion in *Waste Control* that TFEAA claims are "wholly state claims," *199 F.3d at 784*, rebuts the argument that a TFEAA claim necessarily "raise[s] a stated federal issue" because the statute "requires" that state courts interpret it "in harmony" with federal ***antitrust law***. Moreover, it is not determinative that *Grable* was decided after *Waste Control* because *Grable* did not address TFEAA claims and did not create a new basis for federal question jurisdiction. *See Grable, 545 U.S. at 312-14*; *see generally* Fairbairn, Jennifer E., *Keeping Grable Slim: Federal Question Jurisdiction and the Centrality Test*, 58 Emory L.J. 977, 977-89 (2009).